

Court File No.

FEDERAL COURT OF APPEAL

BETWEEN:

AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE,
SQUIALA FIRST NATION, TZEACHTEN, and YAKWEAKWIOOSE

APPLICANTS

AND:

ATTORNEY GENERAL OF CANADA and
TRANS MOUNTAIN CORPORATION

RESPONDENTS

AFFIDAVIT #1 OF TANNY NGUYEN

I, Tanny Nguyen, Project Manager, of Miller Titerle Law Corporation, located at 300 – 638 Smithe Street, Vancouver, British Columbia V6B 1E3, SWEAR THAT:

1. I am a Project Manager at Miller Titerle Law Corporation, counsel for the Applicants in this matter, and as such I have personal knowledge of the facts and matters hereinafter deposed to, save and except where the same are stated to be based on information and belief and where so stated I verily believe the same to be true.
2. The documents attached as Exhibits A-WW to my Affidavit were filed in the National Energy Board (the “**NEB**”) reconsideration hearing (MH-052-2018) (the “**Reconsideration Hearing**”) in respect of Trans Mountain Corporation’s (“**TM Canada**”) Trans Mountain Expansion Project (the “**Project**”), and were accessed via the electronic National Energy Board Regulatory Document Index folder entitled

"Reconsideration (MH-052-2018)", which is available online at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3614457>.

3. Attached as **Exhibit "A"** to my Affidavit is a true copy of a letter from the NEB to Indigenous participants and other potential intervenors (the "**Intervenors**") containing directions regarding applying to participate in the Reconsideration Hearing and requesting public comments on the scope and process of the Reconsideration Hearing (the "**Comment Request Letter**"), dated September 26, 2018 and entitled "A94153-1 NEB Letter – Application to Participate process and comment process MH-052-2018 – A6H7Q6".
4. Attached as **Exhibit "B"** to my Affidavit is a true copy of the NEB's explanatory note to the OIC, published in the *Canada Gazette Part I*, Vol. 152, No. 39 on September 29, 2018 and entitled "A94793-5 NEB Explanatory Note to OIC P.C. 2018-1177 – Trans Mountain Expansion – Reconsideration – A6I7J0".
5. Attached as **Exhibit "C"** to my Affidavit is a true copy of the Stó:lō Collective's Application to Participate dated October 3, 2018 entitled "A94480 Stó:lō Collective – Application To Participate – A6I2G4".
6. Attached as **Exhibit "D"** to my Affidavit is a true copy of a letter from the Stó:lō Collective to the NEB dated October 3, 2018 responding to the Comment Request Letter, entitled "A94494-1 Stó:lō Collective LT NEB in response to request for comments (MH-052-2018) – A6I2J2".
7. Attached as **Exhibit "E"** to my Affidavit is a true copy of a letter from the NEB to the Intervenors requesting additional comments on the appropriate special limit for Project-related marine shipping ("**Additional Comments Letter**"), dated October 5, 2018 and entitled "A94631-1 NEB Letter – All Parties – Trans Mountain Expansion –

Reconsideration – Request for additional comments on the spatial limit of Project-related marine shipping – A6I4Q5”.

8. Attached as **Exhibit “F”** to my Affidavit is a true copy of the NEB’s Hearing Order for the Reconsideration Hearing, dated October 12, 2018 and entitled “A94793-3 NEB HO – Trans Mountain Expansion – Reconsideration – A6I7I8”.
9. Attached as **Exhibit “G”** to my Affidavit is a true copy of the Procedural Direction No. 1 issued by the NEB to all Intervenor, dated October 12, 2018 and entitled “A94804-1 NEB PD No. 1 – Trans Mountain Expansion – Reconsideration – Oral Indigenous traditional evidence – A6I7X2”.
10. Attached as **Exhibit “H”** to my Affidavit is a true copy of a letter from the NEB to all Intervenor containing its decisions (“**Scope and Process Decisions**”) following the comments received to the Comment Request Letter and Additional Request Letter, dated October 12, 2018 and entitled “A94793-1 NEB Letter – Parties – Trans Mountain Expansion – Reconsideration – A6I7I6”.
11. Attached as **Exhibit “I”** to my Affidavit is a true copy of a letter from the NEB to various federal authorities requesting specialist or expert information or knowledge in relation to the Reconsideration Hearing, dated October 12, 2018 and entitled “A94793-8 NEB Letter to Federal Authorities – Request pursuant of the CEAA 2012 – Trans Mountain Expansion – Reconsideration – French included – A6I7J4”.
12. Attached as **Exhibit “J”** to my Affidavit is a true copy of a letter from the Stó:lō Collective to the NEB in response to TM Canada’s request that the NEB hold the Project-related orders, outstanding application review processes and condition compliance determinations and

processes in abeyance, dated October 17, 2018 and entitled "A94920-1 LT NEB re Response to TM Abeyance Request - A6I9Y0".

13. Attached as **Exhibit "K"** to my Affidavit is a true copy of a letter from the Stó:lō Collective to the NEB regarding the Stó:lō Collective's intention to provide oral traditional evidence ("**OTE**") and containing an objection regarding the same, dated October 23, 2018, entitled "A95070-1 Notice of Intent and Objection re Oral Traditional Evidence – A6J2J2".
14. Attached as **Exhibit "L"** to my Affidavit is a true copy of a letter from the NEB to all Intervenor containing its reasons for the Scope and Process Decisions ("**Reasons Letter**"), dated October 29, 2018 and entitled "A95187-1 NEB Letter – Parties – Trans Mountain Expansion – Reconsideration – Reasons for the Board's decisions reached in its 12 October 2018 letter – A6J4X3".
15. Attached as **Exhibit "M"** to my Affidavit is a true copy of Appendix 1 to the Reasons Letter, dated October 29, 2018 and entitled "A95187-3 NEB Appendix 1 – Trans Mountain Expansion – Reconsideration – reasons for marine shipping between the WMT and the 12-nautical-mile territorial sea limit – A6J4X5".
16. Attached as **Exhibit "N"** to my Affidavit is a true copy of Appendix 2 to the Reasons Letter, dated October 29, 2018 and entitled "A95187-5 NEB Appendix 2 – Trans Mountain Expansion – Reconsideration – reasons to the List of Issues, Amended Factors Document, design of the hearing process and which government departments that require information – A6J4X7".
17. Attached as **Exhibit "O"** to my Affidavit is a true copy of a letter from the Stó:lō Collective to the NEB containing further objections regarding the OTE hearings, dated October 30, 2018 and entitled "A95245-1 LT

NEB re Objection to Locations and Limitations re OTE Hearings (with enclosures) – A6J5Q0”.

18. Attached as **Exhibit “P”** to my Affidavit is a true copy of a letter from the NEB to all Intervenor requesters on the locations chosen for OTE hearings, dated October 31, 2018 and entitled “A95289-1 NEB Letter – Parties – Trans Mountain Expansion – Reconsideration – oral Indigenous traditional evidence locations – comments – A6J6L1”.
19. Attached as **Exhibit “Q”** to my Affidavit is a true copy of a letter from the NEB to all Intervenor requesters on the Notice of Motion filed by Squamish Nation on November 5, 2018 (“**Squamish Motion**”) requesting additional time to file its Opening Statement and Written Evidence, dated November 6, 2018 and entitled “A95485-1 NEB Letter – Parties – Trans Mountain Expansion – Reconsideration – Notice of motion from Squamish Nation requesting more time for filing opening statement and evidence – comment – A6K0I2”.
20. Attached as **Exhibit “R”** to my Affidavit is a true copy of Ruling No. 7 of the NEB in response to requests from Indigenous Intervenor requesters regarding the OTE hearings, dated November 7, 2018 and entitled “A95517-1 NEB Ruling No. 7 – Indigenous Groups – Trans Mountain Expansion – Reconsideration – requests from Indigenous intervenors – oral Indigenous traditional evidence locations, time limitations and costs – A6K0Y0”.
21. Attached as **Exhibit “S”** to my Affidavit is a true copy of Procedural Direction No. 2 issued by the NEB to all Intervenor requesters regarding OTE hearings, dated November 7, 2018 and entitled “A95518-1 NEB PD No. 2 – All Parties – Trans Mountain Expansion – Reconsideration – Oral Indigenous traditional evidence – Procedures, guidance, session locations and schedules – A6K0Y3”.

22. Attached as **Exhibit “T”** to my Affidavit is a true copy of Appendix 1 to Procedural Direction No. 2, dated November 7, 2018 and entitled “A95518-3 NEB Appendix 1 – Trans Mountain Expansion – Reconsideration – Oral Indigenous traditional evidence schedule – revised 28 November 2018 – A6K0Y5”.
23. Attached as **Exhibit “U”** to my Affidavit is a true copy of Appendix 2 to Procedural Direction No. 2, dated November 7, 2018 and entitled “A95518-5 NEB Appendix 2 – Trans Mountain Expansion – Reconsideration – Procedures and guidance for oral Indigenous traditional evidence – A6K0Y7”.
24. Attached as **Exhibit “V”** to my Affidavit is a true copy of a letter from the NEB to all Intervenors regarding the Marine Technical Advisor appointed by the federal government, dated November 8, 2018 and entitled “A95542-1 NEB Letter – All Parties – Trans Mountain Expansion – Reconsideration – Federal government-appointed Marine technical advisor – A6K1I0.”
25. Attached as **Exhibit “W”** to my Affidavit is a true copy of a letter from the Stó:lō Collective to the NEB regarding the Squamish Motion, dated November 8, 2018 and entitled “A95575-1 SC - LT NEB re Response to Notice of Motion of Squamish – Nov 8, 2018 – A6K1X5”.
26. Attached as **Exhibit “X”** to my Affidavit is a true copy of Ruling No. 9 of the NEB regarding the Squamish Motion, dated November 13, 2018 and entitled “A95640-1 NEB Ruling No. 9 – Squamish and TWN – Trans Mountain Expansion – Reconsideration – Notices of motion for extension to the deadline for intervenor evidence – A6K3E2”.
27. Attached as **Exhibit “Y”** to my Affidavit is a true copy of Procedural Direction No. 3 issued by the NEB to all Intervenors regarding the revised hearing schedule for OTE hearings, dated November 13, 2018

and entitled “A95641-1 NEB PD No. 3 – All Parties – Trans Mountain Expansion – Reconsideration – Oral Indigenous traditional evidence – Revised hearing events and steps table – A6K3E5”.

28. Attached as **Exhibit “Z”** to my Affidavit is a true copy of a Notice of Motion filed by Living Oceans Society and Raincoast Conservation Foundation (“**Living Oceans Motion**”) making various requests of the NEB, dated November 16, 2018 and entitled “A95798-2 2018 11 16 – Notice of Motion re risk assessment – A6K5U1”.
29. Attached as **Exhibit “AA”** to my Affidavit is a true copy of an Application for Review filed by Living Oceans Society and Raincoast Conservation Foundation (“**Living Oceans Application**”) requesting that the NEB revisit certain conclusions made as part of the Hearing Order, dated November 16, 2018 and entitled “A95804-2 2018 11 16 – Application for review of Spatial Limit Decision – A6K5V5”.
30. Attached as **Exhibit “BB”** to my Affidavit is a true copy of an Application for Review filed by TWN (“**TWN Application**”) requesting that the NEB revisit certain conclusions made as part of the Hearing Order, dated November 16, 2018 and entitled “A95819-1 Application for Review – A6K5Y8”.
31. Attached as **Exhibit “CC”** to my Affidavit is a true copy of a letter from the NEB to all Intervenors requesting comments on the Living Oceans Motion, Living Oceans Application, and TWN Application (collectively, the “**Living Oceans and TWN Notices**”), dated November 21, 2018 and entitled “A96006-1 NEB Letter – Comment processes to parties – Trans Mountain Reconsideration – A6K8K4”.
32. Attached as **Exhibit “DD”** to my Affidavit is a true copy of a letter from the Stó:lō Collective to the NEB regarding the Stó:lō Collective’s intention to withdraw from the OTE hearing, dated November 26, 2018

and entitled "A96126-1 LT NEB re Withdrawing from OTE Hearing – A6L0H7".

33. Attached as **Exhibit "EE"** to my Affidavit is a true copy of a transcript of an OTE hearing of the NEB for the Project held on November 29, 2018 in which Chief Dalton Silver provides evidence for the Stó:lō Collective, entitled "A96243-1 18-11-29 - Volume 7 – A6L2F4".
34. Attached as **Exhibit "FF"** to my Affidavit is a true copy of a letter from the Stó:lō Collective to the NEB regarding the Living Oceans and TWN Notices, dated November 30, 2018 and entitled "A96297-1 LT NEB re TWN and Living Oceans Applications and Motion – A6L2Z3".
35. Attached as **Exhibit "GG"** to my Affidavit is a true copy of the Stó:lō Collective's Opening Statement, dated December 5, 2018 and entitled "A96432-1 Opening Statement of the Stó:lō Collective – A6L5S8".
36. Attached as **Exhibit "HH"** to my Affidavit is a true copy of the Stó:lō Collective's Written Evidence, dated December 5, 2018 and entitled "A96432-2 Written Evidence of the Stó:lō Collective – A6L5S9".
37. Attached as **Exhibit "II"** to my Affidavit is a true copy of Ruling No. 18 of the NEB to TM Canada regarding its notice of motion for an extension to file reply evidence, dated December 7, 2018 and entitled "A96529-1 NEB Ruling No. 18 – Trans Mountain – Extension to reply evidence – Trans Mountain Reconsideration – A6L8L6".
38. Attached as **Exhibit "JJ"** to my Affidavit is a true copy of the information request ("**IR**") filed by the Stó:lō Collective, seeking specific information from the federal government, dated December 17, 2018 and entitled "A96753-2 Information Request #1 to Government of Canada – A6Q2A0".

39. Attached as **Exhibit “KK”** to my Affidavit is a true copy of Ruling No. 22 of the NEB regarding the Living Oceans and TWN Notices, dated December 27, 2018 and entitled “A96969-1 NEB Ruling No. 22 – Trans Mountain Expansion – Reconsideration – Applications for review from Living Oceans and Raincoast and TWN – A6Q5C9”.
40. Attached as **Exhibit “LL”** to my Affidavit is a true copy of TM Canada’s response to the IR filed by the Stó:lō Collective, dated December 29, 2018 and entitled “A97002-5 Response to Information Request from Sto lo Collective – A6Q5X1”.
41. Attached as **Exhibit “MM”** to my Affidavit is a true copy of a letter from the NEB to all Intervenors and TM Canada requesting comments on the Notice of Motion filed by Raincoast Conservation Foundation on January 7, 2019 to file late evidence containing expert opinion regarding the health of Southern resident killer whales (“**Raincoast Motion**”), dated January 7, 2019 and entitled “A97086-1 NEB Letter – All Parties – Trans Mountain Expansion – Reconsideration – Raincoast notice of motion to file late evidence – comment process – A6Q7I3”.
42. Attached as **Exhibit “NN”** to my Affidavit is a true copy of a letter from the Stó:lō Collective to the NEB regarding the Raincoast Motion, dated January 9, 2019 and entitled “A97159-1 LT NEB re Raincoast Notice of Motion (filing late evidence) – A6Q8H9”.
43. Attached as **Exhibit “OO”** to my Affidavit is a true copy of Procedural Direction No. 4 issued by the NEB regarding affidavits, written argument-in-chief, containing the NEB’s draft conditions and recommendations, dated January 10, 2019 and entitled “A97236-1 NEB PD No. 4 – All Parties – Trans Mountain Expansion – Reconsideration – Affidavits and written argument-in-chief, including comments on draft conditions and recommendations – A6Q9I3”.

44. Attached as **Exhibit “PP”** to my Affidavit is a true copy of a letter from the Stó:lō Collective to the NEB containing confirmation that the Stó:lō Collective adopted its Written Evidence, dated January 14, 2019 and entitled “A97289-1 LT NEB re Adopting Written Evidence – A6Q9X4”.
45. Attached as **Exhibit “QQ”** to my Affidavit is a true copy of Ruling No. 27 of the NEB regarding the Raincoast Motion, dated January 14, 2019 and entitled “A97278-1 NEB Ruling No. 27 – Raincoast – Trans Mountain Expansion – Reconsideration – Notice of motion to file late evidence – A6Q9V1”.
46. Attached as **Exhibit “RR”** to my Affidavit is a true copy of the NEB’s Erratum to Ruling No. 27, dated January 16, 2019 and entitled “A97367-1 NEB Letter – Parties MH-052-2018 – Erratum to Ruling No. 27 – A6R1F5”.
47. Attached as **Exhibit “SS”** to my Affidavit is a true copy of the Stó:lō Collective’s Argument-in-Chief, dated January 22, 2019 and entitled “A97548-1 Argument-in-Chief of Stolo Collective – A6R3Z2”.
48. Attached as **Exhibit “TT”** to my Affidavit is a true copy of Part 1 of the Stó:lō Collective’s Book of Authorities, dated January 22, 2019 and entitled “A97567-1 Book of Authorities (Part 1) – A6R4F4”.
49. Attached as **Exhibit “UU”** to my Affidavit is a true copy of Part 2 of the Stó:lō Collective’s Book of Authorities, dated January 22, 2019 and entitled “A97567-2 Book of Authorities (Part 2) – A6R4F5”.
50. Attached as **Exhibit “VV”** to my Affidavit is a true copy of Part 3 of the Stó:lō Collective’s Book of Authorities, dated January 22, 2019 and entitled “A97567-3 Book of Authorities (Part 3) – A6R4F6”.

51. Attached as **Exhibit "WW"** to my Affidavit is a true copy of relevant excerpts from the NEB's Reconsideration Report, dated February 22, 2019 and entitled "A98021-1 NEB Reconsideration Report – Reconsideration – Trans Mountain Expansion - MH-052-2018 – A6S2D8".

SWORN BEFORE ME at the City of)
 Vancouver in the Province of British)
 Columbia, this 6th day of July, 2019)



A Commissioner for Oaths in and)
 for the Province of British Columbia)


 TANNY NGUYEN

Erin Reimer
Barrister & Solicitor
Miller Titerle Law Corporation
300 – 638 Smithe Street
Vancouver, BC V6B 1E3

National Energy
Board



Office national
de l'énergie

This is Exhibit A referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for
British Columbia

File OF-Fac-Oil-T260-2013-03 59
26 September 2018

To: All intervenors in the OH-001-2014 Certificate hearing for the Trans Mountain
Expansion Project¹
Trans Mountain Pipeline ULC (regulatory@transmountain.com)
All Indigenous peoples and groups on the Crown Consultation List in the OH-001-2014
Certificate hearing
All interested persons and groups

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report (Report) as directed by Order in Council (OIC) P.C. 2018-1177
MH-052-2018**

**Application to Participate process; and comment process on the draft List of Issues,
the draft Amended Factors and Scope of the Factors for the Environmental
Assessment under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012),
and the design of the hearing process**

A. Overview

On 20 September 2018, through OIC P.C. 2018-1177, the Governor in Council (GIC) referred aspects of the Board's Report for the Project back to the Board for reconsideration (Reconsideration). The GIC's direction follows a 30 August 2018 decision² of the Federal Court of Appeal that quashed the GIC's approval of the Project. The GIC has imposed a time limit of 155 calendar days for the Reconsideration. Therefore, the Board must complete the Reconsideration process and issue its Reconsideration report no later than **22 February 2019**.

The Board will hold a public hearing in carrying out the Reconsideration. The Chair of the Board has assigned a Panel of three Board Members (Lyne Mercier – presiding, Alison Scott, and Murray Lytle) to conduct the Reconsideration.

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¹ Those remaining in the hearing process at the time that the Board issued its Recommendation Report in May 2016, as listed in Appendix 6 of the Report.

² *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153.

As detailed in this letter, the Board is now seeking public comments on:

- 1) whether, “on a principled basis,”³ Project-related marine shipping should be included in the “designated project” to be assessed under the [CEAA 2012](#);
- 2) the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 (Appendix 1), and the draft List of Issues to be considered in the Reconsideration hearing (Appendix 2); and
- 3) the design of the hearing process to be used for the Reconsideration;
- 4) which government departments or bodies that the Board should require information from during the hearing.

Directions on how to file comments with the Board on the above matters are provided in Part G below.

This letter also provides background and guidance on how those interested in participating in the hearing as an intervenor can apply or register to do so.

The deadline for filing all comments, and for applying or registering to participate, is 3 October 2018.

Once the Board has considered the filed comments and Application to Participate (ATP) forms, it will:

- release a Hearing Order setting out the hearing process that will be followed;
- confirm the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012, and the List of Issues for the Reconsideration hearing; and
- announce the intervenors that will be participating in the hearing.

In determining the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 and the List of Issues for the Reconsideration hearing, in addition to considering the comments received, the Board will be guided by the GIC’s direction, the Federal Court of Appeal’s decision, and relevant provisions of the CEAA 2012 and the *National Energy Board Act* (NEB Act).

B. Background

On 19 May 2016, the Board issued its Report for the Project, which recommended that the GIC approve the Project.

On 29 November 2016, the GIC accepted the Board’s recommendation and issued OIC P.C. 2016-1069. That OIC directed the Board to issue a certificate of public convenience and necessity approving the construction and operation of the Project, subject to the conditions recommended by the Board, which the Board did on 1 December 2016 ([Certificate OC-064](#)).

³ *Tsleil-Waututh Nation v. Canada (Attorney General)*, *supra* note 2 at para. 770.

On 30 August 2018, the Federal Court of Appeal overturned the GIC's approval of the Project, in part because, in the Court's view, the Board unjustifiably excluded Project-related marine shipping from the definition of the "designated project" under the CEAA 2012. The Court noted that this resulted in successive deficiencies, including limiting the Board's consideration of mitigation measures and of section 79 of the [*Species at Risk Act*](#) (SARA). The Court noted that the Board had considered Project-related marine shipping under the NEB Act, and that this was adequate for the purposes of informing the GIC of the effects of Project-related marine shipping on Southern resident killer whales and their use by Indigenous groups, as well as of the significance of these effects.

The Federal Court of Appeal quashed OIC 2016-1069, rendering Certificate OC-064 a nullity. The Court stated that the issue of Project approval should be remitted to the GIC for redetermination, and, in that redetermination, the GIC must refer the Board's recommendations and its terms and conditions back to the Board for reconsideration. At paragraph 770 of its judgment, the Court stated:

Specifically, the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the [SARA] to Project-related shipping, the Board's environmental assessment of the Project in the light of the Project's definition, the Board's recommendation under subsection 29(1) of the [CEAA 2012] and any other matter the [GIC] should consider appropriate.

In OIC 2018-1177 dated 20 September 2018, the GIC, on the recommendation of the Minister of Natural Resources, pursuant to section 53 of the NEB Act and section 30 of the CEAA 2012:

- a) refers back to the National Energy Board for reconsideration the recommendations and all terms or conditions set out in its May 19, 2016 report entitled *Trans Mountain Expansion Project OH-001-2014* that are relevant to addressing the issues specified by the Federal Court of Appeal in paragraph 770 of *Tsleil-Waututh Nation v. Canada (Attorney General)* (2018 FCA 153), including conditions 91, 131 to 134, 144 and 151;
- b) directs that the Board conduct the reconsideration taking into account the following factors:
 - i) the environmental effects of Project-related marine shipping in view of the requirements of the *Canadian Environmental Assessment Act, 2012*, and
 - ii) the adverse effects of Project-related maritime shipping on species at risk, including the Northeast Pacific southern resident killer whale population, and their critical habitat, in view of any requirements of section 79 of the *Species at Risk Act* that may apply to the Project; and
- c) directs that the Board complete its reconsideration within 155 calendar days after the day on which this Order is made."

C. Including Project-related marine shipping as part of the “designated project” under the CEAA 2012

The Board invites public comments on whether, on a principled basis, Project-related marine shipping should be part of the “designated project” under the CEAA 2012, and the rationale for why or why not. More specifically, comments should address whether Project-related marine shipping is “incidental” to Project physical activities, as that term is used in the definition of “designated project” in subsection 2(1) of the CEAA 2012.

The Board is also seeking comments on a draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 (Appendix 1), which reflects a scenario where the Board determines that Project-related marine shipping is part of the “designated project” under the CEAA 2012.

D. Government departments or bodies that the Board should require information from during the hearing

Pursuant to paragraph 20(a) of the CEAA 2012, the Board intends to request specialist or expert information or knowledge from each of Fisheries and Oceans Canada, Environment and Climate Change Canada, and Transport Canada in relation to the Reconsideration.

The Board is seeking comments about which other government departments or bodies, if any, that the Board should require information from during the hearing.

E. Draft List of Issues for the Reconsideration hearing

The Board invites public comments on the appropriate List of Issues to be considered in the Reconsideration hearing. A draft List of Issues for the Reconsideration hearing is provided in Appendix 2.

F. Hearing process design

The Board invites public comments on the design of the hearing process that it should use to carry out its Reconsideration. Comments regarding the hearing process design should include a description of the hearing steps that are appropriate, the timing of these steps, and whether they should be written or oral.

Comments must take into account the **time limit and the limited focus** of the Reconsideration process, and that a portion of the time will be required by the Board to collect and consider comments in determining its hearing process and focus, and to prepare its Reconsideration Report. The Board’s hearing process will be, in accordance with subsection 11(4) of the NEB Act, carried out as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit imposed by the GIC.

Given what will be an expedited hearing process, **all Parties, including individuals, groups and government departments and bodies, that intend to participate as intervenors, are strongly encouraged to start preparing any additional evidence immediately, based on the draft List of Issues for the Reconsideration hearing.** The Board intends for the entirety of the record filed in the OH-001-2014 Certificate hearing to be included as part of its record for the Reconsideration. **Parties will not be required to re-file or re-test evidence that was filed during the OH-001-2014 Certificate hearing.**

G. How to file comments

The deadline for filing all comments pertaining to Parts C to E above is 3 October 2018.

Comments can be filed online using the Board's [e-filing tool](#) (when asked to choose a project name, choose "Trans Mountain Expansion Project – Reconsideration – MH-052-2018").

All filings must refer to **Hearing Order MH-052-2018** and **File OF-Fac-Oil-T260-2013-03 59**, and be addressed to:

Ms. Sheri Young
 Secretary of the Board
 National Energy Board
 Suite 210, 517 Tenth Avenue SW
 Calgary, AB T2R 0A8
 Facsimile 403-292-5503 (toll-free 1-877-288-8803)

Alternatively, comments may be mailed or faxed to the Board using the contact information above. **The Board does not accept filings by email.**

Anyone filing comments with the Board should also provide a copy to Trans Mountain at regulatory@transmountain.com.

All comments received, and any future filings related to this Reconsideration hearing, will be found in the Board's online [public registry](#).

H. How to apply or register to participate in the Reconsideration hearing

The Board's Reconsideration hearing will involve:

- the participation of **intervenors**, which typically may file and challenge relevant evidence and submit final argument; and
- gathering **letters of comment from the public** – related to the final List of Issues for the Reconsideration Hearing or the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 – by a deadline to be set by the Board at a later time.

Only those seeking to participate as an **intervenor** in this hearing are required to file an ATP form. Anyone wanting to file a letter of comment by this future deadline does **not** need to file an ATP form.

Intervenors in the OH-001-2014 Certificate hearing

Intervenors in the OH-001-2014 Certificate hearing at the time that the Board issued its Recommendation Report are **guaranteed intervenor status** in this Reconsideration hearing, should they choose to participate. These intervenors must file an ATP form as a means of "registering" only, though a number of the steps can be skipped.

The purpose of this registration process for these intervenors is to ensure that the Board and Parties to the hearing have their current contact information for the purpose of serving documents.

In the case of a **group** that was granted intervenor status during the OH-001-2014 Certificate hearing, the Board notes that intervenor status was tied to the **group** that participated; **not** to the representative(s) of that group. In other words, **only the group is guaranteed intervenor status** in this Reconsideration hearing. Any individual that represented a group and who wants to participate on his/her own as an individual must file an ATP form for the Board's consideration and decision.

Other interested persons or groups seeking intervenor status

Any other member of the public (individuals or groups) may apply to participate in this Reconsideration hearing as an intervenor. The Board will assess all filed ATP forms and decide who will be allowed to participate as an **intervenor**. Intervenor status will be granted to those who, in the Board's opinion, are directly affected or have relevant information or expertise. Applicants must demonstrate how they meet this criteria as they relate to the draft List of Issues for the Reconsideration hearing.

Those not granted intervenor status – as well as any other interested person or group – will be able to file a letter of comment by a deadline to be set by the Board at a later time.

How to file an ATP form

The ATP form for this Reconsideration hearing can be found on the Board's [website](#).

If you require a hard copy of the ATP form, please contact a Process Advisor (see Part J below).

I. Participant funding

Participant funding is available to facilitate eligible intervenors' participation in this hearing. A simplified funding process will be used for this hearing to reduce administrative burden. Eligible groups may request up to \$80,000, and individuals up to \$12,000.

For information about participant funding and eligible costs, please visit www.neb-one.gc.ca/pfp or contact a Participant Funding Program Coordinator at 1-800-899-1265.

The Participant Funding Request Form is found at the link above, and also attached to this letter as Appendix 3.

J. Where to find additional information

As information becomes available or is released regarding the Reconsideration hearing, the Board's will update its Project [webpage](#).

If you require additional information about this letter, including information on how to file an ATP form or comments, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Trans Mountain is directed to serve this letter on its list of interested parties.

Yours truly,

Original signed by

Sheri Young
Secretary of the Board

Attachments

Appendix 1

Draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the *Canadian Environmental Assessment Act, 2012*⁴

1.0 INTRODUCTION

On 16 December 2013, Trans Mountain Pipeline ULC (Trans Mountain) filed an application with the National Energy Board (Board or NEB) proposing to construct and operate the Trans Mountain Expansion Project (Project). As the Project would require more than 40 kilometres of new pipeline and would be regulated under the *National Energy Board Act* (NEB Act), it is a designated project under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and requires a CEAA 2012 environmental assessment for which the NEB is the Responsible Authority. On 20 September 2018, through [OIC P.C. 2018-1177](#), the Governor in Council (GIC) referred aspects of the Board's [Report](#) for the Project back to the Board for reconsideration.

For the purposes of the environmental assessment under the CEAA 2012, the designated project includes the various components and physical activities as described by Trans Mountain in its 16 December 2013 application submitted to the NEB. The Board determined that Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit is also part of the “designated project” under the CEAA 2012. ~~The Board has determined that the potential environmental and socio-economic effects of increased marine shipping activities to and from the Westridge Marine Terminal that would result from the designated project, including the potential effects of accidents or malfunctions that may occur, will be considered under the NEB Act (see the NEB's Letter of 10 September 2013 for filing requirements specific to these marine shipping activities). To the extent that there is potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board will consider those effects under the cumulative effects portion of the CEAA 2012 environmental assessment.~~

As noted in the List of Issues (attached to Hearing Order [OH-001-2014](#)), the Board does not intend to consider the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline.

In accordance with paragraph 79(2)(b) of the CEAA 2012, the following provides a description of the factors to be taken into account in the environmental assessment under the CEAA 2012 and of the scope of those factors.

⁴ Deletions from the original Scope of Factors are shown with in ~~black strikethrough~~ text, while draft additions are shown in red underlined text. While this document indicates that Project-related marine shipping is part of the designated project on a draft basis, the Board will consider comments on this issue.

2.0 FACTORS AND SCOPE OF THE FACTORS

2.1 Factors to be considered

The CEAA 2012 environmental assessment for the designated project will take into account the factors described in paragraphs 19(1)(a) through (h) of the CEAA 2012:

- (a) the environmental effects⁵ of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;
- (b) the significance of the effects referred to in paragraph (a);
- (c) comments from the public or any interested party received in accordance with the CEAA 2012;
- (d) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;
- (e) the requirements of the follow-up program in respect of the designated project;
- (f) the purpose of the designated project;
- (g) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means; and
- (h) any change to the designated project that may be caused by the environment.

In addition, the environmental assessment will also consider community knowledge and Aboriginal traditional knowledge.

2.2 Scope of the factors to be considered

The environmental assessment will consider the potential effects of the designated project within spatial and temporal boundaries within which the designated project may potentially interact with and have an effect on components of the environment. These boundaries will vary with the issues and factors considered, and will include, but not be limited to:

- construction, operation and maintenance, foreseeable changes, and site reclamation, as well as any other undertakings proposed by the proponent or that are likely to be carried out in relation to the physical works proposed by the proponent, including mitigation and habitat replacement measures;
- seasonal or other natural variations of a population or ecological component;
- any sensitive life cycle phases of species (e.g., wildlife, vegetation) in relation to the timing of Project activities;

⁵ Section 5 of the CEAA 2012 further describes the environmental effects that are to be taken into account.

- the time required for an effect to become evident;
- the area within which a population or ecological component functions; and
- the area affected by the Project.

Any works and activities associated with additional modifications or associated with the decommissioning or abandonment phase of the Project would be subject to a future application under the NEB Act and assessed in detail at that time. Therefore, at this time, any works or activities associated with these phases of the Project will be examined in a broad context only. As indicated above, the environmental assessment will consider cumulative environmental effects that are likely to result from the designated project in combination with effects from other physical activities that have been or will be carried out.

Subsection 2(1) of the CEAA 2012 provides definitions potentially relevant to the scope of the factors, including:

“environment” which means the components of the Earth, including

- (a) land, water and air, including all layers of the atmosphere;
- (b) all organic and inorganic matter and living organisms; and
- (c) the interacting natural systems that include components referred to in paragraphs (a) and (b);

and

“mitigation measures” which means measures for the elimination, reduction or control of the adverse environmental effects of a designated project, and includes restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or any other means.

Appendix 2

Draft List of Issues for the Reconsideration Hearing

The Board's Reconsideration hearing will consider any necessary changes or additions to its May 2016 Report, in light of the inclusion of Project-related marine shipping in the "designated project" under the CEAA 2012. This includes issues related to factors described in paragraphs 19(1)(a) through (h) of the CEAA 2012 and to section 79 of the SARA:

- 1) The environmental effects of Project-related marine shipping, including adverse effects on species at risk, and the significance of those effects.
- 2) Measures that are technically and economically feasible, and that would mitigate any significant adverse environmental effects of Project-related marine shipping. *Given that the Board found four significant adverse effects related to Project-related marine shipping in its original assessment⁶ (i.e., greenhouse gas emissions, Southern resident killer whale, traditional Aboriginal use associated with Southern resident killer whale, and the potential effects of a large or credible worst-case spill), the consideration of mitigation measures will focus on these four matters. This will include consideration of whether the mitigation measures will change the Board's previous significance findings.*
- 3) Alternative means for carrying out Project-related marine shipping that are technically and economically feasible, and the environmental effects of such alternative means.⁷
- 4) Requirements of any follow-up program in respect of Project-related marine shipping.
- 5) Measures to avoid or lessen the adverse effects of Project-related marine shipping on SARA-listed wildlife species and their critical habitat, including monitoring, and consideration of how the undertaking of such measures could be ensured. *The Board's original assessment identified the SARA-listed marine fish, marine mammal, and marine bird species that could be found in the area of, or affected by, Project-related marine shipping,⁸ providing a focus for this issue. Any marine species that have been newly listed, or any species that have seen a change to their designation, since the issuance of the Board's Report and that could be affected by Project-related marine shipping would also require consideration under the SARA.*
- 6) Whether there should be any changes or additions to the Board's recommendations for the Project, or recommended terms or conditions, in light of the above issues.

⁶ See the Board's Report at pages 337, 350-351, 363, 378, and 397-398.

⁷ For greater clarification, the Board does not intend to reconsider alternate locations for the Westridge Marine Terminal as this was previously considered.

⁸ See the Board's Report at pages 338, 341, and 352.

The consideration of the above issues will be limited to Project-related marine shipping between the Westridge Marine Terminal to the 12-nautical-mile territorial sea limit.

The Board is of the view that certain issues described above, in particular Issue #1, were thoroughly canvassed in the OH-001-2014 Certificate hearing and may not require additional evidence. The Board is particularly interested in new, additional evidence (including comments from the public, community knowledge, and Indigenous traditional knowledge) on Issues #s 2 to 5.

Appendix 3 Participant Funding Request Form

MH-052-2018 – Participant Funding Request Form

The National Energy Board (NEB) administers a Participant Funding Program (PFP) independently of the hearing process. Funding is available for eligible intervenors, including Indigenous groups, individuals with a direct local interest, as well as non-industry not-for-profit groups. A simplified funding process has been approved for this hearing to reduce administrative burden. Eligible groups may request up to \$80,000, and individuals up to \$12,000, to participate in this hearing. For more information about the PFP and reimbursement of eligible costs, go to www.neb-one.gc.ca/pfp or contact a PFP Coordinator at 1-800-899-1265.

If you want to request funding, please return a completed form **on or before [ATP Deadline]** to the PFP by email pfppafp@neb-one.gc.ca or by fax 1-877-288-8803.

1. Funding Applicant

Legal name of entity or individual applying for funding

CRA Business # or Band #

Address 1 [apt.; street; city]

Address 2 [province; postal code, zip code; country]

Phone

Fax

Website

2. Funding requested

Please specify the amount of funding you are requesting: \$

Eligible groups may request up to \$80,000, and individuals up to \$12,000.

3. Primary contact for funding

Name and title of person the PFP will contact about funding

Phone

Fax

Email

4. Signing authority for funding

Name and title of person authorized by the applicant to sign funding agreement

Phone

Fax

Email

Important

Once a complete form is received, PFP staff will send you a contribution agreement to be signed. Once signed by both parties, the information provided will be used to administer funding in accordance with the NEB's PFP program, including public disclosure of the award. PFP is a reimbursement-based program, you must submit claims for eligible expenses incurred in order to receive payment.

Privacy notice statement

Your personal information is being collected to process your request to the PFP pursuant to the *National Energy Board Act*. Providing this information is voluntary however, missing information may affect our ability to communicate with you and assess your application. Your personal information will be protected in accordance with the *Privacy Act*. You have the right to access and correct any of your personal information held by the NEB. For more details contact the NEB's Access to Information and Privacy Coordinator at DLATIPCoordinator@neb-one.gc.ca and cite Personal Information Bank NEB PPU 025.

ORDERS IN COUNCIL

DEPARTMENT OF NATURAL RESOURCES

NATIONAL ENERGY BOARD ACT

Trans Mountain Expansion Project Reconsideration

P.C. 2018-1177

September 20, 2018

Whereas, on December 16, 2013, Trans Mountain Pipeline ULC ("Trans Mountain") applied to the National Energy Board ("the Board") pursuant to Part III of the *National Energy Board Act* for a certificate of public convenience and necessity in respect of the proposed construction and operation of the Trans Mountain Expansion Project ("Project");

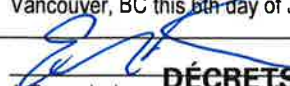
Whereas, on May 19, 2016, having reviewed Trans Mountain's application and conducted an environmental assessment of the Project, the Board submitted its report on the Project entitled *Trans Mountain Expansion Project OH-001-2014* ("the Board's Report") to the Minister of Natural Resources, pursuant to section 29 of the *Canadian Environmental Assessment Act, 2012* and section 52 of the *National Energy Board Act*;

Whereas, on November 29, 2016, the Governor in Council issued Order in Council P.C. 2016-1069, which accepted the Board's recommendation that the Project will be, if the terms and conditions set out in Appendix 3 of the Board's Report are complied with, required by the present and future public convenience and necessity under the *National Energy Board Act* and will not likely cause significant adverse environmental effects under the *Canadian Environmental Assessment Act, 2012*;

Whereas, on December 1, 2016, at the direction of the Governor in Council, the Board issued Certificate of Public Convenience and Necessity OC-064 to Trans Mountain, in respect of the Project, making it subject to the terms and conditions set out in Appendix 3 of the Board's Report;

Whereas, on August 30, 2018, the Federal Court of Appeal ("the Court") quashed Order in Council P.C. 2016-1069 in its decision *Tsleil-Waututh Nation v. Canada (Attorney General)* (2018 FCA 153) ("*Tsleil-Waututh Nation*") and remitted the issue of Project approval to the Governor in Council for prompt redetermination;

And whereas, in *Tsleil-Waututh Nation*, the Court concluded, among other things, that the Board ought to reconsider on a principled basis whether Project-related marine shipping is incidental to the Project,


A Commissioner for taking affidavits for
British Columbia

DÉCRETS

MINISTÈRE DES RESSOURCES NATURELLES

LOI SUR L'OFFICE NATIONAL DE L'ÉNERGIE

Réexamen du projet d'agrandissement du réseau de Trans Mountain

C.P. 2018-1177

Le 20 septembre 2018

Attendu que, le 16 décembre 2013, Trans Mountain Pipeline ULC (Trans Mountain) a présenté à l'Office national de l'énergie (Office), sous le régime de la partie III de la *Loi sur l'Office national de l'énergie*, une demande visant l'obtention d'un certificat d'utilité publique concernant la construction et l'exploitation projetées quant au projet d'agrandissement du réseau de Trans Mountain (projet);

Attendu que, le 19 mai 2016, après avoir examiné la demande de Trans Mountain et effectué l'évaluation environnementale du projet, l'Office a présenté au ministre des Ressources naturelles son rapport sur le projet intitulé *Projet d'agrandissement du réseau de Trans Mountain OH-001-2014* (rapport de l'Office), conformément à l'article 29 de la *Loi canadienne sur l'évaluation environnementale (2012)* et à l'article 52 de la *Loi sur l'Office national de l'énergie*;

Attendu que, par le décret C.P. 2016-1069 du 29 novembre 2016, le gouverneur en conseil a accepté la recommandation de l'Office selon laquelle, si les conditions énoncées à l'annexe 3 du rapport de l'Office sont respectées, le projet présentera, aux termes de la *Loi sur l'Office national de l'énergie*, un caractère d'utilité publique, tant pour le présent que pour le futur, et que le projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants pour l'application de la *Loi canadienne sur l'évaluation environnementale (2012)*;

Attendu que, le 1^{er} décembre 2016, sur instruction du gouverneur en conseil, l'Office a délivré à Trans Mountain le certificat d'utilité publique OC-064, assortissant celui-ci des conditions énoncées à l'annexe 3 du rapport de l'Office;

Attendu que, le 30 août 2018, la Cour d'appel fédérale (Cour) a annulé le décret C.P. 2016-1069 dans la décision qu'elle a rendue dans l'affaire *Tsleil-Waututh Nation c. Canada (Procureur général)* (2018 CAF 153) (affaire *Tsleil-Waututh Nation*) et a renvoyé la question de l'approbation du projet à la gouverneure en conseil pour qu'elle prenne rapidement une nouvelle décision;

Attendu que, dans l'affaire *Tsleil-Waututh Nation*, la Cour a notamment conclu que l'Office devait réexaminer, à la lumière des principes, les questions suivantes, à savoir si le transport maritime associé au

the application of section 79 of the *Species at Risk Act* to Project-related shipping, the Board's environmental assessment of the Project in light of the Project's definition, the Board's recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* and any other matter the Governor in Council should consider appropriate;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Natural Resources, pursuant to section 53 of the *National Energy Board Act* and section 30 of the *Canadian Environmental Assessment Act, 2012*,

(a) refers back to the National Energy Board for reconsideration the recommendations and all terms or conditions set out in its May 19, 2016 report entitled *Trans Mountain Expansion Project OH-001-2014* that are relevant to addressing the issues specified by the Federal Court of Appeal in paragraph 770 of *Tsleil-Waututh Nation v. Canada (Attorney General)* (2018 FCA 153), including conditions 91, 131 to 134, 144 and 151;

(b) directs that the Board conduct the reconsideration taking into account the following factors:

(i) the environmental effects of Project-related marine shipping in view of the requirements of the *Canadian Environmental Assessment Act, 2012*, and

(ii) the adverse effects of Project-related maritime shipping on species at risk, including the Northeast Pacific southern resident killer whale population, and their critical habitat, in view of any requirements of section 79 of the *Species at Risk Act* that may apply to the Project; and

(c) directs that the Board complete its reconsideration within 155 calendar days after the day on which this Order is made.

projet est accessoire au projet, l'application de l'article 79 de la *Loi sur les espèces en péril* au transport maritime associé au projet, l'évaluation environnementale du projet par l'Office à la lumière de la définition du projet, la recommandation faite par l'Office sous le régime du paragraphe 29(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* et toute autre question que la gouverneure en conseil estime indiquée,

À ces causes, sur recommandation du ministre des Ressources naturelles et en vertu de l'article 53 de la *Loi sur l'Office national de l'énergie* et de l'article 30 de la *Loi canadienne sur l'évaluation environnementale (2012)*, Son Excellence la Gouverneure générale en conseil :

a) renvoie à l'Office national de l'énergie, pour réexamen, les recommandations et les conditions contenues dans son rapport du 19 mai 2016 intitulé *Projet d'agrandissement du réseau de Trans Mountain OH-001-2014* qui sont pertinentes dans le cadre de l'examen des questions énoncées par la Cour d'appel fédérale au paragraphe 770 de la décision dans l'affaire *Tsleil-Waututh Nation c. Canada (Procureur général)* (2018 CAF 153), notamment les conditions 91, 131 à 134, 144 et 151;

b) donne instruction à l'Office de tenir compte des facteurs ci-après dans le cadre du réexamen :

(i) les effets environnementaux du transport maritime associé au projet, selon les exigences de la *Loi canadienne sur l'évaluation environnementale (2012)*,

(ii) les effets nocifs du transport maritime associé au projet sur les espèces en péril, y compris la population d'épaulards résidente du sud du Pacifique Nord-Est, et sur leur habitat essentiel, selon les exigences de l'article 79 de la *Loi sur les espèces en péril* pouvant s'appliquer au projet;

c) ordonne à l'Office de compléter le réexamen dans les cent cinquante-cinq jours civils suivant la prise du présent décret.

EXPLANATORY NOTE

(This note is not part of the Order.)

Proposal and objectives

This order in council reflects the Governor in Council's (GIC) decision to refer, pursuant to section 53 of the *National Energy Board Act* (NEB Act) and section 30 of the *Canadian Environmental Assessment Act, 2012* (CEAA, 2012), the National Energy Board's ("Board") recommendations as set out in its report of May 19, 2016, entitled *Trans Mountain Expansion Project OH-001-2014*

NOTE EXPLICATIVE

(La présente note ne fait pas partie du Décret.)

Proposition et objectifs

Le présent décret reflète la décision de la gouverneure en conseil (GC), conformément à l'article 53 de la *Loi sur l'Office national de l'énergie* (Loi sur l'Office) et à l'article 30 de la *Loi canadienne sur l'évaluation environnementale (2012)* [LCEE (2012)], de renvoyer à l'Office national de l'énergie (l'Office), pour réexamen, les recommandations de son rapport du 19 mai 2016, intitulé *Projet*

(“Report”), in respect of the proposed construction and operation of the Trans Mountain Expansion Project (“Project”), back to the Board for reconsideration. In carrying out the reconsideration, the GIC has also directed the Board to take into account specified factors regarding the issue of Project-related marine shipping, all of which is to be completed within the time limit specified by the GIC.

Reconsideration of the Report by the Board responds to the Federal Court of Appeal (“Court”) decision in *Tsleil-Waututh Nation v. Canada (Attorney General)* (2018 FCA 153) (“*Tsleil-Waututh Nation*”), which quashed Order in Council P.C. 2016-1069 and remitted the issue of Project approval to the GIC for prompt redetermination.

In the *Tsleil-Waututh Nation* decision, the Court concluded, among other things, that the Board ought to reconsider on a principled basis whether Project-related marine shipping is incidental to the Project, the application of section 79 of the *Species at Risk Act* (SARA) to Project-related marine shipping, the Board's environmental assessment of the Project in light of the Project's definition, the Board's recommendation under subsection 29(1) of the CEAA, 2012, and any other matter the GIC should consider appropriate.

Background

Trans Mountain Expansion Project background

Trans Mountain submitted its application to the Board for a certificate for the Project on December 16, 2013. The purpose of the Project is to increase capacity of the pipeline system from 300 000 barrels per day (bbl/d) to 890 000 bbl/d by twinning the existing Trans Mountain pipeline that currently transports oil from Edmonton to Burnaby. The Project has the potential to unlock large-scale access to world markets, including in the Pacific basin and Asia and create shipping options for Canadian oil producers to multiple markets. The proponent submitted that the largest contribution of the Project to tax revenues and investment is expected to come from higher prices that oil producers will receive when selling it to overseas markets.

The pipeline would follow an existing right-of-way for 89% of its 1 147 km length. The Project would also expand the Westridge Marine Terminal (WMT) by adding two berths to allow the terminal to increase, from 5 to 34, the number of tankers it receives per month. This would increase Project-related tanker traffic through the Burrard Inlet by up to 13.4% and in the Juan de Fuca Strait by 6.6% over current levels.

d'agrandissement du réseau de Trans Mountain OH-001-2014 (Rapport), portant sur la construction et l'exploitation projetées du Projet d'agrandissement du réseau de Trans Mountain (le Projet). Pour ce réexamen, la GC a également ordonné à l'Office de tenir compte des facteurs spécifiés et spécifiques à la question du transport maritime associé au Projet, et de terminer son travail dans les délais prescrits par la GC.

Le réexamen du Rapport que l'Office doit effectuer fait suite à la décision rendue par la Cour d'appel fédérale (la Cour) dans l'affaire *Tsleil-Waututh Nation c. Canada (Procureur général)* (2018 CAF 153) (affaire *Tsleil-Waututh Nation*), qui a annulé le décret C.P. 2016-1069 et renvoyé la question de l'approbation du Projet à la GC pour une nouvelle décision dans le délai imparti.

Dans la décision rendue dans l'affaire *Tsleil-Waututh Nation*, la Cour a conclu, entre autres choses, que l'Office devait réexaminer sur la base des principes : (i) si le transport maritime associé au Projet était accessoire au Projet; (ii) l'application de l'article 79 de la *Loi sur les espèces en péril* (LEP) au transport maritime associé au Projet; (iii) l'évaluation environnementale qu'il a effectuée à la lumière de la définition du Projet; (iv) sa recommandation en vertu du paragraphe 29(1) de la LCEE (2012) et toute autre question que la GC jugerait pertinente.

Contexte

Contexte du Projet d'agrandissement du réseau de Trans Mountain

Le 16 décembre 2013, Trans Mountain a présenté à l'Office sa demande de certificat pour le Projet. Le Projet vise à augmenter la capacité du réseau de pipelines de 300 000 barils de pétrole par jour (b/j) à 890 000 b/j en doublant le pipeline de Trans Mountain existant qui transporte actuellement le pétrole d'Edmonton à Burnaby. Le Projet a le potentiel de débloquer l'accès à grande échelle aux marchés mondiaux, notamment dans le bassin du Pacifique et en Asie, et d'offrir des options de transport aux producteurs de pétrole canadiens leur permettant l'accès à divers marchés. Le promoteur a indiqué que l'essentiel de la contribution du Projet aux recettes fiscales et aux investissements devrait provenir des prix plus élevés que les producteurs de pétrole obtiendront lorsqu'ils vendront le pétrole sur les marchés d'outre-mer.

Le pipeline longerait l'emprise existante sur 89 % de sa longueur totale de 1 147 km. Le projet agrandirait également le terminal maritime Westridge (TMW) par l'ajout de deux postes d'accostage, ce qui ferait passer de 5 à 34 le nombre de pétroliers qu'il accueille par mois. Cela augmenterait aussi le trafic de pétroliers lié au projet à concurrence de 13,4 % des niveaux actuels dans la baie Burrard et de 6,6 % dans le détroit Juan de Fuca.

Trans Mountain commenced construction on the Project on September 26, 2017. On May 29, 2018, the Government of Canada announced that it has reached an agreement with Kinder Morgan to purchase the company's Trans Mountain Expansion Project and related pipeline and terminal assets. The Government has now completed the purchase agreement.

NEB review process

In April 2014, the Board issued Hearing Order OH-001-2014, setting out the process for the public review of the Project. The Board received and considered a total of 2 118 applications to participate in the OH-001-2014 hearing for the Project. The Board granted standing to participate to 1 650 applicants. Out of these 1 650 hearing participants, 400 participated as intervenors and the remaining as commenters. Hearing participants were from various groups, including federal and provincial governments, business, Indigenous peoples, landowners, individuals and non-governmental organizations. A total of \$3,085,370 in participant funding was allocated to 72 intervenors.

On May 19, 2016, the Board found that the Project was in the public interest and recommended that a Certificate be issued under section 52 of the NEB Act for the construction and operation of the Project. The Certificate is subject to 157 terms and conditions that the Board considered necessary or desirable in the public interest. Pursuant to section 29 of the CEAA, 2012, the Report also stated that the Board is of the view that with the implementation of Trans Mountain's environmental protection procedures, and full compliance with the Board's recommended terms and conditions, the Project is not likely to cause significant adverse environmental effects.

On November 29, 2016, following seven months of consultations, which included a four-month extension of the legislated timeline to allow for deeper Indigenous consultations and public engagement on the Project, the Governor in Council issued Order in Council P.C. 2016-1069, accepting the Board's recommendation that the Project will be required by the present and future public convenience and necessity under the NEB Act and will not likely cause significant adverse environmental effects under the *Canadian Environmental Assessment Act, 2012*.

Under the January 2016 interim approach for major projects review, five principles were used to guide the Government's decision: (i) no project proponent will be asked to return to the starting line; (ii) decisions will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence; (iii) the views of the public and affected communities will be sought and considered; (iv) Indigenous peoples will be meaningfully consulted and, where appropriate, impacts on their rights and

Le 26 septembre 2017, Trans Mountain a démarré les travaux de construction du projet. Le 29 mai 2018, le gouvernement du Canada a annoncé qu'il avait conclu une entente avec Kinder Morgan pour acheter son Projet d'agrandissement du réseau de Trans Mountain et les actifs de terminaux et de pipelines connexes. Le gouvernement a maintenant complété l'accord d'achat.

Processus d'examen de l'Office

En avril 2014, l'Office a émis l'ordonnance d'audience OH-001-2014 établissant le processus d'examen public du Projet. L'Office a reçu et examiné un total de 2 118 demandes de participation à l'audience OH-001-2014 sur le Projet. Il a accordé le droit de participer à 1 650 demandeurs du statut de participant. Sur ces 1 650 participants à l'audience, 400 ont pris part à titre d'intervenants, et les autres, à titre de commentateurs. Les participants à l'audience provenaient de divers groupes, dont les gouvernements fédéral et provinciaux, le milieu des affaires, les peuples autochtones, les propriétaires fonciers, les particuliers et les organisations non gouvernementales. Une aide financière totale de 3 085 370 \$ a été allouée à 72 intervenants.

Le 19 mai 2016, l'Office a conclu que le Projet était dans l'intérêt public et a recommandé qu'un certificat soit délivré en vertu de l'article 52 de la Loi sur l'Office pour la construction et l'exploitation du projet. Le certificat est assujéti à 157 conditions que l'Office juge souhaitables ou nécessaires dans l'intérêt public. En vertu de l'article 29 de la LCEE (2012), le Rapport précise également que l'Office estime que grâce à la mise en œuvre des procédures de protection de l'environnement proposées par Trans Mountain et à son respect de toutes les conditions et modalités recommandées par l'Office, le Projet ne sera pas susceptible d'entraîner des effets environnementaux négatifs importants.

Le 29 novembre 2016, après sept mois de consultations, dont quatre mois de prolongation du délai réglementaire pour permettre la tenue de consultations plus approfondies avec les Autochtones et la participation du public au Projet, la GC a pris le décret C.P. 2016-1069, acceptant ainsi la recommandation de l'Office selon laquelle le Projet sera d'utilité publique, tant pour le présent que pour le futur, en vertu de la Loi sur l'Office et qu'il ne sera pas susceptible d'entraîner des effets environnementaux négatifs importants en vertu de la LCEE (2012).

Dans le cadre de l'approche provisoire de janvier 2016 pour l'examen de grands projets, cinq principes ont été retenus pour orienter la décision du gouvernement, à savoir : (i) aucun promoteur n'aura à retourner au point de départ; (ii) les décisions seront fondées sur des données scientifiques, les connaissances traditionnelles des peuples autochtones et d'autres données pertinentes; (iii) on s'enquerra des points de vue du public et des collectivités concernées pour les prendre en compte; (iv) les

interests will be accommodated; and (v) direct and upstream greenhouse gas emissions ("GHG emissions") linked to the projects under review will be assessed.

At the direction of the Governor in Council, on December 1, 2016, the Board issued Certificate of Public Convenience and Necessity OC-064 to Trans Mountain Pipeline ULC in respect of the proposed construction and operation of the Trans Mountain Expansion Project, subject to terms and 157 conditions set out in Appendix 3 of the Board's Report of May 19, 2016, entitled *Trans Mountain Expansion Project OH-001-2014*, and issued to Trans Mountain Pipeline ULC Amending Orders AO-002-OC-49 and AO-003-OC-2.

Indigenous consultations

Seventy-three Indigenous groups (representing 83 Indigenous communities) participated as intervenors in the hearing and provided their comments, views and evidence through written submissions and oral evidence to the Board. A total of 35 Indigenous groups and individuals provided oral traditional evidence to the Board during the hearing. To date, the proponent concluded benefit agreements with 43 Indigenous groups.

Federal officials began consulting on this Project with Indigenous groups in 2013. The Crown identified a legal duty to consult with 117 Indigenous groups potentially impacted by the Project and offered these groups \$2 million in participant funding. Consultations following receipt of the Board's Report were carried out in partnership with British Columbia given the need for a provincial environmental assessment decision on the Project. Concerns from Indigenous groups expressed during the consultation process included cumulative impacts from increased marine shipping, risks related to land-based and marine spills, impacts to asserted title and need for consent, uncertainty around proponent compliance with NEB conditions, and concerns with the existing pipeline. To respond to what was heard during these consultations, the Government committed \$64.7 million in funding for an Indigenous Advisory and Monitoring Committee that has been working with federal regulators and the proponent to oversee environmental aspects throughout the Project's life cycle.

Federal Court of Appeal decision

On August 30, 2018, the Federal Court of Appeal quashed Order in Council P.C. 2016-1069 in its decision in *Tsleil-Waututh Nation* and remitted the issue of Project approval to the GIC for prompt redetermination.

peuples autochtones seront consultés sérieusement et, s'il y a lieu, on fera en sorte de tenir compte des répercussions sur leurs droits et intérêts; (v) les émissions de gaz à effet de serre directes et en amont attribuables à ces projets à l'étude seront évaluées.

Le 1^{er} décembre 2016 et sur instruction de la GC, l'Office a délivré à Trans Mountain Pipeline ULC le certificat d'utilité publique OC-064 autorisant la construction et l'exploitation du projet d'agrandissement du réseau de Trans Mountain, sous réserve des modalités et des 157 conditions énoncées à l'annexe 3 du Rapport de l'Office daté du 19 mai 2016 et intitulé *Projet d'agrandissement du réseau de Trans Mountain OH-001-2014*; l'Office a également délivré à Trans Mountain Pipeline ULC les ordonnances modificatrices AO-002-OC-49 et AO-003-OC-2.

Consultations des Autochtones

Soixante-treize groupes autochtones (représentant 83 collectivités autochtones) ont participé à l'audience à titre d'intervenants et ont donné leurs commentaires, leurs points de vue et des éléments de preuve par écrit et de vive voix à l'Office. Au total, 35 groupes et individus autochtones ont fourni des preuves traditionnelles de vive voix à l'Office durant l'audience. Jusqu'ici, le promoteur a conclu des ententes de prestations avec 43 groupes autochtones.

Des fonctionnaires du gouvernement fédéral ont commencé à consulter des groupes autochtones en 2013. La Couronne a établi qu'elle avait l'obligation légale de consulter 117 groupes autochtones susceptibles d'être touchés par le Projet; elle a par ailleurs offert 2 millions de dollars à ces groupes pour faciliter leur participation. Les consultations qui ont suivi la réception du Rapport de l'Office ont été menées en partenariat avec la Colombie-Britannique, puisqu'elle doit prendre une décision d'évaluation environnementale provinciale sur le Projet. Les préoccupations exprimées par les groupes autochtones lors de la consultation comprennent les effets cumulatifs engendrés par le transport maritime accru, les risques liés aux déversements terrestres et marins, les répercussions sur les titres revendiqués et la nécessité de consentement, l'incertitude liée au respect par le promoteur des conditions imposées par l'Office et les préoccupations relatives au pipeline existant. Pour répondre aux commentaires reçus lors de ces consultations, le gouvernement a offert une aide financière de 64,7 millions de dollars pour mettre sur pied un comité consultatif et de suivi autochtone qui travaille avec les organismes de réglementation fédéraux et le promoteur pour superviser les aspects environnementaux tout au long du cycle de vie du Projet.

Décision de la Cour d'appel fédérale

Le 30 août 2018, la Cour d'appel fédérale a annulé le Décret C.P. 2016-1069 dans la décision qu'elle a rendue dans l'affaire *Tsleil-Waututh Nation* et a renvoyé la question de l'approbation du Projet à la GC pour une nouvelle décision dans les meilleurs délais.

The Court decision noted the following: “Given the Board’s approach to the assessment and its findings, the Board’s report was adequate for the purpose of informing the Governor in Council about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups.” However, the Court ruled that the Board’s decision to exclude Project-related shipping from its environmental assessment under CEAA, 2012 was not adequately justified. The Court concluded, among other things, that the Board ought to reconsider on a principled basis whether Project-related marine shipping is incidental to the scope of the Project, the application of section 79 of the *Species at Risk Act* to Project-related shipping, the Board’s environmental assessment of the Project in light of the Project’s scope, the Board’s recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* and any other matter the Governor in Council should consider appropriate. In addition, the Court concluded that Canada must redo its Phase III Indigenous consultation on the Project. Once that consultation is completed as well as any necessary accommodation, the Project will be put before the GIC for a decision on whether it should be approved.

Review of marine shipping impacts

The Board found that with the implementation of Trans Mountain’s proposed environmental protection procedures and mitigation measures, and the Board’s recommended conditions, pursuant to its authority under the CEAA, 2012, the Project is not likely to cause significant adverse environmental effects. However, The Board’s scope assessment of the Project under the CEAA, 2012 encompassed Edmonton to Burnaby, up to and including the WMT — the extent of the Board’s regulatory oversight of the Project. Under the NEB Act, the Board determined that potential environmental and socio-economic effects of Project-related tanker traffic, including the potential effects of accidents or malfunctions that may occur, are relevant to the Board’s consideration of the public interest.

While the Board did not include Project-related marine shipping activities in the Project under the CEAA, 2012, since it considered that these are not regulated by the Board and are outside its authority, the Board considered the potential effects of increased marine shipping activities as part of its overall public interest determination under the NEB Act. For instance, the Report found that GHG emissions from Project-related marine vessels are likely to be significant given the absence of emissions reporting thresholds for vessels. Marine shipping is primarily regulated by Transport Canada under the *Canada Shipping Act, 2001* and through international conventions.

Dans sa décision, la Cour a constaté ce qui suit : « Étant donné la méthode que l’Office a retenue pour faire son évaluation et ses conclusions, le Rapport de l’Office était suffisant pour informer le gouverneur en conseil des effets du transport maritime lié au Projet sur les épaulards résidents du sud et l’utilisation de cette ressource par des groupes autochtones ». Cependant, elle a conclu que la décision de l’Office d’exclure de son évaluation environnementale, en vertu de la LCEE (2012), le transport maritime associé au Projet, n’était pas adéquatement justifiée. En outre, elle a conclu, entre autres choses, que l’Office devrait réexaminer sur la base de principes, à savoir : (i) si le transport maritime lié au Projet était accessoire à la portée du Projet; (ii) l’application de l’article 79 de la LEP au transport maritime lié au Projet; (iii) l’évaluation environnementale de l’Office du Projet à la lumière de la portée du Projet; (iv) la recommandation de l’Office en vertu du paragraphe 29(1) de la LCEE (2012) et toute autre question que la GC jugerait pertinente. Par ailleurs, la Cour a estimé que le Canada devait reprendre la phase III de ses consultations auprès des Autochtones sur le Projet. Une fois que les consultations seront terminées et que toute mesure d’accommodement nécessaire aura été apportée, le Projet sera présenté à la GC pour qu’elle prenne la décision d’approuver ou non le Projet.

Examen des répercussions du transport maritime

L’Office a conclu que grâce à la mise en œuvre des procédures de protection de l’environnement et des mesures d’atténuation proposées par le promoteur, et grâce aux conditions qu’il recommandait conformément à son pouvoir en vertu de la LCEE (2012), le Projet n’était pas susceptible d’entraîner des effets environnementaux négatifs importants. Cependant, l’évaluation de la portée du Projet par l’Office en vertu de la LCEE (2012) comprenait la région s’étendant d’Edmonton à Burnaby, jusqu’au TMW inclusivement — ce qui correspond à l’étendue de la supervision réglementaire dont il jouit par rapport au Projet. En vertu de la Loi sur l’Office, l’Office a déterminé que les effets environnementaux et socioéconomiques potentiels découlant du trafic de pétroliers associé au Projet, y compris les effets potentiels d’accidents ou de défauts, étaient pertinents pour son examen de l’intérêt public.

Bien que l’Office n’ait pas inclus dans le Projet les activités du transport maritime associées au Projet en vertu de la LCEE (2012) puisqu’il considérait que celles-ci n’étaient pas réglementées par lui, et donc qu’elles ne relevaient pas de son autorité, il a néanmoins considéré les effets potentiels des activités du transport maritime accru dans sa décision sur l’intérêt public général en vertu de la Loi sur l’Office. Par exemple, le Rapport a établi que les émissions de gaz à effet de serre des navires associés au Projet seront probablement importantes, compte tenu de l’absence de seuils de déclaration des émissions pour les navires et du fait que le transport maritime est principalement régi par Transports Canada, en vertu de la *Loi sur la marine marchande du Canada de 2001* et des conventions internationales.

Marine shipping safety was also considered separately through a Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL) process. TERMPOL is an extensive yet voluntary review process that proponents involved in building and operating a marine terminal system for bulk handling of oil, chemicals and liquefied gases can request. The review process was chaired and led by Transport Canada, with participation from other federal departments and stakeholders. The TERMPOL committee made 17 recommendations, which Trans Mountain supported. The TERMPOL report formed part of Transport Canada's written evidence before the National Energy Board.

Under the NEB Act, the Board was of the view that the operation of Project-related marine vessels would contribute to the total cumulative effects on the Southern resident killer whales, and would further impede the recovery of the Southern resident killer whale population, an endangered species that lives in the Salish Sea. The Board found that, as a result, the operation of Project-related marine vessels would likely result in significant adverse effects on the Southern resident killer whale, and on Aboriginal cultural uses associated with these marine mammals.

The Board encouraged other regulatory authorities, such as Transport Canada and the Department of Fisheries and Oceans, to explore initiatives that would aim to reduce the potential effects of marine vessels on marine mammals. In addition, Trans Mountain committed to a series of actions supporting the recovery of the Southern resident killer whale. For example, as part of its Marine Mammal Protection Program (Condition 132), Trans Mountain has committed to support the objectives and recovery measures identified in the action plan for the species.

In the Board's Report, there are conditions that relate to marine shipping, including Condition 91, Plan for implementing, monitoring and complying with marine shipping-related commitments; Condition 131, Marine Public Outreach Program; Condition 133, Marine shipping-related commitments, including spill response regime, tanker tug escort; Condition 134, Updated Tanker Acceptance Standard; Condition 144, Ongoing implementation of marine shipping-related commitments; and Condition 151, Post-construction environmental monitoring reports, among others. These and other conditions required the proponent to file plans, designs and reports on mitigation measures being implemented to address impacts from marine shipping. The proponent must also monitor and comply with all marine shipping-related commitments it made during the Board review process.

La sécurité du transport maritime a également été considérée séparément grâce au processus d'examen technique des terminaux maritimes et des sites de transbordement (TERMPOL). Le processus TERMPOL est un processus d'examen exhaustif, néanmoins volontaire, auquel peuvent adhérer, sur demande, les promoteurs de projets de construction et d'exploitation de systèmes de terminaux maritimes pour la manutention du pétrole en vrac, de produits chimiques et de gaz liquéfiés. Le processus d'examen a été présidé et dirigé par Transports Canada, avec la participation d'autres intervenants et ministères fédéraux. Le Comité du TERMPOL a formulé 17 recommandations auxquelles a souscrit Trans Mountain. Le rapport du TERMPOL faisait partie de la preuve écrite que Transport Canada a présentée à l'Office national de l'énergie.

En vertu de la Loi sur l'Office, l'Office était d'avis que l'exploitation des navires associés au Projet contribuerait aux effets cumulatifs totaux sur les épaulards résidents du Sud et nuirait davantage au rétablissement de la population de cette espèce en voie de disparition qui vit dans la mer Salish. En conséquence, l'Office a conclu que l'exploitation des navires associés au Projet serait susceptible d'entraîner des effets environnementaux négatifs importants sur les épaulards résidents du Sud, ainsi que sur les usages culturels que font les autochtones de ces mammifères marins.

L'Office a exhorté d'autres autorités réglementaires, notamment Transports Canada et Pêches et Océans Canada (POC), à examiner des initiatives susceptibles de réduire les effets potentiels des navires sur les mammifères marins. De plus, Trans Mountain s'est engagé à prendre une série de mesures pour soutenir le rétablissement de la population des épaulards résidents du Sud. Par exemple, dans le cadre de son Programme de protection des mammifères marins (condition 132), le promoteur s'est engagé à soutenir les objectifs et à poursuivre les mesures de rétablissement indiquées dans le plan d'action pour cette espèce.

Le Rapport de l'Office comporte des conditions qui ont trait au transport maritime, y compris la condition 91, Plan portant sur la mise en œuvre, la surveillance et l'observation des engagements relatifs au transport maritime; la condition 131, Programme d'éducation du public à la sécurité nautique; la condition 133, Engagements relatifs au transport maritime, notamment le système d'intervention d'urgence et l'escorte par remorqueur; la condition 134, Norme actualisée d'acceptation de pétroliers; la condition 144, Exécution continue des engagements liés à la marine marchande; la condition 151, Rapports de surveillance environnementale après construction, entre autres choses. Ces conditions, entre autres, exigeaient du promoteur de déposer des plans, des dessins et des rapports sur les mesures d'atténuation qui seront mises en œuvre afin de répondre aux effets des incidences du transport maritime. Le promoteur doit également surveiller

Oceans Protection Plan

On November 7, 2016, the Government of Canada launched the \$1.5 billion Oceans Protections Plan (OPP), the largest investment Canada has ever made to protect the country's coasts and marine environments. This funding will enhance marine safety along Canada's entire coastline — the longest in the world — supporting new and ongoing prevention, preparedness and response measures. The marine safety improvements from the Oceans Protection Plan, building on the robust system already in place, are putting extraordinary safeguards in place for all vessels, including those carrying petroleum products. To complement Canada's world-leading marine safety regime and response capacity, the Oceans Protection Plan will add to the already significant body of scientific knowledge concerning petroleum products in the marine context and incorporate Indigenous knowledge.

Action to support the recovery of the Northeast Pacific southern resident killer whale

The Government of Canada is taking action to support the recovery of the Northeast Pacific southern resident killer whale (SRKW) off the coast of British Columbia. Under the Oceans Protection Plan, Transport Canada has been working closely with industry stakeholders, Indigenous peoples, environmental non-governmental organizations, academia, the scientific community, and international partners to identify, test and analyze options to reduce underwater noise from vessels in order mitigate the increase in vessel traffic resulting from the Project. Building on this work, in June 2018, the Government of Canada announced the Whales Initiative, a \$167.4M investment in actions and necessary scientific research on the key threats affecting the SRKW, including prey availability, contaminants and underwater noise from vessels. DFO implemented fisheries management measures to provide more prey to SRKW in critical habitat and increased the mandatory distance for vessels. The Government is also strengthening research into cumulative effects to establish baselines to inform further actions.

tous les engagements pris en matière de transport maritime durant le processus d'examen de l'Office et s'y conformer.

Plan de protection des océans

Le 7 novembre 2016, le gouvernement du Canada a lancé le Plan de protection des océans (PPO), doté d'un budget de 1,5 milliard de dollars, le plus important investissement que le Canada ait jamais fait pour protéger les côtes et les environnements marins du pays. Ce financement améliorera la sécurité maritime sur tout le littoral du Canada — le plus long du monde — en appuyant de nouvelles mesures de prévention, de préparation et d'intervention. Les améliorations apportées à la sécurité maritime dans le cadre du PPO, en s'appuyant sur le solide système actuel, mettent en place des mesures de protection extraordinaires pour tous les navires, y compris ceux qui transportent des produits pétroliers. Pour compléter le régime de sécurité maritime et la capacité d'intervention de pointe du Canada, le PPO enrichira l'ensemble déjà considérable de connaissances scientifiques sur les produits pétroliers dans le contexte marin et incorporera les connaissances autochtones.

Mesures de soutien au rétablissement de la population d'épaulards résidente du sud du Pacifique Nord-Est

Le gouvernement du Canada prend des mesures pour soutenir le rétablissement de la population d'épaulards résidente du sud du Pacifique Nord-Est au large de la côte de la Colombie-Britannique. Dans le cadre du PPO, Transports Canada a travaillé étroitement avec les intervenants de l'industrie, les peuples autochtones, des organisations non gouvernementales de l'environnement, le monde universitaire, la communauté scientifique et des partenaires internationaux afin d'établir, de mettre à l'essai et d'analyser des options permettant de réduire le bruit subaquatique provenant des navires pour atténuer les répercussions du trafic de pétroliers accru découlant du Projet. Fort de ces travaux, le gouvernement du Canada a annoncé, en juin 2018, l'Initiative de protection des baleines, un investissement de 167,4 M\$ dans des mesures et la recherche scientifique nécessaire sur les principaux facteurs touchant l'épaulard résident du Sud, notamment la disponibilité des proies, les contaminants et le bruit subaquatique provenant des navires. POC a mis en œuvre des mesures de gestion des pêches pour accroître la disponibilité des proies des épaulards résidents du Sud dans leur habitat essentiel et a augmenté la distance obligatoire que doivent maintenir les navires. Le gouvernement est également en train de consolider la recherche sur les effets cumulatifs afin d'établir des données de base pour éclairer des mesures ultérieures.

Implications

Following the direction issued by the GIC pursuant to section 53 of the NEB Act and section 30 of the CEAA, 2012, the Board must

(a) Reconsider the recommendations and all terms or conditions set out in its May 19, 2016 report entitled *Trans Mountain Expansion Project OH-001-2014* that are relevant to addressing the issues specified by the Federal Court of Appeal in paragraph 770 of *Tsleil-Waututh Nation v. Canada (Attorney General)* (2018 FCA 153), including conditions 91, 131 to 134, 144 and 151; and

(b) Take into account the following factors:

(i) the environmental effects of Project-related marine shipping in view of the requirements of the *Canadian Environmental Assessment Act, 2012*,

(ii) the adverse effects of Project-related maritime shipping on species at risk, including the Northeast Pacific southern resident killer whale population, and their critical habitat, in view of any requirements of section 79 of the *Species at Risk Act* that may apply to the Project.

At the conclusion of the reconsideration process, the Board may revise its previous Recommendation Report entitled *Trans Mountain Expansion Project OH-001-2014*, to reflect its environmental assessment of Project-related marine shipping under the CEAA, 2012, its recommendation under subsection 29(1) of the CEAA, 2012, the application of section 79 of SARA, and its recommendation under the NEB Act on whether a certificate should be issued for any or all portions of the Project and any condition it considers necessary or desirable in the public interest.

The Board is directed to submit a report on its reconsideration to the Minister of Natural Resources no later than 155 calendar days from the issuance of the order.

Conclusion

The order in council is issued in consideration of, among other things, the Court's decision, the existing evidence on the record following the Board's Trans Mountain Expansion hearings and recommendation report, certificate conditions and proponent commitments, progress to date in the implementation of the Oceans Protection Plan and actions to support the recovery of SRKW.

Répercussions

À la suite des directives de la GC, conformément à l'article 53 de la Loi sur l'Office et à l'article 30 de la LCEE (2012), l'Office doit :

a) réexaminer les recommandations et les conditions contenues dans son rapport du 19 mai 2016 intitulé *Projet d'agrandissement du réseau de Trans Mountain OH-001-2014* qui sont pertinentes dans le cadre de l'examen des questions énoncées par la Cour d'appel fédérale au paragraphe 770 de sa décision dans l'affaire *Tsleil-Waututh Nation c. Canada (Procureur général)* (2018 CAF 153), notamment les conditions 91, 131 à 134, 144 et 151;

b) tenir compte des facteurs suivants :

(i) les effets environnementaux du transport maritime associé au Projet, selon les exigences de la LCEE (2012),

(ii) les effets nocifs du transport maritime associé au Projet sur les espèces en péril, y compris la population d'épaulards résidente du sud du Pacifique Nord-Est, et sur leur habitat essentiel, selon les exigences de l'article 79 de la LEP pouvant s'appliquer au Projet.

Au terme de son réexamen, l'Office pourra réviser son précédent rapport sur les recommandations intitulé *Projet d'agrandissement du réseau de Trans Mountain OH-001-2014* afin qu'il reflète son évaluation environnementale du transport maritime associé au Projet en vertu de la LCEE (2012), sa recommandation en vertu du paragraphe 29(1) de la LCEE (2012), l'application de l'article 79 de la LEP et ses recommandations en vertu de la Loi sur l'Office, à savoir si un certificat devrait être délivré pour le Projet, en tout ou en partie, et toute condition qu'il juge nécessaire ou souhaitable dans l'intérêt public.

L'Office doit soumettre au ministre des Ressources naturelles un rapport sur son nouvel examen au plus tard 155 jours civils à compter de la date de la prise du présent décret.

Conclusion

Le présent décret est pris en tenant compte, entre autres choses, de la décision de la Cour, de la preuve au dossier à la suite des audiences et du rapport de recommandations de l'Office au sujet du Projet d'agrandissement du réseau de Trans Mountain; des conditions du certificat et des engagements du promoteur; du progrès réalisé jusqu'ici au chapitre de la mise en œuvre du PPO et des mesures de soutien au rétablissement de la population des épaulards résidents du Sud.

Departmental contact

For more information, please contact

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Personne-ressource du ministère

Pour obtenir de plus amples renseignements, veuillez communiquer avec :

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[39-1-o]

[39-1-o]

National Energy
Board



Office national
de l'énergie

This is Exhibit C referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

Application to Participate(A94480)

Filing Date: 2018-10-03

Hearing Information

Project Name: Trans Mountain Expansion Project - Reconsideration- MH-052-2018

Company: Trans Mountain Pipeline ULC

File Number: OF-Fac-Oil-T260-2013-03 59

I am Applying as:

- ☐ An Individual
- ☐ Authorized Representative on Behalf of an Individual
- ☒ A Group

Select which one best describes your group:

- ☐ Company
- ☐ Association (Special Interest Group)
- ☒ Aboriginal
- ☐ Federal Government
- ☐ Provincial Government
- ☐ Territorial Government
- ☐ Municipal Government
- ☐ Others

- ☐ My group is an organization that will represent its own interests
- ☒ My group is a collection of individuals with common interest

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<http://www..neb-one.gc.ca>
1-800-899-1265

☒ I have permission to identify and speak on behalf of the people listed below:

Pursuant to Hearing Order OH-001-2014, the Stó:lō Collective was granted intervenor status in the initial NEB hearing (the "First Hearing") to consider the application by Trans Mountain Pipeline ULC to the NEB for the Trans Mountain Expansion Project and remained intervenors as of the time the NEB issued its Recommendation Report recommending approval of the Project. As such, the Stó:lō Collective is guaranteed intervenor status in the Reconsideration Hearing.

For the purposes of the Reconsideration Hearing, the Stó:lō Collective continues to represent the interests of the following First Nations: Aitchelitz, Soowahlie, Yakwekwioose, Leq'á:mél, Skawahlook, Skowkale, Squiala, Skwah, Sumas, Shxwhà:y Village, Tzeachten, and Scowlit.

Contact Information:

- If you apply as individual, the contact information is for the Person Applying to Participate.
- If you apply as Authorized Representative, the contact information is for the Individual you are representing.
- If you apply as Group, the contact information is for the Group's main contact.

Salutation: Legal Counsel

Last Name: Walker

First Name: Joelle

Title: Lawyer

Organization: Miller Titerle Law Corporation

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215-209 Carrall Street

Vancouver, British Columbia V6B 2J2

Canada

Authorized Representative(s) Information:

If you do not have an authorized representative this section will be blank.

Salutation: Legal Counsel

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First Name: Joelle

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Last Name: Tarmohamed

First Name: Shellina

Title: Project Manager	Address: 215 - 209 Carrall Street Vancouver, British Columbia V6B 2J2 Canada
Organization: Miller Titerle Law Corporation	
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Method of Participation

I wish to participate as a:

- ☐ Commenter
- ☒ Intervenor

Interest or Expertise

- ☒ The Group I am representing is **directly affected** by the proposed Project
- ☐ The Group I am representing has **relevant information or expertise**

Connection to Project Issues

1. (For previous intervenors only) I or my group was an intervenor in the OH-001-2014 Certificate hearing at the time that the Board issued its Recommendation Report. As a result, I am guaranteed intervenor status in this Reconsideration hearing and am not required to explain my connection to the draft List of Issues.
X

Access, Notification and Service

517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

517, Dixième Avenue S.-O.
Calgary, (Alberta) T2R 0A8



Telephone/Téléphone : (403) 292-4800
Facsimile/Télécopieur : (403) 292-5503
<http://www..neb-one.gc.ca>
1-800-899-1265

Which official language do you wish to use in correspondence with the Board and at the public hearing?					
English	☒	French	☐		
Documents submitted electronically are available on the Board's electronic document repository, (Click 'View' under 'Regulatory Documents' at www.neb-one.gc.ca). If you have the capability to access the repository, the Board and other Participants in this proceeding may serve you by notifying you that a document has been filed and is available in the repository, instead of serving you with a hard copy of the document.					
Are you able to access the Board's electronic document repository?		Yes	☒	No	☐
Notification by email advising that a document has been filed will be sent to the following email addresses:					
Erin Reimer [erin@millertiterle.com]					
Joelle Walker [joelle@millertiterle.com]					
Shellina Tarmohamed [shellina@millertiterle.com]					

October 3, 2018

Our File: 101024-038

VIA NEB e-Filing

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2P 5J2

Attention: Sheri Young, Secretary of the Board

Dear Ms. Young,

**Re: Trans Mountain Expansion Project – Reconsideration
Hearing Order MH-052-2018 & File OF-Fac-Oil-T260-2013-03 59
Comments and Objection of the Stó:lō Collective**

We are counsel for the Stó:lō Collective in relation to the National Energy Board (“NEB”) reconsideration hearing (the “**Reconsideration Hearing**”) directed by the Governor in Council (“GIC”) through OIC P.C. 2018-1177. The purpose of this letter is to respond to the request for comments set out in the letter of the NEB dated September 26, 2018 (the “**Participation Letter**”).

Pursuant to Hearing Order OH-001-2014, the Stó:lō Collective was granted intervenor status in the initial NEB hearing (the “**First Hearing**”) to consider the application by Trans Mountain Pipeline ULC (“**Trans Mountain**”) to the NEB for the Trans Mountain Expansion Project (the “**Project**”). The Stó:lō Collective remained intervenors as of the time the NEB issued its Recommendation Report recommending approval of the Project. As such, the Stó:lō Collective is guaranteed intervenor status in the Reconsideration Hearing. An application to participate noting this guaranteed status has been separately filed.

For the purposes of the Reconsideration Hearing, the Stó:lō Collective continues to represent the interests of Aitchelitz, Soowahlie, Yakwekwioose, Leq’á:mél, Skawahlook, Skowkale, Squiala, Skwah, Sumas, Shxwhà:y Village, Tzeachten, and Scowlitz. Members of these Stó:lō villages or bands are Stó:lō people and Aboriginal peoples within the meaning of the *Constitution Act, 1982* and the *Canada Environmental Assessment Act, 2012* (“**CEAA 2012**”). Aitchelitz, Shxwhà:y Village, Skowkale, Skwah, Soowahlie, Squiala, Tzeachten, and Yakwekwioose were also among the successful Indigenous applicants in the Federal Court of Appeal’s decision quashing the Project approval.¹

¹ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 (“**TWN**”).

1. OBJECTION ON TIMING

At the outset, we wish to record the Stó:lō Collective's objection to the limited time provided by the NEB to consider the matters listed for comment in the Participation Letter and, more generally, the unrealistic timeline set by the GIC for completion of the Reconsideration Hearing and delivery of the NEB's reconsideration report (the "**Reconsideration Report**").

As a public authority that makes administrative decisions that affects rights and interests, the NEB owes a duty of procedural fairness to the parties before it. The concept of procedural fairness is animated by the desire to ensure fair play.² There can be no "fair play" where the timelines have been stacked against the intervenors from the outset.

In the Participation Letter, the NEB states that the Reconsideration Hearing process will be carried out "as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit imposed by the GIC." [Emphasis added.] A one week timeline to allow comments on the draft amended factors and scope of the factors, the environmental assessment under CEAA 2012, the draft list of issues to be considered in the Reconsideration Hearing, and the design of the Reconsideration Hearing process itself is unnecessarily restrictive. Placing significant limitations on the ability of the intervenors to respond fully is not consistent with considerations of fairness. The difficulties in responding in an unnecessarily short time frame are compounded for intervenors such as the Stó:lō Collective, a representative of 12 communities.

Further, the GIC's imposition of a time limit of 155 calendar days for the completion of both the Reconsideration Hearing and the NEB's submission of the Reconsideration Report to the GIC pursuant to section 53(5) of the *National Energy Board Act* suggests that it is timing, and not procedural fairness, or the ability to fully canvas and consider the potentially significant adverse impacts of Project-related marine shipping on, *inter alia*, Aboriginal rights and title, the environment and species at risk, that is the most significant factor in the Reconsideration Hearing.

The timing restrictions also place into sharp focus the difficulties in establishing a procedurally fair, rigorous and transparent process given the conflicting roles the Federal government has now placed itself in in relation to the Project. It is the Project proponent with a significant interest in seeing the Project proceed within the earliest possible time frame; the regulator tasked with conducting the Reconsideration Hearing and delivering the Reconsideration Report on a unilaterally set expedited schedule; the body who unilaterally set the expedited schedule for the Reconsideration Hearing and who will ultimately determine whether to approve the Project; and the Crown who has a duty to act honorably in all dealings with Indigenous peoples and to meaningfully consult whenever it contemplates a decision that may impact their asserted rights and title which, with respect to the Stó:lō Collective, the Project undoubtedly does.

The Stó:lō Collective has been an active participant throughout the regulatory approval process for the Project and will continue to do so but has significant concerns that the Reconsideration Hearing will repeat and exacerbate the mistakes of the past identified by the Federal Court of Appeal in *TWN*.

² Ibid at para. 231.

2. COMMENTS ON THE PARTICIPATION LETTER

The NEB has requested public comments on the following four issues:

- whether, on a “principled basis”, Project-related marine shipping should be included in the “designated project” to be assessed under the CEAA 2012;
- the draft Amended Factors and Scope of Factors for the Environmental Assessment pursuant to the CEAA 2012, and the Draft List of Issues to be considered in the Reconsideration Hearing;
- the design of the hearing process to be used for the Reconsideration Hearing; and
- which government departments or bodies the NEB should require information from during the Reconsideration Hearing.

We will deal with each topic in turn.

a. **Inclusion of Project-related Marine Shipping**

There is no principled basis not to include Project-related marine shipping as part of the “designated project” to be assessed under CEAA 2012. Its inclusion ensures that the factors enumerated in section 19 of CEAA 2012 are specifically considered by the NEB in relation to the seven-fold increase in tanker traffic that will result from the Project, and the significant adverse environmental effects that could be the consequence of this increase. In *TWN*, the Court specifically found that the exclusion of Project-related marine shipping from the scope of “designated project” in the First Hearing was “unjustifiable” and that this “unjustified exclusion” led to “successive, unacceptable deficiencies in the Board’s report and recommendations”.³ In order to remedy such deficiencies, the NEB must include Project-related marine shipping as part of the designated project and complete the required environmental assessment accordingly. To do otherwise is inconsistent with the reasoning clearly articulated by the Court in *TWN*.

b. **Factors and Scope of Factors to be Considered**

Pursuant to section 19 of CEAA 2012, the environmental assessment for the designated project must take into account, *inter alia*, the environmental effects of the designated project, including those arising from malfunctions or accidents that may occur in connection with it, the significance of such effects, and mitigation measures that would mitigate any significant adverse effects. Section 5(c)(i) of CEAA 2012 provides that environmental effects to be taken into account in relation to a designated project are, with respect to Aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on:

- health and socio-economic conditions;
- physical and cultural heritage;
- the current use of lands and resources for traditional purposes; or

³ Ibid at para. 5.

- any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

The members of the Stó:lō Collective are Halkomelem-speaking Coast Salish Indigenous peoples. Since time immemorial, the Stó:lō Collective members have inhabited, controlled and relied on *S'olh Temexw*, their traditional territory in the lower Fraser River watershed. Stó:lō exercise Indigenous rights throughout *S'olh Temexw*, including hunting, gathering, trapping, fishing and spiritual practice, and are one of the few Indigenous peoples in Canada to have an established (non-treaty) right under section 35 of the *Constitution Act*, 1982. This established right to fish for food and ceremonial purposes was affirmed by the Supreme Court of Canada in *R. v. Van der Peet*,⁴ acknowledged by the Crown during the course of consultation on the Project, and recognized by the Court in its reasons in *TWN*.⁵ The Stó:lō Collective are culturally, spiritually, physically, and psychologically interconnected to *S'olh Temexw* and this interconnectivity is evident in all of the areas identified in section 5(c)(i) of CEAA 2012 set out above.

In the course of discussing why the exclusion of consideration of Project-related shipping as part of the designated project during the First Hearing was an important issue, the Court in *TWN* stated: “[p]roject-related tankers carry the risk of significant, if not catastrophic, adverse environmental and socio-economic effects should a spill occur.”⁶ The possibility of contamination of the lower Fraser River watershed and the “significant, if not catastrophic” consequences as a result of Project-related marine shipping cannot be negated. Accordingly, in considering the environmental effects of Project-related marine shipping as part of the environmental assessment, the effects on the Stó:lō Collective’s use and occupation of *S'olh Temexw* (including on health and socio-economic conditions, physical and cultural heritage, the use of land and resources for traditional purposes, and on any structure, site or thing that is of cultural, historical, archaeological, paleontological or architectural significance) must be given specific consideration pursuant to section 5 and 19 of CEAA 2012. The factors to be considered, the scope of factors to be considered, and the draft list of issues for the Reconsideration Hearing should be revised to specifically reflect this.

c. Design of the Process for the Reconsideration Hearing

Unlike the First Hearing, the Reconsideration Hearing should include the following elements:

- oral evidence from the Project proponent that is subject to cross-examination by intervenors with an interest in the subject matter of the particular evidence;
- alternatively, if evidence is submitted by the Project proponent in writing, an intervenor with an interest in the subject matter of that particular evidence may request cross-examination on it;
- in the further alternative, if the Project proponent’s evidence is only subject to questions through written information requests (“IRs”), any incomplete, inaccurate or misleading responses to IRs may be subject to cross-examination by the intervenor who delivered the IR. In addition, the intervenor who delivered the IR be permitted to file responsive evidence; and

⁴ [1996] 2 S.C.R. 507.

⁵ *TWN*, *supra*, note 1 at para. 40.

⁶ *Ibid* at para. 400.

- the process for the relaying of Indigenous traditional knowledge will be reflective of the specific cultural practices of the Indigenous group leading such evidence.

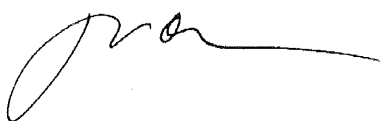
d. Involvement of Government Departments and Bodies

The Stó:lō Collective submits that the NEB should require information from the following government departments or bodies during the Reconsideration Hearing:

- All responsible authorities tasked with carrying out activities under the *Species at Risk Act*, in particular:
 - Department of Environment and Climate Change;
 - Department of Fisheries and Oceans;
 - Parks Canada Agency;
 - Canadian Endangered Species Conservation Council;
 - Committee on the Status of Endangered Wildlife in Canada; and
 - National Aboriginal Council on Species at Risk;
- Canadian Coast Guard; and
- Any other government departments or bodies bearing responsibility for prevention, response or clean up in relation to marine shipping accidents or malfunctions that are not otherwise identified in the foregoing list.

Yours truly,

MILLER TITERLE LAW CORPORATION



Joelle Walker
joelle@millertiterle.com

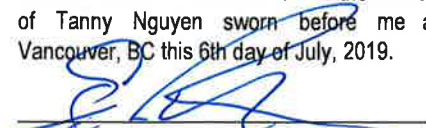
cc: Trans Mountain
regulatory@transmountain.com

National Energy
Board



Office national
de l'énergie

This is Exhibit E referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for
British Columbia

File OF-Fac-Oil-T260-2013-03 59
5 October 2018

To: All Parties¹

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report (Report) as directed by Order in Council (OIC) P.C. 2018-1177
MH-052-2018
Request for additional comments on the spatial limit of Project-related marine
shipping**

A. Overview and Request for Additional Comments

On 20 September 2018, through OIC P.C. 2018-1177, the Governor in Council (GIC) referred aspects of the Board's Report for the Project back to the Board for reconsideration (Reconsideration). The GIC's direction follows a 30 August 2018 decision² of the Federal Court of Appeal that quashed the GIC's approval of the Project. The GIC has imposed a time limit of 155 calendar days for the Reconsideration. Therefore, the Board must complete the Reconsideration process and issue its Reconsideration report no later than **22 February 2019**.

On 26 September 2018, the Board sought public comments on the following matters. Comments were due by 3 October 2018.

- 1) whether, "on a principled basis," Project-related marine shipping should be included in the "designated project" to be assessed under the Canadian Environmental Assessment Act, 2012 (CEAA 2012);
- 2) the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012, and the draft List of Issues to be considered in the Reconsideration hearing;
- 3) the design of the hearing process to be used for the Reconsideration; and
- 4) which government departments or bodies the Board should require information from during the hearing.

.../2

¹ The Parties include Trans Mountain Pipeline ULC and all intervenors.

² *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153.

The Board's draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 stated that the "designated project" includes Project-related marine shipping between the Westridge Marine Terminal (WMT) and the 12-nautical-mile territorial sea limit. The Board has received some comments to the effect that the spatial limit for Project-related marine shipping should be extended to include Canada's 200-nautical-mile exclusive economic zone (EEZ). Other comments either supported the 12-nautical-mile territorial sea limit, or were silent on this specific issue.³

The Board has decided to seek additional, focused comments from the Parties to the hearing on the following limited issue:

Assuming Project-related marine shipping is included in the "designated project" to be assessed under the CEAA 2012, should the designated project be defined as including:

- a) Project-related marine shipping between the WMT and the territorial sea limit; **or**
- b) Project-related marine shipping between the WMT and the outer boundary of Canada's EEZ?

The deadline for Parties to file comments on this limited issue is 9 October 2018. The Board will not consider additional comments that do not relate to this issue.

B. Additional direction regarding comments

The Board wishes to be clear that it is not requesting comments on whether *environmental effects* of the designated project can be considered outside of the territorial sea limit. Section 5 of the CEAA 2012 specifies that environmental effects include changes that may be caused to the environment outside of Canada. Rather, the issue is directed at whether the *designated project itself* should extend to the territorial sea limit or to Canada's EEZ.

Parties that file comments on this issue may wish to consider the following:

- the definition of "designated project" in subsection 2(1) of the CEAA 2012 and its reference in paragraph (a) to physical activities that are on federal lands, including whether this reference encompasses "incidental" physical activities;
- the definition of "federal lands" in subsection 2(1) of the CEAA 2012 and its reference to the territorial sea and Canada's EEZ;
- the purposes of the CEAA 2012, including, but not limited to, paragraph 4(1)(a) and its reference to the legislative authority of Parliament;
- the Canadian Environmental Assessment Agency's criteria relevant to the question of whether physical activities should be considered "incidental," including differences (if any) in the application of the criteria to Project-related marine shipping within and outside of the territorial sea;
- whether OIC P.C. 2018-1177 or the Federal Court of Appeal decision provide any guidance or assistance in addressing this issue; and

³ Examples of filed comments that addressed this issue are found at Filing IDs [A94257](#), [A94491](#), [A94445](#), [A94336](#), [A94518](#), [A94514](#), [A94412](#), [A94502](#), [A94460](#), [A94534](#), [A94543](#), [A94563](#), [A94525](#), and [A94495](#).

- any legal authority or precedent relevant to this issue, including whether other environmental assessments under the CEAA 2012 have addressed this issue.

Once the Board has considered all comments received, it will:

- release a Hearing Order setting out the hearing process that will be followed; and
- confirm the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012, and the List of Issues for the Reconsideration hearing.

C. How to file comments

The deadline for Parties to file comments pertaining to the issue set out in Part A above is 9 October 2018.

Intervenors that have an NEB Account through which they applied to participate in this hearing may use the Participation Portal to file their comments. After logging into your NEB Account, in the list of hearings, choose this Reconsideration hearing (MH-052-2018) and follow the online steps to make your filing.

Comments can be also filed online using the Board's [e-filing tool](#) (when asked to choose a project name, choose "Trans Mountain Expansion Project – Reconsideration – MH-052-2018").

All filings must refer to **Hearing Order MH-052-2018** and **File OF-Fac-Oil-T260-2013-03 59**, and be addressed to:

Ms. Sheri Young
Secretary of the Board
National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2R 0A8
Facsimile 403-292-5503 (toll-free 1-877-288-8803)

Alternatively, comments may be mailed or faxed to the Board using the contact information above. **The Board does not accept filings by email.**

Anyone e-filing comments with the Board should also provide a copy or Filing ID number to Trans Mountain at regulatory@transmountain.com.

All comments received, and any future filings related to this Reconsideration hearing, will be found in the Board's online [public registry](#).

D. Where to find additional information

As information becomes available or is released regarding the Reconsideration hearing, the Board will update its Project [webpage](#).

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by S. Wong for

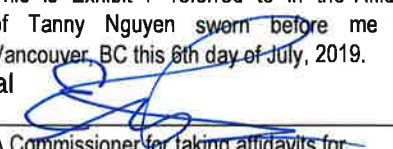
Sheri Young
Secretary of the Board

National Energy
Board



Office national
de l'énergie

This is Exhibit F referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for
British Columbia

**Trans Mountain Pipeline ULC
Trans Mountain Expansion Project**

**National Energy Board reconsideration of aspects
of its Recommendation Report as directed by
Order in Council P.C. 2018-1177**

File OF-Fac-Oil-T260-2013-03 59

Hearing Order MH-052-2018

12 October 2018

Canada

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1 HEARING OVERVIEW

1.1 Introduction

On 20 September 2018, through [Order in Council \(OIC\) P.C. 2018-1177](#), the Governor in Council (GIC) referred aspects of the National Energy Board's (Board or NEB) [Recommendation Report](#) for the Trans Mountain Expansion Project (Project) back to the Board for reconsideration (Reconsideration). The GIC's direction follows a 30 August 2018 [decision](#)¹ of the Federal Court of Appeal that quashed the GIC's approval of the Project.

The Board will hold a public hearing for this Reconsideration. During the hearing, the Board will receive written evidence and other filings, which will be available in the Board's online [public registry](#). The hearing may also include oral portions. The Board will use various ways to gather and test evidence and will review and consider all of the evidence on the record in completing its Reconsideration Report. The Board will rely only on the evidence on the record. This includes relevant evidence previously submitted and any new relevant evidence filed.

The steps and deadlines in the hearing, as outlined in this Hearing Order, are important to make the hearing fair, transparent, and efficient, and they provide certainty to all those involved.

The Board's Reconsideration Report will be submitted to the GIC for a decision.

1.2 Time limit

The OIC requires that the Board complete the Reconsideration within 155 calendar days from the date of the OIC. Therefore, the Board must complete the Reconsideration hearing and submit its Reconsideration Report to the GIC no later than **22 February 2019**. This represents the maximum time to complete the review.

In accordance with subsection 11(4) of the *National Energy Board Act* (NEB Act), this hearing will be carried out as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit imposed by the GIC. The deadlines in this Hearing Order are important to allow this hearing to be completed within that time limit.

1.3 What issues will the Board consider?

The issues that the Board will consider in this Reconsideration hearing are found in the List of Issues attached to this Hearing Order as **Appendix 1**. An Amended Factors and Scope of the Factors for the Environmental Assessment under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) is found as **Appendix 2**.

Both of these documents were finalized following a public [comment period](#) held between 26 September and 3 October 2018.

¹ *Tsileil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153.

1.4 Where can I get help or more information about the hearing process?

The Board has many staff members that can answer questions throughout the hearing process. This includes dedicated Process Advisors to provide you with information and assistance on how to effectively participate. The Process Advisors' role is fully described on the Board's [website](#). See Section 5 of this Hearing Order for contact information.

The Board has set up a dedicated [Reconsideration webpage](#) where you can access valuable information about the Reconsideration hearing.

The Board has developed a [Hearing Process Handbook and related video](#) that provide an overview of its hearing processes, in general. You can request copies of Board publications [online](#) or by calling 1-800-899-1265 (toll-free).

The [National Energy Board Rules of Practice and Procedure, 1995](#) (Rules) provide detailed information about the Board's hearing processes. In the event of an inconsistency between the Rules and this Hearing Order, this Hearing Order should be followed.

2 PARTICIPATION IN THE HEARING

In addition to Trans Mountain's participation, the Board's Reconsideration hearing will involve:

- the **participation of intervenors**; and
- gathering **letters of comment from the public**.

Intervenors in the OH-001-2014 Certificate hearing at the time that the Board issued its Recommendation Report were guaranteed intervenor status in this Reconsideration hearing, if they chose to participate and register.

Any other member of the public was able to apply to participate as an intervenor through an [application process](#) held between 26 September and 3 October 2018. The confirmed intervenors in this hearing are named in the [List of Parties](#). The Board's reasons for its decisions in this regard are found [here](#).

The "**Parties**" consist of Trans Mountain and all intervenors (including Federal Departments and Agencies²).

² "Federal Departments and Agencies" include those federal departments and agencies that have registered as intervenors in this hearing, as well as those from which the Board has requested information under paragraph 20(a) of the CEAA 2012. Federal Departments and Agencies are denoted on the List of Parties with the prefix "AA".

2.1 Letters of comment

As noted above, any member of the public – including those that applied to participate as intervenors, but were not granted that status – may file a letter of comment with the Board by **20 November 2018**. Letters of comment will be placed on the online public registry, will form part of the hearing record, and the Board will read and consider them.

A letter of comment should be in one of Canada's official languages (English or French). It should describe your views pertaining to the Board's Reconsideration and include:

- your name, mailing address, and phone number;
- the name of your organization, if you represent one;
- comments on how you would be impacted positively or negatively by Project-related marine shipping, or any relevant information or expertise that you can offer to assist in the Board's Reconsideration (considering the List of Issues); and
- any information that explains or supports your comments.

There is no page limit to your letter, although clear, succinct and well-organized letters are encouraged. Generally, the Board does not find mass form letters to be helpful in its deliberations in any hearing.

2.2 Intervenors

In this Reconsideration hearing, an intervenor will have the opportunity and may choose to, among other things:

- file an opening statement;
- file written evidence;
- ask written questions about Trans Mountain's and other intervenors' evidence;
- file, and potentially respond to, notices of motion; and
- present written argument and, if deemed necessary by the Board, oral argument.

If you file evidence, or information in response to the Board's request under paragraph 20(a) of the CEEA 2012, you must, in writing, answer any written questions (i.e., information requests) asked about it by the Board or the other Parties.

Intervenors will be notified of, or receive, all documents that are filed or placed on the hearing record. This includes evidence, notices of motion, and all related materials.

Depending on how active you are as an intervenor, you may face a significant time commitment during the hearing. You have a number of responsibilities. You also have various privileges and participation opportunities afforded to you. Detailed information on intervenor deadlines and responsibilities is found in the table in Section 3.

2.3 Can I withdraw?

If you have been allowed to participate as an intervenor, you can withdraw from the hearing at any time by telling the Board in writing, although you are not required to formally withdraw if you no longer wish to participate. You may choose to still retain your participation status, take no action, and simply monitor the hearing's progress.

As an intervenor, unless you formally withdraw, you will continue to regularly receive regular email notifications and/or hard copies of documents.

3 HEARING EVENTS, STEPS, AND DEADLINES

Throughout the Reconsideration hearing, the Board may issue procedural directions that will fully describe certain identified events and steps so that all participants understand what is expected and how to fulfil their responsibilities. Cover letters to documents and information that the Board releases may also contain valuable information about hearing procedures.

Hearing events and steps (responsible person[s] in bold, guidance in italics) ³	Date or deadline (3:00 pm Pacific time [4:00 pm Mountain time])
Order in Council P.C. 2018-1177 received by the Board	20 September 2018
Board announces hearing time limit, establishes comment process for scope and process for the Reconsideration hearing, and initiates Application to Participate process	26 September 2018
All interested persons and groups file Applications to Participate and comments on scope and process for the Reconsideration hearing	3 October 2018
Board releases the List of Parties to the hearing	5 October 2018
Board: - releases Hearing Order MH-052-2018 with the List of Issues and the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 - sends Filing Requirements to Trans Mountain - sends requests to Federal Departments and Agencies pursuant to paragraph 20(a) of the CEAA 2012	12 October 2018
Board releases procedural direction asking Indigenous ⁴ intervenors if they wish to provide oral traditional evidence	12 October 2018

³ All produced documents must be filed with the Board so they can be placed on the hearing record and considered.

⁴ The Board's use of the term "Indigenous" or "Indigenous peoples" in this hearing has the meaning assigned by the definition of "aboriginal peoples of Canada" in subsection 35(2) of the *Constitution Act, 1982*.

Hearing events and steps (responsible person[s] in bold, guidance in italics)³	Date or deadline (3:00 pm Pacific time [4:00 pm Mountain time])
Indigenous intervenors notify the Board of their intent to provide new or supplemental oral traditional evidence	23 October 2018
Trans Mountain files opening statement and direct evidence <i>Evidence must be relevant to one or more of the issues identified in Appendix 1.</i> <i>Evidence must be served on all intervenors</i>	31 October 2018
Federal Departments and Agencies file opening statements, direct evidence, and information requested by the Board under paragraph 20(a) of the CEEA 2012 <i>Evidence must be relevant to one or more of the issues identified in Appendix 1.</i> <i>Evidence must be served on all other Parties</i>	31 October 2018
Intervenors (other than Federal Departments and Agencies) file opening statement and direct evidence <i>Evidence must be relevant to one or more of the issues identified in Appendix 1.</i> <i>Evidence must be served on all other Parties</i>	20 November 2018
Members of the public file letters of comment <i>Letters of comment must be served on Trans Mountain</i>	20 November 2018
Trans Mountain files reply evidence <i>Reply evidence must be served on all intervenors</i>	26 November 2018
All Parties file information requests regarding other Parties' evidence <i>Information requests must be relevant to one or more of the issues identified in Appendix 1, and also to the evidence of the Party to which the questions are asked</i> <i>Information requests must be served on all other Parties</i>	3 December 2018
Oral hearing session: to collect, and allow questioning of, oral Indigenous traditional evidence	late-November or early-December 2018
All Parties respond to information requests asked of them <i>Responses to information requests must be served on all other Parties</i>	13 December 2018
Motion Day – As considered necessary, Parties file notices of motion on the adequacy of other Parties' responses to their own information requests ("motions to compel") <i>Motions to compel must be served on all other Parties</i>	17 December 2018
All Parties file affidavits adopting their written evidence	9 January 2019

Hearing events and steps (responsible person[s] in bold, guidance in italics)³	Date or deadline (3:00 pm Pacific time [4:00 pm Mountain time])
Trans Mountain and Federal Departments and Agencies file written argument-in-chief, including comments on draft conditions (which the Board will release for comment) <i>Comments on conditions must be included in written argument-in-chief; they cannot be raised for the first time during oral argument. No new evidence can be provided in written argument-in-chief</i> <i>Written argument-in-chief must be served on all intervenors</i>	9 January 2019
Intervenors (other than Federal Departments and Agencies) file written argument-in-chief, including comments on draft conditions and any reply argument to Trans Mountain and Federal Departments and Agencies. <i>Comments on conditions must be included in written argument-in-chief; they cannot be raised for the first time during oral argument. No new evidence can be provided in written argument-in-chief</i> <i>Written argument-in-chief must be served on all other Parties</i>	14 January 2019
Optional oral hearing session: to hear all Parties' oral summary argument and/or reply argument <i>Oral summary argument or summary argument on specific issues only may be held if needed and time permits</i> <i>Parties should include all pertinent argument in their written argument-in-chief, as this step may not be held</i> <i>Should oral summary argument take place, Trans Mountain can provide reply argument during this period; otherwise a date for filing written reply argument will be announced by the Board</i>	mid-January 2019
Hearing record closes	Immediately after finishing argument
Board releases its Reconsideration Report to the Governor in Council, and provides it to the Minister of Natural Resources	22 February 2019 or earlier (time limit end)

3.1 More information about written steps

3.1.1 What is evidence?

Evidence is what the Board will consider in the Reconsideration hearing. Evidence is comprised of the reports, statements, oral Indigenous traditional evidence, photographs, letters, and other material that hearing participants file during the hearing. Evidence is used to support one's position in relation to the List of Issues.

The entirety of the evidence filed in the OH-001-2014 Certificate hearing will be included as part of its record for this Reconsideration hearing, and will be considered by the Board to the extent it is relevant to the List of Issues for the Reconsideration hearing. **Parties are not required to re-file or re-test evidence that was filed during the OH-001-2014 Certificate hearing.**

3.1.2 What is an opening statement?

Opening statements are neither argument, nor evidence. A Party's written opening statement should contain a summary of their opening position on the Reconsideration, an executive summary or "road-map" to their evidence (which is due on the same day as the opening statement), and an explanation of how their evidence is new or different than what was filed, tested, and considered during the OH-001-2014 Certificate hearing.

The Board is providing the Parties with the opportunity to file a written opening statement. The Board considers that, in the unique circumstances of this Reconsideration hearing, opening statements will support efficiency, and will assist the Board and all participants in focusing on key matters of importance to them as the hearing proceeds.

Opening statements must be concise, and no longer than five pages in length.

3.2 More information about the oral hearing sessions

Board staff will be available in the hearing room prior to any oral hearing session(s) to explain the layout of the hearing room and answer any process questions.

3.2.1 Oral Indigenous traditional evidence

The Board understands that Indigenous peoples have an oral tradition for sharing knowledge from generation to generation. This information cannot always be shared adequately or appropriately in writing.

In **late-November or early-December 2018**, Indigenous intervenors may choose to provide traditional evidence orally. This would be in addition to their written evidence, if any. This oral traditional evidence may be questioned orally by other intervenors, Trans Mountain, or the Board. Indigenous intervenors may choose to provide responses to questions orally or in writing, or a combination of both.

Additional details about how the Board will gather oral traditional evidence from those Indigenous intervenors who wish to provide it will be provided in a Procedural Direction in the near future.

3.2.2 Oral argument

If deemed necessary by the Board and the time permits, the Board may hold an oral hearing session in **mid-January 2019** to hear oral summary argument and/or reply argument from all Parties.

If the Board decides to proceed with this oral hearing session, it will issue a procedural direction requiring all Parties to notify the Board of their intent to present oral summary argument and/or reply argument. Full details on oral argument (including procedures, time limits, dates, location[s]) will be provided at a later time, if required. The Parties should include all pertinent argument in their written argument-in-chief, as this step may not be held.

3.3 Oral hearing broadcasts and transcripts

The Board will live-stream the oral hearing sessions via its [website](#). Media files of each day's broadcast will also be available for download.

Daily written transcripts will be found on the online public registry by the following morning. Anyone can order paper copies of the transcripts directly from International Reporting Inc. This can be done in the hearing room, by emailing bprouse@irri.net, or by calling 613-748-6043. There may be a fee for this service.

4 PROCEDURES AND GUIDANCE

4.1 How do I prepare documents?

Every document you file with the Board must refer to **Hearing Order MH-052-2018** and **File OF-Fac-Oil-T260-2013-03 59**.

Address all documents to the proper recipient. For example, anything intended for the Board should be addressed to the Secretary of the Board (see Section 4.2.4 for contact information). Documents directed at others (e.g., responses to a specific Party's information requests) should be addressed to them using the List of Parties as a guide.

All documents must be in PDF format. Number document pages consecutively, including blank pages, so that the electronic page numbers match the page numbers showing in your document.

Do not provide references to websites. Instead, provide the actual information you want to refer to. **If using information sourced from a website, it must be filed in PDF format with an indication of the date the information was taken from the website.**

4.2 How do I file documents with the Board?

The Board **requires** you to file your documents online if you are able to do so. This can be done through the Participation Portal once logging into your [NEB Account](#) (if you have one already), or through the Board's [e-filing system](#) (**no** login necessary).

The Board does not accept filings by email. Documents received by email will not form part of the hearing record and will not be considered by the Board.

4.2.1 Participation Portal

If you have an NEB Account through which you applied to participate in this hearing, you may use the Participation Portal to file your future documents with the Board.

After logging into your NEB Account, in the list of hearings, choose this Reconsideration hearing (MH-052-2018) and follow the online steps to make your filing.

The Participation Portal will also email you a filing receipt where you can verify your attachments, as well as instructions about providing a hard copy to the Board.

4.2.2 E-filing

If you do not have an NEB Account, you may use the Board's e-filing system for filing documents. No login is required. While this system provides step-by-step instructions, you may refer to the [Filer's Guide to Electronic Submission](#) for more information.

When you complete a filing by e-filing, you will be emailed a filing receipt, which you must print and sign. You must send the Board that signed filing receipt – as well as one signed hard copy of the e-filed document(s) – by mail/courier, fax, or hand delivery (see Section 4.2.4 for contact information).

4.2.3 What if I do not have Internet access?

Electronic filings are efficient, and allow all Parties to view documents immediately once filed. For this reason, and as noted in Section 4.2, the Board requires the use of the online filing methods described in Sections 4.2.1 and 4.2.2, if the filer has Internet access.

If an intervenor cannot file documents online using the methods described in Sections 4.2.1 or 4.2.2, they **must** advise the Board in writing of the reasons for this. If the Board accepts your reasons, it will inform you in writing that you can file documents in person, by mail/courier, or by fax. An exception to this requirement is when a document cannot be scanned and made into an electronic copy (e.g., if it is physically too large to scan). In these cases, an electronic placeholder will be placed in the online public registry indicating that the document is available in the Board's library, but cannot be viewed online.

Physical documents that are received after a filing deadline, but are date-stamped by the post office or courier on or before the deadline, will be considered as filed on time. If filing hard copies, you must sign each document you file.

4.2.4 Who do I send or address documents to at the Board?

Use the following information when sending correspondence and documents to the Board.

Ms. Sheri Young
Secretary of the Board
National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2R 0A8
Fax: 403-292-5503 (toll-free: 1-877-288-8803)

4.3 How do I serve documents on others?

Serving a document on someone means to provide them with a filing or with a notification that a filing was made.

Intervenors are required to serve their filings on Trans Mountain and its counsel, and on all other intervenors.

Members of the public that are filing letters of comment must serve their letters on Trans Mountain and its counsel only.

Trans Mountain is required to serve its filings on each intervenor.

4.3.1 Participation Portal users

The Participation Portal can send an email notification on your behalf to all those requiring service and who have provided a valid email address. To use this service, when prompted, click on “Yes, I want to use the Participation Portal’s Automated Service Notification option for all Participants who have provided an email address.” The Board will accept this as equivalent to the service of documents required under the Rules.

If you do not choose the automated service option, you must serve the required Parties yourself, using any of the methods allowed under section 8 of the Rules. For **intervenors**, this would also apply in the case of any Party that has not provided a valid email address. This will be indicated in the List of Parties and in one of the emails that the Participation Portal will send you when your filing is completed.

4.3.2 E-filing users

Unless otherwise specified in the List of Parties, the listed intervenors have indicated that they are able to access documents online. The easiest way to serve the required Parties is to forward them the filing receipt you receive by email when you make your filing (see Section 4.2.2). Since you will need to send an email to multiple intervenors, you may want to consider creating an email group/list so that you can send one email to several addresses, as opposed to separate emails to individual addresses. **As a courtesy, please place all email addresses in the blind copy (i.e., BCC) line of your emails.**

Where the List of Parties indicates that an intervenor requires a hard copy, you must provide them with one (e.g., by mail/courier or fax).

4.3.3 Those without Internet access

If you cannot serve documents electronically (e.g., by email, as described in Section 4.3.2), you must serve each of the required Parties with a hard copy (e.g., by mail/courier or fax).

4.4 How do I raise a question of procedure or substance that requires a Board decision?

If you want to ask the Board to do something, such as to extend a particular deadline, you must file a request. This is called a notice of motion. A notice of motion must include:

- a concise statement of the facts;
- the grounds for the request;
- the decision or relief requested;
- the impact of granting the request on other hearing participants; and
- any other information which supports the request.

Your notice of motion must be:

- in writing;
- signed by the person making the request, or by an authorized representative;
- served on, as applicable, Trans Mountain and all intervenors; and
- filed separately from any other correspondence.

If you are relying on case law or other authorities to support your position, you must include these authorities and highlight the specific passages you are relying on.

The Board may provide an opportunity for the Parties to comment on a notice of motion. This decision would be based on the nature of the request, and the circumstances surrounding it.

Given the expedited nature of this hearing, Parties must raise any question of procedure or substance with the Board **at the earliest opportunity possible**. Delay in filing a notice of motion may result in the Board declining to consider it.

The Board will not consider a question of procedure or substance unless it is clearly marked as a “notice of motion” and filed separately from any other materials that the Party is filing.

4.5 Will you keep my evidence confidential?

All evidence in this hearing will be available on the online public registry, unless you file a notice of motion to keep your evidence confidential under sections 16.1 or 16.2 of the NEB Act, and the Board grants your request for confidentiality. If you plan to file a document under these sections, please read Section 1.5 (Confidential Filing) of the Board’s [Filing Manual](#), which explains the steps you need to take to ensure that evidence does not appear publically.

If the Board grants your request for confidentiality, there are specific and important procedures to follow when filing that evidence. Please contact a Process Advisor to discuss these steps (see Section 5 of this Hearing Order for contact information).

5 WHO CAN I CONTACT FOR HELP?

You are encouraged to contact a Process Advisor with any questions you may have during the hearing process. A Process Advisor can be reached by calling 403-292-4800 or 1-800-899-1265 (toll-free), or by emailing TMX.ProcessHelp@neb-one.gc.ca. Any call-back numbers left will be followed-up on as soon as possible.

NATIONAL ENERGY BOARD

Original signed by

Sheri Young
Secretary of the Board

Appendix 1

List of Issues for the Reconsideration Hearing

The National Energy Board's (Board) Reconsideration hearing will consider any necessary changes or additions to its May 2016 [Recommendation Report](#) (Report), in light of the inclusion of Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit in the "designated project" under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012). This includes issues related to factors described in paragraphs 19(1)(a) through (h) and subsection 19(3) of the CEAA 2012, and to section 79 of the *Species at Risk Act* (SARA).

1. The environmental¹ effects of Project-related marine shipping, and the significance of these effects.

This includes adverse effects on species at risk, the environmental effects of malfunctions or accidents that may occur, and any cumulative environmental effects.

2. Measures that are technically and economically feasible, and that would mitigate any significant adverse environmental effects of Project-related marine shipping.

Given that the Board found four significant adverse effects related to Project-related marine shipping in its previous assessment² (i.e., greenhouse gas emissions, Southern resident killer whale, traditional Indigenous use associated with Southern resident killer whale, and the potential effects of a large or credible worst-case spill), the consideration of mitigation measures will include these four matters. This issue will also include consideration of whether the mitigation measures will change the Board's previous significance findings.

3. Alternative means of carrying out Project-related marine shipping that are technically and economically feasible, and the environmental effects of such alternative means.
4. Requirements of any follow-up program in respect of Project-related marine shipping.
5. Measures to avoid or lessen the adverse effects of Project-related marine shipping on SARA-listed wildlife species and their critical habitat, monitoring of the measures, and consideration of how to ensure the measures and monitoring are undertaken.

¹ All references to environmental effects in this List of Issues include health and socio-economic matters as described in section 5 of the CEAA 2012.

² See the Board's Report at pages 337, 350-351, 363, 378, and 397-398.

The Board's previous assessment identified the SARA-listed marine fish, marine mammal, and marine bird species that could be found in the area of, or affected by, Project-related marine shipping.³ Consideration will also be given to any species that have been newly listed or have seen a change to their designation since the issuance of the Board's Report and that could be affected by Project-related marine shipping.

6. The potential impacts of Project-related marine shipping on Indigenous⁴ interests.
7. Whether there should be any changes or additions to the Board's recommendations set out in its Report, or to the recommended terms or conditions, including Conditions 91, 131 to 134, 144, and 151.

Parties are expected to limit their evidence filings to **new or updated** evidence (including comments from the public, community knowledge, and Indigenous traditional knowledge) relevant to the above issues. Parties are not required to re-file or re-test evidence on the record of the OH-001-2014 Certificate hearing. It is recommended that Parties focus their evidence on aspects of the above issues that were not fully canvassed in the OH-001-2014 Certificate hearing. The Board's Filing Requirements for Trans Mountain, and its requests for specialist or expert information or knowledge in the possession of Federal Authorities pursuant to paragraph 20(a) of the CEAA 2012, reflect this.

³ See the Board's Report at pages 338, 341, and 352.

⁴ The Board's use of the term "Indigenous" or "Indigenous peoples" in this hearing has the meaning assigned by the definition of "aboriginal peoples of Canada" in subsection 35(2) of the *Constitution Act, 1982*.

Appendix 2

Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the *Canadian Environmental Assessment Act, 2012*

1.0 INTRODUCTION

On 16 December 2013, Trans Mountain Pipeline ULC (Trans Mountain) filed an application with the National Energy Board (Board or NEB) proposing to construct and operate the Trans Mountain Expansion Project (Project). As the Project would require more than 40 kilometres of new pipeline and would be regulated under the *National Energy Board Act* (NEB Act), it is a designated project under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and requires a CEAA 2012 environmental assessment for which the NEB is the Responsible Authority. On 20 September 2018, through [OIC P.C. 2018-1177](#), the Governor in Council (GIC) referred aspects of the Board's [Report](#) for the Project back to the Board for reconsideration.

For the purposes of the environmental assessment under the CEAA 2012, the designated project includes the various components and physical activities as described by Trans Mountain in its 16 December 2013 application submitted to the NEB. On 12 October 2018, the Board determined that Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit is also part of the “designated project” under the CEAA 2012.

As noted in the List of Issues (attached to Hearing Order [OH-001-2014](#)), the Board does not intend to consider the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline.

In accordance with paragraph 79(2)(b) of the CEAA 2012, the following provides a description of the factors to be taken into account in the environmental assessment under the CEAA 2012 and of the scope of those factors.

2.0 FACTORS AND SCOPE OF THE FACTORS

2.1 Factors to be considered

The CEAA 2012 environmental assessment for the designated project will take into account the factors described in paragraphs 19(1)(a) through (h) of the CEAA 2012:

- (a) the environmental effects¹ of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and

¹ Section 5 of the CEAA 2012 further describes the environmental effects that are to be taken into account.

any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

- (b) the significance of the effects referred to in paragraph (a);
- (c) comments from the public or any interested party received in accordance with the CEAA 2012;
- (d) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;
- (e) the requirements of the follow-up program in respect of the designated project;
- (f) the purpose of the designated project;
- (g) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means; and
- (h) any change to the designated project that may be caused by the environment.

In addition, the environmental assessment will also consider community knowledge and Aboriginal traditional knowledge.

2.2 Scope of the factors to be considered

The environmental assessment will consider the potential effects of the designated project within spatial and temporal boundaries within which the designated project may potentially interact with and have an effect on components of the environment. These boundaries will vary with the issues and factors considered, and will include, but not be limited to:

- construction, operation and maintenance, foreseeable changes, and site reclamation, as well as any other undertakings proposed by the proponent or that are likely to be carried out in relation to the physical works proposed by the proponent, including mitigation and habitat replacement measures;
- seasonal or other natural variations of a population or ecological component;
- any sensitive life cycle phases of species (e.g., wildlife, vegetation) in relation to the timing of Project activities;
- the time required for an effect to become evident;
- the area within which a population or ecological component functions; and
- the area affected by the Project.

Any works and activities associated with additional modifications or associated with the decommissioning or abandonment phase of the Project would be subject to a future application under the NEB Act and assessed in detail at that time. Therefore, at this time, any works or activities associated with these phases of the Project will be examined in a broad context only. As indicated above, the environmental assessment will consider cumulative environmental effects that are likely to result from the designated project in combination with effects from other physical activities that have been or will be carried out.

Subsection 2(1) of the CEAA 2012 provides definitions potentially relevant to the scope of the factors, including:

“environment” which means the components of the Earth, including

- (a) land, water and air, including all layers of the atmosphere;
- (b) all organic and inorganic matter and living organisms; and
- (c) the interacting natural systems that include components referred to in paragraphs (a) and (b);

and

“mitigation measures” which means measures for the elimination, reduction or control of the adverse environmental effects of a designated project, and includes restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or any other means.

National Energy
Board



Office national
de l'énergie

This is Exhibit G referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British Columbia

File OF-Fac-Oil-T260-2013-03 59
12 October 2018

To: All Parties

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project**

**National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018**

Procedural Direction No. 1 – Oral Indigenous traditional evidence

The Board understands that Indigenous peoples have an oral tradition for sharing knowledge from generation to generation. This information cannot always be shared adequately or appropriately in writing, and the Board believes it would be valuable in this Reconsideration. Therefore, the Board is extending an invitation to Indigenous intervenors to provide oral traditional evidence, as set out in Section 3.2.1 of Hearing Order MH-052-2018.

Indigenous intervenors that wish to provide oral traditional evidence must file a written Notice of Intent with the Board on or before 3:00 pm Pacific time (4:00 pm Mountain time) on 23 October 2018. Section I below explains what must be included in the Notice of Intent.

This Procedural Direction No. 1 provides information to assist Indigenous intervenors that are interested in providing oral traditional evidence.

The Board must complete the Reconsideration process and issue its Reconsideration report by 22 February 2019. As a result, and similar to other hearing steps, there may be limited time for the Board to hear oral traditional evidence. Indigenous intervenors are encouraged to also make use of their opportunity to file written evidence, to the extent adequate and appropriate, so as much time as possible can be spent listening to evidence that can only be provided orally. Prior to hearing oral traditional evidence, the Board Members assigned to undertake the Reconsideration will have read the transcripts of the oral traditional evidence provided in the OH-001-2014 Certificate hearing. Therefore, it is not necessary to repeat the oral traditional evidence previously provided.

A. Location

By **23 October 2018**, the Board will know which Indigenous intervenors wish to provide oral traditional evidence. The Board plans to hold oral traditional evidence sessions in late-November/early-December at a location or locations **on Vancouver Island**.

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Suite 210, 517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

517, Dixième Avenue S.-O., bureau 210
Calgary (Alberta) T2R 0A8

Canada

Telephone/Téléphone : 403-292-4800
Facsimile/Télocopieur : 403-292-5503
www.neb-one.gc.ca

Telephone/Téléphone : 1-800-899-1265
Facsimile/Télocopieur : 1-877-288-8803

B. Time limits for oral traditional evidence presentations

In order to hear from all Indigenous intervenors that wish to present oral traditional evidence, time limits on presentations may apply. The exact amount of time available for each presenter will be announced after 23 October 2018 when the Board knows how many Indigenous intervenors will be presenting in person at the location or locations on Vancouver Island.

C. Interpreters

If those providing oral traditional evidence are speaking in a language other than French or English, the intervenor must provide their own interpreter and incur those costs (or use participant funding approved for that purpose). Only the English translation will be included in the hearing transcript. It is up to the intervenor to confirm the accuracy of the translation.

D. Swearing-in or affirming information

Before providing oral traditional evidence, presenters will be asked to swear or affirm that the information they are presenting is accurate and truthful to the best of their knowledge and belief. If they prefer to be sworn in, they will be asked to place their hand on a Bible or another sacred item. If they want to swear on a sacred item other than a Bible, they will need to bring that item to the hearing.

If they prefer to be affirmed, they will simply be asked to make a statement that the information they are presenting is accurate to the best of their knowledge and belief.

E. Remote participation

The Board understands that the selected location or locations may not be the best option for some presenters. Therefore, if there are presenters who cannot physically be present or would prefer to give oral evidence in a different manner, oral traditional evidence may be given by phone or video conference. Interest in such options should be included in Indigenous intervenors' Notice of Intent (see Section I). If there is interest in remote options, details about these options will be provided at a later date.

F. Questioning

Procedural fairness requires that Trans Mountain and intervenors be given the opportunity to test the evidence, including oral traditional evidence. The Board may also ask questions of clarification. Questions can be answered orally at the hearing, or they can be answered and submitted in writing, or a combination of both. A deadline for filing any written responses would be set by the Board.

G. Visual aids in effectively presenting oral traditional evidence

If presenters will refer to any visual aids during their presentation (e.g., photographs, maps, slideshows, videos, or other forms of media), those visual aids must be filed and served as written evidence at least one day in advance of the scheduled time for their oral traditional evidence.

Details about how to file documents on the public record and how to serve other Parties are found in Section 4 of the Hearing Order.

H. Online broadcasts and transcripts

The Board will offer a live audio stream of the oral presentations via its [website](#). Media files of each day's broadcast will also be available for download.

Daily written transcripts will be found on the online [public registry](#) by the following morning. Anyone can order paper copies of the transcripts directly from International Reporting Inc. This can be done in the hearing room, by emailing bprouse@irri.net, or by calling 613-748-6043. There may be a fee for this service.

I. Notice of Intent to present oral traditional evidence

The Board requires the following information be provided in the Notice of Intent:

1. Name of the Indigenous intervenor as it appears on the List of Parties
2. Name of the presenter(s) who will be providing the oral traditional evidence
3. Any request for remote participation (see Section E above)
4. Any other information the Board should consider in relation to the Notice of Intent

J. Additional Information

For information about the Board's hearing process, please see Hearing Order MH-052-2018.

If you require additional information about this Procedural Direction No. 1, oral traditional evidence presentations, or the hearing process, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by

Sheri Young
Secretary of the Board

National Energy
Board



Office national
de l'énergie

This is Exhibit H referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for
British Columbia

File OF-Fac-Oil-T260-2013-03 59
12 October 2018

To: List of Parties

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report (Report) as directed by Order in Council (OIC) P.C. 2018-1177
MH-052-2018**

Various matters:

- Decisions following comment processes
- Hearing Order MH-052-2018
- Explanatory Note to OIC P.C. 2018-1177
- Filing requirements for Trans Mountain
- Request to Federal Authorities pursuant to paragraph 20(a) of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012)
- Offer to consult and cooperate with certain jurisdictions pursuant to section 18 of the CEAA 2012

A. Background

On 20 September 2018, through OIC P.C. 2018-1177, the Governor in Council (GIC) referred aspects of the Board's Report for the Project back to the Board for reconsideration (Reconsideration). The GIC's direction followed a 30 August 2018 decision¹ of the Federal Court of Appeal that quashed the GIC's approval of the Project.

The GIC has imposed a time limit of 155 calendar days for the Reconsideration. Therefore, the Board must complete the Reconsideration process and issue its Reconsideration report no later than **22 February 2019**.

The Board is holding a public hearing to carry out the Reconsideration.

On 5 October 2018, the Board released the List of Parties for the hearing. The "Parties" consist of Trans Mountain and all intervenors (including Federal Departments and Agencies²).

.../2

¹ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153.

² "Federal Departments and Agencies" include those federal departments and agencies that have registered as intervenors in this hearing, as well as those from which the Board has requested information under paragraph 20(a) of the CEAA 2012 (see Part F of this letter). Federal Departments and Agencies are denoted on the List of Parties with the prefix "AA".

B. Decisions following comment processes

In its 26 September 2018 [letter](#), the Board sought public comments on:

- 1) whether, “on a principled basis,”³ Project-related marine shipping should be included in the “designated project” to be assessed under the CEAA 2012;
- 2) the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012, and the draft List of Issues to be considered in the Reconsideration hearing;
- 3) the design of the hearing process to be used for the Reconsideration; and
- 4) which government departments or bodies the Board should require information from during the hearing.

In its 5 October 2018 [letter](#), the Board sought additional, focused comments from the Parties on the following limited issue:

Assuming Project-related marine shipping is included in the “designated project” to be assessed under the CEAA 2012, should the designated project be defined as including:

- a) Project-related marine shipping between the Westridge Marine Terminal and the territorial sea limit; *or*
- b) Project-related marine shipping between the Westridge Marine Terminal and the outer boundary of Canada’s EEZ?

Comments received are found in the Board’s online [public registry](#).

Board decisions

The Board has decided, on a principled basis, to include Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit in the “designated project” to be assessed under the CEAA 2012.

The Board has decided to make adjustments to the List of Issues for the Reconsideration hearing. The List of Issues for the Reconsideration hearing is included as Appendix 1 to Hearing Order MH-052-2018.

The Board has decided not to make adjustments to the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012. The Amended Factors and Scope of the Factors for the Environmental Assessment is included as Appendix 2 to Hearing Order MH-052-2018.

The Board has decided on the hearing process set out in the attached Hearing Order MH-052-2018.

The Board has decided to request specialist or expert information or knowledge in the possession of each of Fisheries and Oceans Canada, Environment and Climate Change Canada, Transport Canada, Vancouver Fraser Port Authority, Pacific Pilotage Authority, Health Canada, Parks Canada, and Natural Resources Canada (see Part F below).

The Board’s written reasons for the all of the above decisions will follow.

³ *Tsleil-Waututh Nation v. Canada (Attorney General)*, *supra* note 2 at para. 770.

C. Hearing Order MH-052-2018

The Board is now releasing Hearing Order MH-052-2018, which details the steps and deadlines that will be followed during the public Reconsideration hearing. In addition to Trans Mountain's participation, the Reconsideration hearing will involve:

- the participation of **intervenors**; and
- gathering **letters of comment**⁴ **from the public**.

The hearing will include written steps and may include oral steps. It also provides information on the Board's procedures, as well as on the roles, responsibilities, and opportunities of those participating in the hearing.

D. Explanatory Note to OIC P.C. 2018-1177

In the interests of transparency, the Board is placing the Explanatory Note to OIC P.C. 2018-1177 (as published in the Canada Gazette, Part 1) onto the record of this Reconsideration hearing. The Board notes that the Explanatory Note is not part of the OIC.

E. Filing Requirements for Trans Mountain

The Board has issued a letter to Trans Mountain describing the additional Filing Requirements for Trans Mountain that the Board requires for the Reconsideration. Trans Mountain must file the required information on or before **3:00 pm Pacific time (4:00 pm Mountain time) on 31 October 2018**.

F. Requests to Federal Authorities pursuant to paragraph 20(a) of the CEAA 2012

The Board has issued a letter, pursuant to paragraph 20(a) of the CEAA 2012, to request specialist or expert information or knowledge in the possession of each of Fisheries and Oceans Canada, Environment and Climate Change Canada, Transport Canada, Vancouver Fraser Port Authority, Pacific Pilotage Authority, Health Canada, Parks Canada, and Natural Resources Canada in relation to the Reconsideration.

These Federal Authorities are required to provide the requested information or knowledge on or before **3:00 pm Pacific time (4:00 pm Mountain time) on 31 October 2018**.

G. Offer to consult and cooperate with certain jurisdictions pursuant to section 18 of the CEAA 2012

Under section 18 of the CEAA 2012, the Board must:

...offer to consult and cooperate with respect to the environmental assessment of the designated project with any jurisdiction referred to in paragraphs (c) to (h) of the definition ***jurisdiction*** in subsection 2(1) if that jurisdiction has powers, duties or functions in relation to an assessment of the environmental effects of the designated project.

⁴ The Board notes that some applicants and other members of the public have already submitted substantive comments regarding the Board's Reconsideration, which may or may not constitute their letters of comment. These will remain on the hearing record and will be considered by the Board in completing its Reconsideration Report. For persons or groups where this is the case, those letters do not need to be re-filed.

In accordance with section 18, the Board has posted its offer to consult and cooperate on the [Canadian Environmental Assessment Registry Internet Site](#).

H. Where to find additional information or help

As information becomes available or is released regarding the Reconsideration hearing, the Board will update its Project [webpage](#).

All filings received, and Board correspondence related to, this hearing will be found in a dedicated [folder](#) in the Board's online public registry.

For any questions about this hearing process, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

I. Direction to Trans Mountain

Trans Mountain is directed to serve this letter and Hearing Order MH-052-2018 (including its appendices) on those listed in the attached distribution list.

Yours truly,

Original signed by

Sheri Young
Secretary of the Board

Attachments

Distribution list

**List of interested persons to be served with Hearing Order MH-052-2018
Liste des parties intéressées à qui l'ordonnance d'audience MH-052-2018
doit être signifiée**

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National Energy
Board



Office national
de l'énergie

This is Exhibit I referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for
British Columbia

File OF-Fac-Oil-T260-2013-03 59
12 October 2018

To: Distribution list

Trans Mountain Pipeline ULC
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report (Report) as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018
Requests to Federal Authorities pursuant to paragraph 20(a) of the *Canadian*
***Environmental Assessment Act*, 2012 (CEAA 2012)**

A. Overview

Pursuant to paragraph 20(a) of the CEAA 2012, the purpose of this letter is to request specialist or expert information or knowledge in the possession of each of Fisheries and Oceans Canada (DFO), Environment and Climate Change Canada (ECCC), Transport Canada (TC), Vancouver Fraser Port Authority (VFPA), Pacific Pilotage Authority (PPA), Health Canada (HC), Parks Canada (PC), and Natural Resources Canada (NRCan) [collectively, the Federal Authorities] in relation to the Reconsideration, the background for which is described in the Board's letter of 26 September 2018.

The Federal Authorities must provide the information or knowledge required by the Board on or before **3:00 pm Pacific time (4:00 pm Mountain time) on 31 October 2018**. By this date, Federal Authorities may also file any other evidence that, in their view, is relevant to the List of Issues for the Reconsideration hearing.

The Federal Authorities have been automatically registered as intervenors in this proceeding, regardless of whether a particular Federal Authority registered for that role or not. This means that they must answer any information requests from the Board or the other Parties about the information or knowledge filed in response to this letter, or any other evidence they may file. For more information on the responsibilities of intervenors, see the Board's Hearing Order MH-052-2018.

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517, Dixième Avenue S.-O., bureau 210
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The Federal Authorities can expect additional follow-up questions from the Board throughout the hearing process.

The particulars of the Board's request are detailed in Parts C and D below.

B. Comment processes and Board decisions

In its letter of 26 September 2018, the Board sought public comments with respect to the Reconsideration hearing, including whether Project-related marine shipping should be part of the "designated project" under the CEAA 2012, and comments on a draft List of Issues.

On 5 October 2018, the Board [sought](#) additional, focused comments from the Parties on the spatial limit of Project-related marine shipping.

In its letter of 12 October 2018, the Board decided, on a principled basis, to include Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit in the "designated project" to be assessed under the CEAA 2012.

On 12 October 2018, the Board also issued the List of Issues for the Reconsideration hearing, which is attached to Hearing Order MH-052-2018 as Appendix 1.

The Board's written reasons for the above decisions will follow.

C. Basis for requests

The List of Issues includes issues related to factors described in paragraphs 19(1)(a) through (h) of the CEAA 2012, such as mitigation measures, alternative means, and requirements of any follow-up program, each in relation to Project-related marine shipping. It also includes issues related to section 79 of the *Species at Risk Act* (SARA), such as measures to avoid or lessen adverse effects of Project-related marine shipping on species at risk.

The Board's requests for specialist or expert information or knowledge are based on the following with respect to each Federal Authority:

Federal Authority	Basis
DFO	Responsibilities and expertise include marine protected areas and certain species at risk that could be affected by marine shipping
ECCC	Responsibilities and expertise include certain species at risk that could be affected by marine shipping
TC	Regulatory authority and expertise includes marine shipping
VFPA	• Regulatory authority and expertise includes marine shipping • Has relevant environmental interests, such as its Enhancing Cetacean Habitat and Observation (ECHO) program

Federal Authority	Basis
PPA	• Regulatory authority and expertise includes marine shipping • Mandate is to establish, operate, maintain, and administer in the interests of safety an efficient pilotage service
HC	Possesses information or knowledge with respect to human health effects
PC	Mandate is to ensure that Canada's national parks and national marine conservation areas are protected
NRCan	Has consulted with Indigenous groups since the date of the Board's Report

Only the latest or most up-to-date information or knowledge is requested. The Board has stated that the record filed in the OH-001-2014 Certificate hearing is included as part of its record for the Reconsideration. Therefore, **if relevant information is already on the Board's online [public registry](#), provide links and page numbers rather than refiling that information.** Where the information or knowledge is lengthy, provide a summary.

D. Requests

The Board requests specialist or expert information or knowledge in the possession of each of DFO, ECCC, and TC in relation to each of the matters in the List of Issues.

Without limiting the generality of that request, the Board includes some particular requests below, which also pertain to VFPA, PPA, HC, PC, and NRCan. Although the Board has suggested particular Federal Authorities for each topic below, it does not preclude other Federal Authorities from providing the information or knowledge if they possess it.

Topic 1: Greenhouse gas (GHG) emissions

Federal Authority(ies): ECCC and TC

Request: With regard to potential mitigation measures for GHG emissions from Project-related marine shipping, provide:

- a) an update of any changes to the relevant regulatory requirements since the date of the Board's Report;
- b) any information or knowledge concerning other plausible mitigation measures (including monitoring measures) to avoid, reduce, and/or offset the GHG emissions of Project-related marine shipping; and
- c) any information or knowledge concerning the safety, and technical and economic feasibility, of each such mitigation measure.

Topic 2: SARA-listed species

Federal Authority(ies): DFO and ECCC

Request: With regard to any SARA-listed species that are likely affected by Project-related marine shipping, or that have critical habitat that is likely to be affected by such shipping (including Southern resident killer whale [SRKW]), provide:

- a) a list of any species that have been newly listed, or any species that have seen a change to their designation, since the date of the Board's Report;
- b) a copy of the latest recovery documents (Recovery Strategies, Action Plans, and Management Plans) for all likely affected species (if these recovery documents have already been filed on the Board's record for the Project, provide links to them);
- c) any updates on the current status and planning for the survival and recovery actions noted in each recovery document;
- d) any updates on any monitoring that is underway or planned to determine the success of survival and recovery actions noted in each recovery document;
- e) for any species that does not have recovery documents, any information or knowledge concerning plausible mitigation measures (including monitoring measures) to avoid or lessen the effects of Project-related marine shipping; and
- f) any further information or knowledge concerning the safety, technical, and economic feasibility of each such survival, recovery, mitigation, and monitoring action or measure.

Topic 3: SRKW

Federal Authority(ies): DFO, TC, VFPA, and PPA

Request: With regard to SRKW, in addition to the request under Topic 2 above, provide:

- a) the most recent copies of the following:
 - o Recovery Strategy and any proposed updates or amendments;
 - o Action Plan and any proposed updates or amendments;
 - o Southern Resident Killer Whale: imminent threat assessment;
 - o Southern resident killer whale – A science based review of recovery actions for three at-risk whale populations;
 - o Oceans Protection Plan, and any relevant implementation information; and

- o any status updates on the ECHO Program as it relates to mitigation measures to reduce potential threats to SRKW as a result of shipping activities, such as acoustic disturbance (underwater noise), physical disturbance (ship collisions), environmental contaminants, and availability of prey;
- b) any information or knowledge concerning the relationship between a vessel's speed and tonnage (including the different types of Project-related marine vessels under both loaded and unloaded conditions) and how much underwater noise the vessel creates;
- c) any information or knowledge concerning the potential effectiveness, safety, and technical and economic feasibility of each of the following potential mitigation measures, including how each could be implemented and monitored, and who (i.e., what authority, body, or organization) would be responsible for each aspect of implementation and monitoring:
 - o altering shipping lanes to reduce adverse effects on SRKW, such as shifting lanes away from marine mammal congregation areas;
 - o speed restrictions and altered shipping patterns, such as convoys, in order to reduce potential adverse effects such as underwater noise or the potential for ship strikes;
 - o use of marine mammal on-board observers on Project-related marine vessels, and what actions need to be taken if SRKW are observed;
 - o measures to increase abundance of prey to offset adverse effects from Project-related marine shipping;
 - o vessel design (including hull and propeller) and maintenance measures for reducing adverse effects such as underwater noise from Project-related marine vessels;
 - o any other measure that could avoid, reduce, and/or offset the adverse effects of Project-related marine shipping on SRKW; and
 - o measures that could avoid or reduce cumulative adverse effects on SKRW.

Topic 4: Marine birds

Federal Authority(ies): ECCC

Request: With regard to marine bird species at risk that are potentially affected by Project-related marine shipping, in addition to the requests under Topic 2 above, provide:

- a) any information or knowledge on potential measures to avoid or reduce adverse effects such as mortality and sensory disturbance as a result of Project-related marine shipping; and

- b) any information or knowledge concerning the development and implementation of relevant monitoring systems.

Topic 5: Marine oil spills

Federal Authority(ies): ECCC, DFO, TC, VFPA, and PPA

Request: Provide:

- a) any information on research and findings, since the date of the Board's Report, related to the fate and behaviour and clean-up of oil (including diluted bitumen) spilled in marine environments that would be applicable to Project-related marine shipping; and
- b) any information or knowledge on any enhancements to marine oil spill prevention, emergency preparedness, and response measures since the date of the Board's Report, including any updates and information on the status of the implementation of the enhanced marine oil spill response regime, as referenced in Condition 133 set out in the Board's Report.

Topic 6: Marine safety, navigation, and disturbance

Federal Authority(ies): TC, VFPA, and PPA

Request: With regard to potential safety, navigation, and disturbance of other vessels, provide:

- a) any information or knowledge on the impacts of wakes created by Project-related marine shipping vessels at varying speeds on non-Project-related vessels crossing those wakes;
- b) any information or knowledge concerning measures to avoid, reduce, and/or offset the impacts of Project-related marine shipping vessels on non-Project-related vessels, including private recreational vessels;
- c) a copy of the most recent Port Information Guide;
- d) any proposed updates or amendments to marine pilotage services and measures to mitigate risks to persons, vessels, and the environment; and
- e) any updates on legislative or policy changes regarding tug escort requirements that would be applicable to Project-related marine shipping.

Topic 7: National parks and/or national marine conservation areas

Federal Authority(ies): PC and DFO

Request: Provide:

- a) a list of all current areas and any future areas under consideration (e.g., parks, protected areas, reserves, conservation areas) under PC's and DFO's responsibilities in the areas of Project-related marine shipping; and

- b) any information or knowledge concerning mitigation and monitoring measures to avoid, reduce, and/or offset the impacts of Project-related marine shipping on marine and shoreline ecosystem components, including any relevant information on legislative requirements or guidelines or best practices to conserve and protect these ecosystems.

Topic 8: Mitigation and monitoring measures for human health effects

Federal Authority(ies): HC

Request: Provide any additional information or knowledge, since the date of the Board's report, concerning mitigation and monitoring measures for human health effects that are likely to result from Project-related marine shipping.

Topic 9: Mitigation, accommodation, and monitoring measures proposed by Indigenous groups

Federal Authority(ies): NRCan, VFPA, and PPA

Request: Provide any information or knowledge, including any Indigenous traditional knowledge, that was raised by Indigenous groups since the date of the Board's Report concerning:

- a) the environmental and socio-economic effects of Project-related marine shipping;
- b) the potential impacts of Project-related marine shipping on Indigenous interests; and
- c) mitigation, accommodation, and monitoring measures in order to avoid, reduce, and/or offset adverse effects from Project-related marine shipping.

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by

Sheri Young
Secretary of the Board

Attachment

c.c. All Parties

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Dossier OF-Fac-Oil-T260-2013-03 59
Le 12 octobre 2018

Destinataires : Liste de distribution

Trans Mountain Pipeline ULC

**Demande visant le projet d'agrandissement du réseau de Trans Mountain
(le « projet »)**

**Réexamen par l'Office national de l'énergie de certains aspects de son rapport
de recommandation (le « rapport »), conformément au décret 2018-1177 de
la gouverneure en conseil (le « réexamen »)
MH-052-2018**

**Demandes présentées à des autorités fédérales aux termes de l'alinéa 20a) de la *Loi
canadienne sur l'évaluation environnementale (2012)* [« LCEE (2012) »]**

A. Aperçu

Conformément à l'alinéa 20a) de la LCEE (2012), la présente vise à demander l'expertise ou les connaissances voulues que possèdent Pêches et Océans Canada (« MPO »), Environnement et Changement climatique Canada (« ECCC »), Transports Canada (« TC »), l'Administration portuaire de Vancouver Fraser (« APVF »), l'Administration de pilotage du Pacifique (« APP »), Santé Canada (« SC »), Parcs Canada (« PC ») et Ressources naturelles Canada (« RNCAN ») [collectivement « les autorités fédérales »] en vue du réexamen, dont le contexte est décrit dans la [lettre](#) de l'Office du 26 septembre 2018.

Les autorités fédérales doivent transmettre à l'Office les renseignements demandés au plus tard **à 15 heures, heure du Pacifique (16 heures, heure des Rocheuses) le 31 octobre 2018**. Pour cette même date, les autorités fédérales peuvent aussi déposer tout autre élément de preuve qu'elles estiment se rapporter à la liste des questions de l'audience de réexamen.

L'Office a accordé *de facto* aux autorités fédérales le statut d'intervenant à la présente instance, qu'elles en aient fait la demande ou non. Par conséquent, elles doivent répondre aux demandes de renseignements que pourraient leur adresser l'Office ou les autres parties au sujet de l'expertise ou des connaissances voulues qu'elles fourniront en réponse à la présente lettre ou de tout autre élément de preuve qu'elles pourraient verser au dossier de l'audience. Pour plus d'information sur les attributions des intervenants, vous êtes prié de consulter l'ordonnance d'audience MH-052-2018 de l'Office.

.../2

Les autorités fédérales peuvent s’attendre à ce que l’Office leur pose d’autres questions pendant le processus d’audience.

Les détails de la demande de l’Office se trouvent aux parties C et D plus loin.

B. Processus de commentaires et décisions de l’Office

Dans sa lettre du 26 septembre 2018, l’Office sollicitait les observations du public sur l’audience de réexamen, y compris sur la question de savoir si le transport maritime connexe au projet devait être inclus dans le « projet désigné » en vertu de la LCEE (2012), ainsi que des commentaires sur une version préliminaire de la liste des questions.

Le 5 octobre 2018, l’Office a [invité](#) les parties à lui faire part d’autres observations sur la question précise de la limite spatiale du transport maritime connexe au projet.

Dans sa lettre datée du 12 octobre 2018, l’Office a décidé, à la lumière des principes, d’inclure le transport maritime connexe au projet entre le terminal maritime Westridge et la limite des eaux territoriales de 12 miles nautiques dans le « projet désigné » devant être soumis à une évaluation en vertu de la LCEE (2012).

Le 12 octobre 2018, l’Office a également rendu publique la liste des questions qui seront étudiées à l’audience de réexamen; cette liste est jointe à l’ordonnance d’audience MH-052-2018, dont elle constitue l’annexe 1.

Les motifs écrits des décisions de l’Office sur les questions qui précèdent suivront.

C. Fondement des demandes

La liste des questions énumère des enjeux qui se rapportent à des éléments décrits aux alinéas 19(1)a) à h) de la LCEE (2012), en l’occurrence les mesures d’atténuation, les solutions de rechange et les exigences de tout programme de suivi, dans le contexte du transport maritime connexe au projet pour chacun de ces éléments. Elle renferme aussi des questions qui se rapportent à l’article 79 de la *Loi sur les espèces en péril*, comme les mesures visant à éviter ou à amoindrir les effets nocifs du transport maritime connexe au projet sur des espèces en péril.

Les demandes de l’Office visant à obtenir l’expertise ou les connaissances voulues reposent sur ce qui suit pour chacune des autorités fédérales.

Autorité fédérale	Fondement
MPO	Ses attributions et son expertise couvrent certaines aires protégées et certaines espèces en péril susceptibles d’être touchées par le transport maritime.
ECCC	Ses attributions et son expertise couvrent certaines espèces en péril susceptibles d’être touchées par le transport maritime.
TC	Son autorité réglementaire et son expertise englobent le transport maritime.

Autorité fédérale	Fondement
APVF	• Son autorité réglementaire et son expertise englobent le transport maritime. • Elle possède un intérêt relativement à l'environnement, notamment en raison de son programme d'observation et d'amélioration de l'habitat des cétacés (« ECHO »).
AAP	• Son autorité réglementaire et son expertise englobent le transport maritime. • Sa mission vise la mise en place, la conduite, le maintien et l'administration d'un service de pilotage pour des raisons de sécurité.
SC	Il possède l'expertise ou les connaissances voulues se rapportant aux effets sur la santé humaine.
PC	Sa mission est de veiller à ce que les parcs nationaux canadiens et les aires marines nationales de conservation soient protégés.
RNCAN	Il a consulté les groupes autochtones depuis la date du rapport de l'Office.

La demande ne vise que l'expertise ou les connaissances voulues les plus récentes ou les plus actuelles. Il a déjà annoncé que le dossier de la présente audience de réexamen comprendrait l'ensemble de la preuve déposée dans le cadre de l'audience OH-001-2014 relative au certificat. Par conséquent, **si des renseignements pertinents se trouvent déjà dans le [registre public](#)** en ligne de l'Office, vous êtes prié de fournir les liens et les numéros de page plutôt que de déposer ces documents de nouveau. Si cette expertise ou ces connaissances voulues sont volumineuses, nous vous prions de bien vouloir fournir un résumé.

D. Demandes

L'Office demande au MPO, à ECCC et à TC de lui fournir l'expertise ou les connaissances voulues qu'ils possèdent sur chacun des éléments mentionnés dans la liste des questions.

Sans restreindre la généralité de cette demande, l'Office relève ci-dessous quelques volets précis, qui visent également l'APVF, l'APP, SC, PC et RNCAN. Bien qu'il identifie certaines autorités fédérales pour chaque volet ci-dessous, cela ne dégage pas d'autres autorités fédérales de lui fournir l'expertise ou les connaissances voulues qu'elles possèdent.

Premier volet : Émissions de gaz à effet de serre (GES)

Autorités fédérales : ECCC et TC

Demande : En ce qui concerne d'éventuelles mesures d'atténuation des émissions de GES découlant du transport maritime connexe au projet, veuillez fournir ce qui suit :

- a) tout élément nouveau dans les exigences réglementaires pertinentes, depuis la date du rapport de l'Office;
- b) l'expertise ou les connaissances voulues sur d'autres mesures d'atténuation envisageables (y compris des mesures de suivi) afin d'éviter, de réduire et/ou de contrebalancer les émissions de GES découlant du transport maritime connexe au projet;

- c) l'expertise ou les connaissances voulues concernant la sécurité et la faisabilité, sur les plans technique et économique, pour chacune de ces mesures.

Deuxième volet : Espèces inscrites sur la liste de la LEP

Autorités fédérales : MPO et ECCC

Demande : En ce qui concerne toute espèce inscrite sur la liste de la LEP susceptible d'être touchée par le transport maritime connexe au projet, ou dont l'habitat est susceptible d'être touché par ce même transport, y compris l'épaulard résident du sud, veuillez fournir ce qui suit :

- a) une liste des espèces nouvellement inscrites sur la liste ou de celles dont la désignation a changé depuis la date du rapport de l'Office;
- b) un exemplaire des plus récentes versions des documents relatifs au rétablissement (stratégies de rétablissement, plans d'action et plans de gestion) pour chaque espèce qui sera vraisemblablement touchée – si ces documents ont déjà été versés au dossier de l'instance du projet, vous êtes prié de fournir des liens vers ceux-ci;
- c) toute mise à jour sur la situation actuelle et la préparation de mesures de survie et de rétablissement faite à chaque document se rapportant au rétablissement;
- d) toute mesure de suivi à jour ou projetée visant à vérifier la réussite des mesures de survie et de rétablissement mentionnées dans chaque document relatif au rétablissement;
- e) pour toute espèce qui n'est pas visée par des documents se rapportant au rétablissement, l'expertise ou les connaissances voulues relatives à des mesures d'atténuation envisageables (y compris des mesures de suivi) afin d'éviter ou d'amoindrir les effets du transport maritime connexe au projet;
- f) l'expertise ou les connaissances voulues complémentaires sur la sécurité et la faisabilité, sur les plans technique et économique, pour chacune des mesures de survie, d'atténuation ou de suivi.

Troisième volet : Épaulard résident du sud

Autorités fédérales : MPO, TC, APVF et APP

Demande : En ce qui concerne l'épaulard résident du sud, en plus de la demande formulée pour le deuxième volet ci-dessus, veuillez fournir ce qui suit :

- a) les versions les plus récentes de ce qui suit :
 - o stratégie de rétablissement et toute mise à jour ou modification proposée;
 - o plan d'action et toute mise à jour ou modification proposée;
 - o épaulard résident du sud : évaluation de la menace imminente pour l'espèce

- o épaulard résident du sud : un examen scientifique des mesures de rétablissement pour trois populations d'épaulards en péril;
 - o plan de protection des océans et toute information pertinente sur la mise en œuvre du plan;
 - o état de la situation du programme ECHO sur les mesures d'atténuation pour réduire les menaces sur l'épaulard résident du sud en raison des activités de transport maritime, comme les perturbations acoustiques (bruits sous-marins), les perturbations physiques (collisions avec des navires, les contaminants environnementaux, la disponibilité de proies;
- b) l'expertise ou les connaissances voulues sur le lien qui existe entre, d'une part, la vitesse et le tonnage des navires (y compris les divers types de navires associés au projet, chargés et déchargés) et, d'autre part, l'intensité du bruit sous-marin que le navire produit;
- c) l'expertise ou les connaissances voulues sur l'efficacité potentielle, la sécurité et la faisabilité, sur les plans technique et économique, de chacune des éventuelles mesures d'atténuation ci-dessous, y compris, pour chacune, la façon dont elle pourrait être mise en œuvre et suivie, et l'entité (autorité, organisme ou organisation) qui pourrait en être chargée :
- o modifications des couloirs de navigation afin de réduire les effets nocifs sur l'épaulard résident du sud, par exemple le déplacement des couloirs de navigation pour les éloigner des zones de rassemblement de mammifères marins;
 - o limitations de vitesse et modifications des trajets habituels de navigation, comme des convois, pour réduire les effets nocifs éventuels, par exemple les bruits sous-marins ou les risques de collision avec des navires;
 - o recours à des observateurs de mammifères marins à bord des navires liés au projet, et les mesures qui devraient être prises dans le cas où l'on constaterait la présence d'épaulards résidents du sud;
 - o mesures pour accroître l'abondance de proies pour contrebalancer les effets du transport maritime connexe au projet;
 - o mesures de conception (y compris la coque et l'hélice) et d'entretien des navires pour réduire les effets nocifs, comme les bruits sous-marins produits par les navires liés au projet;
 - o toute autre mesure susceptible d'éviter, de réduire et/ou de contrebalancer les effets nocifs du transport maritime connexe au projet;
 - o mesures susceptibles d'éviter ou de réduire les effets nocifs cumulatifs sur l'épaulard résident du sud.

Quatrième volet : Oiseaux de mer

Autorités fédérales : ECCC

Demande : En ce qui concerne les espèces d'oiseaux de mer en péril qui sont susceptibles d'être touchés par le transport maritime connexe au projet, en plus des demandes formulées pour le deuxième volet, veuillez fournir ce qui suit :

- a) l'expertise ou les connaissances voulues sur d'éventuelles mesures pour éviter ou réduire les effets nocifs, comme la mortalité et les perturbations sensorielles, du transport maritime connexe au projet;
- b) l'expertise ou les connaissances voulues concernant l'élaboration et la mise en œuvre de systèmes de suivi pertinents.

Cinquième volet : Déversements de pétrole en milieu marin

Autorités fédérales : ECCC, MPO, TC, APVF et APP

Demande : Fournir ce qui suit :

- a) toute information sur la recherche et les découvertes depuis la date du rapport de l'Office sur le devenir et le comportement ainsi que le nettoyage du pétrole (y compris le bitume dilué) déversé dans des milieux marins, qui se rapporteraient au transport maritime connexe au projet;
- b) l'expertise ou les connaissances voulues sur des améliorations qui auraient été apportées, depuis la date du rapport de l'Office, en matière de prévention des déversements en milieu marin et de sécurité, ainsi qu'en ce qui a trait aux mesures de préparation et d'intervention en cas d'urgence et à toute information à jour sur la mise en œuvre du régime renforcé d'intervention en cas de déversement de pétrole, dont il est fait état à la condition 133 du certificat du rapport de l'Office.

Sixième volet : Sécurité maritime, navigation et perturbation

Autorités fédérales : TC, APVF et APP

Demande : En ce qui concerne les risques potentiels à la sécurité et à la navigation et les perturbations des autres navires, veuillez fournir ce qui suit :

- a) l'expertise ou les connaissances voulues sur l'incidence des sillages des navires du transport maritime connexe au projet à diverses vitesses sur les navires non liés au projet qui croisent ces mêmes sillages;
- b) l'expertise ou les connaissances sur des mesures visant à éviter, à réduire et/ou à contrebalancer les effets des navires du transport maritime connexe au projet sur les navires non liés au projet, y compris les embarcations privées de plaisance;

- c) un exemplaire de la plus récente version du guide d'information du port (« *Port Information Guide* »);
- d) les mises à jour ou modifications apportées aux services de pilotage maritimes et aux mesures visant à atténuer les risques pour les personnes, les navires et l'environnement, s'il y a lieu;
- e) les mises à jour des changements législatifs ou de politique concernant les exigences relatives aux remorqueurs d'escorte qui s'appliqueraient au transport maritime connexe au projet, s'il y a lieu.

Septième volet : Parcs nationaux et/ou aires maritimes nationales de conservation

Autorités fédérales : PC et MPO

Demande : Fournir ce qui suit :

- a) une liste des aires actuelles et à l'étude (parcs, aires protégées, réserves, aires de conservation) relevant de PC et du MPO dans les zones visées par le transport maritime connexes au projet;
- b) l'expertise ou les connaissances voulues sur des mesures d'atténuation et de suivi visant à éviter, à réduire et/ou à contrebalancer les effets des navires du transport maritime connexe au projet sur les composantes des écosystèmes marins et côtiers, notamment tout renseignement pertinent sur les exigences prévues par la loi ou lignes directrices ou pratiques exemplaires relatives à la conservation et à la protection de ces écosystèmes.

Huitième volet : Mesures d'atténuation et de suivi des effets sur la santé humaine

Autorités fédérales : SC

Demande : Veuillez fournir l'expertise ou les connaissances voulues supplémentaires, acquises depuis la date du rapport de l'Office, qui se rapportent aux mesures d'atténuation et de suivi des effets sur la santé humaine qui sont susceptibles de découler du transport maritime connexe au projet.

Neuvième volet : Mesures d'atténuation, d'accommodement et de suivi proposées par les groupes autochtones

Autorités fédérales : RNCan, APVF et APP

Demande : Veuillez fournir l'expertise ou les connaissances voulues, y compris les connaissances traditionnelles autochtones, qui ont été communiquées par des groupes autochtones depuis la date du rapport de l'Office sur les sujets suivants :

- a) les effets environnementaux et socioéconomiques du transport maritime connexe au projet;

- b) les effets éventuels du transport maritime connexe au projet sur les intérêts des Autochtones;
- c) les mesures d'atténuation, d'accommodement et de suivi visant à éviter, à réduire et/ou à contrebalancer les effets nocifs du transport maritime connexe au projet.

Pour toute question, veuillez communiquer avec l'équipe de conseillers, par téléphone au numéro sans frais 1-800-899-1265, ou par courriel à l'adresse TMX.Aide@neb-one.gc.ca.

Veuillez agréer, Madame, Monsieur, mes sincères salutations.

La secrétaire de l'Office,

Original signé par

Sheri Young

Pièce jointe

c. c. Toutes les parties

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October 17, 2018

Our File: 101024-038

VIA NEB e-Filing

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2P 5J2

Attention: Sheri Young, Secretary of the Board

Dear Ms. Young,

**Re: Trans Mountain Request to hold NEB Orders and Application Processes in
Abeyance dated September 21, 2018**

We are counsel for the Stó:lō applicants, Aitchelitz, Shxwhà:y Village, Skowkale, Skwah, Soowahlie, Squiala, Tzeachten, and Yakweakwioose (the "**Stó:lō Applicants**"), who were among the successful Indigenous applicants in the Federal Court of Appeal's decision in Tseil-Waututh Nation v. Canada (Attorney General), 2018 FCA 153 ("**TWN**"). The Stó:lō Applicants are also part of the Stó:lō Collective, a broader group who participated as an Intervenor in the National Energy Board ("**NEB**") review of the Trans Mountain expansion project (the "**Project**") and has been granted intervenor status in the Reconsideration Hearing.

We write in response to the letter dated September 21, 2018 from counsel for Trans Mountain to the NEB (the "**Abeyance Letter**") requesting that the NEB hold the Project-related orders, outstanding application review processes and condition compliance determinations and processes in abeyance "pending the issuance of a valid Certificate of Public Convenience and Necessity". Trans Mountain did not deliver a copy of the Abeyance Letter to the Stó:lō Applicants.

We have reviewed the responses to the Abeyance Letter delivered to the NEB to date by counsel for the City of Burnaby, Tseil-Waututh Nation, Squamish, Upper Nicola and Stk'emlupsemc te Secwepemc and agree with the submissions made by those counsel with respect to the relief sought by Trans Mountain. In the circumstances, the NEB must either: (a) decline to provide the relief sought by Trans Mountain; or alternatively (b) not proceed to consider the relief sought unless and until a proper hearing process is in place to provide an opportunity for all of the affected applicants to address the issues raised by Trans Mountain in the Abeyance Letter.

We also wish to note that it is a significant concern that Trans Mountain would deliver a letter to the NEB, without notice to any of the successful applicants in TWN, in which Trans Mountain is

seeking relief from the NEB that is in direct conflict with the relief granted by the Federal Court of Appeal to those successful applicants. It is clear that the Stó:lō Applicants' interests are affected by the relief sought by Trans Mountain in the Abeyance Letter. Trans Mountain has not appealed the decision in TWN, or sought a stay of the decision through the proper appellate route. Instead, it has chosen a route intended to circumvent the remedy granted by the Federal Court of Appeal in a manner meant to avoid the objections of those affected.

We have copied counsel for Trans Mountain on our letter.

Yours truly,

MILLER TITERLE LAW CORPORATION

A handwritten signature in black ink, appearing to read 'Joelle Walker', with a long horizontal flourish extending to the right.

Joelle Walker
joelle@millertiterle.com

cc: Shawn Denstedt Q.C. (counsel for Trans Mountain)

October 23, 2018

Our File: 101024-038

VIA NEB e-Filing

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2P 5J2

Attention: Sheri Young, Secretary of the Board

Dear Ms. Young,

**Re: Trans Mountain Expansion Project – Reconsideration
Hearing Order MH-052-2018 & File OF-Fac-Oil-T260-2013-03 59
Notice of Intent and Objection of the Stó:lō Collective**

We are counsel for the Stó:lō Collective in relation to the National Energy Board ("**NEB**") reconsideration hearing (the "**Reconsideration Hearing**"). The purpose of this letter is to provide the Stó:lō Collective's Notice of Intent to provide oral Indigenous traditional knowledge ("**Oral Traditional Evidence**") pursuant to Practice Direction No. 1 of the NEB dated October 12, 2018 ("**PD #1**"), as well as object to the process provided therein.

During the first hearing (the "**First Hearing**") to consider the application by Trans Mountain Pipeline ULC ("**Trans Mountain**") to the NEB for the Trans Mountain Expansion Project (the "**Project**"), the NEB established a process for the hearing of Oral Traditional Evidence, which imposed time limits on that evidence, set limitations on the nature of the knowledge that could be shared orally, and permitted Trans Mountain, other intervenors and the NEB to cross-examine the witnesses. By letter dated December 5, 2014 (the "**Objection Letter**"), the Stó:lō Collective objected to the process prescribed by the NEB, advising, among other things, that the process was unfair, culturally inappropriate and imbalanced. In particular, the Stó:lō Collective stated that the process chosen conflicted with Stó:lō customs and traditions that support knowledge transfer and honouring their Elders. The Stó:lō Collective also explained in the Objection Letter that the process chosen by the NEB had resulted in internal division, including the loss of two communities from the Stó:lō Collective.

As a result of the Stó:lō Collective's dissatisfaction with the NEB's process for hearing Oral Traditional Evidence, it chose to abstain from it entirely.

1. OBJECTION TO PROCESS FOR COLLECTION OF ORAL TRADITIONAL EVIDENCE

In light of the Stó:lō Collective's concerns about the treatment of Oral Traditional Evidence in the First Hearing, in the letter of comment to the NEB dated October 3, 2018, the Stó:lō Collective requested that Oral Traditional Evidence be collected in a manner that was reflective of the specific cultural practices of the Indigenous group providing such evidence. PD #1 disregards

this entirely. As a result, the Stó:lō Collective wishes to again record an objection to the Oral Traditional Evidence process prescribed by the NEB in PD #1 for this Reconsideration Hearing.

1.1 Timing

As the NEB has repeatedly reminded intervenors, it must complete the Reconsideration Hearing and issue its Reconsideration report by February 22, 2019. Consequently, the rushed pace of the Reconsideration Hearing has truncated the Oral Traditional Evidence process in a manner that the Stó:lō Collective considers culturally insensitive and procedurally unfair. For instance, the time constraint has or is likely to result in the following issues:

- (a) there is inadequate time for the Stó:lō Collective to identify appropriate knowledge holders to provide Oral Traditional Evidence;
- (b) there is limited time for the NEB to hear Oral Traditional Evidence or to design a schedule which accommodates the needs of particular communities;
- (c) Oral Traditional Evidence sessions are scheduled to be held in late-November/early-December which conflicts with the Stó:lō Bighouse season, wherein many of the traditional knowledge holders are occupied with Bighouse duties and are providing spiritual and ceremonial support thereof;
- (d) there has been inadequate consideration of cultural protocols and ceremony surrounding the sharing of Oral Traditional Evidence by Stó:lō knowledge keepers; and
- (e) the NEB has demonstrated a lack of understanding for and protection of Stó:lō intellectual property and confidential and culturally-sensitive information.

1.2 Intellectual Property

The Stó:lō Collective is particularly concerned about the lack of proper safeguards for intellectual property and confidential and culturally-sensitive information which may be shared during the course of Oral Traditional Evidence sessions. The NEB has not taken any steps to ensure that Oral Traditional Evidence remains subject to confidentiality restrictions rather than being subject to public disclosure.

1.3 Cross-examination

As in the First Hearing, the NEB is again allowing Trans Mountain to cross-examine witnesses during the Oral Traditional Evidence sessions. The Stó:lō Collective objected to this aspect of the process in its Objection Letter, and maintains its objection for the Reconsideration Hearing. As stated previously, in Stó:lō cultural practices, it is neither customary nor appropriate to question Elders' expression of traditional knowledge. To do so is to show great disrespect, not just to the particular Elder, but also to their ancestors, name bearers, the land, and the spirits from which the Elder gains their knowledge.

The Stó:lō Collective has been an active participant throughout the regulatory approval process for the Project and will continue to do so but has significant concerns that the Reconsideration

Hearing will repeat and exacerbate the mistakes of the past identified by the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153. To reiterate what the Stó:lō Collective previously expressed in its Objection Letter: the process of oral traditional hearings must reflect a basic understanding of First Nations culture and society. Without an adequate understanding of Stó:lō culture and society, this process, too, is destined to be fatally flawed.

2. NOTICE OF INTENT

Notwithstanding the Stó:lō Collective's objection to the process chosen by the NEB, the Stó:lō Collective wishes to provide Oral Traditional Evidence. Please note, however, that due to time constraints, the Stó:lō Collective is unable to identify the appropriate knowledge keeper at this stage. As these individuals have not yet been identified, we are also unable to indicate whether any of the Stó:lō Collective's witnesses will require the assistance of remote participation. The Stó:lō Collective has circulated a request to each of its member communities to appoint a representative as soon as possible. We anticipate that we will be in a position to provide the NEB with the individual name(s) shortly, as well as any respective requests for remote participation.

Yours truly,

MILLER TITERLE LAW CORPORATION



Joelle Walker
joelle@millertiterle.com

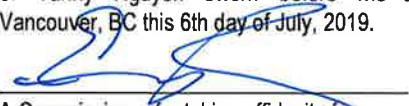
cc: Trans Mountain
regulatory@transmountain.com

National Energy
Board



Office national
de l'énergie

This is Exhibit L referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for
British Columbia

File OF-Fac-Oil-T260-2013-03 59
29 October 2018

To: All Parties

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018
Reasons for the Board's decisions reached in its 12 October 2018 letter**

A. Background

On 26 September 2018, the Board sought public comments by 3 October 2018 on:

- 1) whether, “on a principled basis,”¹ Project-related marine shipping should be included in the “designated project” to be assessed under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012);
- 2) the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 (Amended Factors Document), and the draft List of Issues to be considered in the Reconsideration hearing;
- 3) the design of the hearing process to be used for the Reconsideration; and
- 4) which government departments or bodies the Board should require information from during the hearing.

In its 5 October 2018 letter, the Board sought additional, focused comments from the Parties by 9 October 2018 on the following limited issue:

Assuming Project-related marine shipping is included in the “designated project” to be assessed under the CEAA 2012, should the designated project be defined as including:

- a) Project-related marine shipping between the Westridge Marine Terminal (WMT) and the territorial sea limit; *or*
- b) Project-related marine shipping between the WMT and the outer boundary of Canada's exclusive economic zone?

.../2

¹ *Tsleil-Waututh Nation v. Canada (Attorney General)*, *supra* note 2 at para. 770.

Comments received are found in the Board's online [public registry](#). The Board considered all comments received, including, in this instance, those comments filed late.

On 12 October 2018, the Board released a [series of documents](#), including Hearing Order MH-052-2018 outlining the hearing steps and schedule, to which the List of Issues and the Amended Factors Document are attached. These documents also included a letter requesting specialist or expert information or knowledge in the possession of various Federal Authorities, pursuant to paragraph 20(a) of the CEAA 2012, and Filing Requirements for Trans Mountain. These documents, along with the associated cover letter, provided the Board's decisions on the matters for which it sought comments. The cover letter stated that the Board's reasons for its decisions would follow.

Attached to this letter are the Board's reasons for the decisions it reached in its 12 October 2018 letter and attachments.

Appendix 1 provides the Board's reasons to, on a principled basis, include Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit in the "designated project" to be assessed under the CEAA 2012.

Appendix 2 provides the Board's reasons with respect to the List of Issues, the Amended Factors Document, the design of the hearing process, and which government departments or bodies the Board will require information from during the hearing.

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

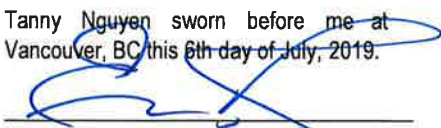
Yours truly,

Original signed by

Sheri Young
Secretary of the Board

Attachments

This is Exhibit M referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British Columbia

Appendix 1

These are the National Energy Board's (Board or NEB) reasons for its decision in its letter of 12 October 2018 to, on a principled basis, include Trans Mountain Expansion Project- (Project-) related marine shipping between the Westridge Marine Terminal (WMT) and the 12-nautical-mile territorial sea limit in the "designated project" to be assessed under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012).

Views of Trans Mountain Pipeline ULC (Trans Mountain)

Inclusion of Project-related marine shipping in the "designated project"

Trans Mountain said that the specific facts of this case, the application of the Canadian Environmental Assessment Agency's (CEA Agency) Guide to Preparing a Description of a Designated Project under the *Canadian Environmental Assessment Act, 2012* (CEA Agency Guidance)¹, and the need for certainty of process, can reasonably lead the Board to conclude that Project-related marine shipping is "incidental" to the Project and part of the "designated project" under the CEAA 2012.

Extent of Project-related marine shipping

Trans Mountain said that the "designated project" should include Project-related marine shipping between the WMT and the territorial sea limit. It said that Canada does not have jurisdiction over shipping beyond the territorial sea limit. Further, Trans Mountain's ability to impose and enforce requirements on tankers in Canada's 200 nautical mile exclusive economic zone (EEZ) is extremely limited. Trans Mountain pointed out that comparable environmental assessments (EAs) have included shipping to the territorial sea limit.

Trans Mountain also said that there are no established shipping lanes in the EEZ. An assessment of effects from routine shipping operations in the EEZ would be impractical and results would be subject to a high degree of inaccuracy, rendering the effort largely ineffectual. Trans Mountain said that the risk of marine shipping accidents is higher in coastal waters, and that an assessment of effects within the 12-nautical-mile territorial sea limit reasonably balances risk and value. It interpreted the Federal Court of Appeal's decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*,² as a confirmation that Trans Mountain's assessment of effects – which considered Project-related tanker traffic to the territorial sea limit – was adequate.

¹ (Updated March 2015), online: <<https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/guide-preparing-description-designated-project-under-canadian-environmental-assessment-act-2012.html>>.

² 2018 FCA 153 at para 770 [*Tsleil-Waututh Nation*].

Views of participants³

Inclusion of Project-related marine shipping in the “designated project”

Participants were in agreement that Project-related marine shipping should be included in the “designated project” to be assessed under the CEAA 2012. Arguments raised by the participants in support of this include the language in [Order in Council P.C. 2018-1177](#) (OIC), findings of the Federal Court of Appeal in *Tsleil-Waututh Nation*, the dictionary definition of “incidental,” the purposes of the CEAA 2012 and the *Species at Risk Act* (SARA), and the CEA Agency Guidance.

Extent of Project-related marine shipping

The Government of Canada and the Government of Alberta support including Project-related marine shipping up to the territorial sea limit. The Government of Alberta said that the Federal Court of Appeal specifically did not criticize the Board’s decision to limit its assessment of Project-related marine shipping to the 12-nautical-mile territorial sea limit, and that any reconsideration should be limited in scope. It said that the legislative scheme of the CEAA 2012 suggests that there must be a certain level of proximity connecting the incidental physical activities to the designated project itself.

Most participants said that Project-related marine shipping between the WMT and EEZ should be included in the “designated project.” Certain participants said that the assessment should extend beyond the EEZ. For example, BC Nature and Nature Canada said that the spatial limit of Project-related marine shipping should not be restricted, but, in the alternative, it should extend to the EEZ. Stk’emlupsemc te Secwepemc of the Secwepemc Nation also said that potential adverse effects of carbon and carbon equivalent emissions must be considered for the entire route of the marine tankers, from the WMT to the end destination terminal for the oil.

Many participants said that including the EEZ is consistent with the scheme and object of the CEAA 2012 and the intention of Parliament. In particular, a broader assessment is supported by the purposes of the CEAA 2012 to protect components of the environment that are within the legislative authority of Parliament and to consider designated projects in a careful and precautionary manner. Some participants also referenced the purpose of the SARA to prevent wildlife species from being extirpated or becoming extinct and to provide for the recovery of wildlife species. Other participants noted that the definition of “environmental effects” in the CEAA 2012 mentions “components of the environment that are within the legislative authority of Parliament” and includes effects on federal lands (which includes the EEZ) and outside Canada. Many participants also relied on the plain meaning of “designated project” and “incidental.” Some submitted that the reference to “federal lands” in the definition of “designated project” is relevant to determining the scope of what is “incidental.” However, other participants had a differing interpretation and said that incidental activities are not restricted to the boundary of Canada or the EEZ.

³ For the purposes of this document, the term “participants” includes intervenors and interested members of the public that filed comments relevant to the issues discussed in these reasons.

Many participants said that Parliament has legislative authority within the EEZ. Some participants pointed to Canada's sovereign rights for conserving and managing living resources within the EEZ and its jurisdiction over the protection and preservation of the marine environment within the EEZ under the *United Nations Convention on the Law of the Sea* and the *Oceans Act*. In addition to the CEAA 2012, participants provided other examples of Parliament's authority in the EEZ including the SARA; *Canada Shipping Act, 2001*; *Canadian Environmental Protection Act, 1999*; *Fisheries Act*; *Migratory Birds Convention Act, 1994*; and *Constitution Act, 1867*. The Washington Department of Ecology also provided some examples from the United States.

Some participants said that the CEA Agency's five criteria regarding "incidental" physical activities make no distinction with respect to where activities occur. Participants said that the Federal Court of Appeal's findings regarding these criteria apply equally to Project-related marine shipping within Canada's territorial sea, the EEZ, and beyond.

Several Indigenous groups said that extending the designated project to the outer boundary of the EEZ is necessary to ensure impacts on their Treaty rights and the environment within their traditional territories are thoroughly assessed and adequately accommodated. Pacheedaht First Nation said that Swiftsure Bank is a critical fishing area that appears to be partially outside of the territorial sea limit.

Many participants expressed concerns about potential effects on wildlife and species at risk, including the Southern resident killer whale, which use the spatial area beyond the territorial sea limit or have critical habitat in the EEZ. Some participants said that large marine spills within the EEZ can occur, which could impact wildlife throughout the EEZ and territorial sea. Participants said that the effects of an oil spill within the territorial sea could be felt well beyond that zone, into the EEZ itself. Living Oceans Society and Raincoast Conservation Foundation said that the Board should request up-to-date information from Fisheries and Oceans Canada about fisheries activities, and the extent of the range and habitats of species at risk within the EEZ.

Some participants said that limiting the assessment of Project-related marine shipping to the territorial sea limit would hinder the Board's ability to adequately collect the information and conduct the assessment necessary for the Governor in Council (GIC) to properly make a final determination.

Views of the Board

1. Introduction

In accordance with paragraph (a) of the OIC, and paragraph 770 of the Federal Court of Appeal's decision in *Tsleil-Waututh Nation*, the Board must reconsider, on a principled basis, whether Project-related marine shipping should be included in the "designated project" to be assessed under the CEAA 2012.⁴ This issue turns on whether Project-related marine shipping is a "physical activity that is incidental" to the pipeline component of the Project, as that phrase is

⁴ *Supra* note 2.

used in section 2 of the CEAA 2012.⁵ The Court stated that “[t]his is not a pure issue of statutory interpretation. Rather, it is a mixed question of fact and law heavily suffused by evidence.”⁶

If Project-related marine shipping is to be included as part of the defined designated project, a subsidiary question arises as to the geographic extent of Project-related marine shipping. Neither *Tsleil-Waututh Nation*, nor the OIC, expressly define “Project-related marine shipping” and, in particular, its geographic extent. In the Board’s [OH-001-2014 Report](#), it assessed, under the *National Energy Board Act*, the environmental effects of Project-related marine shipping to the territorial sea limit, using a similar approach to the EA conducted under the CEAA 2012 for the pipeline component to the extent appropriate.⁷ The study areas applied by the Board to carry out its assessment centered around established inbound and outbound shipping lanes.⁸

2. Executive summary

The Project includes a new onshore pipeline longer than 40 kilometres and is, therefore, a “designated project” subject to an EA by the Board under the CEAA 2012. Subsection 2(1) of the CEAA 2012 defines “designated project” as including any “incidental” physical activity.

First, the Board must determine whether Project-related marine shipping should be included in the “designated project.” When the OIC is considered in combination with the views of the Federal Court of Appeal in *Tsleil-Waututh Nation*, it strongly suggests that Project-related marine shipping should be included in the “designated project.”

The Board finds that the statutory scheme of the CEAA 2012 also supports the conclusion that Project-related marine shipping should be included in the “designated project.” The term “incidental” is not defined in the CEAA 2012. However, in the Board’s view, the additional tanker loads at the WMT are tied to and dependent on the pipeline component of the Project. Further, the purposes of the CEAA 2012 include the protection of the components of the environment within the legislative authority of Parliament from significant adverse environmental effects, and ensuring that designated projects are considered in a careful and precautionary manner. The inclusion of Project-related marine shipping will provide the GIC with a more fulsome understanding of the potential environmental effects of this marine shipping, and how those effects can be mitigated to reduce or avoid environmental harm.

The Board finds that the CEA Agency’s criteria are not decisive, but viewed together with *Tsleil-Waututh Nation*, the OIC, and the statutory scheme, the criteria support the inclusion of Project-related marine shipping in the “designated project.”

⁵ *Ibid* at para 391.

⁶ *Ibid* at para 391.

⁷ National Energy Board, *Trans Mountain Expansion Project* - OH-001-2014 (May 2016) online: NEB <<https://apps.neb-one.gc.ca/REGDOCS/File/Download/2969681>> at 332 [*OH-001-2014 Report*].

⁸ *Ibid*. The spatial boundaries (or study areas) for the Board’s assessment of Project-related marine shipping are described in Appendix 11 of the OH-001-2014 Report.

Secondly, having reached the conclusion that Project-related marine shipping is “incidental” to the “designated project,” the Board must determine the appropriate geographic extent of Project-related marine shipping.

The Board is of the view that that geographic extent should not be so broad as to frustrate the CEAA 2012’s purpose of timely EAs, or to produce results that are not useful in protecting the environment and reducing harm. The Board is of the view that the CEA Agency Guidance provides limited clarity with respect to the appropriate geographic extent of Project-related marine shipping. However, relevant case law suggests that the word “incidental” should be interpreted to require a “certain level of proximity as well as possibly a causal connection between activities and the designated project.”⁹ The Board is not persuaded that a sufficient “level of proximity” exists once the tankers exit the territorial sea.

A key fact that the Board must consider in conducting any EA is the geographical extent of the project, and the spatial boundaries within which that project is expected to have potential effects on the selected valued components. In order to define the spatial boundaries, knowing the project location or route is fundamental.

There is a marked and material difference between marine shipping within the territorial sea limit and the EEZ. Given that there are no defined shipping lanes in the EEZ – a vast area of ocean – no shipping “route” for the Project can be identified with any degree of certainty. Destinations can vary from Washington State, California, or Asia. The lack of a certain route means, in turn, that appropriate spatial boundaries cannot be identified with certainty. It is not possible to predict the project-environment interactions and the full impacts of that project, nor can one adequately evaluate technically and economically feasible mitigation as required by the CEAA 2012.¹⁰ It would produce speculative, as opposed to meaningful, information about project impacts. Such an EA would not be useful as a planning and decision-making tool for the GIC.

The Board assessed Project-related marine shipping to the territorial sea limit in its OH-001-2014 Report. The Board finds it compelling that the Federal Court of Appeal, in *Tsleil-Waututh Nation*, did not raise concerns with this geographic scope, and was able to conclude, among other things, that “[g]iven the Board’s approach to the assessment and its findings, the Board’s report was adequate for the purpose of informing the GIC about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups.”¹¹

Several other EAs carried out under the CEAA 2012 have included consideration of project-related marine shipping; however, only to a maximum geographical extent of the territorial sea limit.¹² It is telling that other expert tribunals have consistently limited the assessment of project-related marine shipping to the territorial sea limit or to a lesser limit.

⁹ *Canada (Canadian Environmental Assessment Agency) v Taseko Mines Limited*, 2018 BCSC 1034 at para 66 [Taseko].

¹⁰ For example, the CEAA 2012, s 19(1)(a), (b) & (d).

¹¹ *Supra* note 2 at para 439.

¹² See Section 4.4 of these reasons for specific project information.

These other EAs solidify the Board's view that incremental marine shipping within the EEZ is not "incidental" and should not be included in the "designated project."

The Board has considered the applicable statutory scheme, the Federal Court of Appeal's decision in *Tsleil-Waututh Nation*, the OIC, case law, the CEA Agency Guidance, and practical EA considerations. The Board has applied all of this to the specific facts in this case and has concluded that Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit is "incidental" to the pipeline component of the Project.

The Board's full reasons are below.

3. Overview of relevant facts

3.1 Project facts

The proposed Project would result in the looping (or twinning) of the existing 1,147-kilometre-long Trans Mountain Pipeline system between Edmonton, Alberta and Burnaby, British Columbia, increasing the system's capacity from 300,000 bbl/d to 890,000 bbl/d of crude petroleum and refined products.¹³ Up to 71 per cent (630,000 bbl/d) of that capacity could be loaded onto tankers at the WMT for transport to Pacific Rim destinations, such as Washington State, California, and Asia.¹⁴

Trans Mountain would not own or operate the tankers loaded at the WMT.¹⁵ However, Trans Mountain's Tanker Acceptance Standard would prevent any tanker not approved by it from loading at the WMT.¹⁶ The existing WMT loads approximately five tankers per month. The expanded system associated with the Project would increase the WMT's loads to approximately 34 Aframax tankers per month, with actual demand driven by market conditions.¹⁷ The whole sailing route from the WMT to the Juliet Buoy outside the Strait of Juan de Fuca (in the vicinity of the territorial sea limit) has a Traffic Separation Scheme that encompasses inbound and outbound shipping lanes.¹⁸ Figure 1 below shows the inbound and outbound shipping lanes for Project-related marine shipping within the territorial sea.

¹³ *Supra* note 7 at 1-2.

¹⁴ *Ibid* at 298.

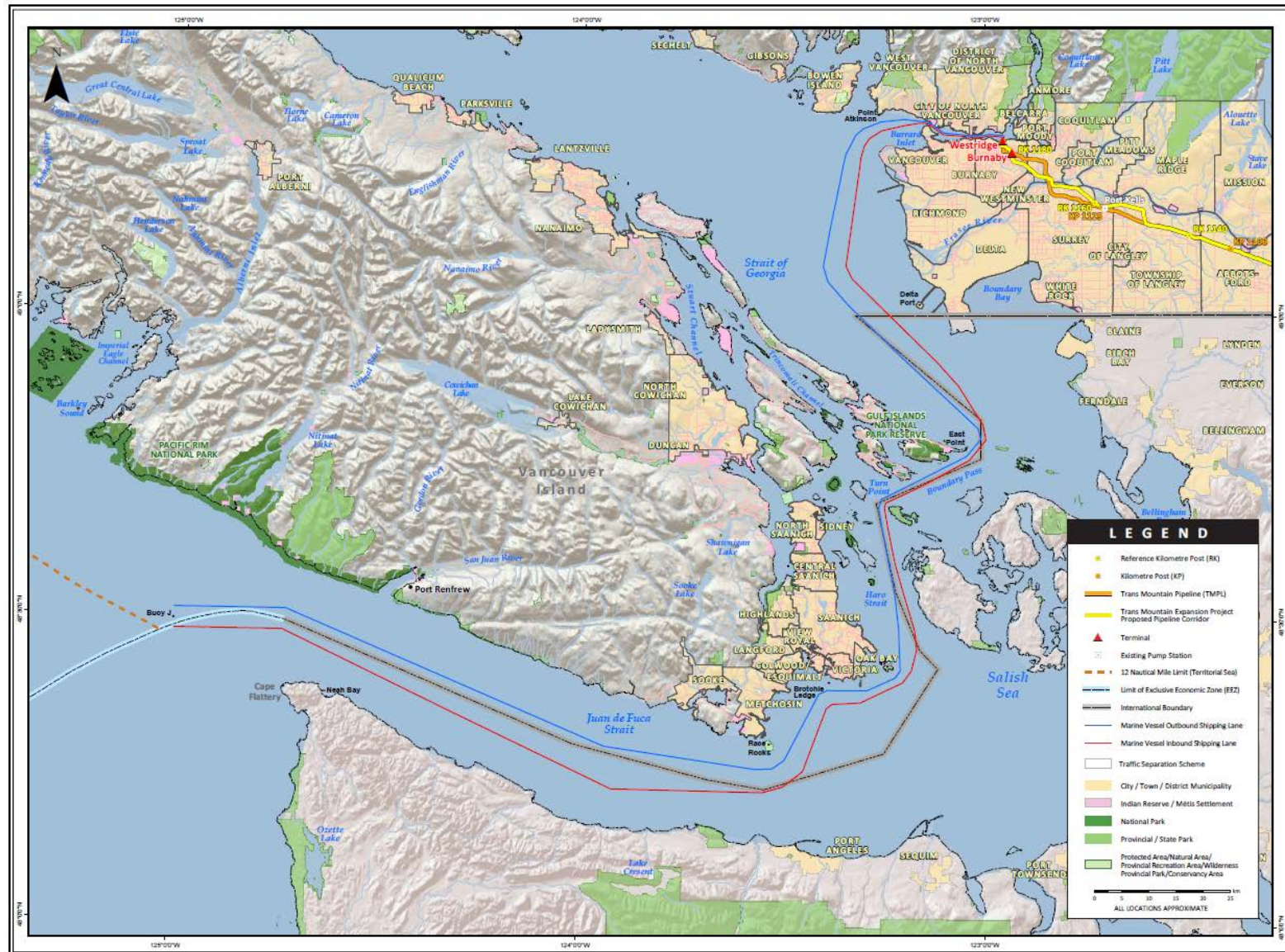
¹⁵ *Ibid* at 324.

¹⁶ *Ibid* at 369 and Transport Canada, TERMPOL Review Process Report on the Trans Mountain Expansion Project, Exhibit C353-4-3 at 34, online: <<https://docs2.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2584073&objaction=download&viewType=1>>.

¹⁷ *Ibid* OH-001-2014 Report at 327.

¹⁸ Trans Mountain, [Trans Mountain Expansion Project Volume 8C Part 2, Exhibit B21-1](#) at 10.

Figure 1 – Inbound and outbound shipping lanes for Project-related marine shipping within the territorial sea



3.2 Regulatory framework

The territorial sea begins at the baseline (low-water mark) and extends 12 nautical miles into the ocean.¹⁹ The territorial sea is part of Canada, and is subject to a broad and detailed Canadian regulatory framework governing safety, security, and environmental protection in relation to marine shipping.²⁰ For example, parts of the *Canada Shipping Act, 2001* relating to personnel, safety, incidents, accidents and casualties, and navigation apply to Canadian vessels everywhere and in respect of foreign vessels in Canadian waters.²¹ Canadian waters means the territorial sea of Canada and all internal waters of Canada;²² it does not include the EEZ. Furthermore, the *Canada Shipping Act, 2001* allows for the establishment of vessel traffic service zones, which can involve traffic separation schemes and shipping lanes, within Canadian waters.²³ Under the *Pilotage Act*, the regions which the pilotage authorities operate are all within Canadian waters.²⁴ Another example is the *Marine Transportation Security Act*, which applies to vessels and marine facilities in Canada and Canadian ships outside Canada.²⁵

Transport Canada has primary responsibility for regulating marine vessels, including shipping lanes and marine traffic safety measures. Several other government agencies, including the Vancouver Fraser Port Authority, Pacific Pilotage Authority, and the Canadian Coast Guard, also impose legal and regulatory requirements in the territorial sea.

Beyond the territorial sea limit is Canada's EEZ. The EEZ is a creation of the *United Nations Convention on the Law of the Sea* (UNCLOS), now reflected in Canadian domestic law, and extends to 200 nautical miles from the baseline.²⁶ Under the *Oceans Act*, Canada has limited rights and jurisdiction within the EEZ that are generally related to "managing the natural resources, whether living or non-living" and the "protection and preservation of the marine environment."²⁷ These rights are not unqualified, and must be exercised in a manner consistent with generally accepted international rules and standards. Furthermore, there are no established shipping lanes within the EEZ.

Examples of Canada's authority within the EEZ include pollution prevention and pollution response under the *Canada Shipping Act, 2001*.²⁸ Similarly, prohibitions and requirements relating to disposal at sea under the *Canadian Environmental Protection Act, 1999* apply to the EEZ.²⁹ The EEZ is also referenced in the SARA in the context of emergency orders and

¹⁹ *Oceans Act*, s 4.

²⁰ See Section 14.2 of the Board's OH-001-2014 Report for a description of the regulatory framework.

²¹ See Parts 1, 3, 4, and 6; *Navigation Safety Regulations*.

²² *Interpretation Act*, s 35(1).

²³ *Canada Shipping Act, 2001*, ss 125-127 & 136(1)(a)-(d) and *Vessel Traffic Services Zones Regulations*.

²⁴ Ss 2, 18 & schedule.

²⁵ s 4. Under subsection 35(1) of the *Interpretation Act*, Canada includes the internal waters of Canada and the territorial sea of Canada.

²⁶ *Oceans Act*, s.13.

²⁷ s 14.

²⁸ Parts 8 & 9 and *Ballast Water Control and Management Regulations*.

²⁹ Part 7, Division 3.

prohibition regarding the destruction of critical habitat.³⁰ The CEAA 2012 refers to the EEZ in its definition of “federal lands,” which is discussed in more detail below.

4. Analysis

Since the Project includes a new onshore pipeline longer than 40 kilometres in length, it is a “designated project” subject to an EA by the Board under the CEAA 2012.³¹ Subsection 2(1) of the CEAA 2012 defines “designated project” as including any “incidental” physical activity.

The Board must determine whether Project-related marine shipping is a physical activity that is “incidental” to the pipeline component of the Project. If Project-related marine shipping is to be included as part of the defined “designated project,” the Board must also determine the geographic scope and extent of marine shipping.

“Incidental” is not defined in the CEAA 2012. The interpretation of that term must be based on the modern principle of statutory interpretation, which requires that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, and the intention of Parliament.³²

Also relevant to the analysis is the Federal Court of Appeal’s decision in *Tsleil-Waututh Nation*, the OIC, case law, the CEA Agency Guidance, and EA considerations.

4.1 *Tsleil-Waututh Nation* and the OIC

The Federal Court of Appeal, in *Tsleil-Waututh Nation*, indicated that “marine shipping is, at the least, an element that accompanies the Project.”³³ The Court went on to say that the Board’s view that it was required to have regulatory authority over shipping in order to include marine shipping as part of the Project is inconsistent with the purposes of the CEAA 2012 and impermissibly restrictive.³⁴ The Court stated that “[t]he Board’s reasons do not well-explain its scoping decision, do not grapple with the relevant criteria, and appear to be based on a rationale that is not supported by the statutory scheme.”³⁵

Accordingly, the resulting OIC:

- (b) directs that the Board conduct the reconsideration taking into account the following factors:
 - (i) the environmental effects of Project-related marine shipping in view of the requirements of the CEAA 2012, and

³⁰ Ss 58(1)(a) & 80.

³¹ *Regulations Designating Physical Activities*, s 46.

³² *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 at para 21.

³³ *Supra* note 2 at para 396.

³⁴ *Ibid* at para 402.

³⁵ *Ibid* at para 409.

- (ii) the adverse effects of Project-related maritime shipping on species at risk, including the Northeast Pacific southern resident killer whale population, and their critical habitat, in view of any requirements of section 79 of the SARA that may apply to the Project;

The OIC, in combination with the views of the Federal Court of Appeal in *Tsleil-Waututh Nation*, strongly suggest that Project-related marine shipping should be included in the “designated project.” However, under the CEAA 2012, the Board is the responsible authority with respect to the designated project, and must ensure an EA of the designated project is conducted.³⁶ As a result, the Board must conduct a principled analysis of this issue. The OIC also instructs the Board to address paragraph 770 of *Tsleil-Waututh Nation*, which requires such an analysis.

The Board must also determine the geographic extent of the marine shipping to be included in the “designated project.” The OIC and *Tsleil-Waututh Nation* do not give express instruction on this point. However, the Board notes that Project-related marine shipping was assessed to the territorial sea limit in its OH-001-2014 Report. The Board finds it compelling that the Federal Court of Appeal did not raise concerns with this geographic scope, and was able to conclude, among other things, that, “[g]iven the Board’s approach to the assessment and its findings, the Board’s report was adequate for the purpose of informing the GIC about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups.”³⁷ This conclusion of the Court was also referenced in the GIC’s [explanatory note](#) to the OIC.³⁸

4.2 Statutory interpretation

Environmental legislation, such as the CEAA 2012, should be given a generous interpretation to allow effective response to environmental harm, in keeping with the precautionary principle and the role of EA as a planning tool.³⁹

In their comments, several participants pointed to the fact that the definition of “designated project” in subsection 2(1) of the CEAA 2012 makes reference, in paragraph (a), to physical activities that are carried out “on federal lands.”

designated project means one or more physical activities that

- (a) are carried out in Canada or **on federal lands**;
- (b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and
- (c) are linked to the same federal authority as specified in those regulations or that order.

³⁶ CEAA 2012 s 15(1)(b) & 22.

³⁷ *Supra* note 2 at para 439.

³⁸ Canada Gazette Part I, Vol 152, No 39 (29 Sept 2018) at 3279.

³⁹ *Taseko*, *supra* note 9 at para 38 citing *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 71 and *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 at paras 9, 20.

It includes any physical activity that is **incidental** to those physical activities [emphasis added].

federal lands means

- (a) lands that belong to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above those lands...;
- (b) the following lands and areas:
 - (i) the internal waters of Canada, in any area of the sea not within a province,
 - (ii) the territorial sea of Canada, in any area of the sea not within a province,
 - (iii) the ***exclusive economic zone of Canada***, and
 - (iv) the continental shelf of Canada... [Emphasis added]

Some participants said that this means that Project-related marine shipping in the EEZ should be included in the scope of the “designated project.” Other participants submitted that the reference to federal lands in paragraph (a) of the definition only applies to the primary project activities (in this case, the pipeline), and not those that are “incidental” to them. For example, the Federation of BC Naturalists and Nature Canada commented as follows:⁴⁰

This definition distinguishes between two types of physical activities. The first type encompasses those physical activities that meet the three criteria under the definition. Particularly, such physical activities must be “carried out in Canada or on federal lands.” These physical activities form the core of the designated project. The second type consists of incidental activities, which are defined as “any physical activity that is incidental *to those physical activities*.” The words “*to those physical activities*” refer to those physical activities that meet the three criteria and form the core of the designated project. None of the three criteria applicable to the core physical activities applies to incidental activities.

The CEAA 2012 clearly allows for the possibility that a “designated project” *could* take place in the EEZ and be subject to an EA. Certain offshore drilling projects are an obvious example.⁴¹ However, there appears to be a degree of ambiguity in the definition of “designated project” with respect to what is “incidental.” Therefore, the Board’s analysis must look beyond the definition of “designated project.”

Some participants referred the Board to the fact that paragraph 5(1)(b) of the CEAA 2012 requires that the “environmental effects” to be taken into account in an EA include changes to the environment that are on federal lands (which is defined as including the EEZ), as well as outside Canada:

⁴⁰ Comments of BC Nature and Nature Canada on the spatial limit of Project-related marine shipping (9 October 2018) at pp 2-3. Living Oceans Society and Raincoast Conservation Foundation made a similar argument.

⁴¹ *Regulations Designating Physical Activities*, ss 40-42.

- 5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are...
- (b) a change that may be caused to the environment that would occur
- (i) on federal lands...or
- (iii) outside Canada;

The Board is not questioning that environmental *effects* of a “designated project” can extend outside of Canada, including in the EEZ. However, this does not address the issue of the geographical extent of the “*designated project*” *itself*, including its incidental activities.

In looking at the CEAA 2012 as a whole, the Board finds its purposes to be instructive. These purposes include the protection of the components of the environment within the legislative authority of Parliament from significant adverse environmental effects, ensuring that designated projects are considered in a careful and precautionary manner, and ensuring EAs are completed in a timely manner.⁴² Additionally, responsible authorities must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle, in the administration of the CEAA 2012.⁴³

The Board is of the view that the purposes of the CEAA 2012 support the conclusion that Project-related marine shipping is “incidental” to the pipeline, and included in the “designated project.” The inclusion of Project-related marine shipping will provide the GIC with a more fulsome understanding of the potential environmental effects of this marine shipping, and how those effects can be mitigated to reduce or avoid environmental harm. However, the Board also notes that the extent of what is “incidental” should not be too broad as to frustrate the other the CEAA 2012 purpose of timely EAs. The other limitation of an overly broad assessment is that results may not be useful in protecting the environment and reducing harm.

In the specific context of the CEAA 2012, the term “incidental” has been judicially considered by the Supreme Court of British Columbia in *Canada (Canadian Environmental Assessment Agency) v. Taseko Mines Limited*. The Court noted that the word “incidental” has been judicially construed to mean “occurring or liable to occur in fortuitous or subordinate conjunction with something else.”⁴⁴ The Court also referred to the *Shorter Oxford English Dictionary* definition of “incidental” as “liable to happen,” “naturally attaching to,” “occurring as something causal or of secondary importance,” and “following upon as a subsequent circumstance.”⁴⁵

The Court was “not persuaded that the word ‘incidental’ should be interpreted to include all physical activities that are in subordinate conjunction with and or consequent upon” the project. The Court concluded that the “above definitions, read within the scheme of the CEAA 2012, support that “incidental” requires a **certain level of proximity** as well as possibly causal connection between activities and the designated project” [emphasis added].⁴⁶

⁴² CEAA 2012 at s 4(1).

⁴³ *Ibid* at s 4(2).

⁴⁴ *Taseko*, *supra* note 9 at para 65.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at para 66.

Tsleil-Waututh Nation notes that the primary purpose of the Project is “to provide additional transportation capacity for crude oil from Alberta to markets in the Pacific Rim.”⁴⁷ In the Board’s view, the addition of up to approximately 29 tanker loads from the WMT is tied to and dependent on the pipeline component of the Project. This supports an interpretation of “incidental” that includes Project-related marine shipping. The Board also finds that the “level of proximity” identified by the Federal Court of Appeal is an important consideration in determining the geographic extent of Project-related marine shipping. Based on the analysis below, the Board is not persuaded that a sufficient level of proximity exists once the tankers exit the territorial sea.

4.3 CEA Agency Guidance

The interpretation of the term “incidental” can be assisted by reference to the CEA Agency Guidance. While such guidance documents are not legally binding nor determinative, they can assist in understanding the meaning of “incidental.” The CEA Agency Guidance provides a set of five criteria relevant to the question of whether certain activities should be considered “incidental” to a project:

- i. *The nature of the proposed activities and whether they are subordinate or complementary to the designated project*

The additional tanker loads at the WMT are tied to and dependent on the pipeline component of the Project. Accordingly, the Board finds that marine shipping is subordinate and complimentary to the pipeline. This criterion points towards marine shipping being incidental.

- ii. *Whether the activity is within the care and control of the proponent*

Marine shipping is undertaken by third parties, not Trans Mountain. Shipping cannot, therefore, be said to be within the care or ultimate control of Trans Mountain. This points against marine shipping being incidental.

- iii. *If the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to “direct or influence” the carrying out of the activity*

With respect to this criterion, in *Tsleil-Waututh Nation* the Court noted:

In this regard, Trans Mountain stated...that while it did not own or operate the vessels calling at the Westridge Marine Terminal, “it is an active member in the maritime community and works with BC maritime agencies to promote best practices and facilitate improvements to ensure the safety and efficiency of tanker traffic in the Salish Sea.” Trans Mountain also referenced its Tanker Acceptance Standard whereby it can prevent any tanker not approved by it from loading at the Westridge Marine Terminal. The Board

⁴⁷ *Supra* note 2 at para 395.

recognized Trans Mountain's ability to give directions to tanker operators in Conditions 133, 134 and 144...⁴⁸

However, the Board notes that pipeline shippers own the product shipped on the Trans Mountain Pipeline system and the shippers are responsible for chartering tankers to transport the product that arrives at the WMT. Pipeline shippers have their own screening and selection process to ensure that tankers calling on the WMT meet international regulations and Trans Mountain's Tanker Acceptance Standard. It is also the pipeline shipper that arranges for a local shipping agent to assist the vessel with local logistical and regulatory requirements.⁴⁹

The Board accepts that Trans Mountain does have the ability to direct or influence the carrying out of *some* aspects of marine shipping, primarily through its Tanker Acceptance Standard. Some requirements of the Tanker Acceptance Standard only apply within the territorial sea,⁵⁰ while a couple of requirements also apply in the EEZ.⁵¹ However, this is far from the level of direction Trans Mountain exerts over the pipeline component of the Project (for example, the ability to direct the shutdown of the pipeline, at any point in time, in the event of a safety concern). Once a tanker leaves the WMT, Trans Mountain's ability to enforce any requirements is very minimal.

This criterion is inconclusive in terms of marine shipping being incidental within the territorial sea and slightly leans against being incidental outside of the territorial sea.

iv. Whether the activity is solely for the benefit of the proponent or is available for other proponents as well

The oil delivered to the WMT is not owned by Trans Mountain, but by a variety of shippers. In this sense, the marine shipping benefits other proponents (i.e., oil producers in Western Canada).

At the same time, there are no other pipelines or sources that deliver oil to the WMT for the purpose of export.

The Board finds this criterion to be equivocal, but is slightly persuaded that it leans towards marine shipping being incidental.

v. The federal and/or provincial regulatory requirements for the activity

⁴⁸ *Supra* note 2 at para 405 & 406.

⁴⁹ *Supra* note 7 at 369.

⁵⁰ For example, section 4.8.1 of the Tanker Acceptance Standard states that "all vessels shall conduct operations within Canada, specifically PMV [Port Metro Vancouver], in accordance with any additional guidance provided by the Terminal." Section 4.8.3 states that the "vessel shall always navigate within the designated marine traffic corridors and comply with relevant rules of the Pacific Pilotage Authority and Port Metro Vancouver."

⁵¹ Section 4.8.4 of the Tanker Acceptance Standard states that "a vessel planning to depart Canada via the Juan de Fuca Straits shall agree that, upon exiting the Juan de Fuca Straits, it will steer a course no more northerly than due West (270°) till the vessel is outside Canadian EEZ". Section 4.8.5 states that "the Terminal may monitor the vessel's position from the time her nomination to load is accepted until she leaves the Canadian EEZ."

The Board does not have the legislative mandate to regulate marine shipping. Parliament, however, does have such authority, and its control over marine shipping is more extensive than Trans Mountain's. Within the territorial sea, save for the exception of allowing for the right of innocent passage, Canada exercises full authority over marine shipping through a comprehensive legal and regulatory regime addressing safety, security, and environmental protection. This includes confinement of marine traffic to shipping lanes.

Beyond the territorial sea, Parliament's authority is materially reduced. Parliament does not have the ability to regulate shipping traffic in the EEZ beyond what is consistent with international rules and standards, and there are no established shipping lanes in this area.

This criterion points towards marine shipping being incidental within the territorial sea, but slightly leans against being incidental outside of the territorial sea.

Conclusion

The Board finds that the criteria do not decisively favor one side, but, when viewed together with *Tsleil-Waututh Nation*, the OIC, and the statutory scheme, the criteria support a finding that Project-related marine shipping is "incidental" and included in the "designated project." Criteria i), iv), and v) point towards marine shipping being incidental, Criterion ii) does not, and Criterion iii) is inconclusive.

The Board is also of the view that this guidance provides limited clarity with respect to the appropriate geographic extent of Project-related marine shipping. However, the circumstances of Criteria iii) and v) change with distance and slightly lean against incremental marine shipping being incidental outside of the territorial sea.

4.4 EA considerations

As noted above, the determination of whether Project-related marine shipping is incidental to the pipeline is "a mixed question of fact and law heavily suffused by evidence."⁵² A key fact that the Board must consider in conducting any EA is the geographical extent of the project, and the spatial boundaries within which that project is expected to have potential effects on the selected valued components. There are usually several scales of spatial boundaries that are relevant to an assessment. Typically, the scale ranges from the project footprint to the regional study area. Well-defined spatial boundaries result in useful and meaningful data regarding project effects.

In order to define the spatial boundaries, knowing the project location or route is fundamental. The CEA Agency Guidance requires proponents to provide the project location, identify project-environment interactions, and describe the potential effects of the project.⁵³

The Board accepts that all project EAs involve some level of uncertainty and the outcomes when a project is built can differ, to some degree, from the predictions made in the EA. However, given that there are no defined shipping lanes in the EEZ – a vast area of ocean – no shipping

⁵² Supra note 2 at para 391.

⁵³ Supra note 1.

“route” for the Project can be identified with any degree of certainty. Even if tankers exiting the Juan de Fuca Straight are assumed to take the most direct route out of the EEZ, the routes and speeds of incoming and outgoing vessels in the EEZ are still uncertain given that destinations can vary from Washington State, California, or Asia.

The lack of a certain route means, in turn, that appropriate spatial boundaries cannot be identified. It is not possible to predict the project-environment interactions and the full impacts of that project, nor can one adequately evaluate technically and economically feasible mitigation as required by the CEAA 2012.⁵⁴ Attempting to conduct an EA in the EEZ would be akin to conducting an EA for a pipeline without knowing the proposed path or corridor for that pipeline. It would produce speculative, as opposed to meaningful, information about project impacts and, accordingly, would not be useful as a planning and decision-making tool for the GIC. No participant adequately explained to the Board how an EA could be carried out in a meaningful way in the EEZ in the circumstances where the route of the tankers is uncertain. This is a marked and material difference from marine shipping within the territorial sea limit. As noted previously, the Board’s study areas for its original assessment of Project-related marine shipping centered around established inbound and outbound shipping lanes.

Several other EAs carried out under the CEAA 2012 have included consideration of project-related marine shipping; however, only to a maximum geographical extent of the territorial sea limit. Most only considered shipping to a pilotage station (which is within the territorial sea) or closer to shore.

Project	Spatial boundary for project-related marine shipping assessment
Roberts Bank Terminal 2 Project	Marine traffic within the Port Metro Vancouver area only ⁵⁵
Enbridge Northern Gateway Project	Up to the 12-nautical-mile territorial sea limit ⁵⁶
Wespac Tilbury Marine Jetty Project	Up to the pilotage station ⁵⁷
Pacific NorthWest LNG Project	Up to Triple Island pilotage station ⁵⁸
LNG Canada Export Terminal Project	Up to Triple Island pilotage station ⁵⁹

⁵⁴ For example, the CEAA 2012, s 19(1)(a), (b) & (d).

⁵⁵ CEA Agency, [Updated Guidelines for the Preparation of an Environmental Impact Statement for the Roberts Bank Terminal 2 Project](https://www.ceaa-gc.ca/050/documents/p80054/101303E.pdf), cover note, section 17.1.2 (17 April 2015) at 36, online: CEAA <<https://www.ceaa-gc.ca/050/documents/p80054/101303E.pdf>>.

⁵⁶ Canada, National Energy Board, [Considerations – Report of the Joint Review Panel for the Enbridge Northern Gateway Project](https://www.ceaa-gc.ca/050/documents/p21799/80935E.pdf), vol 2, section 8.6.1 (December 2013) at 182, online: NEB <<https://apps.nerb.gc.ca/REGDOCS/File/Download/2396478>>. <https://www.ceaa-gc.ca/050/documents/p21799/80935E.pdf>

⁵⁷ CEA Agency, [Notice of Commencement of an Environmental Assessment and Substitution Approval](https://www.ceaa-gc.ca/050/evaluations/document/101960?culture=en-CA) (10 July 2015), online: CEAA <<https://www.ceaa-gc.ca/050/evaluations/document/101960?culture=en-CA>>.

⁵⁸ Canadian Environmental Assessment Agency, [Pacific NorthWest LNG Project - Environmental Assessment Report](https://www.ceaa-gc.ca/050/documents/p80032/115668E.pdf), appendix 11.1 (September 2016) at 181, online: CEAA <<https://www.ceaa-gc.ca/050/documents/p80032/115668E.pdf>>.

⁵⁹ BC Environmental Assessment Office, [LNG Canada Export Terminal Project Assessment Report](https://www.ceaa-gc.ca/050/documents/p80038/101852E.pdf), section 5.6.1 (6 May 2015) at 86, online: CEAA <<https://www.ceaa-gc.ca/050/documents/p80038/101852E.pdf>>.

Project	Spatial boundary for project-related marine shipping assessment
Prince Rupert LNG Project	Up to Triple Island pilotage station ⁶⁰
Woodfibre LNG Project	Howe Sound ⁶¹
Marine Terminal Project on the North Shore of the Saguenay	Downstream as far as the mouth of the Saguenay river ⁶²
Saguenay Energy Project – Liquefied Natural Gas Export Terminal	As far as the mouth of the Saguenay river ⁶³
Port of Quebec Deep-Water Multipurpose Wharf Project – Beauport 2020	Within the Port of Quebec area ⁶⁴

The above EAs were all conducted by the CEA Agency or the BC Environmental Assessment Office as permitted by Canada’s Minister of the Environment under a substitution decision. Specific reasons for these scoping decisions were generally not given, with the exception of Pacific Northwest LNG:

The spatial scope of assessment of marine shipping for the Project was determined based on consideration of the potential environmental effects, care and control by the proponent as it pertains to the Agency’s ability to establish enforceable conditions, and comparable scoping to other LNG Project EAs.⁶⁵

⁶⁰ CEA Agency, [Environmental Impact Statement Guidelines for the Prince Rupert LNG Project](https://www.ceaa-acee.gc.ca/050/documents/p80042/93670E.pdf) (20 August 2013) at 12, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80042/93670E.pdf>>.

⁶¹ BC Environmental Assessment Office, [Woodfibre LNG Project Assessment Report](https://projects.eao.gov.bc.ca/api/document/58869291e036fb01057690bc/fetch), section 7.3.1 (19 August 2015) at 145, online: BCEAO <<https://projects.eao.gov.bc.ca/api/document/58869291e036fb01057690bc/fetch>>.

⁶² CEA Agency, [Guidelines for the Preparation of an Environmental Impact Statement – Marine Terminal Project on the North Shore of the Saguenay](https://www.ceaa-acee.gc.ca/050/documents/p80103/102207E.pdf), section 9.2 (21 August 2015) at 32, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80103/102207E.pdf>>. Note that the mouth of the Saguenay river is not as far as the Les Escoumins pilot station or territorial sea limit.

⁶³ CEA Agency, [Guidelines for the Preparation of an Environmental Impact Statement – Saguenay Energy Project Liquefied Natural Gas Export Terminal](https://www.ceaa-acee.gc.ca/050/documents/p80115/108257E.pdf), section 9.2 (14 March 2016) at 37, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80115/108257E.pdf>>.

⁶⁴ CEA Agency, [Guidelines for the Preparation of an Environmental Impact Statement – Port of Quebec Deep-Water Multipurpose Project – Beauport 2020](https://www.ceaa-acee.gc.ca/050/documents/p80107/103179E.pdf), section 3.1 (16 October 2015) at 3, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80107/103179E.pdf>>.

⁶⁵ *Supra* note 58 at 169. Reasons for scoping marine shipping well within the territorial sea limit were also provided in the [Marine Terminal Project on the North Shore of the Saguenay – Environmental Assessment Report](https://www.ceaa-acee.gc.ca/050/documents/p80103/125802E.pdf) (October 2018) at 6, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80103/125802E.pdf>>. The Board did not rely on this EA report as it was released after the Board’s 12 October 2018 decision, but is referencing it for completeness on this topic. The CEA Agency concluded that marine shipping that would occur outside the Saguenay Port Authority’s area of jurisdiction is not an incidental physical activity and therefore is not part of the designated project: “Although shipping outside the proponent’s area of jurisdiction is still an activity that is complementary to the Project, shipping outside the area of jurisdiction is not within the care and control of the proponent and the degree of influence that the proponent could exert on the third parties shipping outside its area of jurisdiction is not sufficient to make it an incidental activity to the Project. In addition, marine shipping outside the proponent’s area of jurisdiction is an activity regulated under various laws and would not be solely for the benefit of the proponent.”

The Board is not aware of an EA that considered project-related marine shipping outside of the territorial sea⁶⁶ (this can be distinguished from EAs of designated projects where the primary activities themselves have an identified location in the EEZ, such as offshore drilling).

The EAs for these projects support the inclusion of Project-related marine shipping as an “incidental” activity and provide insight into its appropriate geographic extent. The Board finds persuasive the consistent approach taken by expert tribunals in other EAs, which have not considered project-related marine shipping beyond the territorial sea limit. This points to a sufficient “level of proximity” as discussed in *Taseko* and strongly indicates that this approach is reasonable within the context of the CEAA 2012 statutory scheme. These other EAs solidify the Board’s view that incremental marine shipping within the EEZ is not “incidental” and should not be included in the “designated project.”

The Board acknowledges and appreciates the concerns expressed by participants about environmental effects of marine shipping in the EEZ, including adverse effects on species at risk. However, project-specific EAs are not meant to accomplish what might be considered akin to a regional study of marine shipping in a large area such as the EEZ. The authority for conducting a regional study lies with the Minister of Environment and Climate Change and the process is set out in a separate part of the CEAA 2012.⁶⁷ Furthermore, the Board notes that the probability and consequence of a marine incident declines with distance from the coast, in light of traffic volume and navigational hazards.⁶⁸ Thus, risk reduction measures such as pilotage, tug escorts, and traffic separation schemes are focused within the territorial sea.⁶⁹

Lastly, it is important to distinguish the effects from the designated project from the extent of the designated project itself. Under paragraph 5(1)(b) of the CEAA 2012, effects can be considered even if they occur in the EEZ or elsewhere outside of Canada. For example, effects of a spill from the Project having an impact in the EEZ can be considered. Thus, although only Project-related marine shipping within the territorial sea is to be considered as part of the “designated project,” effects from that shipping that occur outside of the territorial sea can still be considered by the Board, including certain trans-boundary effects.

5. Conclusion

The Board has considered the applicable statutory scheme, the Federal Court of Appeal’s decision in *Tsleil-Waututh Nation*, the OIC, case law, the CEA Agency Guidance, and practical EA considerations. The Board has applied all of this to the specific facts in this case and has concluded that Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit is “incidental” to the pipeline component of the Project.

⁶⁶ Nor did any participant provide such an example.

⁶⁷ Ss 73-77.

⁶⁸ Trans Mountain, *Comments on Spatial Limit of Project-Related Marine Shipping* (9 October 2018) at 6-7.

⁶⁹ [Trans Mountain Expansion Project Volume 8C Part 2, Exhibit B21-1 at 1.](#)

Appendix 2

These are the National Energy Board's (Board) reasons for its decisions in its letter of 12 October 2018 related to the List of Issues, the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the *Canadian Environmental Assessment Act, 2012* (Amended Factors Document), the design of the hearing process, and which government departments or bodies the Board will require information from during the hearing.

These reasons also cover other matters raised in comments received.

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1. General matters

1.1 Reconsideration of overall recommendation

The Board heard comments that it would have to reconsider its overall recommendation on the Project after taking Trans Mountain Expansion Project- (Project-) related marine shipping into account under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), as well as recommendations concerning the significance of effects and whether any likely significant adverse effects can be justified in the circumstances. The Board also heard that it should reconsider its recommendations in light of the requirements of subsection 79(2) of the *Species at Risk Act* (SARA) for all of the SARA-listed species that would be affected by Project-related marine shipping.

In this Reconsideration hearing, the Board will carry out an environmental assessment (EA) of Project-related marine shipping under the CEAA 2012.¹ In carrying out this EA, the Board will consider new or updated evidence related to the List of Issues that is filed in this hearing, along with evidence from the OH-001-2014 Certificate hearing. The Board will make its recommendations under subsection 30(4) of the CEAA 2012 and, if required, it will also make recommendations on whether any significant adverse environmental effects are justified. The Board will also consider the measures to avoid or lessen the adverse effects of Project-related marine shipping under the CEAA 2012 and section 79 of the SARA.

This approach reflects the direction contained in the Governor in Council's (GIC) [Order in Council P.C. 2018-177](#) (OIC). The OIC directed the Board to conduct a reconsideration of the recommendations and terms or conditions set out in its [OH-001-2014 Report](#) for the Project that are relevant to addressing paragraph 770 of the Federal Court of Appeal's [decision](#) in *Tsleil-Waututh Nation v. Canada (Attorney General)*². That paragraph made reference to the EA of the Project and the Board's recommendation under the CEAA 2012, as well as the application of section 79 of the SARA.

The Board will then consider whether its recommendation under the CEAA 2012 results in changes or additions to the recommendations (including recommended terms or conditions) that it set out in its OH-001-2014 Report. This is consistent with the OIC, and the [explanatory note](#) accompanying the OIC.³ After completing its Reconsideration Report, the Board will submit it to the GIC for decision.

¹ Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit will be included in the "designated project" assessed under the CEAA 2012.

² *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 770 [*Tsleil-Waututh*].

³ The explanatory note, under "Implications," states that "[a]t the conclusion of the reconsideration process, the Board may revise its OH-001-2014 Report ...to reflect its environmental assessment of Project-related marine shipping under CEAA, 2012, its recommendation under subsection 29(1) of the CEAA, 2012, the application of section 79 of SARA, and its recommendation under the NEB Act on whether a certificate should be issued..."

This approach is also set out in the List of Issues (Appendix 1 of [Hearing Order MH-052-2018](#)), as it includes issues related to the factors described in paragraphs 19(1)(a) through (h) of the CEAA 2012, subsection 19(3) of the CEAA 2012, and section 79 of the SARA. Considerations relating to recommendations concerning significance and justifications are covered by Issue Nos. 2 and 7 in the List of Issues.⁴

2. List of Issues

2.1 Whether effects were actually “thoroughly canvassed”

The Board’s draft List of Issues for the Reconsideration, [issued](#) on 26 September 2018, stated that certain issues – particularly the environmental effects of Project-related marine shipping – were thoroughly canvassed in the OH-001-2014 Certificate hearing and may not require additional evidence. The Board received comments that questioned whether the effects of Project-related marine shipping were actually thoroughly canvassed. Some comments specifically questioned why the Board made this statement in the draft List of Issues.

The Board remains of the view that its OH-001-2014 Report extensively canvassed certain issues set out in the List of Issues; for example, the environmental effects of Project-related marine shipping. Despite the fact that the Board did not include Project-related marine shipping under its CEAA 2012 EA and its recommendations in the OH-001-2014 Report, it did determine that potential environmental and socio-economic effects of Project-related tanker traffic (including the potential effects of accidents or malfunctions) were relevant under the *National Energy Board Act* (NEB Act).

When carrying out its analysis under the NEB Act, the Board followed an approach similar to the EA conducted for the pipeline component under the CEAA 2012. As a result of this approach, the Board collected extensive evidence relevant to Project-related marine shipping. For example, Chapter 14 of the Board’s OH-001-2014 Report extensively considered the effects of Project-related marine shipping, and the significance of those effects. Chapter 8 considered the environmental behaviour of spilled oil, and related environmental effects. This is reflected in the Federal Court of Appeal’s decision in *Tsleil-Waututh*, when it stated that the Board, among other things, considered the effects of Project-related marine shipping on Southern resident killer whales (SRKW) and the significance of those effects,⁵ and that the OH-001-2014 Report was adequate for the purposes of informing the GIC about the effects of Project-related marine shipping on SRKW and their use by Indigenous groups, and of the significance of these effects.⁶

The Board has indicated that the entirety of the evidence filed in the OH-001-2014 Certificate hearing will be included as part of its record for this Reconsideration hearing, and will be considered by the Board to the extent it is relevant to the List of Issues for the Reconsideration hearing. Parties are not required to re-file or re-test evidence on the record of the OH-001-2014 Certificate hearing.

⁴ On its own initiative, and to provide further clarity, the Board has updated Issue No. 7 to more closely mirror the wording of the OIC.

⁵ *Supra* note 2 at para 438.

⁶ *Ibid* at para 439.

Given the above, the Board's focus during the Reconsideration hearing will be on gathering information relating to the issues in the List of Issues that, in its view, were not fully canvassed in the OH-001-2014 Certificate hearing. The Board's [Filing Requirements for Trans Mountain](#), and [requests for specialist or expert information or knowledge](#) in the possession of Federal Authorities further show the Board's focus in the Reconsideration hearing.

Notwithstanding the views above, the Board remains open to **new or updated evidence** (including comments from the public, community knowledge, and Indigenous traditional knowledge) **relevant to its List of Issues**. This includes new or updated evidence regarding matters that were extensively canvassed in the OH-001-2014 Certificate hearing. However, the Board recommends that Parties focus their evidence on aspects of the List of Issues that were not fully canvassed in the OH-001-2014 Certificate hearing, and reminds Parties to take into account the Board's analysis and recommendations in its OH-001-2014 Report. For example, the OH-001-2014 Report made findings of significant adverse effects related to Project-related marine shipping. The Board is interested in measures that may avoid or reduce those significant adverse effects.

The Board has amended the wording in the List of Issues to better reflect the above.

2.2 Additional consideration of spills

The Board received comments that the List of Issues should be amended to reflect the need for the consideration (or re-consideration) of the potential effects and risks of spills from Project-related marine shipping, including the fate and behavior of any spilled product and the potential effectiveness of response. The Board heard, for example, that there are new scientific reports concerning spills, the fate and behavior of oil in marine environments, and the use of dispersants. The Board heard comments that the assessment of spills should include not only large or credible worst case spills, but also smaller spills and chronic oil pollution, and spills in different seasons and under adverse weather conditions. The Board also heard comments that effects of spills on United States' (U.S.) water, shorelines, and interests should be considered.

For clarity, the Board has updated Issue No. 1 to include **environmental effects of malfunctions or accidents that may occur**, as noted in paragraph 19(1)(a) of the CEAA 2012. The Board is of the view that the other matters raised by Parties are already covered by the List of Issues. For example, the wording in Issue No. 1 includes the effects of all spills (including smaller spills), as well as the effects of spills from Project-related marine shipping that may extend into the U.S. (the words "environmental effects" used in the List of Issues include those effects set out in section 5 of the CEAA 2012).⁷

That said, the Board notes that its OH-001-2014 Report extensively considered the environmental behavior of spilled oil, the effects of spills, and the risks associated with spills that might occur. The evidence filed in the OH-001-2014 Certificate hearing is part of the record for the Reconsideration hearing. As noted at the bottom of the List of Issues, Parties are expected to restrict their submissions to **new and updated evidence** only.

⁷ Effects of spills from Project-related marine shipping on the U.S. is covered by sub-paragraph 5(1)(b)(iii) of the CEAA 2012.

2.3 Specific or broader reference to SRKW

The Board received comments that the List of Issues should explicitly address the effects of Project-related marine shipping on SRKW, including cumulative effects, new data, potential mitigation measures, potential marine protected areas, and alternative routing of the shipping lanes. All of these matters are included under the List of Issues, particularly under Issue Nos. 1 through 5.

In the Board's view, its OH-001-2014 Report extensively considered the potential for effects on SRKW, including physical and acoustic disturbance, vessel strikes, chemical and biological contaminants, and reduction in the availability or quality of prey (primarily chinook and chum salmon). The evidence that the Board's OH-001-2014 Report considered is part of the record for the Reconsideration hearing. The Board has added a note at the bottom of the List of Issues to explain that Parties are expected to limit their evidence filings to **new or updated evidence** only.

2.4 Addition of other species (besides SRKW)

The Board received comments that the List of Issues should include species in addition to the SRKW. It also heard comments about the potential for Project-related marine shipping to affect other species at risk, including those that have been recently listed or re-designated since the issuance of the Board's OH-001-2014 Report. Other comments talked about the importance of considering effects on other species, including salmon species, species of importance to Indigenous peoples, and species not yet at risk but with declining populations. The Board heard concerns about the importance of considering cumulative effects, and to consider the potential introduction and spread of invasive species.

These matters are already covered by the List of Issues. For example, Issue No. 1 includes potential effects on all species, including cumulative effects, Issue No. 5 explicitly mentions any newly listed species or species that have seen a change to their designation. Issue No. 6 speaks to potential impacts of Project-related marine shipping on Indigenous interests.

Notwithstanding the above, the Board has decided to adjust Issue No. 1 to more explicitly note that it includes **cumulative effects**, consistent with paragraph 19(1)(a) of the CEAA 2012. The wording in Issue No. 5 has also been changed in order to clarify that both measures and **monitoring** will be considered.

2.5 Specific reference to Indigenous rights and interests

Comments were received suggesting that the List of Issues explicitly include reference to the rights and interests of Indigenous peoples,⁸ including section 35 Indigenous⁹ and Treaty rights. The Board also heard concerns about how the Reconsideration hearing will account for the significance of effects on Indigenous people.

⁸ The Board's use of the term "Indigenous" or "Indigenous peoples" in this hearing has the meaning assigned by the definition of "aboriginal peoples of Canada" in subsection 35(2) of the *Constitution Act, 1982*.

⁹ "Indigenous rights" has the meaning assigned by the definition of "aboriginal rights" in subsection 35(1) of the *Constitution Act, 1982*.

The Board has amended the List of Issues to include Issue No. 6 – **The potential impacts of Project-related marine shipping on Indigenous interests**. This amendment more clearly reflects that the Board must carry out its responsibilities in a manner consistent with the *Constitution Act, 1982*, including subsection 35(1).

The Board's OH-001-2014 Report extensively considered the potential impacts from Project-related shipping on Indigenous interests, consistent with its constitutional obligations under section 35. In addition, the Federal Court of Appeal, in *Tsleil-Waututh*, stated that it was satisfied that the Board's OH-001-2014 Certificate process was "adequate for fulfilling its consultation obligations."¹⁰

In the Reconsideration hearing, the Board will assess evidence on, among other things, the potential impacts of Project-related marine shipping on Indigenous interests and mitigation measures to avoid, reduce, or offset potential adverse effects. The Board's Reconsideration Report will consider whether there has been adequate consultation and accommodation for the purposes of this Reconsideration hearing, consistent with the recognition of the rights recognized and affirmed in section 35 of the *Constitution Act, 1982*. The Board will also have to decide whether any of its conclusions on consultation, accommodation, and section 35 regarding the Reconsideration will result in changes or additions to its recommendations (including recommended terms or conditions) that it had set out in its OH-001-2014 Report.

The Board generally expects that evidence filings related to Issue No. 6 will be limited to **new or updated evidence**. However, the Board recognizes that systems of Indigenous traditional knowledge often adopt a holistic approach to issues, particularly so when delivering evidence through the oral traditional evidence process that the Board offers (and more generally for evidence addressing impacts to Indigenous interests). The Board's approach to gathering oral traditional evidence is discussed in subsequent sections.

2.6 Alternate locations for the marine terminal

The Board heard comments that the List of Issues should provide for the reconsideration of the suitability of the location of the marine terminal at Westridge. Certain comments argued that the Board will now have to consider alternative means for Project-related marine shipping under the CEAA 2012, and whether any significant adverse effects of that shipping are justified under the CEAA 2012. They questioned how justification can be given if other alternatives have not been fully considered.

The Board has decided to remove Footnote 7 from the draft List of Issues which said that "the Board does not intend to reconsider alternate locations for the Westridge Marine Terminal as this was previously considered." However, the Board is of the view that the technical and economic feasibility of alternative terminal locations was extensively considered in the OH-001-2014 Certificate hearing. That evidence will be used by the Board in its consideration of the issues relevant to the Reconsideration. As noted at the bottom of the List of Issues, Parties are expected to restrict their submissions to **new and updated evidence** only.

¹⁰ *Supra* note 2 at para 531.

2.7 Greenhouse Gas (GHG) emissions from Project-related marine shipping

The Board received comments suggesting that GHG emissions from Project-related marine shipping should be included in the List of Issues. Some comments said that consideration of such emissions should extend to the destination port.

The List of Issues already covers issues relating to GHG emissions from Project-related marine shipping. Issue No. 1 includes GHG emissions from Project-related marine shipping and Issue No. 2 includes consideration of mitigation related to those emissions.

The Board is of the view that its OH-001-2014 Report exhaustively considered the GHG emissions from Project-related shipping to the limit of Canada's territorial sea, as well as the resulting increase in marine GHG emissions in the region, in British Columbia, and in Canada. The Board's OH-001-2014 Report also noted that any incremental contribution from Project-related marine shipping would increase the burden at a global scale, regardless of how large or small the contribution. The evidence that the Board's OH-001-2014 Report considered is part of the record for the Reconsideration hearing. As noted at the bottom of the List of Issues, the Board expects Parties to file only **new or updated evidence** on GHG emissions from Project-related marine shipping.

2.8 Upstream and downstream effects, including GHG emissions

The Board received comments that the List of Issues should address effects of other upstream and downstream activities. Comments said that upstream oil production and downstream refining and end-use should be considered in addition to the GHG emissions from such activities. A number of comments referenced the Board's List of Issues for the Energy East Project, which included incremental indirect GHG emissions from any incremental upstream oil production and upgrading, incremental downstream refining and end-use, and incremental third-party electricity generation. Some comments said that there is a constitutional obligation under the *Canadian Charter of Rights and Freedoms* (Charter) to consider the total contribution of the Project to climate change, taking into account the fact that the Crown will now own the Project.

During the OH-001-2014 Certificate hearing, in [Ruling No. 25](#), the Board denied motions requesting that the Board include in the List of Issues the environmental and socio-economic effects associated with upstream activities and downstream use. The Board provided several reasons for doing so, including that the effects from upstream production are not directly linked or necessarily incidental to the Project. Similarly, the Board stated that the Project is not tied to, or dependent on, any particular use in any particular destination. Leave to appeal Ruling No. 25 was subsequently dismissed without reasons by the Federal Court of Appeal.¹¹ The Board is of the view that the analysis in Ruling No. 25 applies in this case.

The CEAA 2012 does not require the Board to consider upstream or downstream effects. Paragraph 5(2)(a) of the CEAA 2012 requires the Board to take into account changes in the environment that are directly linked or necessarily incidental to the Project. The Project does not include upstream production and is not dependent on any particular upstream development. As

¹¹ *City of Vancouver v National Energy Board* (16 October 2014), Ottawa 14-A-55, (FCA).

was stated in Ruling No. 25, shippers cannot ship all of their oil on the existing Trans Mountain pipeline, yet oil sands projects continue to be built or are in development. No commenter provided submissions addressing these facts, or otherwise explained why upstream development is directly linked or necessarily incidental to the Project.

Similarly, the effects of downstream refining and end use are not directly linked or necessarily incidental to the Project. The Board continues to be of the view expressed in Ruling No. 25 that the Project does not include downstream use and is not tied to, or dependent on, any particular use in any particular destination. Oil will go where the demand is, whether or not the Project proceeds. No commenter provided submissions that directly rebutted these points.

In the case of the Energy East Project, the Board determined that upstream and downstream effects were relevant to the EA under paragraph 19(1)(j) of the CEAA 2012, due to “increasing public interest in GHG emissions, together with increasing governmental actions and commitments,” and because indirect GHG emissions are an “environmental concern.” For the reasons described above, the Board is not persuaded by the rationale provided for the Energy East Project, or the submissions arguing that it should adopt that rationale. In any event, the Board is not bound by the decisions it made during the Energy East Project proceeding, which were specific to that project.

The Board is also not persuaded that it has a constitutional obligation under the Charter to consider the total contribution of the Project to climate change. While Parties indicated that there was a possibility that sections 7 and 15 of the Charter could be breached, they failed to provide appropriate detail as to how, or relevant case law from a Canadian jurisdiction on these points.¹²

For the reasons above, the Board declines to amend the List of Issues to address effects of upstream and downstream activities proposed by the comments received.

2.9 Section 79 of the SARA – monitoring of measures

The Board heard comments that Issue No. 5 does not accurately reflect the wording in subsection 79(2) of the SARA. For example, under that subsection, it is necessary to both ensure that measures are taken to avoid or lessen adverse effects, and to monitor those effects.

The Board has decided to amend Issue No. 5 to more closely reflect the words of subsection 79(2) of the SARA.

2.10 Socio-economic issues and human health effects

The Board received comments that socio-economic issues should be included explicitly in the List of Issues. The Board also received comments that the socio-economic issue of human health should be included explicitly in the List of Issues. Some comments pertained to the potential effects on human health from Project-related marine shipping, including comments concerning

¹² The Board previously considered section 7 of the Charter in [Ruling No. 29](#), dated 19 August 2014, where Mr. L.D. Harvey filed a motion on this issue that was dismissed by the Board. Leave to appeal was dismissed by the Federal Court of Appeal, *Harvey v National Energy Board* (24 October 2014), Ottawa 14-A-59 (FCA). Any further motions on section 7 would need to address Ruling No. 29.

health risks from increased marine vessel traffic, and health impacts from exposure to a marine oil spill on residents, water users, and first responders. Some also suggested that Health Canada be involved in the process.

As noted above, the Board will be carrying out a CEAA 2012 EA of Project-related marine shipping. Accordingly, certain socio-economic issues will be included in the assessment due to the definition of “environmental effects” in section 5 of the CEAA 2012. That definition includes, among other things, the effects of any change that is caused to the environment on health and socio-economic conditions and physical and cultural heritage. The Board has clarified the List of Issues by adding a footnote to explain that **all references to environmental effects in the List of Issues include health and socio-economic matters as described in section 5 of the CEAA 2012.**

The Board is of the view that its OH-001-2014 Report adequately considered the potential socio-economic effects and the potential effects on human health from Project-related shipping, including the effects on human health from the routine operations of marine transportation associated with the Project and on human health in the event of a spill in the marine environment during shipping. The evidence that the Board’s OH-001-2014 Report considered is part of the record for the Reconsideration hearing. As noted at the bottom of the List of Issues, the Board expects Parties to file only **new or updated evidence** on health and socio-economic matters as described in section 5 of the CEAA 2012.

The Board will not carry out an assessment of socio-economic effects under the NEB Act. As noted below in Section 2.13, the OIC was specific about the issues the Board was to reconsider under the CEAA 2012 and the SARA. The Board was not directed to reconsider all issues from the OH-001-2014 Certificate hearing.

2.11 Questions as to why mitigation is for only four significant effects

The Board received comments that it was not appropriate that Issue No. 2 limited mitigation to just four significant adverse effects. Other comments suggested that Issue No. 2 (as well as other issues) should be amended to clarify that they apply to measures that were not previously considered by the Board.

The Board confirms that it is not limiting its consideration of mitigation measures to the four matters referenced in Issue No. 2 (i.e., GHG emissions, SRKW, traditional Indigenous use associated with SRKW, and the potential effects of a large or credible worst-case spill). The Board will be taking into account **all** mitigation measures that are technically and economically feasible (whether or not previously considered) and that will mitigate **any** significant adverse environmental effects of Project-related marine shipping, as required by paragraph 19(1)(d) of the CEAA 2012.

In light of the comments received, the Board has amended Issue No. 2 to indicate that its consideration of mitigation measures will **include** GHG emissions, SRKW, traditional Indigenous use associated with SRKW, and the potential effects of a large or credible worst-case spill. Issue No. 2 continues to note that, as part of its assessment, the Board will consider whether mitigation measures will change the Board's previous significance findings for these four matters.

2.12 Navigation, including collision with bridges

The Board received comments that its List of Issues should include reference to difficult navigation and potential bridge collisions associated with tankers.

The Board is of the view that this issue is covered by Issue Nos. 1 and 2. Issue No. 1 was amended to include the environmental effects of malfunctions and accidents that may occur. Issue No. 2 was amended to clarify that the Board will consider mitigation measures for all significant adverse environmental effects of Project-related marine shipping. The Board does not consider it necessary to make further changes to the List of Issues.

The Board notes that the issues of difficult navigation and potential bridge collisions associated with tankers were extensively covered in Chapter 14 of the Board's OH-001-2014 Report and, in particular, the TERMPOL review process. The evidence that the Board's OH-001-2014 Report considered is part of the record for the Reconsideration hearing. As noted at the bottom of the List of Issues, the Board expects Parties to file only **new or updated evidence** that pertains to these issues.

2.13 Reconsideration of the need for the Project, economic feasibility, and other financial matters

The Board received comments that, due to the lapse of time and the federal government's purchase of the Project, the List of Issues should include a re-evaluation of the economics of the Project, including the need for the Project and its economic feasibility. Comments were also received that there should be corrections made to the OH-001-2014 Report due to either changed facts or errors in certain aspects of the report. In some cases, comments were of the effect that the views of Parties in the OH-001-2014 Report were incorrect and, in other cases, that there were factual errors within the Board's views.

The Board does not consider it necessary to make any changes to the List of Issues as a result of these comments. The Board is also not persuaded that it should re-examine issues that are outside of the GIC's direction in the OIC. In the Board's view, it is consistent with the purpose of section 53 of the NEB Act for the GIC to direct the Board to conduct a reconsideration focused on a specific issue or issues.¹³ To interpret section 53 as requiring new evidence or *de novo* findings on all issues, despite the direction in the OIC, would not be consistent with the statutory scheme of the NEB Act, including the requirement for expeditious proceedings under subsection 11(4). In this case, the OIC was specific about the issues the Board was to reconsider under the CEAA 2012 and the SARA. The Board was not directed to reconsider all issues from the

¹³ In *Tsileil-Waututh* the Federal Court of Appeal recognized, at paragraph 769, the GIC's ability to direct the Board to conduct a reconsideration taking into account any factor specified by the GIC.

OH-001-2014 Certificate hearing, nor does paragraph 770 of the Federal Court of Appeal's decision speak to all issues.¹⁴ The Board accepts that, as time passes, there will always be some changes in facts and short-term changes in markets. However, the need for the Project is not negated by short-term market fluctuations. As the Board stated in its OH-001-2014 Report, "[t]here is always a degree of uncertainty in projecting the long term utilization of transportation facilities since utilization is influenced by many variables, including supply, market development and the evolution of transportation infrastructure overall."

In this context, the Board responded to concerns about shipper contracts discussed during the OH-001-2014 Certificate hearing by imposing Condition 57, requiring Trans Mountain to file with the Board, 90 days prior to construction, signed confirmation that secured agreements or contracts remain in force with shippers for a minimum 60 per cent of its total capacity of 141 500 m³/d (890,000 bbl/d) and any rights to terminate held by shippers that may have existed in any agreements or contracts between Trans Mountain and shippers (which may have reduced the Project's contracted total capacity to less than 60 per cent for a minimum term of 15 years) have lapsed and or expired because their conditions precedent have been satisfied or waived. This "commercial support" condition ensures that the pipeline will be used and useful. If Trans Mountain cannot maintain support for the pipeline at the level specified in Condition 57, it may not construct the pipeline.

Those that requested that the Board re-evaluate the economics of the Project did not sufficiently address Condition 57, or the terms of the OIC. Comments also did not sufficiently consider a purposive approach to the NEB Act, including section 53. As a result, the Board is not persuaded to make changes to the List of Issues based on comments received about economic and financial issues.

2.14 Other requested issues

The Board heard comments that the List of Issues should reflect a reconsideration of the safety of the Burnaby tank farm, watercourse crossing construction methods for the pipeline with regard to chinook salmon, and the risks of transporting oil by rail absent alternate routes by pipeline, and to consider the conversion of the oil to anhydrous ammonia or to bitumen pellets or "pucks" prior to transport. The Board heard comments that it should also consider "alternatives to" the Project pursuant to paragraph 19(1)(j) of the CEAA 2012.

The Board declines to make any changes to the List of Issues as a result of these comments.

As noted above, the Board was not directed by the GIC to reconsider all issues from the OH-001-2014 Certificate hearing. As a result, the Board will not reconsider the safety of the Burnaby tank farm, or watercourse crossing construction methods for the pipeline with regard to chinook salmon, all of which were considered by the Board in its OH-001-2014 Report.

¹⁴ *Supra* note 2 at 770.

The OIC was specific that the Board was to reconsider Project-related marine shipping under the CEAA 2012 and the SARA. The conversion of oil to anhydrous ammonia or bitumen pellets, the transportation of oil by rail, and other “alternatives to” the Project are not relevant to the scope of the OIC and to the Reconsideration hearing, both of which focus on Project-related marine shipping.

2.15 Number of tankers

The Board heard comments that the evidence relating to Project-related tanker traffic on the hearing record, upon which the Board’s OH-001-2014 Report relied, is materially flawed because it suggests 29 tankers per month as the incremental Project-related tanker traffic. One commenter was of the view that the incremental volume is more accurately 32 tankers per month, and that an incremental volume of 32 tankers per month would show that a large spill from Project-related tankers is likely.

The OH-001-2014 Report states that the existing Westridge Marine Terminal *typically* loads five tankers per month and that the expanded system associated with the Project would require *approximately* 34 Aframax class vessels per month, with actual demand driven by market conditions. The Board also heard evidence during the OH-001-2014 Certificate hearing that actual tanker numbers *could vary* depending on whether Panamax or Aframax class tankers were used. Similarly, the TERMPOL Review Committee report notes an average number of tanker transits. Given the above, the Board is of the view that project-related variations in incremental tanker shipments above the base/current project tanker shipments has been addressed in the OH-001-2014 Report.

The Board is of the view that the List of the Issues for the Reconsideration hearing does not require amendments as a result of these comments.

The Board has stated that the entirety of the evidence filed in the OH-001-2014 Certificate hearing will be included as part of its record for this Reconsideration hearing. The Board has noted in its List of Issues that **new or updated relevant evidence** that pertains to the List of Issues would be considered. However, the Board reminds Parties to take into account the Board’s analysis and recommendations in its OH-001-2014 Report.

3. Scope of the factors and Amended Factors Document

The Board heard comments that the Board’s Filing Manual does not explicitly address the marine components associated with the Project, and that more details should be provided in the Amended Factors Document, similar to the document prepared by the Canadian Environmental Assessment Agency titled *Scope of Factors – Northern Gateway Pipeline Project*. The Board also heard that the Board’s Amended Factors Document omitted mention of certain other matters noted in the CEAA 2012, such as community knowledge, Indigenous traditional knowledge, sustainable development, and the precautionary principle.

The Board does not consider it necessary to make any changes to the List of Issues or the Amended Factors Document as a result of these comments, other than to add a reference to subsection 19(3) of the CEAA 2012 in the List of Issues (to clarify that the Board will be considering community knowledge and Indigenous traditional knowledge).

The Board has issued Filing Requirements for Trans Mountain, and is requesting specialist or expert information or knowledge in the possession of Federal Authorities. These documents were developed after considering the requirements of the CEAA 2012, section 79 of the SARA, and the evidence that already exists on the Board's record. The evidence filed by Trans Mountain and Federal Authorities as a result of these documents, as well as any evidence filed by intervenors, will allow the Board to fully address the requirements of the CEAA 2012 and section 79 of the SARA.

As noted above, the Board will carry out a CEAA 2012 EA of the Project through the Reconsideration hearing. To do so, it must take into account the relevant provisions under the CEAA 2012, including subsection 4(2), which requires the Board, in the administration of the CEAA 2012, to exercise its powers in a manner that applies the precautionary principle. The Board must also consider the purposes of the CEAA 2012, which include sustainability. Community knowledge and Indigenous traditional knowledge will also be taken into account by the Board under subsection 19(3).

The List of Issues and Amended Factors Document are both express and clear that all factors in paragraphs 19(1)(a) through (h) of the CEAA 2012 are relevant to the Reconsideration. While the Board may determine, based on the existing record, that it requires differing degrees of additional *evidence* with respect to each of these factors, all factors are relevant to the Reconsideration and Parties may lead **new or updated evidence** on them should they choose to do so.

All other comments on the scope of the factors are addressed in the Board's comments on the List of Issues in Section 2.

4. Legal matters

4.1 Alleged bias of the Panel

The Board received a few comments suggesting that the Panel is biased.

All comments concern the background and knowledge of the Panel Members. Several of the comments express a view that the Panel is "one-sided" or not balanced enough because their background involves energy owners and operators. There was also a suggestion that the Panel ought to have more Indigenous or environmental experience or representation.

The Supreme Court of Canada set out the test for reasonable apprehension of bias in *Committee for Justice and Liberty et al. v. National Energy Board et al.*:¹⁵

¹⁵ [1978] 1 SCR 369 at 394, in dissent, but subsequently adopted by the Court, for example: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 46.

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, the test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

There were no detailed comments about why a reasonable and fully informed person would consider that the Panel or its individual Members would have a reasonable apprehension of bias. Allegations of bias are a serious allegation and must be supported by evidence. As the Federal Court of Appeal has stated, they cannot rest on mere suspicion, conjecture, or impressions.¹⁶ In this case, there is no detailed evidence supporting the allegations.

Having considered the comments, the Panel Members are each of the view that they can continue to objectively review the evidence and materials for this Reconsideration in an open-minded manner. The Panel notes that all three Panel Members have had significant experience at the Board related to Indigenous and environment issues. The Panel is also supported by technical experts from a broad variety of backgrounds.

The Board, therefore, dismisses these concerns.

4.2 Potential conflicts of interest

The Board heard comments that there is a potential conflict of interest if federal agencies are called to provide expert information, given that the federal Crown now owns the Project.

The Board is an expert quasi-judicial tribunal that operates at arms-length from the government.

With respect to experts working at federal government departments, it is worth noting that acceptance and adherence to the [*Values and Ethics Code for the Public Sector*](#) is a condition of employment for every public servant in the federal public sector, regardless of their level or position. In particular, the value of integrity includes the expected behavior to:

- act at all times with integrity and in a manner that will bear the closest public scrutiny, an obligation that may not be fully satisfied by simply acting within the law; and
- never use their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others.

The Board recognizes the federal government’s ownership of the Project and has set out a process that it considers to be fair to all Parties in this circumstance. This includes written questioning by intervenors of federal government departments and agencies responding to the Board’s requests for information under paragraph 20(a) of the CEAA 2012. Eligible intervenors are being provided participant funding and all intervenors will have the opportunity to bring forward their own expert information.

¹⁶ *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8.

The Board will consider all evidence filed on the record before making its recommendation in this Reconsideration. Tribunals make decisions involving a government proponent from time to time, and no comments included legal authority to support the claim that this creates a potential conflict of interest. The Board will review the evidence in a manner that is free from the influence of extraneous factors.

4.3 *De novo* process

The Board received comments that a *de novo* hearing is required because the Panel undertaking the Reconsideration did not *hear* the original evidence.

It is important to state up front that most evidence in the OH-001-2014 Certificate hearing was filed in writing. This included responses to information requests. Indigenous traditional evidence, as well as summary argument, was heard orally in the OH-001-2014 Certificate hearing, and this was recorded in written transcripts. All other evidence was filed in writing.

The rule that “he who hears must decide” does not apply where legislation expressly, or by necessary implication, ousts its application.¹⁷ In this case, the legislative scheme ousts the application of this rule. The addition of the reconsideration provision in the NEB Act in 2012 indicates Parliament’s intention to have an option that is distinct from a new project application. Subsection 53(2) provides specific authorization for the GIC to “direct the Board to conduct the reconsideration taking into account any factor specified in the order.” It is clear from this wording that Parliament intended that the Board could be directed to reconsider specific issues only, in which case there is no requirement for a *de novo* hearing or for all previous evidence heard orally to be reheard.

A careful reading of the NEB Act suggests that the legislation does not *require* a reconsideration to be carried out by the same Panel, but it does not prevent it either. Section 53 does not refer to the Board Panel, but says only that any recommendation can be referred back to “the Board.” Under the NEB Act, any quorum¹⁸ of the Board is “the Board” and can carry out the statutory obligations of the Board. The fact that an exception to quorum requirements exists for the original section 52 proceeding (see subsection 7(2.1)), but not for the section 53 reconsideration, also indicates that the reconsideration does not require the same Panel.¹⁹

The rule that “he who hears must decide” can also be ousted by necessary implication in these circumstances. The legislation does not set a limit on the number of times that a report can be reconsidered. It would not be practical to expect the original Panel Members to remain available through an unlimited number of reconsiderations.

¹⁷ *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282 at 329-30.

¹⁸ Subsection 7(2) of the NEB Act states that three Members constitute a quorum of the Board. By implication, fewer than three Members is not a quorum and, therefore, is not “the Board,” unless there is a statutory exception.

¹⁹ In a scenario where a single Member is appointed by the Chair to ensure a section 52 time limit is met using subsection 7(2.1), it is unlikely that this single Member could carry out the responsibilities of the Board in respect of a reconsideration as there is no statutory exception to quorum for section 53 reconsiderations.

As regards the hearing of oral traditional evidence, the Board issued [Procedural Direction No. 1](#) on 12 October 2018. The procedural direction noted that the Board Members assigned to undertake the Reconsideration will have read the transcripts of the oral traditional evidence provided in the OH-001-2014 Certificate hearing. This relieves Indigenous intervenors of the requirement to repeat the oral traditional evidence previously provided.

However, the Board emphasizes that decisions as to whether to present oral traditional evidence, how to do so, and what evidence to provide in the Reconsideration hearing are ultimately for each Indigenous intervenor to make, taking into account the guidance provided by the Board here, as well as the discussion above in Section 2.5.

5. Departments to consult

5.1 Indigenous groups

The Board received comments that it should consult with Indigenous groups and that, under the CEAA 2012, the Board is under a legal obligation to consult and cooperate with other jurisdictions.

The Board notes that more than 40 Indigenous groups are participating in the Reconsideration hearing as intervenors. Many of these groups were intervenors in the OH-001-2014 Certificate hearing and provided valuable evidence in that proceeding. The Board anticipates they will do so again in this proceeding.

In addition, as required by section 18 of the CEAA 2012, the Board posted on the [Canadian Environmental Assessment Registry Internet Site](#) an offer to consult and cooperate with other jurisdictions with respect to the EA of the designated project.²⁰

5.2 Canadian government departments

The Board received comments that it should seek input into the Reconsideration from a broad range of government agencies. Under paragraph 20(a) of the CEAA 2012, the Board can request specialist or expert information or knowledge from federal departments and agencies. In this hearing, on 12 October 2018, the Board asked for such information from the following:

- Fisheries and Oceans Canada
- Environment and Climate Change Canada
- Transport Canada
- Vancouver Fraser Port Authority
- Pacific Pilotage Authority
- Health Canada
- Parks Canada
- Natural Resources Canada

²⁰ The definition of “jurisdiction” is found in section 2 of the CEAA 2012. It includes Indigenous groups as defined under part (f).

The Board's 12 October 2018 letter identifies the basis for its requests of the various federal departments and agencies. The requests identify specifically what the Board is interested in receiving, which was guided by the scope of its review outlined in the List of Issues and Amended Factors Document.

5.3 Other third party / external experts

The Board heard suggestions that it should seek information from various other entities, such as provincial and municipal government agencies, the Western Canada Marine Response Corporation, non-government organizations, researchers and other subject matter experts.

The Board notes that individuals and groups with expertise have been accepted as intervenors in this Reconsideration hearing. The Board is of the view that the process will be enhanced by their involvement.

5.4 U.S. government departments and experts

The Board heard suggestions that it should seek information from various U.S. entities, such as U.S. federal and state government agencies.

The Board notes that individuals and groups from the U.S. have been accepted as intervenors in this Reconsideration hearing. The Board is of the view that the process will be enhanced by their involvement.

6. Hearing process

6.1 Need for more time

The Board received comments stating that the timeline for the hearing, including the time allotted for the initial comment process, is too short. Others commented that the Board should extend the timeline or seek an extension from the GIC.

The Board acknowledges that the timeline is not lengthy. This requires an expedited process and the need for Parties to stay focused on the hearing steps and to work diligently. Section 53 of the NEB Act authorizes the GIC to direct the Board to undertake a reconsideration based on any factor specified, and to specify a time limit for the Board to complete its reconsideration. In this focused Reconsideration, it is not necessary that the Board have the same timelines as a new application. There is already significant evidence on the record on numerous topics being examined. Many of the Parties will also be familiar with the record from the OH-001-2014 Certificate hearing. Consistent with subsection 11(4) of the NEB Act, there is a need for proceedings to be conducted expeditiously and fairly and, in any case, within the time limit set by the GIC.

The Board has set out a process that, while expedited, is fair to all Parties, given the focused nature of the Reconsideration, and would allow the Board to deliver its Reconsideration Report to the GIC on or before 22 February 2019.²¹

While the Board must meet the 22 February 2019 deadline, it is also required to conduct a hearing that is procedurally fair. As determined recently by the Federal Court of Appeal, the content of the duty of procedural fairness in this case is significant.²² This required that:

The parties were entitled to a meaningful opportunity to present their cases fully and fairly. Included in the right to present a case fully is the right to effectively challenge evidence that contradicts that case.

The Board accepts that the same is required for the Reconsideration and that similar opportunities are provided. In the OH-001-2014 Certificate hearing, there were instances where Trans Mountain filed new evidence on specific topics, and intervenors were provided an opportunity to challenge that evidence, including by providing their own evidence in response within reasonably expedited time lines.²³

If a Party feels there are particular circumstances requiring additional time, the Board will consider such individual requests. Any requests should be made reasonably ahead of the deadline and, unless and until an extension is granted, Parties should continue to work toward the existing deadline. Parties should not assume that deadlines can be adjusted materially, given the time limit specified. In many cases, moving one Party's deadline could create prejudice for another Party, which the Board would consider when an extension request is filed.

6.2 Oral cross-examination

The Board heard many comments from those who wanted a process that includes oral cross-examination. Some suggested that cross-examination could be limited by subject matter or that only certain Parties could take part.

In [Ruling No. 14](#), the Board said:

“In the Board’s view, the legislation makes it clear that the Board is master of its own procedure and can establish its own procedures for each public hearing with regard to the conduct of hearings. This includes the authority to determine for a particular public hearing the manner in which evidence will be received and tested. In the circumstances of this hearing, where there are 400 intervenors and much of the information is technical in nature, the Board has determined that it is appropriate to test the evidence through written processes. All written evidence submitted will be subject to written questioning by up to 400 parties, and the Board.”

²¹ The Federal Court of Appeal also had an expedited pre-hearing process with respect to the consolidated judicial reviews.

²² *Supra* note 2 at para 235.

²³ For instance, [Ruling No. 61](#) dated 15 April 2015 accepted late evidence from Trans Mountain regarding a Seismic Hazard Update and provided a schedule for intervenors to test this evidence and file evidence in response.

After reviewing Ruling No. 14, the Federal Court of Appeal concluded that the duty of fairness was not breached by the Board's decision not to allow oral cross-examination and that the Board's procedure did allow the Parties "a meaningful opportunity to present their cases fully and fairly."²⁴ The Board is of the view that the reasoning in Ruling No. 14 applies equally in this case. A mostly written process provides a fair opportunity to test the evidence, and is relatively predictable and manageable in the time permitted.

In this Reconsideration hearing, the Board already has a more limited scope of issues to cover. It has over 100 intervenors and approximately 5 months to consult on and set a hearing process; to gather and test evidence, and to receive argument.²⁵ It must also write and submit a Reconsideration Report.

6.3 Collaborative and open hearing process

The Board received comments that it should design a process that allows for collaboration between those interested, and that is open to the public. Some comments said that the process should include oral statements from the public as was done in the hearing for the Enbridge Northern Gateway Project. Some felt that the hearing itself should be designed through a collaborative process.

The Board acknowledges that bringing Parties together to discuss and resolve certain issues during a hearing process can be effective. The Board has used this "conference" approach in the past. It is used to complement the required hearing steps that must be implemented to meet the rules of natural justice and the requirements of the NEB Act. Such an approach cannot substitute for certain required hearing steps such as filing new evidence.

In this case, it is not possible to build in time for a "conference" approach. The Board has set out a process that, while it does not include any opportunities for "conferences," is fair to all Parties and that allows the Board to deliver its Reconsideration Report to the GIC on or before 22 February 2019. The Board also provided early comment opportunities for Indigenous groups and members of the public, and took the comments received into consideration in designing the hearing process.

The Board is of the view that hearing from a broad range of people and groups would be beneficial. Given the time constraints, the Board cannot take these submissions in person via oral statements. However, the Board will consider all letters of comment that are filed on or before the 20 November 2018 deadline.

²⁴ *Supra* note 2 at para 257.

²⁵ While there are fewer intervenors registered for the Reconsideration hearing, 100+ intervenors is a significant number and a greater percentage may be active in comparison to the OH-001-2014 Certificate hearing.

6.4 Oral Indigenous traditional evidence

The Board heard comments that Indigenous intervenors wanted the opportunity to provide traditional evidence orally. Some of the comments requested that these oral sessions take place in the communities where the evidence holders reside. The Board also heard comments that Indigenous knowledge should not be restricted to oral traditional evidence, and should be meaningfully incorporated into the review *process*.

Hearing oral traditional evidence from Indigenous peoples and groups was very helpful to the Board in the OH-001-2014 Certificate hearing. The Board has scheduled time to hear oral traditional evidence in central locations. In the circumstances of this case, it is not possible to travel to each of the individual Indigenous communities. Indigenous intervenors may also choose to provide oral traditional evidence by remote means if that is more convenient. See the Board's [Procedural Direction No. 1](#) for more information on this hearing step. Indigenous intervenors are reminded that participant funding is available to travel to hearing locations.

In addition to participating in the oral traditional evidence sessions, the Board encourages Indigenous intervenors to also participate in other hearing steps to facilitate the incorporation of Indigenous knowledge throughout the entire hearing process.

6.5 Lack of funding for commenters

The Board received comments that it should provide funding to groups that wish to provide written comments to the Board, as opposed to only providing funding for intervenors.

The Participant Funding Program is independent from the Board's regulatory hearing process. For information and questions about participant funding, please visit the Board's [website](#) or contact a Participant Funding Program Coordinator at 1-800-899-1265.

6.6 Matters for future letters of comment

Many comments received provided substantive comments on the matters to be considered in the hearing itself. The Board will consider these comments in its consideration of the broader issues in the hearing, just as it will consider all evidence filed. These comments do not need to be re-filed.

6.7 Break in hearing process over Christmas

The Board heard comments that participants want a break from the hearing process over the Christmas period.

While the time limit does not allow the Board to schedule a break *per se*, the Board has devised a schedule that should require relatively limited work for intervenors during this period.

October 30, 2018

Our File: 101024-038

VIA NEB Participation Portal

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2P 5J2

Attention: Sheri Young, Secretary of the Board

Dear Ms. Young,

**Re: Trans Mountain Expansion Project – Reconsideration
Hearing Order MH-052-2018 & File OF-Fac-Oil-T260-2013-03 59
Objection of the Stó:lō Collective**

Further to our letter of October 23, 2018 ("**NOI Letter**") containing the Stó:lō Collective's Notice of Intent to provide oral Indigenous traditional knowledge ("**Oral Traditional Evidence**"), and in response to the National Energy Board's ("**NEB**") email correspondence of October 24-26, 2018 (the "**OTE Email**"), a copy of which is enclosed, we write to object to the locations chosen for the Oral Traditional Evidence hearings and the limitations imposed thereon.

Background

In the NOI Letter, the Stó:lō Collective objected to the NEB's process for the hearing of Oral Traditional Evidence, as it had done previously in the first hearing (the "**First Hearing**") of the Trans Mountain Expansion Project by letter dated December 5, 2014 (the "**First Objection**"). In both the First Objection and the NOI Letter, the Stó:lō Collective objected to the process prescribed by the NEB, advising, among other things, that the process was unfair, culturally inappropriate and imbalanced. In particular, the Stó:lō Collective stated that the process chosen conflicted with Stó:lō customs and traditions that support knowledge transfer and honouring their Elders.

Prior to sending the NOI, and in light of the Stó:lō Collective's concerns about the treatment of Oral Traditional Evidence in the First Hearing, the Stó:lō Collective requested that Oral Traditional Evidence be collected in a manner that reflects the specific cultural practices of the Indigenous group providing such evidence in its letter of comment to the NEB ("**Letter of Comment**") dated October 3, 2018. Despite the First Objection, Letter of Comment, and NOI, the NEB has chosen to proceed with a process for collecting Oral Traditional Evidence that disrespects the Stó:lō Collective's cultural practices and Elders. This has been compounded by the NEB's unilateral and inexplicable decision to only hold Oral Traditional Evidence hearings on Vancouver Island.

As a result, the Stó:lō Collective wishes to again record an objection to the Oral Traditional Evidence process prescribed by the NEB for this Reconsideration Hearing.

Objection

The Stó:lō Collective objects to the locations chosen, and time limitations imposed, by the NEB for the Oral Traditional Evidence hearings. In the OTE Email, the NEB asked the Stó:lō Collective to choose between travelling to Victoria or Nanaimo to attend an Oral Traditional Evidence hearing, during which its intervenors will be entitled to 1½ to 2 hours to present. The NEB is aware that the Stó:lō Collective is composed of twelve First Nations, all of whom are located in the Fraser Valley, and whose Elders cannot easily travel to Vancouver Island to provide Oral Traditional Evidence. Accordingly, these locations might prevent the Stó:lō Collective's Elders from attending a hearing to provide Oral Traditional Evidence.

Despite our enquiries, NEB has not provided an adequate reason for choosing two locations on Vancouver Island, despite the fact that many of the Indigenous intervenors are located on the mainland of British Columbia, in Alberta, and/or in Washington, and would be considerably less inconvenienced travelling to a location such as Vancouver, BC.

In the LOI, the Stó:lō Collective advised that the rushed pace of the Reconsideration Hearing would result in, among other things:

- (a) limited time for the NEB to hear Oral Traditional Evidence or to design a schedule which accommodates the needs of particular communities; and
- (b) inadequate consideration of cultural protocols and ceremony surrounding the sharing of Oral Traditional Evidence by Stó:lō knowledge keepers.

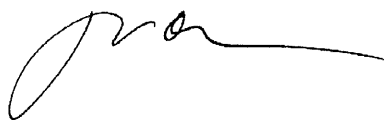
In the Federal Court of Appeal's recent decision quashing the approval of the Trans Mountain Expansion Project, the court held that the duty of fairness owed by the NEB to the parties was significant and the parties were entitled to a meaningful opportunity to present their cases fully and fairly. The NEB's chosen locations for, and time limitations imposed on, the Oral Traditional Evidence hearings only serve to again validate the Stó:lō Collective's concerns about this process and further demonstrate the NEB's ongoing struggle to design a hearing process that safeguards procedural fairness.

Notice of Intent

Notwithstanding the Stó:lō Collective's objection to the locations chosen by the NEB, the Stó:lō Collective is not withdrawing its Notice of Intent to participate. We ask that you please reconsider the locations chosen, and advise us of your decision as soon as possible.

Yours truly,

MILLER TITERLE LAW CORPORATION



Joelle Walker
joelle@millertiterle.com

cc: Trans Mountain, regulatory@transmountain.com
Enclosure: OTE Email; NOI Letter

Joelle Walker

From: NEB Process Advisor Team – [TMX] <TMX.ProcessHelp@neb-one.gc.ca>
Sent: Friday, October 26, 2018 10:26 AM
To: Joelle Walker; NEB Process Advisor Team – [TMX]
Cc: Erin Reimer; Shellina Tarmohamed; Ryley Mennie
Subject: RE: OTE - Sto:lo Collective

Hello Joelle – sorry for the delay. I had to leave the office early yesterday and am playing catch-up today.

I am not privy to the actual deliberations of the Board on these logistics but have been informed that the decision regarding holding OTE on Vancouver Island was influenced by three factors: the narrow timelines of this Hearing, the scope of the reconsideration hearing being limited to marine shipping, and the limited availability of venues.

Hope this helps and let me know if you would like to discuss options for remote participation

Thanks, Shirley

From: Joelle Walker [mailto:Joelle@millertiterle.com]
Sent: Thursday, October 25, 2018 2:45 PM
To: NEB Process Advisor Team – [TMX]
Cc: Erin Reimer; Shellina Tarmohamed; Ryley Mennie
Subject: RE: OTE - Sto:lo Collective

Shirley:

Thank you for your quick response. We realize the reconsideration hearing is being conducted on extremely aggressive timelines but we are wondering why Vancouver Island was chosen as the location for OTE hearings instead of the Lower Mainland given the number of Indigenous intervenors whose respective territories are not located on Vancouver Island?

Thank you in advance for your assistance.

Regards,

Joelle

Joelle Walker | Principal

Miller Titerle + Company*
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* Miller Titerle Law Corporation

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From: NEB Process Advisor Team – [TMX] [<mailto:TMX.ProcessHelp@neb-one.gc.ca>]
Sent: Thursday, October 25, 2018 1:18 PM
To: Joelle Walker <Joelle@millertiterle.com>; NEB Process Advisor Team – [TMX] <TMX.ProcessHelp@neb-one.gc.ca>
Cc: Erin Reimer <Erin@millertiterle.com>; Shellina Tarmohamed <Shellina@millertiterle.com>; Ryley Mennie <Ryley@millertiterle.com>
Subject: RE: OTE - Sto:lo Collective

Hi Joelle.

We are holding sessions only on Vancouver Island because we have timing limitations due the high amount of interest from Indigenous intervenors, the narrow timelines of this Hearing, the scope of the reconsideration hearing being limited to marine shipping, and the limited availability of venues.

The Board understands that the selected locations may not be the best option for some presenters. Therefore, we will also likely hold sessions at the Board's offices in Calgary. Oral traditional evidence may also be given at a mutually agreed upon time by phone or video conference.

Let me know if I can help further.

Shirley

From: Joelle Walker [<mailto:Joelle@millertiterle.com>]
Sent: Thursday, October 25, 2018 11:39 AM
To: NEB Process Advisor Team – [TMX]
Cc: Erin Reimer; Shellina Tarmohamed; Ryley Mennie
Subject: RE: OTE - Sto:lo Collective

Shirley:

Thank you for your email. Can you please confirm:

- (a) Whether any OTE hearings will be held in the Lower Mainland; and
- (b) if not, what is the NEB's reasoning for only holding OTE hearings on Vancouver Island?

Regards,

Joelle

Joelle Walker | Principal

Miller Titerle + Company*
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F: 604.681.4113
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* Miller Titerle Law Corporation

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From: NEB Process Advisor Team – [TMX] [<mailto:TMX.ProcessHelp@neb-one.gc.ca>]

Sent: Wednesday, October 24, 2018 3:39 PM

To: Joelle Walker <Joelle@millertiterle.com>; Erin Reimer <Erin@millertiterle.com>; Shellina Tarmohamed <Shellina@millertiterle.com>

Cc: NEB Process Advisor Team – [TMX] <TMX.ProcessHelp@neb-one.gc.ca>

Subject: OTE - Sto:lo Collective

We received the Notice of Intent to provide OTE for Sto:lo Collective. We are currently working to put together a schedule. As you can imagine, we have timing limitations due the high amount of interest from Indigenous intervenors, the narrow timelines of this Hearing, and the limited availability of venues.

We are looking to receive OTE in probably two locations on Vancouver Island (Victoria and Nanaimo) the last week of November and first week of December. Timing constraints would allow for 1 ½ to 2 hours per community/intervenor with up to four sessions each day.

Would you be most interested in booking a session in Victoria or Nanaimo?

Would your group be available for an evening session or is there a preferred time of day?

Thank you Shirley

Shirley P. Dawe

Socio-economic Specialist, Aboriginal Engagement | Spécialiste des questions socioéconomiques, Participation des Autochtones

National Energy Board | Office national de l'énergie

517 Tenth Avenue SW, Calgary AB T2R 0A8 | 517 Dixième Avenue S.-O., Calgary (AB) T2R 0A8 Government of Canada | Gouvernement du Canada

Telephone| téléphone 403-299-3605

1-800-899-1265 (toll free/sans frais)

October 23, 2018

Our File: 101024-038

VIA NEB e-Filing

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2P 5J2

Attention: Sheri Young, Secretary of the Board

Dear Ms. Young,

**Re: Trans Mountain Expansion Project – Reconsideration
Hearing Order MH-052-2018 & File OF-Fac-Oil-T260-2013-03 59
Notice of Intent and Objection of the Stó:lō Collective**

We are counsel for the Stó:lō Collective in relation to the National Energy Board (“NEB”) reconsideration hearing (the “**Reconsideration Hearing**”). The purpose of this letter is to provide the Stó:lō Collective’s Notice of Intent to provide oral Indigenous traditional knowledge (“**Oral Traditional Evidence**”) pursuant to Practice Direction No. 1 of the NEB dated October 12, 2018 (“**PD #1**”), as well as object to the process provided therein.

During the first hearing (the “**First Hearing**”) to consider the application by Trans Mountain Pipeline ULC (“**Trans Mountain**”) to the NEB for the Trans Mountain Expansion Project (the “**Project**”), the NEB established a process for the hearing of Oral Traditional Evidence, which imposed time limits on that evidence, set limitations on the nature of the knowledge that could be shared orally, and permitted Trans Mountain, other intervenors and the NEB to cross-examine the witnesses. By letter dated December 5, 2014 (the “**Objection Letter**”), the Stó:lō Collective objected to the process prescribed by the NEB, advising, among other things, that the process was unfair, culturally inappropriate and imbalanced. In particular, the Stó:lō Collective stated that the process chosen conflicted with Stó:lō customs and traditions that support knowledge transfer and honouring their Elders. The Stó:lō Collective also explained in the Objection Letter that the process chosen by the NEB had resulted in internal division, including the loss of two communities from the Stó:lō Collective.

As a result of the Stó:lō Collective’s dissatisfaction with the NEB’s process for hearing Oral Traditional Evidence, it chose to abstain from it entirely.

1. OBJECTION TO PROCESS FOR COLLECTION OF ORAL TRADITIONAL EVIDENCE

In light of the Stó:lō Collective’s concerns about the treatment of Oral Traditional Evidence in the First Hearing, in the letter of comment to the NEB dated October 3, 2018, the Stó:lō Collective requested that Oral Traditional Evidence be collected in a manner that was reflective of the specific cultural practices of the Indigenous group providing such evidence. PD #1 disregards

this entirely. As a result, the Stó:lō Collective wishes to again record an objection to the Oral Traditional Evidence process prescribed by the NEB in PD #1 for this Reconsideration Hearing.

1.1 Timing

As the NEB has repeatedly reminded intervenors, it must complete the Reconsideration Hearing and issue its Reconsideration report by February 22, 2019. Consequently, the rushed pace of the Reconsideration Hearing has truncated the Oral Traditional Evidence process in a manner that the Stó:lō Collective considers culturally insensitive and procedurally unfair. For instance, the time constraint has or is likely to result in the following issues:

- (a) there is inadequate time for the Stó:lō Collective to identify appropriate knowledge holders to provide Oral Traditional Evidence;
- (b) there is limited time for the NEB to hear Oral Traditional Evidence or to design a schedule which accommodates the needs of particular communities;
- (c) Oral Traditional Evidence sessions are scheduled to be held in late-November/early-December which conflicts with the Stó:lō Bighouse season, wherein many of the traditional knowledge holders are occupied with Bighouse duties and are providing spiritual and ceremonial support thereof;
- (d) there has been inadequate consideration of cultural protocols and ceremony surrounding the sharing of Oral Traditional Evidence by Stó:lō knowledge keepers; and
- (e) the NEB has demonstrated a lack of understanding for and protection of Stó:lō intellectual property and confidential and culturally-sensitive information.

1.2 Intellectual Property

The Stó:lō Collective is particularly concerned about the lack of proper safeguards for intellectual property and confidential and culturally-sensitive information which may be shared during the course of Oral Traditional Evidence sessions. The NEB has not taken any steps to ensure that Oral Traditional Evidence remains subject to confidentiality restrictions rather than being subject to public disclosure.

1.3 Cross-examination

As in the First Hearing, the NEB is again allowing Trans Mountain to cross-examine witnesses during the Oral Traditional Evidence sessions. The Stó:lō Collective objected to this aspect of the process in its Objection Letter, and maintains its objection for the Reconsideration Hearing. As stated previously, in Stó:lō cultural practices, it is neither customary nor appropriate to question Elders' expression of traditional knowledge. To do so is to show great disrespect, not just to the particular Elder, but also to their ancestors, name bearers, the land, and the spirits from which the Elder gains their knowledge.

The Stó:lō Collective has been an active participant throughout the regulatory approval process for the Project and will continue to do so but has significant concerns that the Reconsideration

Hearing will repeat and exacerbate the mistakes of the past identified by the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153. To reiterate what the Stó:lō Collective previously expressed in its Objection Letter: the process of oral traditional hearings must reflect a basic understanding of First Nations culture and society. Without an adequate understanding of Stó:lō culture and society, this process, too, is destined to be fatally flawed.

2. NOTICE OF INTENT

Notwithstanding the Stó:lō Collective's objection to the process chosen by the NEB, the Stó:lō Collective wishes to provide Oral Traditional Evidence. Please note, however, that due to time constraints, the Stó:lō Collective is unable to identify the appropriate knowledge keeper at this stage. As these individuals have not yet been identified, we are also unable to indicate whether any of the Stó:lō Collective's witnesses will require the assistance of remote participation. The Stó:lō Collective has circulated a request to each of its member communities to appoint a representative as soon as possible. We anticipate that we will be in a position to provide the NEB with the individual name(s) shortly, as well as any respective requests for remote participation.

Yours truly,

MILLER TITERLE LAW CORPORATION



Joelle Walker
joelle@millertiterle.com

cc: Trans Mountain
regulatory@transmountain.com

National Energy
Board



Office national
de l'énergie

This is Exhibit P referred to in the Affidavit of
Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
31 October 2018

To: All Parties

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177
MH-052-2018**

**Letters and requests from Shxw'ōwhámél First Nation, the Stó:lō Collective, and
Little Shuswap Lake Indian Band regarding oral Indigenous traditional evidence
locations**

On 29 October 2018, the Board received a letter from Shxw'ōwhámél First Nation in which it objects to, and asks the Board to reconsider, the locations chosen for the oral Indigenous traditional evidence sessions. On 30 and 31 October 2018, respectively, the Stó:lō Collective and Little Shuswap Lake Indian Band filed letters with similar objections and requests.

Before deciding on these requests, the Board will accept comments on them from Trans Mountain and the intervenors on or before **3:00 pm Pacific time (4:00 pm Mountain time) on 2 November 2018**.

Shxw'ōwhámél First Nation, the Stó:lō Collective, and Little Shuswap Lake Indian Band may file reply comments on or before **noon pm Pacific time (1:00 pm Mountain time) on 6 November 2018**.

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

Suite 210, 517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

517, Dixième Avenue S.-O., bureau 210
Calgary (Alberta) T2R 0A8

Canada

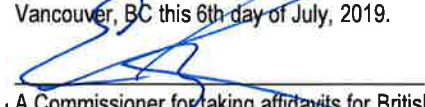
Telephone/Téléphone : 403-292-4800
Facsimile/Télécopieur : 403-292-5503
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Telephone/Téléphone : 1-800-899-1265
Facsimile/Télécopieur : 1-877-288-8803

National Energy
Board



Office national
de l'énergie

This is Exhibit Q referred to in the Affidavit of
Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
6 November 2018

To: All Parties

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177
MH-052-2018
Notice of motion from Squamish Nation requesting more time for filing opening
statement and evidence**

On 5 November 2018, the Board received a notice of motion from Squamish Nation seeking additional time for intervenors to file their opening statement and evidence. The motion seeks an extension from the current deadline of 20 November 2018 to 5 December 2018.

Before deciding on this request, the Board will accept comments on it from Trans Mountain and the intervenors on or before **3:00 pm Pacific time (4:00 pm Mountain time) on 8 November 2018**.

Squamish Nation may file reply comments on or before **3:00 pm Pacific time (4:00 pm Mountain time) on 9 November 2018**.

As the Board has previously stated, the timeline requires an expedited process and the need for Parties to stay focused on the hearing steps and to work diligently. The Board expects all Parties to continue working on submissions using the **deadlines set out in the Hearing Order** while decisions are pending.

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

Suite 210, 517 Tenth Avenue SW
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Facsimile/Télécopieur : 1-877-288-8803

National Energy
Board



Office national
de l'énergie

This is Exhibit R referred to in the Affidavit of
Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
7 November 2018

Ms. Joelle Walker
Representative for Shxw'ōwhámél First Nation
and the Stó:lō Collective
Miller Titerle & Company
215 – 209 Carrall Street
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Email joelle@millertiterle.com

Mr. Arthur M. Grant
Representative for Little Shuswap
Lake Indian Band
Grant Kovacs Norell litigation counsel
400 – 900 Howe Street
Vancouver, BC V6Z 2M4
Email agrant@gkn.ca

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report (Report) as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018**

**Ruling No. 7 – Letters and requests from Indigenous intervenors regarding oral
Indigenous traditional evidence locations, time limitations, and costs**

Background

On 20 September 2018, through Order in Council P.C. 2018-1177, the Governor in Council (GIC) referred aspects of the Board's Report for the Project back to the Board for reconsideration. The GIC's direction follows a 30 August 2018 decision¹ of the Federal Court of Appeal that quashed the GIC's approval of the Project. The GIC has imposed a time limit of 155 calendar days for the Reconsideration. Therefore, the Board must complete the Reconsideration process and issue its Reconsideration Report no later than 22 February 2019.

On 12 October 2018, in Procedural Direction No. 1, the Board announced that it planned to hold oral traditional evidence sessions in late-November/early-December at a location or locations on Vancouver Island, British Columbia (BC). The procedural direction explained that, as a result of GIC's imposed time limit, there may be limited time for the Board to hear oral traditional evidence. The procedural direction also said that, prior to hearing oral traditional evidence, the Board Members assigned to undertake the Reconsideration will have read the transcripts of the oral traditional evidence provided in the OH-001-2014 Certificate hearing. Therefore, it is not necessary for Indigenous intervenors to repeat the oral traditional evidence previously provided.

.../2

¹ *Tsileil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153.

The Board asked Indigenous intervenors that wished to provide oral traditional evidence to notify the Board of their intent to do so by 23 October 2018 (Notices of Intent).

In response to Procedural Direction No. 1, the Board received comments about the Board's intention to hold oral traditional evidence sessions on Vancouver Island. These comments came within the Notices of Intent and in separate letters to the Board. After receiving separate letters of objection from Shxw'ōwhámel First Nation (Shxw'ōwhámel), the Stó:lō Collective, and Little Shuswap Lake Indian Band (LSLIB), the Board [established](#) a comment period on 31 October 2018.

1. Letters of objection

1.1 Shxw'ōwhámel

In its [Notice of Intent](#), Shxw'ōwhámel said that, on a number of occasions, it has explained to the Board its customary belief that the sharing of oral traditional evidence must be done in person. Shxw'ōwhámel requested that the Board hold oral traditional evidence hearings in Hope or Vancouver, BC to facilitate First Nations' participation in the Lower Mainland.

On 29 October 2018, Shxw'ōwhámel filed a [letter](#) in which it objects to the chosen locations and reiterated its request for the Board to schedule oral traditional evidence sessions in Vancouver or Hope, in order to facilitate participation by Shxw'ōwhámel and other similarly impacted groups.

Shxw'ōwhámel submits that the Board owes a duty of procedural fairness to the Parties before it, citing *Baker v. Canada (Minister of Citizenship and Immigration)*.² Shxw'ōwhámel is of the view that the cost and effort for it to travel to Vancouver Island is prohibitive and unfair and that, while the Board has granted Shxw'ōwhámel participant funding, the fairness of the Board's process is compromised if intervenors must expend limited funding on travel costs.

1.2 Stó:lō Collective

On 30 October 2018, the Stó:lō Collective filed a [letter](#) in which it requested that the Board reconsider its chosen locations. The Stó:lō Collective objected to the locations chosen for oral traditional evidence and submitted that 1.5 to 2 hours is insufficient time to provide oral traditional evidence. It noted that it is composed of 12 First Nations, all of which are located in the Fraser Valley, and whose Elders cannot easily travel to Vancouver Island to provide oral traditional evidence.

1.3 LSLIB

In its [Notice of Intent](#), LSLIB indicated that it intended to provide oral traditional evidence and one of its Elders may need to testify remotely.

² [1999] 2 S.C.R. 817 (*Baker*).

On 31 October 2018, LSLIB filed a [letter](#) in which it requested that the Board reconsider the locations and schedule an oral traditional evidence session in Kelowna, Kamloops, or Vancouver, BC. LSLIB provided views on the purpose of participatory rights within the duty of fairness, citing, as Shxw'ōwhámel did, *Baker v. Canada (Minister of Citizenship and Immigration)*.

LSLIB also said the cost and effort for LSLIB to travel to Vancouver Island is an unreasonable burden and unfair for an Indigenous community with a significant stake in the proceedings. It also argued that remote participation was not adequate because it does not allow for a meaningful two-way dialogue. In addition, LSLIB raised concerns regarding the potential for weather conditions to affect travel.

2. Comments received

2.1 Squamish Nation (Squamish)

In its [Notice of Intent](#), Squamish said that it intends to provide oral traditional evidence, including about the cultural and spiritual importance of the orca to Squamish. It said that, in order to satisfy its own internal protocols with cultural advisors and Elders, it anticipates that it will want to present its evidence, in part, in the form of a sacred ceremony that can only be performed and discussed in the Squamish longhouse at Xwmelch'stn, in confidence, and with a limited audience present and no recording devices. It said that this is the only culturally appropriate way in which evidence regarding this ceremony can be presented.

In a follow-up [letter](#) of 31 October 2018, Squamish reiterated its statement that the only culturally appropriate way to present its evidence is in the Squamish longhouse as described earlier. The Board notes that this letter was received on the same day, and just before, the Board released its request for comments on the three letters described in Section 1 above.

Squamish declined to provide oral traditional evidence via telephone or video conference.

2.2 Tsartlip First Nation

Tsartlip First Nation filed [comments](#) on 1 November 2018 in which it said that it takes no position on the letters of objection, save to say that, in its view, Victoria ought to be maintained as a hearing location due to its centrality for a number of Vancouver Island-based First Nations.

2.3 Trans Mountain

Trans Mountain filed [comments](#) on 2 November 2018 in which it said that it does not take a position on the location of the oral traditional evidence sessions, provided that the process can proceed efficiently and within the timeframes established in [Hearing Order MH-052-2018](#).

2.4 Province of BC

The Province of BC filed [comments](#) on 2 November 2018 in which it said that it would support the Board hearing matters in Indigenous communities.

2.5 Stk'emplupsemc te Secwepemc of the Secwepemc Nation

Stk'emplupsemc te Secwepemc of the Secwepemc Nation filed [comments](#) on 2 November 2018 in which it supported the letters of objection and requested that hearings be held in Vancouver or Kamloops.

2.6 Musqueam Indian Band

Musqueam Indian Band filed [comments](#) in support of the letters of objection.

3. Views of the Board

The Board acknowledges the objections raised by Shxw'ōwhámel, the Stó:lō Collective, and LSLIB, as well as the comments filed by other Parties, which focus on concerns regarding Vancouver Island locations to hear oral traditional evidence. The Board further acknowledges related concerns raised about the cost of travel, the time permitted to collect oral traditional evidence, and the expedited nature of the Reconsideration process. In addition, the Board acknowledges Squamish's request to provide oral traditional evidence in the form of a sacred ceremony that can only occur in the Squamish longhouse on its traditional territory.

While several Indigenous groups raised concerns as summarized above, a large number did not raise concerns.

The Board is mindful of the scope of the Reconsideration hearing and the expedited timeline, which was explained in Section 6.1 of the Board's 29 October 2018 [reasons on process design](#). The GIC has directed the Board to reconsider the environmental effects of Project-related marine shipping in view of the requirements of the *Canadian Environmental Assessment Act, 2012*, and the adverse effects of Project-related marine shipping on species at risk in view of any requirements of section 79 of the *Species at Risk Act*. The GIC has given the Board until 22 February 2019 to complete the Reconsideration.

Travel concerns

The Board appreciates that, for a number of Indigenous intervenors, travel would have been more straightforward if an appropriate venue was available on the Lower Mainland. However, this is not possible in the circumstances and time restrictions of the Reconsideration process. Normally, the Board books venues many months ahead and all venues are reviewed carefully with safety and security considerations in mind. The Board checked the availability of venues previously used in the Lower Mainland and it was not possible to find a suitable venue that had availability during the November-December period for an appropriate number of days. In order to complete the Reconsideration by 22 February 2019, oral traditional evidence must be heard in this timeframe.

In the Board's view, the Vancouver Island locations for oral traditional evidence allow Indigenous intervenors to be adequately heard. The Board acknowledges that travel times will vary depending on the intervenor, but the Board does not consider travelling from the Lower Mainland to Vancouver Island to be unreasonable in the circumstances of an expedited hearing,

with limited scope, and where participant funding is available for travel costs.³ Should weather conditions on certain days compromise the ability of Indigenous intervenors to attend, the Board will do what it can to make alternative arrangements. In addition to the Vancouver Island locations, the Board has added Calgary as a location to facilitate hearing oral traditional evidence remotely. Indigenous intervenors may also choose to provide the Board with audio or video recordings of their oral traditional evidence in lieu of, or in addition to, any oral presentations.

The oral traditional evidence sessions set up for the Reconsideration hearing do not replace the oral traditional evidence sessions held during the OH-001-2014 Certificate hearing. These new sessions will supplement the oral traditional evidence already provided with respect to the issues⁴ being considered in this Reconsideration. All evidence from the OH-001-2014 Certificate hearing – including the [transcripts](#) from past oral traditional evidence sessions – is on the record of the Reconsideration hearing and that evidence will be considered to the extent it applies to the current List of Issues. A considerable portion of past oral traditional evidence was focused on marine effects of the Project.

Time limits

The Board has previously addressed concerns about the expedited nature of the Reconsideration hearing in its [reasons on process design](#), as well as in Procedural Direction No. 2, also of today's date. Those reasons apply here.

With respect to concerns regarding the two-hour time limit, the Board is of the view that, while it would have been preferable not to have limits on the time allowed for each Indigenous intervenor to present oral traditional evidence, that was not possible with the number of intervenors presenting and the time limit imposed for the Reconsideration. As noted above, a previous opportunity for oral traditional evidence was provided in the OH-001-2014 Certificate hearing. For Indigenous intervenors comfortable in doing so, the Board will also accept oral traditional evidence by video or audio recordings.

The Board acknowledges the Stó:lō Collective's view that 1.5 to 2 hours may not be sufficient time for its oral traditional evidence given that it is a collective of 12 First Nations. The Board is mindful that there are Indigenous intervenors providing oral traditional evidence that represent more than one First Nation, and that two of these have requested additional time for their presentations.⁵

Accordingly, for each of these three Indigenous intervenors, the Board has decided to increase the amount of time allotted for oral traditional evidence. This additional time is reflected in the detailed oral traditional evidence schedule attached to Procedural Direction No. 2.

³ Indigenous groups can request \$80,000 in participant funding to facilitate their participation in the Board's hearing. The Participant Funding Program specifically lists travel expenses as costs eligible for reimbursement by that fund. The choice on how to use funding in a given hearing is entirely up to the intervenor.

⁴ The List of Issues for the Reconsideration hearing are set out in Appendix 1 to [Hearing Order MH-052-2018](#).

⁵ The Stó:lō Collective; Swinomish Indian Tribal Community, Tulalip Tribes, Suquamish Tribe, and Lummi Nation (U.S. Tribes); and the Indigenous Caucus for the Trans Mountain Indigenous Advisory and Monitoring Committee

Squamish ceremony at Xwmelch'stn

The Board understands that Squamish proposes to share traditional knowledge in the form of a sacred ceremony that can only be performed and discussed in the Squamish longhouse at Xwmelch'stn in confidence, with a limited audience present and with no recording devices.

The Board appreciates and is honoured by Squamish's request and invitation. As set out in Section 6.4 of the Board's [reasons on process design](#), in the circumstances of this case, it is not possible to travel to individual Indigenous communities. If the Board were to accept Squamish's proposal, then, in fairness, it would also have to consider requests from other Indigenous intervenors to visit their territories as well. It would have also been necessary to find appropriate ways to address the limitations on attendance and recording proposed by Squamish.

The Board's hearing process is public and transparent so that all Parties are aware of the evidence that the Board will consider in reaching its recommendation in this Reconsideration. The Board recognizes that the sacred ceremony can only occur at Xwmelch'stn, but invites Squamish to consider whether it wishes to provide another form of oral traditional evidence on Vancouver Island. The Board notes that Squamish previously provided oral traditional evidence in the OH-001-2014 Certificate hearing and the Board Members assigned to undertake the Reconsideration will have read the transcripts of that evidence prior to hearing oral traditional evidence in the current hearing.

Procedural fairness

With respect to comments received regarding procedural fairness, the Board acknowledges that the duty of fairness owed by the Board to the Parties is significant and the Parties are entitled to a meaningful opportunity to present their cases fully and fairly. In considering the design of the overall hearing process, the Board finds that it is procedurally fair to all Indigenous intervenors, including those from the Lower Mainland.

Indigenous intervenors will have an opportunity to present their case fully and fairly. This takes into account the procedural steps offered, including to:

- 1) file written evidence in response to the evidence of Trans Mountain and Federal Departments and Agencies, and to address the List of Issues for the Reconsideration;
- 2) present oral traditional evidence, either in person or remotely, on Vancouver Island or in Calgary, or through an audio or video recording (participant funding is available for travel costs or other hearing steps undertaken);
- 3) ask information requests of other Parties written evidence, and an opportunity to file motions to compel full and adequate answers if the responses are not considered adequate; and
- 4) file written-argument-in chief, including replying to the argument of Trans Mountain and Federal Departments and Agencies.

Taking into account all these rights and hearing steps, the Board is of the view that the significant duty of procedural fairness owed to Indigenous intervenors is satisfied. This takes into account the context of a large multi-party proceeding, the statutory scheme, and the Board's

choice of procedures.⁶ Also relevant to whether the hearing is procedurally fair is the time limit for the Reconsideration, the practical limits on the availability of suitable venues in the Lower Mainland, and the potential for the Project to adversely affect Indigenous and Treaty rights protected under subsection 35(1) of the *Constitution Act, 1982*. While not all factors point the same way, on an overall basis, the requirement for significant procedural fairness is satisfied by providing here a meaningful opportunity for Indigenous intervenors to present their case and to effectively challenge opposing evidence.⁷

While the Reconsideration hearing steps are not identical to those in the OH-001-2014 Certificate hearing, they are comparable. Having to travel to provide oral traditional evidence, while not ideal, is still procedurally fair in the circumstances. No legal authority was provided for the argument advanced that travelling to present oral traditional evidence, or remote participation, was procedurally unfair in the circumstances. The Board notes that mere inconvenience does not amount to unfairness.⁸

Disposition

As stated, the Board appreciates the concerns and suggestions of a number of Indigenous intervenors. Where the Board was able to make revisions to its process, it did so. However, it is necessary to retain the Vancouver Island venues to hear oral traditional evidence. The Board looks forward to hearing further from those Indigenous intervenors that are able to provide oral traditional evidence.

For more information, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

c.c. All Parties

⁶ *Tsleil-Waututh Nation v. Attorney General of Canada*, 2018 FCA 153, paras. 230 to 277, where the Court applied the principles in *Baker*.

⁷ *Ibid*, para. 235.

⁸ Macaulay & Sprague, *Practice and Procedure before Administrative Tribunals*, electronic (Toronto: Thomson Canada Limited) at 9.4(d)(ii).

This is Exhibit S referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.

National Energy
Board



Office national
de l'énergie

A Commissioner for taking affidavits for British Columbia

File OF-Fac-Oil-T260-2013-03 59
7 November 2018

To: All Parties

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018**

**Procedural Direction No. 2 – Oral Indigenous traditional evidence – Procedures,
guidance, and session locations and schedules**

A. Overview

On 12 October 2018, in Procedural Direction No. 1, the Board announced that it planned to hold oral traditional evidence sessions in late-November/early-December at a location or locations on Vancouver Island, British Columbia (BC). It also asked Indigenous intervenors that wish to provide oral traditional evidence to notify the Board of their intent to do so by 23 October 2018 (Notices of Intent). In their Notices of Intent, Indigenous intervenors had the opportunity to provide any other information they thought the Board should consider regarding the process for gathering oral traditional evidence.

Thirty-one Indigenous intervenors provided Notices of Intent. Comments received in these Notices of Intent are summarized and addressed in Parts C and D below.

The Board will hear oral traditional evidence at three locations – Calgary, Alberta (AB) and Victoria and Nanaimo, BC – at the venues and during the date ranges noted below:

Session 1 19 – 23 November 2018
Board Hearing Room
517 Tenth Avenue SW
Calgary, AB

Session 2 26 – 29 November 2018
Delta Hotels Victoria Ocean Pointe Resort
100 Harbour Road
Victoria, BC

.../2

Suite 210, 517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

517, Dixième Avenue S.-O., bureau 210
Calgary (Alberta) T2R 0A8

Canada

Telephone/Téléphone : 403-292-4800
Facsimile/Télocopieur : 403-292-5503
www.neb-one.gc.ca

Telephone/Téléphone : 1-800-899-1265
Facsimile/Télocopieur : 1-877-288-8803

Session 3 3 – 6 December 2018
Vancouver Island Conference Centre
101 Gordon Street
Nanaimo, BC

If presenters cannot appear at any of the locations listed above, they can provide their oral traditional evidence remotely during the time that the Panel is sitting in Calgary, or they may provide the Board with an audio or video recording. For those that present in person at a particular session but feel that more time is required to share their oral traditional evidence, they may also provide the Board with an audio or video recording. It is up to each Indigenous intervenor to decide which method of participation is appropriate and acceptable to them.

B. Attendance

For each oral traditional evidence session, access to the hearing room will be limited to those that are presenting the evidence, members of their communities, registered intervenors, Trans Mountain, and accredited media.

The Board must ensure a safe and respectful environment for everyone attending and participating in its oral traditional evidence sessions. Experiences at previous Board hearings, which have included physical and verbal threats against hearing attendees and participants requiring intervention by security and law enforcement staff, combined with security assessments for the upcoming oral hearing sessions, have given the Board reason to limit access to the hearing room. Minimizing these risks is necessary for ensuring the safety of all hearing participants and attendees. The Board notes that it does not have the full range of security measures as courts, where certain safeguards are in place by virtue of the physical attributes of courthouses and their staffing.

The Board recognizes that public access to hearings is a presumptive right. In the Board's view, the restrictions on physical access are as limited in scope as is necessary to address safety and security concerns. The Board is ensuring the transparency and accessibility to the upcoming hearings to all members of the public through live audio streams, downloadable media files, and transcripts of all sessions. The Board continually updates its [website](#) regarding the Reconsideration hearing, and all documents related to the hearing are available in the Board's online [public registry](#). In addition, accredited media can attend and report on the oral traditional evidence sessions.

C. Comments received in Notices of Intent

Some Indigenous intervenors requested that the Board hear oral traditional evidence in additional towns or cities. Others also filed subsequent letters objecting to, and requesting that the Board reconsider, the chosen locations. The Board has considered and addressed all such requests in Ruling No. 7, also of today's date. Please see that ruling for details on those submissions, the Board's views on them, and its reasons for selecting the chosen locations.

Comments received on other topics are summarized below.

Stó:lō Collective

The Stó:lō Collective said that, during the OH-001-2014 Certificate hearing, it had objected to the process used by the Board to collect oral Indigenous traditional evidence and chose not to provide such evidence during that proceeding. The Stó:lō Collective objects to the oral traditional evidence process for this Reconsideration hearing, but still wishes to provide it. The Stó:lō Collective's concerns include:

- i) **Timing:** The rushed pace of the Reconsideration hearing has truncated the oral traditional evidence process in a manner that the Stó:lō Collective considers culturally insensitive and procedurally unfair.
- ii) **Intellectual property:** The lack of proper safeguards for intellectual property and confidential and culturally-sensitive information that may be shared during the oral traditional evidence sessions.
- iii) **Cross-examination:** It is not customary, nor appropriate, to question Elders' expression of traditional knowledge.

Swinomish Indian Tribal Community, Tulalip Tribes, Suquamish Tribe, and Lummi Nation (U.S. Tribes)

The U.S. Tribes noted that the List of Issues for the Reconsideration hearing (Appendix 1 to [Hearing Order MH-052-2018](#)) includes "potential impacts of Project-related marine shipping on Indigenous interests," yet defines "indigenous" as being limited to "aboriginal peoples of Canada." The U.S. Tribes said that Project-related marine shipping will have impacts to Indigenous peoples on both sides of the international border and that the impacts and risk of increased marine vessel traffic do not stop at the border, nor do the orcas, salmon, and other marine life.

Other comments

A number of Indigenous intervenors – including [Tsawout First Nation](#), [Tsuut'ina Nation](#), the Stó:lō Collective, and the U.S. Tribes – specified or suggested that they plan to have several knowledge holders attend and share their oral traditional knowledge.

D. Views of the Board

Stó:lō Collective

The Board must set a hearing process that fulfills its legislative mandate, the statutory time limits, and that is fair to all Parties. However, the Board also recognizes the importance of accounting for the cultural norms and practices of Indigenous participants. The Board values the unique knowledge and perspectives held by Indigenous intervenors and intends to treat the collection of oral traditional evidence with dignity, respect, and sensitivity. Presenters can choose to swear on a sacred item, and ceremonies, prayers, or other cultural practices can be incorporated into the oral traditional evidence presentations. The Board encourages the Stó:lō

Collective to contact the Board's Process Advisors so that appropriate arrangements can be made.

With respect to the Stó:lō Collective's concerns about the timeline for the Reconsideration hearing, as explained in Section 6.1 of the Board's 29 October 2018 [reasons on process design](#), the Board is bound to work within the mandate set for it in the *National Energy Board Act* (NEB Act). Section 53 of the NEB Act authorizes the Governor in Council (GIC) to direct the Board to undertake a reconsideration based on any factor specified, and to specify a time limit for the Board to complete its reconsideration. In this case, the GIC has specified that the Board must reconsider the environmental effects of Project-related marine shipping in view of the requirements of the *Canadian Environmental Assessment Act, 2012*, and the adverse effects of Project-related marine shipping on species at risk in view of any requirements of section 79 of the *Species at Risk Act*. This is a focused Reconsideration and the GIC has given the Board until 22 February 2019 to deliver its Reconsideration Report. There is already significant evidence on the record on numerous topics being examined. Consistent with subsection 11(4) of the NEB Act, there is a need for proceedings to be conducted expeditiously and fairly and, in any case, within the time limit set by the GIC.

The Board is mindful that oral traditional evidence may include confidential or culturally sensitive information. The Board is not asking Indigenous intervenors to share more than is culturally appropriate for their individual communities. The Board may also take measures to ensure the confidentiality of information under sections 16.1 or 16.2 of the NEB Act, should an intervenor make, and the Board grant, a request for such treatment. More details can be found in Section 4.5 of the Hearing Order and Section 1.5 of the Board's [Filing Manual](#).

With respect to the Stó:lō Collective's objection to cross-examining witnesses during the oral traditional evidence sessions, the Board notes that questions may be answered and submitted in writing, as indicated in Procedural Direction 1 (Part F). Questions put to Elders, if any, should be courteous and respectful. This balances cultural practices and the procedural fairness requirement for Trans Mountain and intervenors to be given the opportunity to test the evidence. This approach was affirmed by the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*.¹

U.S. Tribes

The U.S. Tribes raised a concern around the definition of "Indigenous" in the List of Issues. The purpose of Footnote 4 in the List of Issues was to acknowledge the language used in the *Canadian Constitution Act, 1982*. The Board is also aware of its responsibilities in relation to paragraphs 5(1)(b) and (c) of the *Canadian Environmental Assessment Act, 2012*, to take into account environmental effects, including changes "outside Canada" and "with respect to aboriginal peoples." The footnote does *not* restrict the Board's consideration of impacts to *only* those on Indigenous peoples of Canada.

¹ 2018 FCA 153 at para 258.

The U.S. Tribes have been accepted as an intervenor in this hearing because the Board is aware that Project-related marine shipping may have impacts on them. The Board acknowledges the oral traditional evidence that the U.S. Tribes provided on [22](#) and [23](#) October 2014 in Chilliwack, BC during the OH-001-2014 Certificate Hearing. That evidence is on the record of this Reconsideration hearing and the Board believes it will be valuable to hear further evidence from the U.S. Tribes.

Other comments

The Board acknowledges all oral traditional evidence [provided](#) by various Indigenous intervenors during the OH-001-2014 Certificate hearing. That evidence is on the record of this Reconsideration hearing and is valuable to the Board.

A number of Indigenous intervenors in the Reconsideration hearing have identified several knowledge holders who will attend and share their oral traditional knowledge. The Board will be on Vancouver Island for only eight days. Should presenters at those locations feel that more time is required to share their oral traditional evidence, they may provide the Board with an audio or video recording.

Please see **Appendix 1** for the detailed oral traditional evidence schedule, which was developed based on the Notices of Intent received and discussions between Indigenous intervenors and the Board's Process Advisors. The Process Advisors will continue to discuss scheduling matters with these intervenors in the time leading up to the oral hearing sessions.

As a result, it is possible that the detailed schedule will change as the sessions approach. Presenters will not have their schedule changed without notice. Based on requests from Indigenous intervenors, and in consultation with any other Parties involved, the Board will update Appendix 1 on the public registry as this occurs. The Board asks the Parties to revisit the schedule online for the most up-to-date scheduling information.

In **Appendix 2**, the Board provides procedures, guidance, and other details to assist the Parties in understanding how the sessions will unfold.

For information about the Board's hearing process, please see Hearing Order MH-052-2018.

The Board's Process Advisors can be reached by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

Attachments

Appendix 1 Detailed oral Indigenous traditional evidence schedule (all times are local)

Day	Date	9:00 am – 11:00 am	12:30 pm – 2:30 pm	3:00 pm – 5:00 pm
Session 1 Calgary	Monday			
	Tuesday	Louis Bull Tribe	Makah Tribal Council (teleconference)	
	Wednesday	Driftpile Cree First Nation		
	Thursday	Whitefish Lake First Nation #459	Tsuut'ina Nation	Papaschase First Nation #136
	Friday			
Session 2 Victoria	Monday	Stó:lō Tribal Council	Kwantlen First Nation	
	Tuesday	Indigenous Caucus for the Trans Mountain Indigenous Advisory and Monitoring Committee		
	Wednesday	Tsawout First Nation	Tsartlip First Nation	Swinomish Indian Tribal Community, Tulalip Tribes, Suquamish Tribe, and Lummi Nation (U.S. Tribes) ¹
	Thursday		Squamish Nation	Stó:lō Collective ^{1,2}
	Monday		Tsleil-Waututh Nation	Adam Olsen
Session 3 Nanaimo	Tuesday	The First Nations of the Maa-Nulth Treaty Society	Stz'uminus First Nation	Shxw'ōwhámel First Nation
	Wednesday	Lyackson First Nation	Musqueam Indian Band	Snauneymuxw First Nation
	Thursday	Suk'emlupsemc te Secwepemc of the Secwepemc Nation (teleconference)	Little Shuswap Lake Indian Band	Adams Lake Indian Band

This is Exhibit T referred to in the Affidavit of
Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

¹ Presentation time extended to 6:00 pm (representing multiple First Nations)

² Beginning at 4:00 pm

Appendix 2 Procedures and guidance for oral Indigenous traditional evidence

A. What is oral traditional evidence?

The Board understands that Indigenous peoples have an oral tradition for sharing knowledge from generation to generation. This information cannot always be shared adequately or appropriately in writing.

The oral traditional evidence previously provided in the OH-001-2014 Certificate hearing is on the record of this Reconsideration hearing and is valuable to the Board. Prior to hearing oral traditional evidence, the Board Members assigned to undertake the Reconsideration will have read the transcripts of the oral traditional evidence previously provided. This relieves Indigenous intervenors of the requirement to repeat that evidence in the current Reconsideration hearing.

Indigenous intervenors are encouraged to also make use of their opportunity to file written evidence, to the extent adequate and appropriate, so the Board can spend as much time as possible listening to evidence that can only be provided orally. For example, scientific studies or other expert reports should be provided as written evidence.

The Board recognizes that, ultimately, each Indigenous intervenor decisions will make its own decisions as to whether to present oral traditional evidence, how to do so, and what evidence to provide in the Reconsideration hearing, taking into account the guidance provided by the Board in the List of Issues (Appendix 1 to Hearing Order MH-052-2018) and its associated reasons.

B. Who can provide oral traditional evidence?

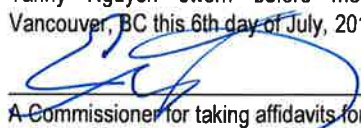
Presenters must be representatives of Indigenous groups or individuals that have been granted intervenor status in this Reconsideration hearing and that provided the Board with a Notice of Intent to present oral traditional evidence, as outlined in Procedural Direction No. 1. Those who have not previously registered to present oral traditional evidence will not be allowed to provide it.

C. How much time do I have to make my oral traditional evidence presentation?

In order to hear from all presenting individuals and groups, and in an effort to be fair, each Indigenous intervenor has been allotted up to two hours to present its oral traditional evidence. Participating groups and individuals are welcome to use part of their two-hour time allotment to share a prayer or ceremony, if they wish.

For those that present in person at a particular session but feel that more time is required to share their oral traditional evidence, they may also provide the Board with an audio or video recording.

This is Exhibit U referred to in the Affidavit of
Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British
Columbia

D. Can I use visual aids during my oral traditional evidence presentation?

Visual aids or other written materials referred to during presentations (e.g., a map illustrating traditional land use, a PowerPoint presentation, or a sacred item), should only be used as a tool for illustrating the oral traditional evidence. Normally, most written materials should be filed with an intervenor's written evidence rather than being part of the oral presentation.

Any visual aids that presenters intend to use during their oral traditional evidence presentation **must be filed and served as written evidence at least one day in advance of their oral traditional evidence presentation.** The Hearing Order provides instructions on how to file and serve documents.

E. If I cannot attend the location or time that has been scheduled for my presentation, can I still participate?

If presenters cannot appear at one of the three hearing venues in person, they can provide their oral traditional evidence remotely during the time that the Panel is sitting in Calgary, or they may provide the Board with an audio or video recording.

To discuss scheduling or remote participation, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

F. What will happen when I arrive at the venue to give my oral traditional evidence?

Upon arriving at the hearing venue, please check in with a Process Advisor who will explain the process for that venue. This will allow Board staff to confirm attendance and answer any questions.

G. Will I be “sworn in” prior to presenting my oral traditional evidence?

Before providing oral traditional evidence, presenters will be asked to either swear or affirm that the information they are presenting is accurate and truthful to the best of their knowledge and belief.

If presenters prefer to be sworn in, they will be asked to place their hand on a Bible or another sacred item. If they want to swear on a sacred item other than a Bible, they will need to bring that item to the hearing.

If they prefer to be affirmed, they will be asked to make a statement that the information they are presenting is accurate to the best of their knowledge and belief.

Presenters may also swear or affirm their information through other methods, such as a traditional ceremony or prayer. Please note any such preferences to the Board's Process Advisors so that necessary arrangements can be made.

H. Can I present my evidence in a language other than English?

If those providing oral traditional evidence are speaking in a language other than English, the intervenor must provide their own interpreter and incur those costs (or use participant funding approved for that purpose). Only the English translation will be included in the hearing transcript. It is up to the presenting intervenor to confirm the accuracy of the translation. The presentation, including interpretation, must be no longer than two hours in total (with exceptions for those representing more than one group and as reflected in Appendix 1).

I. Will anyone ask me questions during my presentation?

Since all other evidence will be tested with written questioning, the Board is of the view that it is fair that there also be an opportunity for Parties to respectfully ask questions about oral traditional evidence. The Board may also ask questions of clarification. Questions may be answered orally at the hearing, or they can be answered and submitted in writing, or a combination of both. The choice of how to answer questions, if any, is entirely up to each Indigenous intervenor.

J. Online broadcast and transcripts

The Board will provide a live audio stream of the oral traditional evidence sessions via its [website](#). Media files of each day's broadcast will also be available for [downloading](#).

Daily written transcripts will be found on the online [public registry](#) by the following morning. Anyone can order paper copies of the transcripts directly from International Reporting Inc. This can be done in the hearing room, by emailing bprouse@irri.net, or by calling 613-748-6043. There may be a fee for this service.

National Energy
Board



Office national
de l'énergie

This is Exhibit V referred to in the Affidavit of
Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
8 November 2018

To: All Parties

Trans Mountain Pipeline ULC
Application for the Trans Mountain Expansion Project
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018
Federal government-appointed Marine technical advisor

On 1 November 2018, in Order in Council P.C. 2018-1341, the federal government appointed Mr. Nigel S. Greenwood of Victoria, British Columbia as a Marine technical advisor to the Board. Specifically, Mr. Greenwood has been appointed by the Governor in Council pursuant to section 10 of the *National Energy Board Act* (NEB Act) to assist the Board in an advisory capacity.

The Board is aware that Mr. Greenwood prepared a *Ship Noise Mitigation Risk Assessment*, which has been filed by certain Parties as part of their direct evidence in the Reconsideration, including the following:

- A95292-9 – Department of Justice, on behalf of Fisheries and Oceans Canada and Canadian Coast Guard, Environment and Climate Change Canada, Health Canada, Natural Resources Canada, Parks Canada, and Transport Canada, Part 1, Annex 3.F.4;
- A95296-14 – Vancouver Fraser Port Authority, Appendix 9.1.

The Board values transparency and recognizes that the content of the duty of procedural fairness owed to the Parties in this Reconsideration is significant.¹ For clarity, the Panel Members assigned to the Reconsideration have not had any interaction with Mr. Greenwood. Out of an abundance of caution, the Board has decided on its own volition to respectfully decline using Mr. Greenwood in an advisory capacity with respect to the Reconsideration.

.../2

¹ This is consistent with the Federal Court of Appeal's determination in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at para 235.

Public confidence in the National Energy Board's impartiality is integral to the Board's role in this hearing. Section 10 of the NEB Act does not override the need for a hearing process that is and is perceived to be fair to all Parties.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

November 8, 2018

Our File: 101024-038

VIA NEB Participation Portal

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2P 5J2

Attention: Sheri Young, Secretary of the Board

Dear Ms. Young,

**Re: Trans Mountain Expansion Project – Reconsideration
Hearing Order MH-052-2018 & File OF-Fac-Oil-T260-2013-03 59
Notice of Motion for Extension to File (the “Motion”) by Squamish Nation
(“Squamish”) dated November 6, 2018**

We write further to the Motion and the corresponding direction from the National Energy Board (“NEB”) dated November 6, 2018 requesting responses to the Motion. The Stó:lō Collective supports the relief sought by Squamish for an order extending the deadline of November 20, 2018 for intervenors to file their opening statement and direct evidence, as set out in the Hearing Order MH-052-2018, by 15 days to December 5, 2018. The Stó:lō Collective agrees that such an order is appropriate in the circumstances and that it should apply to all intervenors.

Procedural Fairness

It bears repeating that the NEB owes intervenors a significant degree of procedural fairness in this Reconsideration Hearing, and that the intervenors are entitled to “a meaningful opportunity to present their cases fully and fairly”.¹ The Federal Court of Appeal recently explained the NEB’s duty of procedural fairness in *Tsleil-Waututh Nation v. Canada*²:

[230] The Board, as a public authority that makes administrative decisions that affect the rights, privileges or interests of individuals, owes a duty of procedural fairness to the parties before it. However, the existence of a duty of fairness does not determine what fairness requires in a particular circumstance.

[231] It is said that the concept of procedural fairness is eminently variable, and that its content is to be decided in the context and circumstances of each case. The concept is animated by the desire to ensure fair play. The purpose of the participatory rights contained within the duty of fairness has been described to be:

¹ *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153 at para. 235.

² *Ibid.*

... to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. [Emphasis added.]

(*Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, at paragraph 22).

As pointed out in the Motion, Trans Mountain and the Federal authorities filed a substantial volume of materials as their opening statements and direct evidence. It is not a reasonable or fair process to expect the Stó:lō Collective and other intervenors to read, digest, and meaningfully respond to these materials, totalling over 8,000 pages, by November 20, 2018.

Duty to Consult

Based on a review of filings made to date in the Reconsideration Hearing, it appears Canada has advised certain intervenors (Squamish Nation and Malahat First Nation)³ that it will be relying on the Reconsideration Hearing to the extent possible to fulfil its constitutional duty to consult with Indigenous intervenors. In such circumstances, “the Board’s process serves the additional purpose of contributing to the extent possible to the constitutional imperative not to approve a project if the duty to consult was not satisfied”.⁴ A timeline which requires Indigenous intervenors to consider thousands of pages of evidence in three weeks is entirely inconsistent with any meaningful consultation, and clearly does not contribute in any meaningful way to the discharge of Canada’s duties.

The Supreme Court of Canada (“**SCC**”) has confirmed that the Crown may rely on steps taken by an administrative body to fulfil the duty to consult, in part or in full, so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances.⁵ However, where the Crown intends to rely on a regulatory process to discharge the duty to consult, it should be made clear to the affected Indigenous groups that the Crown is so relying.⁶ In addition, if the NEB does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval.⁷

Contrary to the SCC’s clear directions in the companion cases of *Chippewas* and *Clyde River*:

- a. Canada has not made it clear to all affected Indigenous groups that it intends to rely on the Reconsideration Hearing to discharge its constitutional duty to consult with the Indigenous intervenors;

³ Motion at page 4 [**NEB Filing ID A95463-2**], and Malahat First Nation Application to Participate at page 1 [**NEB Filing ID A95347-1**], respectively.

⁴ *TWN*, *supra*, note 1, at para. 526.

⁵ *Clyde River v. Petroleum Geo-Services Inc.*, 2017 SCC 40 [“**Clyde River**”] at para. 30; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 [“**Chippewas**”] at para 32.

⁶ *Chippewas*, para 44; *Clyde River*, para 23.

⁷ *Chippewas*, para. 32.

- b. Canada has filed voluminous evidence which cannot be thoroughly reviewed and responded to by November 20 making any meaningful consultation within the Reconsideration Hearing process impossible; and
- c. Canada has not provided any clear guidance or engaged with the Stó:lō Collective about any consultation framework to address additional or outstanding concerns of the Stó:lō Collective following what has already proven to be a flawed and insufficient Reconsideration Hearing process.

Given Canada's stated intention (to some) that it will rely on the Reconsideration Hearing to discharge its duty to consult with respect to Project-related marine shipping, the NEB must ensure that its process is consistent with the honour of the Crown. In light of the evidentiary record put forward by Canada and Trans Mountain, the current timelines simply do not meet this standard.

For the reasons set out in the Motion and herein, the Stó:lō Collective respectfully requests that the NEB grant the relief sought by Squamish.

In closing and for clarity, the Stó:lō Collective's submissions are in support of the Motion and expressly without prejudice to any position(s) it, or any of the members of the Stó:lō Collective, may advance regarding the fairness of the procedure underlying the Reconsideration Hearing or the sufficiency of the Crown's actions in seeking to fulfill its duty to consult.

Yours truly,

MILLER TITERLE LAW CORPORATION



Joelle Walker
joelle@millertiterle.com

cc: Trans Mountain, regulatory@transmountain.com

National Energy
Board



This is Exhibit X referred to in the Affidavit of
Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.
Office national
de l'énergie
A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
13 November 2018

Mr. Matthew Kirchner
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Representative for Squamish Nation
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North Vancouver, BC V7M 3J3
Email mkirchner@ratcliff.com

Mr. Paul Seaman
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Mr. Scott A. Smith
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Dear Mr. Kirchner, Mr. Seaman, and Mr. Smith:

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018
Ruling No. 9 – Notices of motion from Squamish Nation (Squamish) and Tsleil-
Waututh Nation (TWN) for an extension to the deadline for intervenor evidence**

1. Background

On 26 September 2018, the Board issued a letter that, among other things, stated:

“Given what will be an expedited hearing process, all Parties, including individuals, groups and government departments and bodies, that intend to participate as intervenors, are strongly encouraged to start preparing any additional evidence immediately, based on the draft List of Issues for the Reconsideration hearing.”
(Emphasis in original.)

On 12 October 2018, the Board issued Hearing Order MH-052-2018 outlining the hearing steps and schedule. The Hearing Order established the following deadlines for Parties to file opening statements and evidence:

- Trans Mountain and the Federal Departments and Agencies – 31 October 2018
- All other intervenors – 20 November 2018.

.../2

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Telephone/Téléphone : 1-800-899-1265
Facsimile/Télocopieur : 1-877-288-8803

On 31 October 2018, Trans Mountain filed an opening statement and evidence consisting of approximately 800 pages. The Federal Departments and Agencies' opening statement and evidence consisted of over 7,000 pages.

2. Squamish's notice of motion

On 5 November 2018, Squamish filed a [notice of motion](#) in which it seeks a 15-day extension to the deadline for intervenors to file their opening statements and evidence. This request would result in the deadline moving from 20 November to 5 December 2018.

Squamish submitted that, since the Board's letter of 26 September 2018, it has worked diligently to identify evidence for its submission to the Board and experts who are available to provide that evidence, as well as to secure resources to retain those experts. It stated that it has coordinated its efforts with other Indigenous intervenors in order to work efficiently.

According to Squamish, its experts cannot, within the timeline provided by the Board, carry out quantitative analyses to properly respond to the evidence submitted by the Federal Departments and Agencies and Trans Mountain on 31 October 2018.

Squamish is of the view that the overall timeline for the Reconsideration hearing is unduly short. However, for the purposes of its notice of motion, it is seeking a 15-day extension to the deadline for intervenors' opening statements and evidence.

3. Comment period

On 6 November 2018, the Board established a [comment period](#) with respect to Squamish's notice of motion. Trans Mountain and intervenors were given until 8 November 2018 to provide comments, while Squamish was given until 9 November 2018 to provide its reply to any comments filed.

In the Board's letter, it stated its expectation that all Parties should continue working on submissions using the deadlines set out in the Hearing Order while decisions are pending.

4. Comments received

Most of the comments received (and listed below) were in support of Squamish's notice of motion, and a number of Parties provided their own evidence in support:

[Friends of Ecological Reserves](#)

[Cheam First Nation](#)

[Seabird Island Band](#)

[Stó:lō Tribal Council](#)

[Indigenous Caucus for the Trans Mountain](#)

[Indigenous Advisory and Monitoring Committee](#)

[Stk'emlupsemc te Secwepemc of the Secwepemc Nation](#)

[Barkley Sound Stewardship Alliance](#)

[Musqueam Indian Band](#)

[Shxw'ōwhámel First Nation](#)

[North Shore No Pipeline Expansion](#)

[Chawathil First Nation](#)

[Kwantlen First Nation](#)

[Georgia Strait Alliance](#)

[Swinomish Indian Tribal Community, Tulalip Tribes, Suquamish Tribe, and Lummi Nation \(U.S. Tribes\)](#)

[Raincoast Conservation Foundation and Living Oceans Society](#)

[Province of British Columbia](#)

[Stz'uminus First Nation](#)

[Snuneymuxw First Nation](#)

[Stó-lō Collective](#)

[Tsawout First Nation](#)

[Malahat First Nation](#)

[Cowichan Tribes](#)

[Pro Information Pro Environment United
People Network](#)

[Little Shuswap Lake Indian Band](#)

[Metro Vancouver](#)

[Tsartlip First Nation](#)

[Pacheedaht First Nation](#)

[T'Sou-ke First Nation](#)

[Tsuut'ina Nation, Whitefish Lake First Nation,
Driftpile Cree Nation, Louis Bull Tribe](#)

Dr. Katherine Dunster filed [comments](#) on 9 November 2018, after the comment deadline had passed. Dr. Dunster provided no explanation for the late filing, so it was not considered by the Board.

In addition, TWN filed a supporting [notice of motion](#) on 8 November 2018 in which it adopted the arguments in Squamish's notice of motion. TWN also argued that, if the extension is not granted, the issues would have to be raised during the Government's Phase III consultation, but that this is not an adequate alternative.

Comments objecting to Squamish's notice of motion were received from:

- [Trans Mountain](#), which noted the limited scope of the Reconsideration hearing and that the majority of the evidence filed by Trans Mountain and the Federal Departments and Agencies was publicly available prior to the filings. Trans Mountain suggested that a brief extension, such as three to five days, may be reasonably accommodated. It expressed concerns about prejudice if less time is available for subsequent steps in the process.
- [Department of Justice \(on behalf of the Federal Departments and Agencies\)](#), which noted that the Board's website was inaccessible for a short period, so an extension of up to five days may be reasonable.
- [Government of Alberta](#), which argued that the Board must ensure that, if an extension is granted, it must be as brief as reasonably possible and must not prejudice other Parties in subsequent hearing steps. Alberta also reiterated the importance of completing the Reconsideration in the established timeframe.

5. Reply to comments

Squamish filed its [reply](#) on 9 November 2018. In it, Squamish argued that the resources available to it are not comparable to those available to Trans Mountain and the Government of Canada, making it unfair to expect it to have obtained and reviewed the studies referred to in the evidence prior to them being filed on 31 October 2018.

In addition, Squamish reiterated that 15 days is the minimum extension that would allow it to prepare its evidence. An extension of three to five days would not be sufficient.

6. Views of the Board

The Board has considered Squamish's notice of motion, supporting affidavit, and reply submissions; TWN's additional arguments and affidavit; as well as all the submissions and affidavits received from other Parties. The Board finds that there was a large volume of evidence filed by the Federal Departments and Agencies and, to a lesser extent, Trans Mountain, and accepts the argument that the intervenors are unable to adequately review and respond to that volume of evidence before 20 November 2018.

As previously stated by the Board in Section 6.1 of its 29 October 2018 [reasons for process design](#), consistent with subsection 11(4) of the *National Energy Board Act*, there is a need for proceedings to be conducted expeditiously and fairly and, in any case, within the time limit set by the Governor in Council. However, while the Board must meet the 22 February 2019 deadline, it is also required to conduct a hearing that is procedurally fair, and the content of the duty of procedural fairness in this case is significant. This requires that the “parties [are] entitled to a meaningful opportunity to present their cases fully and fairly.”¹

The Board is of the view that, while Parties must work in an expedited manner, having time to prepare evidence in order to fully present a case is of fundamental importance, and this requires the Board to re-examine the timeframes established in the Hearing Order. However, in the context of a hearing subject to an overall time limit (in this case, 155 days), any adjustment in the filing deadlines for any individual step necessarily requires adjustment and compression in subsequent steps in the hearing. In order to accommodate a 15-day extension and still respect the 22 February 2019 deadline, the Board has shortened the time between the Parties’ responses to information requests being filed and written argument-in-chief, as well as the Board’s own time for writing the Reconsideration Report after the close of the hearing record.

By reducing the time available for writing the Reconsideration Report, the Board has, to the extent possible, taken upon itself the consequences of a further compression of the schedule. The Board’s usual service standard for releasing a report is 12 weeks after the close of record; however, under the adjusted schedule, this is reduced to 4 weeks.

With respect to submissions regarding the Board’s website being inaccessible for a period of time, this was not the main reason for the notice of motion being granted. The website was down for approximately 11 hours on Saturday afternoon and evening due to an unexpected outage. The Board will attempt to limit any periods of future inaccessibility, but Parties should download critical filings ahead of time.

Also, to ensure the efficiency and usefulness of the information request process, Parties are reminded that information requests should be about new or updated evidence only, and Parties are encouraged to continue to work together to promote efficiency and avoid duplication, as some intervenors have indicated they are already doing. The extension has been granted in recognition of the importance of preparing evidence that supports an intervenor’s case and challenges the evidence of those that do not. However, to accommodate this, Parties will have to be judicious in their use of the information request process. For Parties planning on filing information requests, the Board strongly encourages them to start preparing and collaborating on potential information requests at the same time that they are preparing evidence.

The changes to the schedule only permit a short period for notices of motion on the adequacy of other Parties’ responses to information requests (known as “motions to compel”). The Board encourages all Parties to answer information requests as fully as possible and to carefully consider the need for motions to compel.

With the resulting changes to the schedule set out in Procedural Direction No. 3 (also of today’s date), the Board will be extremely constrained in its ability to accommodate any further extensions. The Board again encourages and expects Parties to stay focused on the List of Issues for this Reconsideration hearing and to work diligently on and towards the established, and now revised, hearing steps and deadlines. In some instances, this will require Parties to work ahead of having all filings as they prepare for future hearing steps in an expedited manner.

¹ *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 235.

Disposition

Even with the very real constraints ensuing from the Governor in Council's imposed time limit, the Board has decided to extend the deadline for intervenors to file opening statements and evidence by 15 days. **The new deadline for this step is 5 December 2018.** This change and the other resulting schedule changes are shown in Procedural Direction No. 3, also of today's date.

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by

Sheri Young
Secretary of the Board

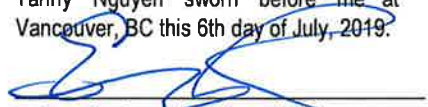
c.c. All Parties

National Energy
Board



Office national
de l'énergie

This is Exhibit Y referred to in the Affidavit of
Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
13 November 2018

To: All Parties

Trans Mountain Pipeline ULC
Application for the Trans Mountain Expansion Project
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177
MH-052-2018

Procedural Direction No. 3 – Revised hearing events and steps table

On 12 October 2018, the Board released Hearing Order MH-052-2018, which included, in Section 3, a table outlining the hearing events and steps, and associated deadlines.

The Board has recently issued:

- Procedural Direction No. 2, which announced the dates and locations that the Board will hear oral Indigenous traditional evidence; and
- Ruling No. 9 that resulted in an extension to the deadline for intervenors to file their opening statements and direct evidence, and which impacted subsequent steps and deadlines in the hearing.

In addition, the Board has determined additional deadlines associated with the optional step for Parties to file notices of motion on the adequacy of other Parties' responses to information requests.

At this time, the Board is releasing the attached revised hearing events and steps table to reflect these changes. Parties should refer to this revised table as their guide for making filings and participating in the remaining hearing steps.

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by

Sheri Young
Secretary of the Board

Attachment

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Appendix 1 Revised hearing events and steps table (13 November 2018)

Notes:

- 1) Past steps and deadlines have been deleted and are found in [Hearing Order MH-052-2018](#)
- 2) New or revised steps and deadlines are highlighted in yellow. Revisions to guidance (in *italics*) have been made for clarity, but are not highlighted.

Hearing events and steps (responsible person[s] in bold, guidance in italics) ¹	Date or deadline (3:00 pm Pacific time [4:00 pm Mountain time])
Members of the public file letters of comment <i>Letters of comment must be served on Trans Mountain</i>	20 November 2018
Intervenors (other than Federal Departments and Agencies) file opening statements and direct evidence <i>Evidence must be relevant to one or more of the issues identified in Appendix 1 to Hearing Order MH-052-2018.</i> <i>Evidence must be served on all other Parties</i>	5 December 2018 (formerly 20 November 2018)
Trans Mountain files reply evidence <i>Reply evidence must be served on all other Parties</i>	11 December 2018 (formerly 26 November 2018)
Oral hearing session: to collect, and allow questioning of, oral Indigenous traditional evidence	20 November to 6 December 2018 (formerly late-November or early-December 2018)
All Parties file information requests regarding other Parties' evidence <i>Information requests must be relevant to one or more of the issues identified in Appendix 1 to Hearing Order MH-052-2018, and also to the evidence of the Party to which the questions are asked</i> <i>Information requests must be served on all other Parties</i>	17 December 2018 (formerly 3 December 2018)
All Parties respond to information requests asked of them <i>Responses to information requests must be served on all other Parties</i>	31 December 2018 (formerly 13 December 2018)

¹ All produced documents must be filed with the Board so they can be placed on the hearing record and considered.

Hearing events and steps (responsible person[s] in bold, guidance in italics) ¹	Date or deadline (3:00 pm Pacific time [4:00 pm Mountain time])
Motion Day – As considered necessary, Parties may file notices of motion on the adequacy of other Parties’ responses to their own information requests (“motions to compel”) ² <i>To help the Board and Parties follow the filed motions to compel and related comments, the attached chart format (or something similar) should be used. Parties are encouraged to provide each other with editable documents, if possible, as the motion to compel process unfolds. Board staff will email the Parties a fillable electronic version.</i> <i>Motions to compel must be served on all other Parties</i>	4 January 2019 (formerly 17 December 2018)
Parties that have motions to compel directed at them may respond to those motions to compel <i>See the guidance included above under “Motion Day”</i> <i>Responses must be served on all other Parties</i>	8 January 2019
Parties that filed motions to compel, <u>and</u> had responses provided by the other Party, may reply to those responses <i>See the guidance included above under “Motion Day”</i> <i>Replies must be served on all other Parties</i>	10 January 2019
All Parties file affidavits adopting their written evidence	17 January 2019 (formerly 9 January 2019)
Trans Mountain and Federal Departments and Agencies file written argument-in-chief, including comments on draft conditions (which the Board will release for comment) <i>Comments on conditions must be included in written argument-in-chief; they cannot be raised for the first time during oral summary argument. No new evidence can be provided in written argument-in-chief</i> <i>Written argument-in-chief must be served on all other Parties</i>	17 January 2019 (formerly 9 January 2019)

² Information on **what constitutes a motion to compel and how the Board considers them** can be found in the Board’s 20 January 2015 [Procedural Direction No. 9](#), which was issued during the OH-001-2014 Certificate hearing. The deadlines in this **current** Procedural Direction No. 3 should be followed for the motions to compel process in this Reconsideration hearing.

Hearing events and steps (responsible person[s] in bold, guidance in italics) ¹	Date or deadline (3:00 pm Pacific time [4:00 pm Mountain time])
Intervenors (other than Federal Departments and Agencies) file written argument-in-chief, including comments on draft conditions and any reply argument to Trans Mountain and Federal Departments and Agencies. <i>Comments on conditions must be included in written argument-in-chief; they cannot be raised for the first time during oral argument. No new evidence can be provided in written argument-in-chief</i> <i>Written argument-in-chief must be served on all other Parties</i>	22 January 2019 (formerly 14 January 2019)
Optional oral hearing session: to hear all Parties' oral summary argument and/or reply argument <i>Oral summary argument or summary argument on specific issues only may be held if needed and time permits</i> <i>Parties should include all pertinent argument in their written argument-in-chief, as this step may not be held</i> <i>Should oral summary argument take place, Trans Mountain can provide reply argument during this period; otherwise a date for filing written reply argument will be announced by the Board</i>	late-January 2019 (formerly mid-January 2019)
Hearing record closes	Immediately after finishing argument
Board releases its Reconsideration Report to the Governor in Council, and provides it to the Minister of Natural Resources	22 February 2019 or earlier (time limit end)

Attachment to revised hearing events and steps table (13 November 2018) – Organizational chart for motions to compel and related comments

Guidance:

- A Party **can only** file a motion to compel in relation to its own information requests (IRs).
- A Party filing a motion to compel must explain in detail why it considers each individual IR response (or sub-parts of an IR) to be inadequate.
- The Parties are encouraged to provide each other with editable documents, if possible, as the motion to compel process unfolds.

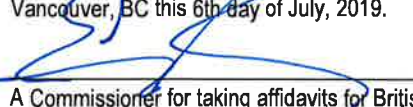
Name of Party to which this motion to compel is directed (referred to as the Respondent)		[name of Party]			
IR #	IR wording ¹	Response to IR ²	Motion filer’s explanation for claiming IR response to be inadequate	Respondent’s comments on motion to compel	Motion filer’s reply comments ³

¹ Insert the relevant text of the IR that was asked. If the entire question is relevant to your submission, insert the full text. References and preambles can be removed, unless they are essential to your submission.

² Insert the relevant text of the IR response. If the entire response is relevant to your submission, insert the full text.

³ The motion filer may only provide reply comments if the Respondent has filed comments on the motion to compel. The motion filer’s reply comments may only deal with matters raised by the Respondent in its comments.

This is Exhibit Z referred to in the Affidavit of
Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British
Columbia

Hearing Order MH-052-2018
File No. OF-Fac-Oil-T260-2013-03 59

**IN THE MATTER OF
TRANS MOUNTAIN PIPELINE ULC
TRANS MOUNTAIN EXPANSION PROJECT**

NOTICE OF MOTION

Name of person bringing motion: LIVING OCEANS SOCIETY and
RAINCOAST CONSERVATION FOUNDATION

Decision or order

1. That the Board require Trans Mountain to conduct a proper risk assessment of Project-related marine shipping that includes all Species at Risk Act ("SARA")-listed species that may be affected by Project-related marine shipping.
2. Such other relief as the Board may consider appropriate.

November 16, 2018

Date submitted

<original signed by>

Dyna Tuytel and Margot Venton, Barristers & Solicitors
Representatives for Living Oceans Society and Raincoast Conservation Foundation
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Statement of Facts

1. In the previous hearing, Living Oceans filed an expert report by Dr. Jeffrey Short in which Dr. Short identified shortcomings in Trans Mountain's Ecological Risk Assessment (the "ERA") with respect to oil spills. Dr. Short found that the ERA:
 - a) failed to integrate exposure to oil based on multiple locations, instead choosing a few locations where there might be a higher risk of collision, and omitting some of the most sensitive habitats from its analysis;
 - b) "failed to assess hazard based on species sensitivity to oiling independently of oiling probability", took an inappropriately generic approach to assessing sensitivity of species to oiling, and conflated the two concepts of probability and consequence of exposure to oil, which should have been evaluated independently;
 - c) failed to assess the possibility of organisms being exposed to submerged oil; and
 - d) failed to consider all of the ways that oil can harm organisms.¹
2. In the previous hearing, the proponent used an indicator species approach to assess effects of Project-related marine shipping on SARA-listed marine species.
3. For the purposes of the Reconsideration, the Board has identified 35 SARA-listed species that are likely to be affected by Project-related marine shipping.²
4. The proponent has not provided a new risk assessment in the Reconsideration, and the proponent continues to rely on an indicator species approach to the SARA s. 79(2) requirement to identify and ensure measures with respect to every SARA-listed species.³

Grounds

5. Raincoast Conservation Foundation ("Raincoast") and Living Oceans Society ("Living Oceans") bring this motion pursuant to Rule 35 of the *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208 ("NEB Rules").

¹ Dr. Jeffrey Short, Fate and Effect of Oil Spills from the Trans Mountain Expansion Project in Burrard Inlet and the Fraser River Estuary, prepared for Tsleil-Waututh Nation, City of Vancouver, and Living Oceans Society (4 May 2015), Filing ID A4L9R7.

² A95671 National Energy Board – Letter to Ministers of Environment and Fisheries and Oceans – Trans Mountain Expansion – Reconsideration – Potential effects on species listed under the Species at Risk Act, online at <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A95671>; A95280-2 Trans Mountain Direct Evidence - A6J6F4-1 at 13-14.

³ A95280 Trans Mountain Pipeline ULC – Opening Statement and Direct Evidence, A95280-2 Direct Evidence – A6J6F4, online: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3643427>.

6. Raincoast and Living Oceans submit that the proponent's approach described above prevents the accurate evaluation of risks to marine species, including SARA-listed species.
7. Subsection 79(2) of SARA requires the Board to identify, and ensure measures to avoid or lessen, all adverse effects of Project-related marine shipping on all of the listed wildlife species that are likely to be affected by Project-related marine shipping, and their critical habitat.
8. Subsection 79(2) requires more than a generic approach. It requires identification of all effects and measures to mitigate all effects on each SARA-listed species. The proponent has not done this.
9. More broadly, the proponent's risk assessment still fails to live up to the standard of a proper risk assessment, for the reasons identified in paragraph 1. The Reconsideration is an opportunity to correct the shortcomings and produce a proper risk assessment.
10. Therefore, Raincoast and Living Oceans submit that the Board should require the proponent to identify effects and measures with respect to the s. 79(2) requirements for each SARA-listed marine species. They further submit that the Board should require the proponent to complete a proper risk assessment that addresses effects of Project-related marine shipping, including effects of an oil spill from Project-related marine shipping. That risk assessment should include a less generic approach to sensitivity of species to oiling. It should also include effects on all of the SARA-listed species that are likely to be affected by the Project, not only on selected species.

Suggestion for more efficient retrieval of documents

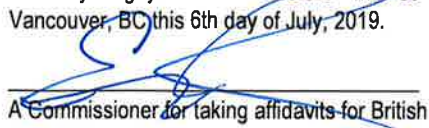
11. Raincoast and Living Oceans further note that it would be of assistance to them if the Board would include the Filing ID or hyperlinks when it referred to documents on the record in the Board's Reasons. Raincoast and Living Oceans strive to do this to assist the Board in reading their filings. Given the short timeline of this hearing, efforts to save all parties time in locating documents are essential.

Decision Sought

12. Living Oceans and Raincoast request that the Board order:
 1. that the Board include Project-related marine shipping between the WMT and the EEZ as part of the "designated project" under CEAA 2012;

2. that the Board require Trans Mountain to conduct a proper risk assessment of Project-related marine shipping that includes all Species at Risk Act (“SARA”)-listed species that may be affected by Project-related marine shipping; and
3. such other relief as the Board may consider appropriate.

This is Exhibit AA referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British
Columbia

Hearing Order MH-052-2018
File No. OF-Fac-Oil-T260-2013-03 59

IN THE MATTER OF
TRANS MOUNTAIN PIPELINE ULC
TRANS MOUNTAIN EXPANSION PROJECT

APPLICATION FOR REVIEW

Names of persons bringing application: LIVING OCEANS SOCIETY and
RAINCOAST CONSERVATION FOUNDATION

- Decision or order:
1. That the Board review its decision to limit the scope of the Reconsideration to Project-related marine shipping between the Westridge Marine Terminal (the "WMT") and the 12-nautical-mile territorial sea limit.
 2. That the Board issue a new decision that includes Project-related marine shipping between the WMT and the outer boundary of Canada's exclusive economic zone (the "EEZ") is part of the "designated project" under the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012").
 2. Such other relief as the Board may consider appropriate.

November 16, 2018

Date submitted

<original signed by>

Dyna Tuytel and Margot Venton, Barristers & Solicitors
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Overview

1. Raincoast Conservation Foundation (“Raincoast”) and Living Oceans Society (“Living Oceans”) bring this application pursuant to s. 21(1) of the *National Energy Board Act*, RSC, 1985, c N-7 (“NEB Act”) and s. 44 of the *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208 (“NEB Rules”).
2. Raincoast and Living Oceans submit that the Board erred in excluding Project-related marine shipping within the EEZ from the “designated project” to be assessed under CEAA 2012 in this Reconsideration.
3. Raincoast and Living Oceans therefore submit that the Board should review its decision concerning the spatial limit of the “designated project” and issue a new decision that defines the “designated project” to include Project-related marine shipping between the WMT and the outer boundary of the EEZ.

Statement of Facts

4. On October 5, 2018, the Board sought comments on the following question with respect to the scope of the Reconsideration:

Assuming Project-related marine shipping is included in the “designated project” to be assessed under the CEAA 2012, should the designated project be defined as including:

- a) Project-related marine shipping between the Westridge Marine Terminal (WMT) and the territorial sea limit; or
 - b) Project-related marine shipping between the WMT and the outer boundary of Canada’s exclusive economic zone?
5. On October 9, 2018, Raincoast Conservation Foundation (“Raincoast”) and Living Oceans Society (“Living Oceans”) filed [comments](#) that the designated project should be defined as including Project-related marine shipping between the WMT and the outer boundary of Canada’s exclusive economic zone (the “EEZ”) (Filing ID A6I5L7).
 6. On October 12, 2018, the Board issued the [Hearing Order](#) (Filing ID A6I7I8), which stated that the Board had “determined that Project-related shipping between the WMT and the 12-nautical-mile territorial sea limit is [...] part of the ‘designated project’ under the CEAA 2012” (the “Spatial Limit Decision”).
 7. On October 29, 2018, the Board provided a [letter](#) to the parties (Filing ID A95187) attaching reasons for various decisions in the Hearing Order. Reasons for the Spatial Limit Decision were set out in Appendix 1 to the letter (the “Board’s Reasons”).

Grounds

8. Raincoast and Living Oceans submit that the Board should review the Spatial Limit Decision and issue a new decision that defines the “designated project” to include Project-related marine shipping between the WMT and the outer boundary of the EEZ.
9. Subsection 21(1) of the NEB Act provides that “the Board may review, vary or rescind any decision or order made by it”.
10. Rule 44 of the NEB Rules provides for applications for review or rehearing pursuant to s. 21(1) of the NEB Act. Rule 44(2)(b) requires applications for review to set out grounds that raise a doubt as to the correctness of the decision at issue – in this case, the Spatial Limit Decision.
11. The Spatial Limit Decision concerns the extent of the “designated project” for the purposes of CEAA 2012.
12. Subsection 2(1) of CEAA 2012 defines a “designated project” as follows:
designated project means one or more physical activities that
 - (a) are carried out in Canada or on federal lands;
 - (b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and
 - (c) are linked to the same federal authority as specified in those regulations or that order.It includes any physical activity that is incidental to those physical activities.
13. Project-related marine shipping is “incidental” to the Project and therefore captured by this definition.
14. Raincoast and Living Oceans submit that Project-related marine shipping not only within the 12-nautical mile territorial sea limit (the “Territorial Sea”) but from the WMT to the outer boundary of the EEZ is “incidental” to the Project and therefore captured by this definition. As Raincoast and Living Oceans submitted in their October 9 comments to the Board on this topic, Project-related marine shipping from WMT to the outer boundary of the EEZ is within the legislative authority of Parliament, there is no basis under CEAA 2012 for excluding it from the designated project, and it would be contrary to the purposes of CEAA 2012 and SARA to exclude it.¹

¹ Filing ID A6I5L7.

15. Raincoast and Living Oceans submit that the factual and legal errors in the Spatial Limit Decision, set out below, raise doubts as to the correctness of that decision.
16. Raincoast and Living Oceans therefore submit that the Board should include Project-related marine shipping from the WMT to the outer boundary of the EEZ is part of the “designated project” under CEAA 2012.

Overly narrow interpretation of “designated project” and “incidental”

17. The Board states at page 10 of the Board’s Reasons that “[e]nvironmental legislation, such as the CEAA 2012, should be given a generous interpretation to allow effective response to environmental harm, in keeping with the precautionary principle and the role of EA as a planning tool.” The Board has failed to give a generous interpretation to CEAA 2012.
18. The Board states at page 4 of the Board’s Reasons that “the additional tanker loads at the WMT are tied to and dependent on the pipeline component of the Project”, and that “the purposes of the CEAA 2012 include the protection of the components of the environment within the legislative authority of Parliament from significant adverse environmental effects, and ensuring that designated projects are considered in a careful and precautionary manner”. The Board states that this supports the inclusion of Project-related marine shipping in the “designated project”. Raincoast and Living Oceans submit that it also supports inclusion of Project-related marine shipping from WMT to the outer limit of the EEZ in the “designated project”.
19. The Board unduly emphasizes the timeliness of environmental assessment - a purpose of CEAA 2012 identified in s. 4(1)(f) – relative to other purposes of CEAA 2012. The Board states at page 12 of the Board’s Reasons that “the extent of what is ‘incidental’ should not be so broad as to frustrate the CEAA 2012 purpose of timely EAs”. With respect, to the extent that the environmental assessment of the Project has not been “timely”, it is not over-inclusiveness but rather the under-inclusiveness of the original hearing that is to blame for delays, as it resulted in litigation and the need for this Reconsideration.
20. Conducting a review that considers all environmental effects of a designated project under CEAA 2012 cannot be said to “frustrate” timely environmental assessment. Timeliness must be balanced against the other purposes of CEAA 2012, including:

- a) “to protect the components of the environment that are within the legislative authority of Parliament from significant adverse effects caused by a designated project” (s. 4(1)(a)); and
 - b) “to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid significant adverse environmental effects” (s. 4(1)(b).
21. The FCA in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 (“*Tsleil-Waututh*”) emphasized that the Board must address the Project’s effects on all components of the environment that are within the legislative authority of Parliament in order for its environmental assessment to be consistent with the purposes of CEAA 2012.² The Order in Council simply orders the Board to take into account the requirements of CEAA 2012 and s. 79 of SARA.
22. As Raincoast and Living Oceans noted in their previous comments with respect to the purposes of CEAA 2012, protection of the environment within the EEZ is within the authority of Parliament.³ This requires the Board to address effects of Project-related marine shipping occurring within the EEZ.
23. The NEB cites a single decision of the Supreme Court of British Columbia with respect to the meaning of “incidental” (at page 12 of the Board’s Reasons). That decision offers a number of definitions drawn from case law and a dictionary definition: “occurring or liable to occur in fortuitous or subordinate conjunction with something else”; and “liable to happen”, “naturally attaching to”, “occurring as something causal or of secondary importance”, and “following upon a subsequent circumstance.”⁴ The Court concluded that these definitions in the context of CEAA 2012 “support that ‘incidental’ requires a certain level of proximity as well as possibly causal connection between activities and the designated project.”⁵
24. The Board further notes at page 13 of the Board’s Reasons that the FCA in *Tsleil-Waututh* stated that the Project’s primary purpose is “to provide additional transportation capacity for crude oil from Alberta to markets in the Pacific Rim.” The Board notes that Project-related marine shipping is “tied to and dependent on the pipeline component of the Project” and that “[t]his supports an interpretation of ‘incidental’ that includes

² *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*] at para 402.

³ Filing ID A615L7.

⁴ *Canada (Canadian Environmental Assessment Agency) v Taseko Mines Limited*, 2018 BCSC 1034 at para 65.

⁵ *Ibid* at para 66.

Project-related marine shipping.” However, the Board finds that there is not a “sufficient level of proximity [...] once the tankers exit the territorial sea.”

25. Raincoast and Living Oceans submit that the same Project-related marine shipping continuing beyond the Territorial Sea into the EEZ is still incidental to the Project, and that the Board’s decision to cut off its environmental assessment before the EEZ is arbitrary. The causal connection is the same in the EEZ as it is in the Territorial Sea. Proximity is not to be understood in terms of miles but in terms of the relationship between the Project-related marine shipping and the Project, which is the same regardless of whether it occurs within the Territorial Sea or the EEZ.
26. Furthermore, the Board is not bound by the approaches taken by other responsible authorities in other environmental assessments cited in the Board’s Reasons.
27. Finally, the Board states at page 18 of the Board’s Reasons that “project-specific EAs are not meant to accomplish what might be considered akin to a regional study of marine shipping in a large area such as the EEZ”, which is a separate process under ss. 73-77 of CEAA 2012. Raincoast and Living Oceans are not asking for the equivalent of a regional study, which is an optional exercise, but rather for the Board’s current, mandatory review of the Project to address the environmental effects of the entirety of the Project, including mitigation, as required by CEAA 2012, and to ensure mitigation of the Project’s effects on SARA-listed species as required under s. 79(2) of SARA.

Results are necessary for protecting the environment and reducing harm

28. The Board states at page 5 of the Board’s Reasons that “geographic extent should not be so broad as to [...] produce results that are not useful in protecting the environment and reducing harm.” Raincoast and Living Oceans submit that the results of assessing Project-related marine shipping between the WMT and the outer boundary of the EEZ would be useful in protecting the environment and reducing harm.
29. Canada has jurisdiction over, and the proponent can influence, Project-related marine shipping within the EEZ, to protect the environment from its effects.
30. As the Board states at page 8 of the Board’s Reasons, Canada has jurisdiction over “the protection and preservation of the marine environment” within the EEZ.⁶

⁶ *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3 (entered into force 1994, ratified by Canada 7 November 2003) [UNCLOS], article 56, para 1(a), (b)(iii); *Oceans Act*, SC 1996, c 31, s 14(a)-(b).

31. The Board further states at page 14 of the Reasons that some of the proponent's Tanker Acceptance Standards apply beyond the Territorial Sea, within the EEZ.

32. The Transport Canada TERMPOL Review Process Report on the Project (the "TERMPOL Report"), filed in the previous hearing, stated that:

Trans Mountain is proposing to add a requirement to its tanker acceptance criteria that Project tankers planning to leave Canada via the Juan de Fuca Strait must agree that, upon exiting the Juan de Fuca Strait, they will steer a course no more northerly than due West (270°), until the tankers are outside the Canadian Exclusive Economic Zone (EEZ), 200 nautical miles from Canada's coast. The routing requirement will ensure Project tankers will use the shortest route to exit the EEZ.⁷

Transport Canada found that this would "enhance safety and protection of the marine environment".

33. As such, including Project-related marine shipping between WMT and the outer boundary of the EEZ would result in recommendations and recommended conditions that would take into account the effects of Project-related marine shipping occurring within that area and would be useful in protecting the environment and reducing harm in a more complete manner than under the current Spatial Limit Decision.

34. The ability to influence Project-related marine shipping within the EEZ also undermines the Board's conclusion at page 15 of the Board's Reasons that the CEA Agency criteria "slightly lean against" including Project-related marine shipping within the EEZ being "incidental". It indicates that a generous, and correct, interpretation of CEAA 2012 would include Project-marine shipping within the EEZ in the "designated project".

35. The Board notes at pages 5 and 8 of the Board's Reasons that there are not defined shipping lanes in the EEZ, and that destinations can vary, such that environmental effects cannot be predicted and mitigation cannot be evaluated, and an environmental assessment would be speculative.

36. Project-related shipping cannot simply proceed without an environmental assessment on the basis that the Board assumes that it cannot figure out where vessels go. Impacts of an oil spill within the EEZ may be different than impacts of an oil spill within the Territorial Sea. These different impacts must be assessed.

⁷ C353-4-4 – TMEP TERMPOL Report December 11 2014 – A4F8Z4 at 15.

37. The Board notes that the CEA Agency Guidance “requires proponents to provide the project location, identify project-environment interactions, and describe the potential effects of the project.” The proponent should be able to ascertain where tankers go when travelling to the destinations to which it seeks to ship oil, and inform the Board so that it can determine acceptable spatial boundaries and conduct the environmental assessment. It strains credulity to suggest that no one knows, and the proponent and Board cannot find out, where and how Project-related oil tankers would travel within the EEZ.
38. Furthermore, even without more information on routes within the EEZ, it is already clear from the facts in paragraphs 41 and 44 below and the government recovery documents cited therein that ships travelling into the EEZ by any route will pass through habitat for SARA-listed species, which for many species runs along the continental shelf.

The Board’s Reasons neglect species at risk outside of the Territorial Sea

39. The Federal Court of Appeal (“FCA”) in *Tsleil-Waututh* clearly stated that the Board must address the Project’s effects on all components of the environment that are within the legislative authority of Parliament in order for its environmental assessment to be consistent with the purposes of CEAA 2012.⁸
40. Section 79 of SARA requires that:
- (1) Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of the *Canadian Environmental Assessment Act, 2012* in relation to a project, must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.
 - (2) The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.
41. The Board states at page 10 of the Board’s Reasons that it “finds it compelling” that the FCA concluded in *Tsleil-Waututh* that “the Board’s report was adequate for the purpose of informing the GIC about the effects of Project-related marine shipping on the Southern resident killer whales and their use by indigenous groups.”

⁸ *Tsleil-Waututh* at para 402.

42. However, since the Board's report, new critical habitat for Southern Resident Killer Whales has been identified and proposed for designation by Fisheries and Oceans Canada, most of which falls outside of the Territorial Sea, within the EEZ.⁹
43. Furthermore, the Board must meet SARA s. 79(2) requirements for all SARA-listed species that are likely to be affected by the Project. Southern Resident Killer Whales are not the only SARA-listed species likely to be affected by Project-related marine shipping. While Raincoast and Living Oceans, and others, used their limited resources to focus on effects on the endangered Southern Resident Killer Whales during the previous hearing, and therefore also in the litigation before the FCA, the requirements of s. 79(2) of SARA apply to all SARA-listed species.
44. The Board has identified 35 SARA-listed species that are likely to be affected by Project-related marine shipping.¹⁰
45. The habitat of many of these species extends beyond the Territorial Sea, to the continental shelf and the EEZ¹¹:
- c) the recently published Recovery Strategy for the Offshore Killer Whale states that "Offshore Killer Whales seem to predominantly inhabit continental shelf-edge waters along the British Columbia coast"¹²;
 - d) the Black-footed Albatross "visit[s] Canada's Pacific EEZ to forage during the breeding and post-breeding season", and they are "abundant over the outer continental shelf, particularly at the shelf break"¹³;
 - e) the Action Plan for Blue, Fin, Sei and North Pacific Right Whales states that "Blue, Fin, Sei and North Pacific Right Whale habitat in Canadian Pacific Waters

⁹ Fisheries and Oceans Canada, Recovery Strategy for the Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada [Proposed] (2018), online at http://www.registrelep-sararegistry.gc.ca/virtual_sara/files/plans/Rs%2DResidentKillerWhale%2Dv00%2D2018Aug%2DEng%2Epdf.

¹⁰ A95671 National Energy Board – Letter to Ministers of Environment and Fisheries and Oceans – Trans Mountain Expansion – Reconsideration – Potential effects on species listed under the Species at Risk Act, online: <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A95671>; A95280-2 Trans Mountain Direct Evidence - A6J6F4-1 at 13-14.

¹¹ See: BC Marine Conservation Analysis, "Human Use – Maritime Zones", online: https://bcmca.ca/datafiles/individualfiles/bcmca_hu_maritimezones_atlas.pdf; Fisheries and Oceans Canada, Canadian Hydrographic Service, "Defining Canada's Maritime Zones", online: http://publications.gc.ca/collections/collection_2012/mpo-dfo/Fs23-571-2011-eng.pdf.

¹² Fisheries and Oceans Canada, Recovery Strategy for the Offshore Killer Whale (*Orcinus orca*) in Canada (2018) at iv, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/Rs%2DOKw%2Dv00%2D2018Nov%2DEng%2Epdf.

¹³ Environment and Climate Change Canada, Management Plan for the Black-footed Albatross (*Phoebastria nigripes*) in Canada (2017) at 6, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/mp%5Fblack%5Ffooted%5Falbatross%5Fe%5Ffinal%2Epdf.

includes the continental shelf break, slope and oceanic areas beyond the shelf break”¹⁴;

- f) the Recovery Strategy for the North Pacific Humpback Whale identifies critical habitat extending well beyond the Territorial Sea off of Southwest Vancouver Island¹⁵;
- g) the Bluntnose Sixgill Shark is “often found over the outer continental and insular shelves as well as upper slopes associated with areas of upwelling and high biological productivity”, and the Tope Shark is “often found well offshore but not oceanic” and its habitat is “temperate continental shelf waters ranging from close inshore [...] to offshore waters up to 471 m depth”¹⁶;
- h) the Longspine Thornyhead and the Rougheye Rockfish types I and II occur along the continental slope¹⁷;
- i) the Yelloweye Rockfish Pacific Ocean outside waters population extends beyond the Territorial Sea¹⁸;
- j) habitat is uncertain for Basking Shark¹⁹; and
- k) it is uncertain how far the range of the West Coast Transient Killer Whale population extends.²⁰

¹⁴ Fisheries and Oceans Canada, Action Plan for Blue, Fin, Sei and North Pacific Right Whales (*Balaenoptera musculus*, *B. physalus*, *B. borealis*, and *Eubalaena japonica*) in Canadian Pacific Waters (2017) at 1, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/BlueFinSeiNprWhales%2Dv00%2D2017Feb20%2DEng%2Epdf.

¹⁵ Fisheries and Oceans Canada, Recovery Strategy for the North Pacific Humpback Whale (*Megaptera novaeangliae*) in Canada (2013) at 34, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/rs%5Frb%5Fpac%5Fnord%5Fhbw%5F1013%5Fe%2Epdf.

¹⁶ Fisheries and Oceans Canada, Management Plan for the Bluntnose Sixgill Shark (*Hexanchus griseus*) and Tope Shark (*Galeorhinus galeus*) in Canada (2012) at 9, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/Mp%2DGrisetMilandreBluntnoseTope%2Dv02%2D2012Apr%2DEng%2Epdf.

¹⁷ Fisheries and Oceans Canada, Management Plan for the Rougheye/Blackspotted Rockfish Complex (*Sebastes aleutianus*) and Longspine Thornyhead (*Sebastolobus altivelis*) in Canada (2012) at 13-14, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/mp%5Fsebastes%5Fsebastolobe%5Frockfish%5Fthornyhead%5F0412%5Feng%2Epdf.

¹⁸ COSEWIC, COSEWIC assessment and status report on the Yelloweye Rockfish *Sebastes ruberrimus*, Pacific Ocean inside waters population and Pacific Ocean outside waters population, in Canada (2008) at 16-22, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/cosewic/sr%5Fyelloweye%5Frockfish%5F0809%5Fe%2Epdf.

¹⁹ Fisheries and Oceans Canada, Recovery Strategy for the Basking Shark (*Cetorhinus maximus*) in Canadian Pacific Waters (July 2011), online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/rs%5Fbasking%5Fshark%5Fpacific%5F0711%5Fe%2Epdf.

²⁰ COSEWIC, COSEWIC assessment and update status report on the Killer Whale *Orcinus orca*, Southern Resident population, Northern Resident population, West Coast transient population, Offshore population and Northwest Atlantic / Eastern Arctic population, in Canada (2008) at 13, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/cosewic/sr%5Fkiller%5Fwhale%5F0809%5Fe%2Epdf.

Unsupported conclusions about the Order in Council and *Tsleil-Waututh*

46. The Board relies in part on the fact that the Order in Council ordering the Reconsideration (P.C. 2018-1177) (the “Order in Council”) and the FCA’s decision *Tsleil-Waututh* do not specifically address the geographic scope of Project-related marine shipping (at page 10 of the Board’s Reasons).
47. The question before the FCA was whether the wholesale exclusion of Project-related marine shipping from the designated project was unlawful. The fact that it did not answer a question that was not before it cannot be understood as an answer to that question. Similarly, the fact that the Order in Council, which is intended to implement the FCA’s orders in *Tsleil-Waututh*, does not speak to this question cannot be understood as an answer to the question.

Reliance on unproven facts

48. At page 18 of the Board’s Reasons, the Board “notes that the probability and consequences of a marine incidence declines with distance from the coast, in light of traffic volumes and navigational hazards. Thus, risk reduction measures [...] are focused within the territorial sea.” In support of this factual conclusion, which it uses to justify the Spatial Limit Decision, the Board cites only a bald assertion by the Project proponent made in the proponent’s comments with respect to the spatial limit.²¹
49. Rather than rely on unsupported claims to avoid hearing any evidence of the effects of marine shipping that occurs outside of the Territorial Sea, the Board should consider Project-related marine shipping between WMT and the outer limit of the EEZ. If the Board finds, after reviewing the evidence, that fewer risk reduction measures are required outside of the Territorial Sea, that finding will be reflected in its recommendations and recommended conditions.

Conclusions

50. The above grounds raise doubts as to the correctness of the Spatial Limit Decision.
51. The Board has erred in interpreting the “designated project” to exclude the EEZ, based on a flawed interpretation of what is “incidental” to the Project, a flawed interpretation of what is “proximate” to the Project, a lack of attention to facts about the federal

²¹ See Trans Mountain, Comments on Spatial Limit of Project-Related Marine Shipping (9 October 2018) at 6-7 (Filing ID A6I5J9).

government's and the proponent's ability to influence Project-related shipping within the EEZ, and a lack of attention to facts concerning effects of Project-related shipping within the EEZ on Southern Resident Killer Whales and other SARA-listed species.

52. If the Spatial Limit Decision is not reviewed it will result in prejudice and damage in the form of a lack of recommendations and recommended conditions for environmental protection within the EEZ, including with respect to SARA-listed species.

53. As such, Raincoast and Living Oceans submit that the Board should review the Spatial Limit Decision and issue a new decision that includes Project-related marine shipping between the WMT and the EEZ as part of the "designated project" under CEAA 2012.

Suggestion for more efficient retrieval of documents

54. Raincoast and Living Oceans further note that it would be of assistance to them if the Board would include the Filing ID or hyperlinks when it referred to documents on the record in the Board's Reasons. Raincoast and Living Oceans strive to do this to assist the Board in reading their filings. Given the short timeline of this hearing, efforts to save all parties time in locating documents are essential.

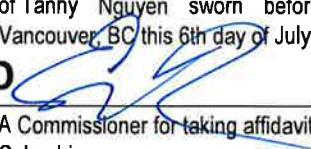
Decision Sought

55. Living Oceans and Raincoast request that the Board order:

1. that the Board include Project-related marine shipping between the WMT and the EEZ as part of the "designated project" under CEAA 2012;
2. that the Board require Trans Mountain to conduct a proper risk assessment of Project-related marine shipping that includes all Species at Risk Act ("SARA")-listed species that may be affected by Project-related marine shipping; and
3. such other relief as the Board may consider appropriate.

This is Exhibit BB referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.

NATIONAL ENERGY BOARD


A Commissioner for taking affidavits for British Columbia

IN THE MATTER OF the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended ("**NEBA**") and the Regulations made thereunder;

AND IN THE MATTER OF an application by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P. (collectively "**Trans Mountain**") for a Certificate of Public Convenience and Necessity ("**CPCN**") and other related approvals pursuant to Part III of *NEBA* for the Trans Mountain Expansion Project ("**Project**");

AND IN THE MATTER OF the National Energy Board's reconsideration of aspects of its Recommendation Report ("**Report**"), Hearing Order MH-052-2018, File OF-Fac-Oil-T260-2013-03 59, as directed by the Governor in Council through Order in Council P.C. 2018-1177 (the "**Reconsideration**").

To: Ms. Sheri Young
Secretary of the Board
National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2R 0A8

TSLEIL-WAUTUTH NATION'S APPLICATION FOR REVIEW OF NATIONAL ENERGY BOARD HEARING ORDER MH-052-2018

November 16, 2018

I. INTRODUCTION & OVERVIEW

1. This application for review by the Tsleil-Waututh Nation (“**TWN**”) is made pursuant to s. 21(1) of [NEBA](#) and Rules 43 and 44 of the [National Energy Board Rules of Practice and Procedure, 1995](#) (“**Rules**”).
2. TWN submits that the Board erred in the following three respects in its approach to this Reconsideration hearing:
 - (a) excluding Project-related marine shipping activities in the Exclusive Economic Zone (“**EEZ**”) from the “designated project” that must be assessed under the [Canadian Environmental Assessment Act, 2012](#) (“**CEAA 2012**”);
 - (b) failing to conduct a *de novo* hearing because the Panel appointed to undertake this Reconsideration hearing did not hear the original evidence and submissions of the parties; and
 - (c) excluding the need for and the socio-economic effects of the Project from the List of Issues.
3. TWN requests that the Board revisit the determinations made as part of, or flowing from, the Hearing Order in this proceeding by (i) including Project-related marine shipping in the EEZ as part of the “designated project” that must be assessed under *CEAA, 2012*, (ii) including the need for and the socio-economic effects of the Project from the List of Issues, and (iii) requiring a *de novo* hearing, owing to the addition of new panel members to conduct this Reconsideration hearing.

II. STATEMENT OF FACTS

4. On September 26, 2018, the Board [requested](#) that the parties provide comments by October 3, 2018 on several issues, including:
 - (a) whether, “on a principled basis,” Project-related marine shipping should be included in the “designated project” to be assessed under *CEAA 2012*; and

- (b) the draft Amended Factors and Scope of Factors for the environmental assessment of the Project pursuant to *CEAA 2012* and the draft List of Issues to be considered in the Reconsideration hearing.
5. On October 3, 2018, TWN provided [comments](#) to the Board to the effect that Project-related marine shipping should be included in the “designated project” to be assessed under *CEAA 2012* and other comments associated with on the draft Amended Factors and Scope of Factors, the draft List of Issues, and the design of the hearing process applicable to this Reconsideration hearing.
6. Of relevance to this Application for Review, TWN argued in those comments that the Board had breached the applicable principles of natural justice, specifically the maxim that “he who decides must hear” by appointing a new panel to oversee this Reconsideration hearing, without conducting a *de novo* hearing.¹
7. TWN also argued that the need for and the socio-economic effects of the Project had to be included in the List of Issues because, *inter alia*, the economics of the Project and other context relevant to this issue have changed in a fundamental way since Trans Mountain submitted its evidence on this issue several years ago.²
8. On October 5, 2018, the Board [sought further comments](#) from the parties on the following question with respect to the scope of the Reconsideration:

Assuming Project-related marine shipping is included in the “designated project” to be assessed under the *CEAA 2012*, should the designated project be defined as including:

- a) Project-related marine shipping between the Westridge Marine Terminal (WMT) and the territorial sea limit; or
- b) Project-related marine shipping between the WMT and the outer boundary of Canada's exclusive economic zone?

¹ Tsleil-Waututh Nation, “Comments on the draft Amended Factors and Scope of the Factors of the Environmental Assessment under the *Canadian Environmental Assessment Act, 2012* (“*CEAA 2012*”), the draft List of Issues, and the design of the hearing process”, October 3, 2018 – A94536-1 at pp. 3-5.

² Tsleil-Waututh Nation Comments at pp. 15-16.

9. On October 9, 2018, TWN filed [further comments](#) in response to the Board's October 5, 2018 request, to the effect that the "designated project" should indeed be defined as including Project-related marine shipping between the WMT and the outer boundary of Canada's EEZ.
10. On October 12, 2018, the Board issued its [Hearing Order](#) in this matter, which provides that the Board has "determined that Project-related marine shipping between the WMT and the 12 nautical mile territorial sea limit is [...] part of the 'designated project' under the CEAA 2012" (the "**Spatial Limit Decision**").³
11. On October 29, 2018, the Board provided a [letter](#) to the parties with reasons associated with various decisions in the Hearing Order. Reasons for the Spatial Limit Decision were set out in [Appendix I](#) to the October 29 letter, and reasons were set out in [Appendix II](#) in connection with the Board's disagreement that it had breached the principles of natural justice by violating the maxim "he who decides must hear" by appointing a new panel to oversee this Reconsideration hearing without conducting a *de novo* hearing.⁴
12. The Board summarized Trans Mountain's submissions in its Reasons for the Spatial Limit Decision as follows:

Further, Trans Mountain's ability to impose and enforce requirements on tankers in Canada's 200 nautical mile exclusive economic zone (EEZ) is extremely limited ...

Trans Mountain also said there are no established shipping lanes in the EEZ. An assessment of effects from routine shipping operations in the EEZ would be impractical and results would be subject to a high degree of inaccuracy, rendering the effort largely ineffectual.⁵
13. The Spatial Limit Decision turned on this issue. In the Board's words, "knowing the project location or route is fundamental". The Board held as follows:

A key fact that the Board must consider in conducting any EA is the geographical extent of the project, and the spatial boundaries within which that project is expected to have potential effects on the selected valued components. In order to define the spatial boundaries, knowing the project location or route is fundamental.

³ Hearing Order MH-052-2018, Appendix I and Appendix II.

⁴ Appendix II at pp. 16-17.

⁵ Appendix I at p. 1.

There is a marked and material difference between marine shipping within the territorial sea limit and the EEZ. Given that there are no defined shipping lanes in the EEZ – a vast area of ocean – no shipping “route” for the Project can be identified with any degree of certainty. Destinations can vary from Washington State, California, or Asia. The lack of a certain route means, in turn, that appropriate spatial boundaries cannot be identified with certainty. It is not possible to predict the project-environment interactions and the full impacts of that project, nor can one adequately evaluate technically and economically feasible mitigation as required by the CEAA 2012. It would produce speculative, as opposed to meaningful, information about project impacts. Such an EA would not be useful as a planning and decision-making tool for the GIC.⁶

14. In short, the factual basis underlying the Board’s Spatial Limit Decision is incorrect.
15. In the TERMPOL Review Process Report on the Trans Mountain Expansion Project, Transport Canada observed as follows:

Trans Mountain is proposing to add a requirement to its tanker acceptance criteria that Project tankers planning to leave Canada via the Juan de Fuca Strait must agree that, upon exiting the Juan de Fuca Strait, they will steer a course no more northerly than due West (270°), until the tankers are outside the Canadian Exclusive Economic Zone (EEZ), 200 nautical miles from Canada’s coast. The routing requirement will ensure Project tankers will use the shortest route to exit the EEZ.⁷

16. Transport Canada incorporated Trans Mountain’s proposal into TERMPOL Recommendation 9:

Trans Mountain’s commitment to require via its tanker acceptance process that Project tankers steer a course no more northerly than due West (270°) upon exiting the Juan de Fuca Strait will enhance safety and protection of the marine environment by providing the shortest route out of the Canadian EEZ.⁸

17. Trans Mountain subsequently agreed to adopt and implement all of the TERMPOL recommendations.⁹ As a result, and contrary to Trans Mountain’s submissions which formed the factual basis for the Spatial Limit Decision, the route for Project-related marine shipping in the EEZ is known, can be identified with certainty, and appropriate spatial boundaries for the CEAA 2012 environmental assessment can therefore also be identified with certainty.

⁶ Appendix I at p. 5. (emphasis added)

⁷ Transport Canada, “TERMPOL Review Process Report on the Trans Mountain Expansion Project” (December 11, 2014), C353-4-3 (“**TERMPOL Report**”), at p. 15.

⁸ TERMPOL Report, at p. 47.

⁹ A77045-1 – National Energy Board Report – Trans Mountain Expansion Project (May 19, 2016) at pp. 368-69.

III. GROUNDS FOR REVIEW

18. Subsection 21(1) of *NEBA* provides that the Board may review, vary or rescind any decision or order made by it:

21. (1) ... the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it.

19. Subsection 44(2) of the Rules establishes the parameters for applications for review. It states as follows:

44. (2) An application for review or rehearing shall contain

(a) a concise statement of the facts;

(b) the grounds that the applicant considers sufficient, in the case of an application for review, to raise a doubt as to the correctness of the decision or order or, in the case of an application for rehearing, to establish the requirement for a rehearing, including

(i) any error of law or of jurisdiction,

(ii) changed circumstances or new facts that have arisen since the close of the original proceeding, or

(iii) facts that were not placed in evidence in the original proceeding and that were then not discoverable by reasonable diligence;

(c) the nature of the prejudice or damage that has resulted or will result from the decision or order; and

(d) the nature of the relief sought.

20. When the Board receives a s. 21 *NEBA* application for review, the Board's Filing Manual provides that it must: "first [determine] whether the decision or order should be reviewed or the application reheard. In order to find that a review or rehearing is required, the Board must be satisfied that the applicant has raised a doubt as to the correctness of the decision or order under review or has demonstrated that a rehearing is required."¹⁰

¹⁰ National Energy Board, Filing Manual – Guide O – Review, Rehearing or Variance applications (NEBA s. 21) (January 2012), online: <https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/fmgdo-eng.html>.

21. Raising a doubt as to the correctness of the decision or order under review has been described as an onus for the applicant to “satisfy the Board that a *prima facie* case for review exists in the particular circumstances of any case”.¹¹
22. The Board has held that in exercising its s. 21(1) review power:¹²
- (a) The Board should exercise it with care;
 - (b) It is within the Board’s discretion whether circumstances exist to warrant its use;
 - (c) In exercising that discretion, the Board should consider the following factors:
 - (i) Whether a sufficient doubt has been raised as to the correctness of the prior Board order or decision;
 - (ii) Whether circumstances have changed or new facts have arisen since an order or decision was made which justify a Board review;
 - (iii) The timeliness of the application for review;
 - (iv) The relationship of the application for review to other proceedings pending before the Board; and,
 - (v) The extent to which the relief sought is available under other provisions of *NEBA*, its regulations, or an order of the Board.
23. The primary justification for review is the significant doubt as to the correctness of the Board’s decisions. However, the Board has previously held that grounds for review are not limited to those listed in section 44(2)(b) of the Rules, and that other grounds for review will be considered if they raise a doubt as to the correctness of a Board decision.¹³

¹¹ National Energy Board – Newfoundland & Labrador Hydro Application for Review under Section 17 (June 1984) at 1, as cited in Canadian Institute of Resources Law, *Canada Energy Law Service* (Toronto: Carswell, 2017) (loose-leaf updated 2018, Release 1) (“**Canada Energy Law Service**”), Ch. VIII at §311, Tsleil-Waututh Nation’s Book of Authorities (“**BOA**”) Tab D3.

¹² Westcoast Transmission Co. – Application for Review of Order No. TG-5-79 and for an Order Fixing Interim Tolls (August 1980) at p. 4, as cited in *Canada Energy Law Service*, Ch. VIII at §310, BOA Tab D5.

¹³ National Energy Board, Letter Decision, “Application for Review of the Decision of Members Ballem and Lytle, in Report GH-003-2015 (Towerbirch Report), Respecting the Toll Treatment of the Tower Lake Section (TLS)”, March 16, 2017, at p. 5, online: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3210070>, BOA Tab B1.

(a) *The Spatial Limit Decision is Factually Incorrect*

24. The Board's Spatial Limit Decision is factually incorrect in that the Board erroneously concluded that "no shipping 'route' for the Project can be identified with any degree of certainty" and "[t]he lack of a certain route means...that appropriate spatial boundaries cannot be identified with certainty".¹⁴
25. The Board's conclusion in that regard is manifestly flawed. It is contradicted by the existing facts before the Board. Although the Board made reference to certain of these facts in its reasons, the Board appears to have misapprehended the degree to which Trans Mountain can "direct or influence" marine shipping in the EEZ and, as a result, the extent to which shipping routes, and corresponding appropriate spatial boundaries, within the EEZ can be identified with certainty.¹⁵
26. Importantly, the factual basis for the Spatial Limit Decision is directly contradicted by Trans Mountain's evidence:
 - (a) Trans Mountain has the ability to impose and enforce requirements on tankers within the EEZ through its Tanker Acceptance Standards, a fact which the Board has acknowledged;¹⁶
 - (b) the routes Project-related marine shipping will use within the EEZ can indeed be determined with precision:
 - (i) there are a limited number of destinations for Project-related marine shipping that may require tankers to transit within the EEZ, namely California and Asia (movements to Washington State do not require transit within or through the EEZ);¹⁷

¹⁴ Appendix at p. 5.

¹⁵ Appendix I, at p. 14.

¹⁶ Appendix I, at p. 14.

¹⁷ Appendix I, at p. 16.

- (ii) Trans Mountain, through its Tanker Acceptance Standards, has already agreed to require tankers to “steer a course no more northerly than due West (270°) upon exiting the Juan de Fuca Strait”, with a view to enhancing safety and protection of the marine environment by providing the shortest route out of Canada’s EEZ;¹⁸ and
 - (iii) Trans Mountain can refuse vessels calling at the WMT if they do not abide by this EEZ sailing requirement.
27. As a result, and contrary to the Board’s erroneous findings of fact (which are directly contradicted by the evidence before it), the route(s) for Project-related marine shipping within the EEZ are known, can be identified with certainty and, as a result, appropriate spatial boundaries for the *CEAA 2012* environmental assessment can also be identified with certainty.
28. The Board has also unlawfully returned to the unduly narrow approach it applied to the phrase “incidental to” in the earlier hearing, an approach which was ultimately rejected by the Federal Court of Appeal in *Tsleil-Waututh*. There, the Court held that the Board’s view that it “must itself have regulatory oversight over a particular subject matter” to include incidental physical activities in the designated project was to impermissibly rewrite the relevant section of *CEAA 2012* as “[including] any physical activity that is incidental to those physical activities *and that is regulated by the responsible authority*” and without regard to *CEAA 2012*’s purposes.¹⁹
29. Here, the Board is again impermissibly looking to rewrite the relevant section of *CEAA 2012*, but this time to state that it “includes any physical activity that is incidental to those physical activities *and that the proponent controls in the same manner as all other physical activities*” and, again, without reference or regard to *CEAA 2012*’s purposes.

¹⁸ TERMPOL Report, at p. 47.

¹⁹ [Tsleil-Waututh Nation v. Canada \(Attorney General\)](#), 2018 FCA 153 (“*Tsleil-Waututh*”) at para. 401, BOA Tab A14.

30. The Board has acknowledged that (i) “the determination of whether Project-related marine shipping is incidental to the pipeline is ‘a mixed question of fact and law heavily suffused by evidence’” and (ii) a “key fact that the Board must consider in conducting any EA is the geographical extent of the project, and the spatial boundaries within which that project is expected to have potential effects on the selected valued components.”²⁰
31. In view of these factual errors, the Board’s overall conclusion that no shipping route can be ascertained with any degree of certainty appears to be in significant doubt and must be revisited.

(b) *The Spatial Limit Decision is Legally Incorrect*

32. Even if there is some degree of uncertainty about the precise location of Project-related marine shipping routes, nothing in *CEAA 2012* authorizes the Board to “scope out” Project-related marine shipping activities within the EEZ from the “designated project” it must assess. Rather, the plain language of *CEAA 2012* is clear that such activities must form part of the “designated project”.
33. In that regard, TWN submits the Board, in making the Spatial Limit Decision, incorrectly and/or unreasonably interpreted *CEAA 2012* in a manner which does not accord with the text, context, and purpose of the relevant provisions within the meaning of the Supreme Court of Canada’s leading decision on statutory interpretation in *Rizzo & Rizzo Shoes Ltd (Re)*.²¹

²⁰ Appendix I, at p. 15.

²¹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21: “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”, BOA Tab A13.

34. In particular, the Board did not properly apply the *Rizzo Shoes* test in considering whether the 12 nautical mile territorial sea limit or the EEZ was the proper spatial limit to be applied to the circumstances before it. While the Board reasoned that a “designated project” *could* take place in the EEZ and be subject to an environmental assessment,²² it nonetheless purported to depart from the plain language of the definition of “designated project” on the basis that in its view that “there appears to be a degree of ambiguity in the definition of ‘designated project’ with respect to what is ‘incidental’.”²³
35. First, statutory interpretation cannot go against the plain language of the statute. The words, of a statute “if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.”²⁴ While the text, context, and purpose of a provision must always be examined, a purposive approach cannot be used to ground unexpressed legislative intentions, nor can so-called ‘policy’ or ‘practical’ considerations be used override the clear language of an enactment.²⁵
36. Here, the plain language of *CEAA 2012* must indeed dominate. The starting point for this exercise is the definition of “designated project” found in s. 2(1) of *CEAA 2012*. Parliament has defined it as meaning “one or more physical activities that (a) are carried out in Canada or on federal lands; (b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and (c) are linked to the same federal authority as specified in those regulations or that order. It includes any physical activity that is incidental to those physical activities.”
37. The definition of “federal lands” also found in s. 2(1) of *CEAA 2012* in turn expressly includes “the exclusive economic zone of Canada” in subsection (b)(iii) of that definition.
38. A plain reading of *CEAA 2012* supports the conclusion that physical activities of any kind (whether incidental or not) that occur in the EEZ are part of the “designated project” that must be assessed.

²² Appendix I, at p. 11.

²³ Appendix I, at p. 11.

²⁴ *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 at para. 21, BOA Tab A7.

²⁵ *Canada v. Craig*, 2012 SCC 43 at para. 38, BOA Tab A6; *65302 British Columbia Ltd. v. Canada*, [1999] 3 SCR 804 (“*65302 British Columbia Ltd.*”) at para. 50-51, BOA Tab A1; *Markevich v. Canada*, 2003 SCC 9 (“*Markevich*”) at para. 34, BOA Tab A11.

39. There is therefore no ambiguity present which would allow the Board to resort to purposive, policy or practical considerations to disregard the plain language of *CEAA 2012*.²⁶ These words are not ambiguous and are incapable of supporting multiple interpretations.
40. The Board has determined that marine shipping is “incidental to” the pipeline portion of the Project. It follows, then, that marine shipping carried out in Canada on “federal lands” (i.e. the EEZ) is *ipso facto* ‘included’ in the “designated project”. There is no provision which allows the Board to make a secondary determination relating to the degree of ‘incidental’ to be associated with marine shipping in the EEZ. The Board’s further focus on ‘incidental’ in that regard was, with respect, misguided.
41. The fundamental flaws in the Board’s reasoning are further revealed by the following rhetorical question: how can Project-related marine be “incidental to” the pipeline within the 12 nautical mile territorial sea limit, but somehow cease to be “incidental to” the pipeline once those very same tankers transit the EEZ?
42. In both cases, Project-related marine shipping is liable to happen as a consequence of the pipeline or, put another way, without marine shipping transiting the EEZ the Project would, again, constitute the proverbial pipeline to nowhere.
43. An examination of *CEAA 2012*’s scheme as a whole, as required by *Rizzo Shoes*, in concert with the federal statute book as coherent and logical whole,²⁷ also lends further support to the conclusion that Project-related marine shipping within the EEZ is part of the “designated project” that must be assessed:

²⁶ [Bell ExpressVu Limited Partnership v. Rex](#), 2002 SCC 42 at para. 29, BOA Tab A3; [Markevich](#) at para. 34, BOA Tab A11.

²⁷ In [65302 British Columbia Ltd.](#) at para. 7, BOA Tab A1 Mr. Justice Bastarache noted that “[t]he statute book as a whole forms part of the legal context in which an act ... is passed ... The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation. When courts examine a provision in the context of the statute book as a whole, they are concerned primarily with two things. One is avoiding conflict with the provisions of other statutes. It is presumed that the legislature does not intend to contradict itself; it is presumed to create coherent schemes ...”. See also [R. v. Ambrosi](#), 2014 BCCA 325 at para. 22, BOA Tab A12 and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis, 2014) at 403, 416-17, BOA Tab D4 and cases cited therein.

- (a) Sections 5(1)(a) and 5(1)(b)(i) of *CEAA 2012* set out the environmental effects that must be taken into account in relation to a “designated project”. These include (i) “a change that may be caused to the components of the environment that are within the legislative authority of Parliament”²⁸ and (ii) “a change that may be caused to the environment that would occur on federal lands”²⁹ (i.e. again referencing the EEZ), respectively;
- (b) The Board’s obligations pursuant to ss. 79(1) of the [Species at Risk Act](#), S.C. 2002, c. 29 (“**SARA**”) refer to a “project”, and ss. 79(3) incorporates the definition of “designated project” from *CEAA 2012* by reference (which, as noted above, also in turn relies on the definition of “federal lands” from *CEAA 2012* that expressly includes the EEZ); and
- (c) Sections 13 and 14 of the [Oceans Act](#), S.C. 1996, c. 31 define the EEZ and, *inter alia*, (i) declare Canada’s “sovereign rights in the [EEZ] for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil” and (ii) asserts Canada’s “jurisdiction in the exclusive economic zone of Canada with regard to ... the protection and preservation of the marine environment.”³⁰

44. An interpretation that includes Project-related marine shipping between the WMT and the outer boundary of Canada’s EEZ also best accords with the express purposes of *CEAA 2012*, in particular those found at ss. 4(1)(a) and (b),³¹ and the primary purpose stated at s. 6 of *SARA*.³²

²⁸ *CEAA 2012*, s. 5(1)(a) (emphasis added).

²⁹ *CEAA 2012*, s. 5(1)(b)(i) (emphasis added).

³⁰ [Oceans Act](#), S.C. 1996, c. 31, ss. 14(a) and (b)(iii), BOA Tab C1.

³¹ “(a) to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project; (b) to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid significant adverse environmental effects”.

³² “The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.”

45. In contrast, the Board's exclusion of Project-related marine shipping within the EEZ from the "designated project" is an incorrect and unreasonable departure from the plain language of *CEAA 2012* and Parliament's obvious, manifest intent that it should be included.
46. Moreover, the Board also misinterpreted and misapplied the B.C. Supreme Court's decision in *Taseko Mines*. The issue in *Taseko Mines* was whether the initial activities authorized under a provincial exploration permit for a proposed mine were sufficiently related to the carrying out of a designated project.³³ The Court responded in the negative, that the exploration activities "[did] not have a sufficient relationship to the actual construction, operation, decommissioning or abandonment of the [mine]."³⁴
47. Here, the Board has already determined that marine shipping is "incidental to" the pipeline. As a result, the holding in *Taseko Mines* is of no moment and its reasoning not useful to determining the issue that was before the Board.
48. Finally, the Board erroneously purported to rely on the fact that the Court in *Tsleil-Waututh* (i) "did not raise concerns with this geographic scope" [i.e. that the Board assessed Project-related marine shipping pursuant to *NEBA* to the 12 nautical mile territorial sea limit in its OH-001-2014 Report], and (ii) concluded that "the Board's report was adequate for the purpose of informing the GIC about the effects of Project-related marine shipping on the Southern resident killer whales and their use by indigenous groups."³⁵
49. However, the Board's reliance on the Court's finding on this point is misplaced for at least two reasons:

³³ [*Canada \(Canadian Environmental Assessment Agency\) v Taseko Mines Limited*](#), 2018 BCSC 1034 ("*Taseko Mines*") at para. 22, BOA Tab A5.

³⁴ *Taseko Mines* at para. 66, BOA Tab A5.

³⁵ Appendix I, at p. 10.

- (a) The issue of proper spatial boundaries of the environmental assessment of the “designated project” under *CEAA 2012* was not a live issue before the Court, and thus the issue of whether it was appropriate to apply the 12 nautical mile territorial sea limit or EEZ was not argued or, for that matter, considered by the Court. It therefore cannot be assumed from the comments cited by the Board that the Court was endorsing the 12 nautical mile territorial sea limit over the EEZ. Indeed no weight can be attached to those comments in this case: as the Court commented elsewhere in its reasons on another issue, no weight can be attached to decisions where an argument on a particular point has not been put in issue by the parties to the case.³⁶
- (b) New critical habitat for southern resident killer whales has been identified and proposed for designation by Fisheries and Oceans Canada, most of which falls outside of the territorial sea.³⁷ This significantly undermines the Board’s finding that examining impacts on the EEZ would “frustrate” the purpose of timely EAs under *CEAA 2012*, and the Board’s conclusion that “[t]he other limitation of an overly broad assessment is that results may not be useful in protecting the environment and reducing harm.”³⁸ Surely there is clear utility consonant with the purposes of *CEAA 2012* in protecting the environment and reducing harm to the critical habitat of species at risk in areas which clearly fall within the definition of “federal lands” under *CEAA 2012*.
50. TWN therefore submits that a correct appreciation of the facts supports the inclusion of Project-related marine shipping from the WMT to the outer limit of the EEZ in the “designated project” at issue here.

³⁶ *Tsleil-Waututh* at para. 186, BOA Tab A14.

³⁷ Fisheries and Oceans Canada, Recovery Strategy for the Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada [Proposed] (2018), online at http://www.registrelep-sararegistry.gc.ca/virtual_sara/files/plans/Rs%2DResidentKillerWhale%2Dv00%2D2018Aug%2DEng%2Epdf.

³⁸ Appendix I, at p. 15.

(c) *The Board incorrectly determined that a de novo hearing was not required*

51. The Board held that a *de novo* hearing is not required because the Panel undertaking the Reconsideration did not hear the original evidence, and that *NEBA* ousts the application of the maxim “he who decides must hear.”³⁹ TWN agrees with the Board that this rule “does not apply where legislation expressly, or by necessary implication, ousts its application.”⁴⁰ However, neither exception applies here.
52. First, the Board has pointed to no express provision of *NEBA* that ousts this principle. It does cite “[t]he addition of the reconsideration provision in the NEB Act in 2012” as evidence of Parliament’s intention “that the Board could be directed to reconsider specific issues only, in which case there is no requirement for a *de novo* hearing or for all previous evidence heard orally to be reheard.”⁴¹
53. This argument is, with respect, a red herring. There is no suggestion by TWN that on reconsideration, this triggers a *de novo* hearing, or a requirement “or for all previous evidence heard orally to be reheard.” Rather, TWN’s position is that the same panel members must hear the reconsideration, failing which a *de novo* hearing is required. Again, the Board was required to apply the *Rizzo Shoes* analysis to this question, to determine whether the application of “he who decides must hear” was expressly or impliedly excluded by Parliament.⁴²
54. In this case, again, Parliament’s addition of the reconsideration power to *NEBA* provides no support for the Board’s conclusion that this bedrock rule of administrative law has been ousted. The plain meaning of the word “reconsider” is, literally, “to discuss or take up (a matter) again”⁴³ or “to consider again”,⁴⁴ directly implying that the same panel members would be expected to hear a matter “again” during a reconsideration process.

³⁹ Appendix II, at p. 16.

⁴⁰ Appendix II, at p. 16.

⁴¹ Appendix II, at p. 16.

⁴² [*ATCO Gas & Pipelines Ltd. v. Alberta \(Energy & Utilities Board\)*](#), 2006 SCC 4 (“ATCO”) at paras. 37-38, BOA Tab A2.

⁴³ *Black’s Law Dictionary*, 10th ed., p. 1464, *sub verbo* “reconsider”, BOA Tab D1.

⁴⁴ *The Concise Oxford English Dictionary*, 11th ed. (revised), p. 1202, *sub verbo* “reconsider”, BOA Tab D2.

55. The Board's reasoning that "an exception to quorum requirements exists for the original section 52 proceeding (see subsection 7(2.1)), but not for the section 53 reconsideration, also indicates that the reconsideration does not require the same Panel" similarly does not comport with a proper *Rizzo Shoes* analysis. Again, the word "reconsideration" chosen by Parliament has a plain meaning associated with it which does not expressly or impliedly provide the Board an ability to substitute in other panel members at will.
56. Moreover, the Board's cites s. 7(2) of *NEBA* for the authority that "any quorum of the Board is 'the Board' and can carry out the statutory obligations of the Board."⁴⁵ However, as the Federal Court of Appeal confirmed in *Johnny v. Adams Lake Indian Band*, a quorum provision of this nature simply means that if all members of a panel are not eligible or available to participate in an inquiry, then "a majority of the members may nonetheless embark upon the inquiry."⁴⁶ A quorum provision "does not authorize members to come and go and participate in a decision when they have not heard all of the evidence or the submissions of the parties."⁴⁷
57. The Board's comment that "[i]t would not be practical to expect the original Panel Members to remain available through an unlimited number of reconsiderations" also does not comport with a proper *Rizzo Shoes* analysis. As outlined above, "practical considerations" may only be considered where there is genuine ambiguity present, and the words at issue may bear more than one meaning. Here, the plain meaning of "reconsideration" is obvious and does not require resort to such considerations, nor does the Board justify, with evidence or past practice, its speculative conclusion regarding the possibility of "multiple reconsiderations" occurring.⁴⁸

⁴⁵ Appendix II, at p. 16.

⁴⁶ [*Johnny v. Adams Lake Indian Band*](#), 2017 FCA 146 ("*Johnny*") at paras. 31-32, BOA Tab A10.

⁴⁷ *Johnny* at paras. 31-32, BOA Tab A10.

⁴⁸ Appendix II, at p. 16.

58. Importantly, in determining whether implied powers exist, the Board must presume Parliament “to have a mastery of existing law, both common law and statute law [and] to have known all of the circumstances surrounding the adoption of new legislation.”⁴⁹ However, notwithstanding this, and notwithstanding that the courts’ view that “nothing is more fundamental to administrative law” than the “he who decides must hear” maxim,⁵⁰ there is no indication whatsoever that Parliament intended to abrogate it under *NEBA* nor provide the Board with the express or implied power to do so.
59. Rather, the structure of *NEBA* and the Board’s powers lead to the opposite conclusion: the Board is established under s. 11(1) of *NEBA* as “a court of record” and s. 11(4) provides that “all applications and proceedings before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit provided for under this Act, if there is one.”
60. In TWN’s submission, the Board’s status as a court of record that has been expressly bound by “considerations of fairness” further suggests that a court-like procedure must be followed, and the principles of natural justice, including the “he who decides must hear” maxim, have not been expressly or impliedly ousted from *NEBA*.
61. TWN submits that the Board’s consideration of this issue was therefore also doubtful and must be revisited.
- (d) *The Board incorrectly excluded the need for and the socio-economic effects of the Project from the List of Issues***
62. The economics of the Project have changed in a fundamental way since Trans Mountain submitted its evidence on this issue: as the Board is aware, two new pipelines have been approved (one of which, Line 3, is now under construction), new capacity is being added to the Enbridge mainline, the costs of building the Project have increased significantly, and oil production forecasts have decreased.

⁴⁹ ATCO at para. 59, BOA Tab A2.

⁵⁰ Johnny at para. 31, BOA Tab A10.

63. Given these material changes in Project economics, new evidence is required on a wide range of issues in connection with the justification analysis under *CEAA, 2012* and the Board's consideration of the public interest under *NEBA*. As such, this issue requires new evidence which is essential to the Board's recommendation and the Governor in Council's ultimate decision on justification. It would be unfathomable to attempt to justify significant adverse environmental effects of a Project for which there was no need, that would provide limited economic benefits, or on the basis of stale-dated evidence.

IV. NATURE OF THE PREJUDICE OR DAMAGE FROM THE DECISION OR ORDER

64. The above errors cause prejudice to TWN, other parties, and the public interest in several significant ways.

65. First, respecting the requirement that "he who decides must hear" which is already acknowledged as a fundamental principle of Canadian administrative law,⁵¹ it takes on added significance in an instance such as this, where oral Aboriginal history and tradition evidence has been transmitted as part of the initial hearing process.

66. In this regard, the Supreme Court of Canada has stated that that the laws of evidence must "operate to ensure that the aboriginal perspective is 'given due weight by the courts'" and requires a sensitive application of rules of evidence.⁵²

67. Further, the Supreme Court of Canada has also recognized that "the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige ..."⁵³

⁵¹ *Johnny* at para. 31, BOA Tab A10.

⁵² *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 ("*Delgamuukw*") at paras. 84-85, BOA Tab A9.

⁵³ *Delgamuukw* at para. 87, BOA Tab A9.

68. The case law first makes clear that it does not suffice for panel members to advise those who were not present as to what happened when they were not, nor does it suffice to read, *ex post facto*, written accounts or summaries of that evidence.⁵⁴ Further, as Member Scott will no doubt recall, the TWN oral evidence included traditional songs, a teaching and communication method which cannot be readily captured by a transcript.
69. There is also prejudice associated with the exclusion of Project-related marine shipping in the EEZ and the need for and the socio-economic effects of the Project from the List of Issues. From TWN's perspective, the Board's exclusion of these matters puts matters as they relate to marine shipping back into the state they were in as of April 2, 2014, when the Board excluded marine shipping altogether, and respecting evidence of the need for the Project that goes to the justification decision under *CEAA, 2012*, as of the date of the close of the Board's hearing record nearly three years ago.
70. Respecting marine shipping, given TWN's rights and uses associated with the southern resident killer whales, the Board's latest exclusions significantly prejudice the considerations of its associated rights and interests with respect to killer whales. This is particularly so in light of Fisheries and Oceans Canada's proposed expansion of the critical habitat of those whales into the EEZ, which may well be impacted by Project-related marine shipping activities therein.
71. Respecting the need to re-examine the need for and the socio-economic effects of the Project, it would be unfathomable, for example, to attempt to justify significant adverse environmental effects of a Project for which there was no need, that would provide limited economic benefits, or on the basis of stale-dated evidence.
72. This exclusion operates to also prejudice any examination of justification of any environmental effects to the southern resident killer whales and TWN's rights and uses associated with them, and indeed prejudices the significant public interest in an accurate examination of this issue as part of this Reconsideration hearing.

⁵⁴ Johnny at paras. 33-39, BOA Tab A10.

73. Further, it is no answer to state that TWN can raise these matters with the Governor-in-Council during future Phase III consultation, because TWN does not itself have the ability to trigger a reconsideration, and the Governor in Council has consistently refused to do so. Phase III therefore does not represent an adequate alternative remedy to TWN within the meaning of the case law.⁵⁵
74. The statutory timeline in place in this matter is also no answer. A legislative timeline cannot operate to constrain or “box in” a lawful environmental assessment pursuant to *CEAA 2012* or the proper consideration of Aboriginal concerns. Canada has stated that it intends to rely on this Reconsideration process, to the extent possible, to discharge its duty to consult and accommodate TWN. However, as the Federal Court has observed, “[i]t is not sufficient to set up some form of elaborate system and then put it on auto-pilot and hope for success.”⁵⁶
75. Rather, if these issues are not addressed, further litigation will become more likely, which will cause prejudice to all concerned. As the Supreme Court of Canada recently observed in *Clyde River*, discharging the duty to consult Aboriginal peoples is a “constitutional imperative” that must be met, and “[n]o one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.”⁵⁷

V. RELIEF SOUGHT

76. TWN requests that for the above reasons, the Board revisit the conclusions made as part of, or flowing from, the Hearing Order, including the following:
- (a) determine that Project-related marine shipping in the EEZ forms part of the “designated project” to be assessed under *CEAA 2012* in this Reconsideration hearing;

⁵⁵ [Buenaventura Jr. v. Telecommunications Workers Union](#), 2012 FCA 69 at paras. 30-31, BOA Tab A4.

⁵⁶ [Yellowknives Dene First Nation v. Canada \(Attorney General\)](#), 2010 FC 1139 para. 102, BOA Tab A15.

⁵⁷ [Clyde River \(Hamlet\) v. Petroleum Geo-Services Inc.](#), 2017 SCC 40 at para. 24, BOA Tab A8.

- (b) determine that a *de novo* hearing is required in view of the newly-reconstituted panel members involved in this Reconsideration hearing not hearing the original evidence and submissions of the parties; and
- (c) determine that the need for and the socio-economic effects of the Project must be included in the List of Issues.

Dated this 16th day of November, 2018.



Scott A. Smith*
Partner, Environmental and Indigenous Resource Law
*Denotes Law Corporation



Paul Seaman*
Partner, Indigenous Resource Law
*Denotes Law Corporation

National Energy
Board



Office national
de l'énergie
A Commissioner for taking affidavits for British
Columbia

This is Exhibit CC referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

File OF-Fac-Oil-T260-2013-03 59
21 November 2018

To: All Parties

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177
MH-052-2018
Comment processes on 16 November 2018 requests from Living Oceans Society
and Raincoast Conservation Foundation (Living Oceans/Raincoast), and
Tsleil-Waututh Nation (TWN)**

On 16 November 2018, the Board received a notice of motion and applications for review from Living Oceans/Raincoast and TWN. These filings make various requests which are described in more detail below.

A. Notice of motion regarding risk assessment

The Living Oceans/Raincoast notice of motion makes the following request:

Request 1 That the Board require Trans Mountain to conduct a proper risk assessment of Project-related marine shipping that includes all *Species at Risk Act*-listed species that may be affected by Project-related marine shipping.

Before deciding on Request 1, the Board will accept comments from the Parties in accordance with the following schedule.

Request 1 – Risk assessment

Party(ies) and submission	Deadline
All intervenors (other than Living Oceans/Raincoast) may file comments	30 November 2018
Trans Mountain may file comments	4 December 2018
Living Oceans/Raincoast may file reply comments	6 December 2018

.../2

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Canada

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Facsimile/Télocopieur : 1-877-288-8803

B. Review regarding 12 October 2018 dec

The TWN review [application](#) makes the following requests:

- Request 2** That the Board revisit the conclusions made as part of, or flowing from, the Hearing Order, including the following:
- a) determine that Project-related marine shipping in the exclusive economic zone (EEZ) forms part of the “designated project” to be assessed under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) in this Reconsideration hearing;
 - b) determine that a *de novo* hearing is required in view of the newly-reconstituted panel members involved in this Reconsideration hearing not hearing the original evidence and submissions of the parties; and
 - c) determine that the need for and the socio-economic effects of the Project must be included in the List of Issues.

The Living Oceans/Raincoast review [application](#) makes the following requests:

- Request 3** That the Board:
- a) review its decision to limit the scope of the Reconsideration to Project-related marine shipping between the Westridge Marine Terminal (WMT) and the 12 nautical-mile territorial sea limit.
 - b) issue a new decision that includes Project-related marine shipping between the WMT and the outer boundary of Canada’s EEZ as part of the “designated project” under the CEAA 2012.¹

Request 2 and Request 3 relate to [decisions](#) made by the Board on 12 October 2018, which are associated with [Hearing Order MH-052-2018](#). The Board issued its [reasons](#) for these decisions on 29 October 2018.

Process determinations by the Board

Subsection 21(1) of the *National Energy Board Act* provides that the Board may review, vary or rescind any decision made by it. Part III of the *National Energy Board Rules of Practice and Procedure, 1995* (Rules) describe the procedures and grounds for a review.

It is within the Board’s discretion whether circumstances exist to warrant the use of the Board authority to review its decisions. The Board considers applications for review through a two-step process. In the first step, the Board considers the threshold question of whether the applicant has raised a doubt as to the correctness of the Board’s decision. If the Board decides to review the decision, it proceeds to the second step where it reviews the decision on its merits.

The Board has decided in this case to receive submissions on both the threshold question and the merits at the same time. This approach is consistent with subsection 45(2) of the Rules and, in the Board’s view, this is in keeping with the expedited nature of this hearing and may avoid some duplication of submissions. Given this procedure, TWN and Living Oceans/ Raincoast will

¹ Living Oceans/Raincoast made Requests 3a) and 3b) at Page 1 of its review application. At the conclusion of its review application, at Page 12, it repeated Request 3b) but not 3a). At Page 12, it also requested that the Board “require Trans Mountain to conduct a proper risk assessment of Project-related marine shipping that includes all *Species at Risk Act* (“SARA”)-listed species that may be affected by Project-related marine shipping.” Living Oceans/Raincoast made the same request in its notice of motion described above.

have an opportunity to file supplemental information in order to address the merits of their respective Requests.

The Board invites Parties to provide comments on both Step 1 (threshold question) and Step 2 (merits of the review application) of the review process for Request 2 and Request 3 in accordance with the following schedules.

Request 2a) and Request 3 – Project-related marine shipping in the EEZ

Party(ies) and submission	Deadline
TWN and Living Oceans/Raincoast may file supplemental information, if needed, since the Board is seeking comment on both Step 1 and Step 2	27 November 2018
All other intervenors may file comments	30 November 2018
Trans Mountain may file comments	4 December 2018
TWN and Living Oceans/Raincoast may file reply comments	6 December 2018

Requests 2b) and c) – *De novo* hearing, and the need for, and socio-economic effects of, the Project

Party(ies) and submission	Deadline
TWN may file supplemental information, if needed, since the Board is seeking comment on both Step 1 and Step 2	27 November 2018
All other intervenors may file comments	30 November 2018
Trans Mountain may file comments	4 December 2018
TWN may file reply comments	6 December 2018

C. General information

All comments must be filed with the Board and served on the other Parties by **3:00 pm Pacific time (4:00 pm Mountain time)** on the dates specified in the above schedules.

Parties must be clear regarding which specific Requests their comments are about. **Parties are directed to make a single filing for each of the deadlines.** For example, if an intervenor is commenting on more than one Request on 30 November 2018, it should include all comments in the same letter, but organize the comments in relation to each individual Request.

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by

Sheri Young
Secretary of the Board

November 26, 2018

Our File: 101024-038

VIA NEB Participation Portal

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2P 5J2

Attention: Natalia Churilova

Dear Ms. Churilova,

**Re: Trans Mountain Expansion Project – Reconsideration
Hearing Order MH-052-2018 & File OF-Fac-Oil-T260-2013-03 59
Oral Traditional Evidence**

We write to inform you that, despite the considerable effort of community members, the Stó:lō Collective will not be participating in the Oral Traditional Evidence session scheduled to take place on November 29, 2018 in Victoria, BC.

The Stó:lō Collective cannot participate in the Oral Traditional Evidence sessions for the reasons previously raised with the NEB in our letters of October 23 and 30, 2018 containing, respectively, the Stó:lō Collective's Notice of Intent to provide Oral Traditional Evidence, and the Stó:lō Collective's objections to the locations chosen for the Oral Traditional Evidence hearings and the limitations imposed thereon. In addition, in the Stó:lō Collective's original letter of comment dated October 3, 2018, we suggested that the process for the relaying of Indigenous traditional knowledge should be reflective of the specific cultural practices of the Indigenous group leading such evidence.

In our previous letters, the Stó:lō Collective expressed, among other things, concern and frustration over the locations chosen for the Oral Tradition Evidence sessions – Nanaimo and Victoria – as both are located on Vancouver Island and impose undue travel requirements on Elders. Our letters also explained that webcam sessions are an inappropriate, and frankly insensitive, substitute for traditional hearings conducted in person. Despite our numerous inquiries, the NEB did not provide an adequate reason for choosing two locations on Vancouver Island, nor did it agree to add a location in the lower mainland for its many Indigenous intervenors who are located on the mainland of British Columbia.

In addition to the issues with the locations chosen, the Stó:lō Collective advised the NEB that the date range chosen for the Oral Traditional Evidence sessions conflict with the Stó:lō Bighouse season. Consequently, many of the traditional knowledge holders are occupied with Bighouse duties and are providing spiritual and ceremonial support thereof. Accordingly, the Stó:lō Collective advised that these dates and locations might prevent their Elders from providing Oral Traditional Evidence entirely.

Further, the Stó:lō Collective's date to provide Oral Traditional Evidence – November 29, 2018 – is also the date reserved by the Province of British Columbia and the First Nations Leadership Council to hold the 4th annual BC Cabinet and First Nations Leaders' Gathering in Vancouver. Other Stó:lō Collective members who may have otherwise been able to attend the Oral Traditional Evidence session in Victoria, BC, will be occupied with the Leadership Gathering.

Rather than a process that is reflective of cultural practices, the NEB has structured a process which is unduly burdensome, unaccommodating and restrictive. For all of these reasons, the Stó:lō Collective is withdrawing from the upcoming Oral Traditional Evidence sessions, and maintains its objections previously stated.

Yours truly,

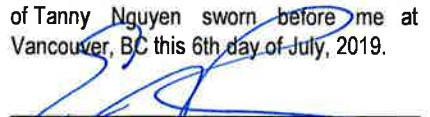
MILLER TITERLE LAW CORPORATION

A handwritten signature in black ink, appearing to read 'Joelle Walker', with a long horizontal flourish extending to the right.

Joelle Walker
joelle@millertiterle.com

cc: Trans Mountain, regulatory@transmountain.com

This is Exhibit EE referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British
Columbia

**NATIONAL ENERGY BOARD
OFFICE NATIONAL DE L'ÉNERGIE**



**Trans Mountain Pipeline ULC
Trans Mountain Expansion Project
National Energy Board reconsideration of aspects of its
Recommendation Report as directed by Order in Council P.C. 2018-1177
Hearing Order MH-052-2018**

**Trans Mountain Pipeline ULC
Projet d'agrandissement du réseau de Trans Mountain
Réexamen par l'Office national de l'énergie de certains aspects de son
rapport de recommandation, conformément au décret 2018-1177 de la
gouverneure en conseil
Ordonnance d'audience MH-052-2018**

VOLUME 7

**Hearing held at
L'audience tenue à**

**Delta Hotels Victoria Ocean Pointe Resort
100 Harbour Road
Victoria, British Columbia**

**November 29, 2018
Le 29 novembre 2018**

**International Reporting Inc.
Ottawa, Ontario
(613) 748-6043**

Canada

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as represented by the National Energy Board

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and, as such, is taped and transcribed in either of the
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spoken by the participant at the public hearing.

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participant à l'audience publique.

Imprimé au Canada

HEARING ORDER/ORDONNANCE D'AUDIENCE
MH-052-2018

IN THE MATTER OF Trans Mountain Pipeline ULC
Trans Mountain Expansion Project
National Energy Board reconsideration of aspects of its Recommendation Report
as directed by Order in Council P.C. 2018-1177
File OF-Fac-Oil-T260-2013-03 59

HEARING LOCATION/LIEU DE L'AUDIENCE

Hearing held in Victoria, British Columbia, Thursday, November 29, 2018
Audience tenue à Victoria (Colombie-Britannique), jeudi, le 29 novembre 2018

BOARD PANEL/COMITÉ D'AUDIENCE DE L'OFFICE

Lyne Mercier	Chairperson/Présidente
Alison Scott	Member/Membre
Murray Lytle	Member/Membre

APPEARANCES/COMPARUTIONS

(i)

Applicants/Demandeurs

Trans Mountain Pipeline ULC

- Mr. Sander Duncanson
- Ms. Cassie Richards
- Mr. Max Nock
- Mr. Phil Symington
- Mr. Jamie Andrews

Intervenors/Intervenants

Natural Resources Canada

- Mr. David Murray, Senior Policy Advisor

Squamish Nation

- Mr. Jamie Arbeau
- Mr. Chris Lewis
- Chief Ian Campbell
- Elder Vanessa Campbell

Stó:lō Collective

- Ms. Joelle Walker
- Chief Dalton Silver

National Energy Board/Office national de l'énergie

- Mr. Paul Johnston

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Squamish Nation
Oral Traditional Evidence

--- Upon commencing at 12:31 p.m./L'audience débute à 12h31

3045. **THE CHAIRPERSON:** Before we commence our hearing today, the Board wishes to acknowledge with respect the Lekwungen-speaking people in whose traditional territory we are gathered, and the Songhees, the Esquimalt and the Saanich people whose historical relationships with the land continue to this day. It is with truth and respect we would like to acknowledge all the Indigenous ancestors of this place and reaffirm our relationship with one another.

3046. Good afternoon, everyone. Welcome to the Oral Traditional Evidence phase of the National Energy Board's hearing regarding the Trans Mountain Expansion Project Reconsideration. My name is Lyne Mercier. I am the Chair of the Panel. With me and on my left is Alison Scott and on my right is Murray Lytle. We want to welcome everyone who is here today, both in the hearing room, and those listening in to the webcast.

3047. As a matter of housekeeping, I'd like to describe the evacuation procedures in the event of an emergency. If the building's evacuation tone begins sounding and we are asked to leave the building, the muster point for the venue is the waterfront walkway. Please exit in an orderly fashion through the lobby. At the muster point, please ensure your party is accounted for.

3048. In addition to the Panel, we have staff in the room to answer process-related questions that you may have. You will be able to recognize them by their brass name tags.

3049. With respect to our schedule for hearing traditional evidence, today we have scheduled time to hear from two Indigenous groups. We will normally plan to take breaks if it is required.

3050. In order to be fair to all presenters we have allotted up to two hours to hear from you. If two hours are not enough, at the end of the session please feel free to file additional oral traditional evidence by electronic means, such as a video or some other method.

3051. Before we get underway, I would remind parties of the Panel's guidance in the Hearing Order and Procedural Directions in regards to oral traditional evidence.

3052. The Board understands that the Squamish First Nation has an oral

**Squamish Nation
Oral Traditional Evidence**

tradition for sharing knowledge from generation to generation and this information cannot always be adequately shared in writing.

3053. Sharing your traditional knowledge and stories about the use of your traditional territory is of value to us. We appreciate that you have chosen to be here today.
3054. Following oral traditional evidence, Trans Mountain, other intervenors, or the Board may have questions for the witnesses. If so, witnesses can choose whether they will answer questions orally, or at a later date in writing, or a combination of both.
3055. With that, I believe we are ready to get underway. Before I call onto the Squamish First Nation to present their evidence, I'd like to have the representatives of the Proponent, Trans Mountain, identify themselves.
3056. **MR. DUNCANSON:** Thank you, Madam Chair.
3057. Good afternoon, everyone. My name is Sander Duncanson with the law firm Osler, Hoskin, and Harcourt representing Trans Mountain. With me is Cassie Richards who is also from our office, and Max Nock with Trans Mountain. Good afternoon.
3058. **THE CHAIRPERSON:** And I would also ask if there are any other intervenors in the room who would like to introduce themselves or if there are any preliminary matters they would like to raise. And for the record, if you could please indicate who you are and who you are representing. Thank you.
3059. **MR. MURRAY:** Thank you, Madam Chair. Thank you, Panel Members.
3060. My name is David Murray and I'm a Senior Policy Advisor with Natural Resources Canada. I am here as a representative of the federal Crown to hear the witnesses' oral traditional evidence in relation to the reconsideration of the Trans Mountain Expansion Project.
3061. I do not intend to ask any questions today, but rather, I am here as a representative of several federal department and agencies that are registered intervenors.

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3062. If necessary, we will ask additional questions through the NEB's Information Request process.
3063. Finally, I'd like to note that I'm honoured to be present at this hearing in traditional territory of the Coast Salish. Thank you.
3064. **THE CHAIRPERSON:** Thank you, Mr. Murray.
3065. Any other intervenors? I see no other intervenors or any preliminary matters.
3066. So I understand that the members of the Squamish First Nation wish to affirm to indicate that the information they are presenting is accurate, truthfully, and to the best of their knowledge and belief.
3067. Ms. Comte, can you please proceed?
- IAN CAMPBELL: Affirmed**
VANESSA CAMPBELL: Affirmed
CHRIS LEWIS: Affirmed
3068. **THE CHAIRPERSON:** With that, we are now underway, so I will turn to the lawyer, Mr. Arbeau, to lead his witness. You can use yours. It's just that mine was not turned off. So just give me a second, please.
3069. **MR. ARBEAU:** Thank you, Madam Chair.
3070. Good afternoon, Madam Chair, Panel Members, representatives of Trans Mountain, and Board staff.
3071. My name is Jamie Arbeau. I am legal counsel for the Squamish Nation. The Squamish Nation will have three witnesses presenting evidence today. Starting on the far end we have Chief Ian Campbell who is a councillor in the Squamish Nation. In the middle we have Vanessa Campbell who is a Squamish Nation elder. And sitting immediately to my right is Councillor Chief Lewis -- Councillor Chris Lewis, my apologies.
3072. The Squamish intends to proceed today by way of a relaxed, direct examination style. I'll be asking questions to kind of guide the witnesses through

their evidence.

3073. The witnesses are happy to answer questions in order to clarify their evidence, but any substantive matters, we would prefer to be answering in writing. And I just would note that Squamish Nation continues to rely on the evidence provided to the Board in October of 2014.

3074. Chief Campbell, welcome to the hearing. I believe you would like to acknowledge the ground that we're on?

--- ORAL PRESENTATION BY/REPRÉSENTATION ORALE PAR SQUAMISH FIRST NATION:

3075. **CHIEF IAN CAMPBELL:** (Speaking in Native language). I just wanted to say hello. And good afternoon. It's wonderful to be here. I appreciate this opportunity to speak on behalf of our Squamish Nation and certainly want to recognize my relatives from the Songhees, Esquimalt, and Saanich First Nations, whose territories we are on.

3076. My ancestral name is Sekyú. I am a hereditary chief of the Squamish Nation and I've been elected for four consecutive terms as an elected representative for the Squamish, along with my colleague Councillor Chris Lewis.

3077. And I'm very honoured to be here with my Aunty Iyal, who is one of our historians and our language experts.

3078. I've been fortunate to be raised by my grandparents with my language and my culture. Myself and my sister were immersed from a young age in the oral tradition of our people.

3079. And my late grandfather Chief Lawrence Baker was an orator in our longhouse ceremonies, so we visited all of our families along the Salish Sea, including the families here on Vancouver Island, as well as Puget Sound, Fraser Valley, the Lower Mainland, where we continue to practise our culture to this day. Our spiritual ceremonies have maintained in the face of adversity our authenticity to our ancient spiritual beliefs.

3080. I find it ironic -- and I have to make this on the record -- that we swear to tell the truth here when in fact we invited the NEB representatives to our longhouse to swear in this exact format. So I want to ensure that there's mutual

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reciprocation in us swearing to share our sacred information with you that this will be used in the best of your ability; that you will weigh this and that you will take it to your heart and your minds.

3081. And that's something that I -- I had the privilege of presenting to the NEB in 2014 as an intervenor representing the Squamish Nation, and it was not clear as to how NEB representatives would take this information and use it. So that's something I'm still not clear on in sharing today.
3082. Nonetheless, I will make it very clear that there's some information we cannot tell you in this setting, because in our laws, in our teachings, much of the spiritual and cultural beliefs can only be demonstrated to you in context, which is in ceremony in our longhouses or out on the land, in our canoes, which becomes our place of governance. It becomes our church, our hospital, our place of economy. It continues to this today throughout the Salish Sea.
3083. And that's something I continue to invite you to take into consideration. Please join us in our communities and see firsthand what it is as a government, as a people, as a nation, that we continue to maintain to this day.
3084. In saying that, I am happy to share what I can with you today, along with my relatives from the Squamish Nation to talk about some of the cultural and spiritual beliefs that we hold near and dear to us.
3085. So as I mentioned, we continue our spiritual practices around the Salish Sea where our people are initiated in longhouse ceremonies, and they live in our longhouses for many months out of the year.
3086. I'm a speaker in our longhouses. I've been groomed from a young age to continue those traditions. So I travel to many different longhouses and speak on behalf of different families when they're hosting gatherings.
3087. And at these gatherings you will observe specific types of ceremonies that we cannot sing those songs here to you. They are not public songs. We cannot tell you those stories. They are in context in ceremony. But we have been immersed in these types of traditions from birth.
3088. And what is challenging in sharing this today is that there was a deliberate attempt by Canada to eradicate our entire language and way of life and culture stemming from B.C. joining Confederation in 1872, paired with the *Indian*

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Act in 1876. It is quite blatant in the tactics used to try and annihilate the oral tradition of the Squamish people and the continuity of our use in spiritual practices throughout the Salish Sea.

3089. Alienation and marginalization is a reality in today's imposition of Canada issuing rights to third party interests that continues to affect our cultural and spiritual values and connection to our lands and resources.
3090. I was raised as a hunter and a fisher, and that's something I continue to do to this day is get out into our lands and our waters annually throughout the various seasons to continue our cultural and spiritual practices.
3091. So this morning, for example, I did go to our creeks, known as Xa7élcha, as one of our traditional creeks in north Vancouver, to conduct what we call *shopum*, which is a cleansing ceremony to go the water at daybreak and give thanks and to purify, strengthen our mind, our body, our spirit and our emotions to prepare ourselves for the responsibilities that we have.
3092. And I invite you to join me at the creek to purify yourselves, for the task that you have is not an easy one, and I want to commend you for the work.
3093. Speaking of spiritual connections, today we bring with us a strong mythological connection that we call (speaking in Native language), which goes back -- if you look at the mythology of our people, just like many cultures around the world, we have our creation stories that talk about the universe in darkness.
3094. We talk about (speaking in Native language), which refers to the spirit of raven, the seagull and the fox of daylight. The science community will call that the big bang theory, when the universe was created.
3095. We talk about our first ancestor stories, just as many cultures around the world.
3096. We talk about Si'nuscustan and (Native word), our first ancestors who appeared or were created with this physical realm. And we are the direct descendants of those people who have inhabited this part of the world for enumerable generations. Again science will try and define us as crossing some land bridge as a one-way door, which is not our story.
3097. We talk about the great mythological times when there were giant

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beings that inhabited this part of the world. We don't believe in evolution, that all of the sudden the sabretooth tiger shrunk its fangs and became a cougar. We have stories that talk about relationship to all of the animal beings, both on land, and in the water, and in the sky.

3098. And those are spiritual and cultural foundations of our responsibilities as stewards of our lands and water, and it's built into our ceremonial structures as well as our governance structures. So as a hereditary chief we're raised to understand that respect and our responsibilities as a part of the ecosystem.
3099. Our mythology is important to continue to illustrate to you from the mythological times pre-glaciation.
3100. We also talk about our ancestral names, our lineages that connect us to our homelands through direct succession of lineage of ancestral names that are handed down from generation to generation. So you'll see big names in our territories like Xatslanexw, who some of you may recognize as Kitsilano, or (Native word), which some people may recognize as Capilano. These are anglicized ways of saying our ancestral family names. And with those names they connect us to specific stories of the ice ages.
3101. We then continue post-glaciation to an era, a universal story of the great flood, where we have sacred mountains in our territory that became the safe haven for our people, so Nch'Kay is known as Mount Garibaldi to the north of our territory, we have Sxeltskwu7, which is Ice Cap Peak in the western part of our territory and Xwsa7k, which is just to the south of us, southeast, which is known as Mount Baker.
3102. So these points of land become the stronghold of our Squamish people and our connection to the rest of our family, our kinship ties to other Coast Salish peoples, and that's something we maintain today, and it's verified through those stories that have been handed down through the millennia.
3103. If we go post-flood, which is a universal story all over the world -- I've been to about 36 countries now and many cultures talk about these chapters of change and transformation. We then transition into an era of what we call ta swa7s ts'its'ap, which would be an era of professionals that comprised our society prior to contact with European cultures in 1791 with Narváez followed by Vancouver in 1792.

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3104. So prior to that arrival we had many leagues of professionals that had responsibility and stewardship to maintain a strong economy of trade and commerce, not only internally amongst the Squamish but through marriage and kinship ties to all other tribes around the Salish Sea.
3105. With that, you have the toolmakers, you have the *tchatwe* (ph), the canoe carvers, you have the *tl'elhnáyem*, the mountain goat hunters, the (Native word), the small fur bearing hunters and trappers, you have *nuxtlunts* (ph), the weavers, you have a multitude of specialists. And those specialists could not just go out into someone else's territory and do as they please to issue rights to third-party interests, if you will.
3106. There was protocols and there was special permission that was granted the authority of our (speaking in Native language), of our chiefs and our matriarchs. We're the ones who would grant, if you will, in today's context, permits and licensing and the ability to extract the value chains from extraction to manufacturing to implementation and trade and beyond. Our people were quite affluent prior to contact with European cultures.
3107. If you go to 1791 with Narváez where we discovered him in our waters, you'll see that that's a catalyst of change where new tools were introduced to our people and we readily embraced those tools, in particular, (speaking in Native language) which are steel products like guns, ammunition, the ability to move beyond stone, bone, and antler. In being some of the best natural carpenters in the world, we then implemented new tools.
3108. And that's where we fast forward today to Confederation as well as the *Indian Act*, 1876. We sent delegations to England in 1906 to implore the Crown to seek honour in the Crown in their alienation of our lands and resources and the deliberate attempt to usurp power from Indigenous peoples and allocate jurisdiction to the provincial and federal governments atop of our Aboriginal title.
3109. We were never -- we never provided consent or were compensated for the loss and alienation of our lands and resources and our tribes were dissected in half by the Canada-U.S. border during these formulative times of Canada and U.S.A.
3110. We weren't even citizens in our land until about 1960, I believe. We had no legal recourse to hold governments accountable to their actions, to develop and issue rights to third-party interests. But amongst all of this challenge, we

continued to maintain our spiritual context and connections.

3111. So at one point in time, simply in my grandparents' era, the (speaking in Native language) known as orcas would calve in what we call (speaking in Native language) which is known as Burrard Inlet, in particular, the elbow of Indian Arm and Burrard Inlet where the current Trans Mountain project is located on Burnaby Mountain. That was the traditional calving grounds of the orcas before the advent of much of the industrial activity in Burrard Inlet.
3112. Another prominent area would be (speaking in Native language) which is known as Thornborough Channel in (speaking in Native language) which is Howe Sound. These were two of the critical calving areas for orcas which we no longer see orcas calving in these areas due to acoustic and other impacts to their habitat.
3113. I want to bring you now briefly before I hand it over to our elder and my colleague to some of the practices that we go through in our rites of passage, what we call (speaking in Native language). We're immersed from a young age to watch, observe, and listen to our elders. So the information I'm going to share with you isn't my opinion; it isn't something that I am making up. It's stories that are handed down through my grandparents, and my grandfather was taught this by his grandmother Tsiyáliya who lived in the 1800s. Many of these old timers were very humble and very respectful in how they shared this information.
3114. They would bring us to the ocean, to the Salish Sea to bathe and purify ourselves in the salt water for specific purposes before we go on long canoe journeys or hunting. We would have to purify ourselves. And there's different ways in which we do that that are proprietary. We can't tell you all the details of how we get involved in some of those specific ceremonies but there are areas that we continue to do this, but it's been impeded. And we have grave concern over the projection of increased tanker traffic that will continue to impact and disrupt our cultural and spiritual values.
3115. We're in an era of reconciliation where we don't go to other people's churches and tell them what they can and cannot do or what to believe. But we still live in a society that will impose projects and alienation to First Nations people to marginalize and remove us from our cultural and spiritual practices. So places like (speaking in Native language) or down at (speaking in Native language) or (speaking in Native language), these are all issues that I presented back in 2014 on cultural and traditional uses of Burrard Inlet and connections to

the Salish Sea.

3116. I invite you to go back and review that once again, and I'd be happy to elaborate on any of that information or clarify or add to that information, because it's hard to share thousands of years of history with you in two hours although it is important to have you consider the information we're about to share.
3117. So I do invite you to return to our longhouses and to our communities so that we can immerse you properly and you can be called as a witness, you could be blanketed, you could be welcomed, and observe first hand what it is we would like to portray to you as our cultural and spiritual practices.
3118. Today, our people continue to go on tribal journeys. We have many of our young people, in fact, thousands of young people gather every year throughout the Salish Sea. We have a resurgence in canoe culture since 1993 where we paddled to Heiltsuk territory, known as Bella Bella, Central Coast, B.C. Last year we paddled to Puyallup which is in Puget Sound where we had 110 canoes congregate from Oregon, California, Washington State, and B.C. as far as Alaska.
3119. And about 10,000 Indigenous youth gathered where we're seeing a resurgence in traditional culture where it was once forbidden for us to practise these traditions. I'm the first generation out of residential schools in my family, so my parents weren't allowed to speak their language in residential schools or practise their culture. It was even tougher for my grandparents who were sent to Sechelt and Kamloops and Mission to the residential schools where it was strictly forbidden for them to practise their culture or to speak their language. But our young people today are hungry and they're reaching out to our elders like Iyal to be immersed and to be mentored in our traditions.
3120. We also are practising rites of passage for our young people. Our young women go through specific ceremonies when their body goes through changes and they're bestowed an ancestral name. Our young men are put through rigorous training where they're in isolation. They fast, they do solos. That's just something we do with our children today. I was fortunate to experience those things. And we also do a number of cultural camps where we share the mythology and the songs and the dances and the traditions.
3121. I do want to describe the ceremonies more to you but refrain from that because I have to adhere to my elders' teachings that it's inappropriate for us to try

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and simply tell you these without context of showing you. So I hesitate and I apologize for that.

3122. But I think at this point I'm happy to look to my (speaking in Native language), to my Auntie Iyal to share with us a little bit more about the language and the culture around our connection to the marine life. And I would ask her to speak a little bit more about (speaking in Native language) which is a term I introduced to you earlier in my remarks that talks about our ability to converse with all beings, that in our spiritual beliefs, we look to the (speaking in Native language) or any of the animal beings in a spiritual context. They take their skins off and were in our spirit form and we can (speaking in Native language), we understand, we could talk to each other. And these are ancient teachings. And then when we see them in the physical realm, we then have reverence and we have a connection, a spiritual connection to these beings, so the orca, the wolf, the mountain goat, all of the beings to the eagle all have stories of transformation that inform us of our relationship to them.

3123. And we have a concern over the salmon, which I'm going to invite Councillor Lewis to talk and to speak a little bit more about the connection to Sts'úłwí7 and our laws and our teachings around salmon and the grave concerns we have over the current state of our salmon stocks on the mighty Fraser River and our other systems. We can spend all day telling you stories, and I would love to, but I'm going to pass it on at this time.

3124. So thank you very much.

3125. **MR. ARBEAU:** Ms. Campbell, would you like to take up Chief Campbell's invitation?

3126. **ELDER VANESSA CAMPBELL:** (Speaking in Native language).

3127. I just wanted to say it is good to be here with you today, to know that you understand and value the kind of information that you're asking for. In the past it's never been asked. There's lots of times when things have been taken and we've been told, "Oh, this is for the good of everyone." But it's never been good for us. So it's time we have to say we know our land, we know the creatures that we share our life with. You know these creatures too.

3128. There are people all over the world who are saying this is a time when you can do something so that the world that we inherited does not disintegrate

into darkness, and cold, and disaster.

3129. I want to share with you. (Speaking in Native language).
3130. In the long ago it is said everyone that walked this earth, that swam in the waters, and that flew in the sky, we understood one another, we talked to one another, we learned from one another. This is the way all of our stories began. This is the first understanding that we give our children, that we are only here to share the earth; we don't own it. We are here to take care of each other, to take care of them. It's not some kind of cliché.
3131. This is the role that we take when we are part of a community, when we are a parent, when we are an aunt and uncle, when we are grandparents. We are here to make sure there's something for the future.
3132. What are the ways we can do these things? Those are the things we're starting to understand now. We're not alone in this. We know that it's true.
3133. I know that there are concepts that seem strange or fantastic. For sure there are years and years when, in a very public way, we were never allowed to share, to teach, to celebrate the kind of world view that our elders learned at their parents' and grandparents' knees. These are the things now that we are starting to be able to share more openly, but still we hesitate. We don't want to be ridiculed, as we have been in the past. We don't want to be brushed aside and dismissed because we have no scientific proof. But we know and understand that all the creatures around us can tell us about our lives all the time.
3134. When I was young, the beaches all along Burrard Inlet, there were mussels, and clams, and oysters. One of the very famous incantations for our people was, "The tide is out, the table is set."
3135. Now, we know that food comes from everywhere around the world and we can think, "Oh, okay. We can get that -- it can come in from such and such a place." How many places are going to stay healthy like that if we don't stop doing the things that we have done that have made us unable to get the food that we need right from where we are? What are the steps we can take to make sure that we can do that?
3136. I would love to be able to just go down to the beach again, but now I have to go further and further away to find the healthy food, the healthy food that

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- my body absorbs. If I have salmon, if I have clam, if I have any kind of game, my body takes it right away. But the food that I buy in the stores, it will sit inside my body and it takes a long time for my body to use it.
3137. These are the big changes that we've seen in our lives, in the way that our bodies are reacting to the things around us. So yes, we still try to teach our children these same values, to look at every creature with respect. Even if we're going to have an animal that we need for food, we say a prayer that tells that animal, that spirit of that animal, that we really appreciate who you are, we really appreciate that you can give us life, that we can share life with you. These seem like it's a very small gesture, but it has a great big meaning in our life, because it teaches our children to respect everything around them.
3138. I know that a lot of places in the world now are dealing with the same kinds of struggles that we're talking about here. But as an elder in my community, as leaders in our community, as leaders in your community that you are, you have to think about what is best, not what is going to be expedient.
3139. So I'm asking you to think about the things that we're saying, because they are heartfelt. We don't want our whole world to disappear. (Speaking in Native language).
3140. **MR. ARBEAU:** Thank you, Ms. Campbell.
3141. Councillor Lewis, I'd ask you to speak a little bit about Squamish's interaction with the marine life; you could even focus on the mouth of the Fraser, that could be useful as well.
3142. **MR. CHRIS LEWIS:** Okay.
3143. **MR. ARBEAU:** Thank you.
3144. **MR. CHRIS LEWIS:** Thank you, Jamie.
3145. And I just really want to thank everyone in the room.
3146. (Speaking in Native language). Just opening in our language saying it's great to see each and everyone of you today.
3147. My ancestral name, as I mentioned, is Syetáxtn. That name has been

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- given to me by my grandparents, who raised me in X̱wemelch'stn, which is now known as Capilano IR Number 5, which is at the First Narrows, underneath the Lions Gate Bridge.
3148. So I was raised there from birth until I was a young man. And then I moved a block away. And then I moved a couple blocks away. And I'm still there. So I'm still very connected to my community.
3149. Everything we do as Skwxwú7mesh people is based in place. Our songs, our teachings, our ancestral names tell us of who we are and where we come from. My name is directly linked to Seṇák̓w, which is now known as Kitsilano underneath the Burrard Street Bridge. My ancestors have descended from there for time immemorial. The name also was first recorded in a village known as Chuck Chucks (ph), which is way up in the -- just before the confluence of the Elaho and Squamish River. It was recorded there and it was recorded in Seṇák̓w.
3150. The reason I tell you this is our people were seasonal people. We moved as a result of our kinship and our relationship with the resources.
3151. And I also want to recognize and thank the Songhees, the Esquimalt, and Saanich people for allowing us on their traditional territory to say these words. We are humbled. We are visitors. And we respect their hospitality at this time.
3152. As was mentioned by Xàlek and Iyal, that what we say has been passed down, or we have observed it ourselves in our lifetime.
3153. As was mentioned by Madam Chair, it is oral tradition that has been passed down from our grandparents.
3154. I think before I get to our relationship with the Salmon People, I do want to talk to you about a place called (Native word) which is in Stanley Park, which is up the hill from what we now know is Siwash Rock. It is a place where a woman was transformed while she was giving birth because her husband, who is now Siwash Rock was bathing himself to cleanse himself so that when his baby got into the world, he was just as pure as the baby and none of the negativity would go on to that child.
3155. At the same time, our supernatural links to the Creator, I guess you

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- would say -- we call them the transformers, the (speaking in Native language), they were paddling in the water at the time and they told the man and the woman to make way while they were passing. And they defied them. And they turned them into stone, not as a punishment, but as a reward and a reminder to all the Sk̓wx̓wú7mesh people and the Coast Salish people of the responsibilities that we have as parents but also the responsibilities we have as Indigenous peoples to the connection to the supernatural realm and to the physical realm and all the realms that we know through our traditions.
3156. (Native word) was also known as a place where we would use it as a vantage point to harvest whales. And that's all that was told from us, that we would harpoon whales in the narrows. And we haven't done that for many, many, many generations but our teachings tell us that. And there's a teaching where the story of another chief up the inlet transformed a piece of wood into a whale. He breathed life into that whale. And the men harpooned the whale in the first narrows which we now know as Lions Gate or near Lions Gate Bridge or (speaking in Native language) to the Sk̓wx̓wú7mesh. And that imitation whale dragged our hunters, our whale hunters out, way out into the ocean and it took them a long time to get back.
3157. It was a teaching that we must not be greedy. We must let the whales do what they must do. And the story is that it was most likely porpoise and there was reference to the (Native word) which is the killer whales.
3158. The reason I mention this is because (Native word) which is the village on the north side and (Native word) is on the south side, and (Native word) which is the high bank where now Lions Gate Bridge comes on the south side, were strategic vantage points. (Native word) was a fortified village for a specific reason. It would keep outsiders out. And outsiders knew that if they didn't follow protocol, there would be troubles.
3159. The reason I say all of this is that connection to that place and to those narrows. (Native word) means "rolling at the mouth with fish". It's a testament to the tidal rollers that you see when you look over the Lions Gate Bridge and you see those big rollers, if you've ever been in a boat. And it's rolling with fish. And so no wonder why the whales were there because the fish were there.
3160. And I tell you this because my grandfather, along with my uncles and myself have observed transient killer whales, resident killer whales, training their young in the narrows where they line up side by side in the narrows as the tide

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- comes out of Burrard Inlet. And everything is draining out of the inlet and the (Native word) are -- they're like a firing line almost. And you can see their dorsal fins. And if they're residents, how we know if they're residents is they start flipping the fish around. You start seeing the fish flipping around. And they're teaching their young how to hunt and how to catch the fish.
3161. If they're transients, you will see the fish jump by them and then you will see the harbour seals flipping in the air because the transients will eat the harbour seals.
3162. I was at the mouth of Xwmelchstn River which is Capilano River and we have a point there and we were fishing. And I witnessed this with my uncle. And I didn't know what was happening and my uncle is one of our fisheries guardians, so from June til October he sits down on that point and on that river for seven to eight hours a day ensuring that he's upholding our fishing rights and ensuring that people are respecting our people fishing at that time. He's one of our guardians.
3163. And he told me, "Nephew, those are residents. Those are the ones that eat the chinook." Because you can see the fish. And then he told me the story of when he witnessed the same thing with the transients. And then he would tell me the story that my grandfather told him and also myself about how we would use the high ground and (Native word) to harvest various different resources at the narrows.
3164. So that connection to that way of life is still alive and well and has been passed down. I'm not that old. I don't have any white hair. And I've been fortunate to hear those stories and I will be passing those on to my -- and I hope my kids see the (Native word) hunting and teaching their little ones how to hunt the seals or hunt the fish in the narrows at Xwmelchstn.
3165. *Sts'úkwí7* which is our word for salmon is a keystone species to the *Sḵw̓xwú7mesh* people. Everything we do from the time they arrive to the time they spawn is in relations to harvesting salmon. We have many stories from many elders where we would leave a village and travel to the Fraser River to harvest Sockeye, to harvest chinook, to harvest eulachon, to harvest smelts. We would go to a village we know as (Native word) which is now known as the Pattulo Bridge. We had a village on the north side. We were forcibly removed from the north side because New Westminster became the capital of British Columbia. And under the *Oliver Act*, there couldn't be any Indians close to a non-

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Indian settlement. So they moved us across the river and created a reserve.

3166. In the meantime, they tore down any of our structures, killed any of our cattle, anything that we had.
3167. Our people and our ancestors are still buried on that hill. They are still in what we now know as Queen's Park. And our elders tell us -- they tell me that as one of the fisheries portfolio holders for Chief and Council, for Council of the Squamish Nation, never to forget that. And that village of (Native word) was an interaction place. We were there with our relatives, the Musqueam, the Tsleil-Waututh, the Kwikwetlem, our Stó:lō relatives up the river. We got to think of a time 200 years ago where what we now know as Richmond was probably all river mud. We have to think differently in terms of what the land looked like, and hence, why we would go upriver where the river narrowed to harvest *Sts'úkwí7*, salmon.
3168. Our teachings and our relations to the salmon people -- we call them the people because they occupy the underwater realm -- is if we don't treat them with the utmost respect, they will not come back. And we have many origin stories and many stories of the (Native word), the transformers going to find the salmon people and bringing them back because we wanted them to pity us because we've lost our way.
3169. So there's stories like that, origin stories that tell us that we must treat the salmon people with the utmost respect or they just won't return. And we have many stories where we've starved because the salmon didn't come back.
3170. The chinook, to us, the chinook salmon is the (Native word) of the salmon people. He is the chief. We must respect the chinook salmon. We must only carry the chinook salmon one at a time. We must not carry many. We must respect because that's like their chief.
3171. We also harvested smelts, herring, eulachon, skate, dogfish, sturgeon, rockfish, shellfish, trout, steelhead, seal, sea lion, and porpoise. So our connection to the underwater realm was very important to the *Skwxwú7mesh*.
3172. Our teachings tell us that when you go fishing you can't eat too much because a full fisherman doesn't deserve a fish. So you can't go out there with a full stomach. You've got to be a little bit hungry because you'll fish a little harder, regardless of what you're fishing for.

3173. It also tells us that if we're transporting something of significance, such as a person who has passed on, or something of significance to the people, we must cover our paddles with red ochre, because the paddles will go into the underwater realm and stir up the water and the currents. And we must respect that, and respect that whatever's in that canoe cannot enter that underwater realm and that we have to -- we have to tell them that we're here, not having any harm.
3174. So we have teachings where our ancestors were being transported from a village, after they had passed away, to another village, and we would have our Skwta'a7ts, our ritualistic, our medicine people on the canoes telling the salmon to move out of the way because we were coming.
3175. It's no different today about our responsibility in relations to this project, and what's in the big canoe -- we see big canoes all the time now, not our little wooden canoes -- and how we show the underwater people that respect of whatever's in that canoe. And our Elders will remind us as leaders that we're falling out of line our traditional ways.
3176. I'll bring you into a modern context now. As I mentioned we have fisheries guardians on the Capilano River from June to November, 24 hours a day, seven days a week because we have our own fisheries bylaw that controls the fishery at the mouth of the Capilano River. And we own both sides of the bank, so Department of Fisheries and Oceans has no jurisdiction there. We control it through our guardians and we ensure that our people have access to that resource, where it was a generation or two ago we had no access to that resource on the Capilano because we were forbidden to fish on that river.
3177. So our guardians are there ensuring that our young children have the ability to learn how to harvest the fish and how to respect the fish. And that teaching that I just mentioned to all of you in those stories get passed down on that river.
3178. So just imagine yourselves; if the salmon did not return, the stories would not be told because there's no salmon. So that connection to the salmon and the Squamish People is very significant.
3179. We continue to fight and lobby the Department of Fisheries and Oceans for our rightful place on the Fraser River to harvest the sockeye and the other resources there. We continue to work with our relatives, the ha-Musqueam

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and the Stó:lō Nations, to ensure that governments aren't putting us against one another, because then nothing happens and no-one fishes.

3180. So I think that's all I have to say at this time. (Speaking in Native language); those are my words and that's the way it is. O siem.

3181. **MR. ARBEAU:** Thank you, Councillor Lewis.

3182. Councillor Campbell, did you have something to add to that?

3183. **CHIEF IAN CAMPBELL:** Sure.

3184. **MR. ARBEAU:** Thank you.

3185. **CHIEF IAN CAMPBELL:** (Speaking in Native language).
Thanking my relatives once again for their generosity in sharing.

3186. I just wanted to add a few more comments about our relationship to the natural world. One of the things that challenges us in presenting again today is cumulative impact throughout our territory. We've seen the loss and degradation of habitat, critical habitat, and the decline in resources due to Western management structures.

3187. Upon arrival with European cultures, there was a succession of gold rush mentality where you had the gold rush influx of settlers coming in, staking and claiming lands that belonged to the Squamish People and our Coast Salish kinship.

3188. You then have the fur trade, which was decimated in the west coast here by 1841. Paired with deforestation, that made a lot of settlers very affluent by stripping our most valuable forests, the old-growth forests, of the timbers that we use for our post-and-beam timber frame houses, known as longhouses, as well as our seven different makes and models of canoes; our hot rods and limousines that we used on the coast here.

3189. You then have, following the deforestation, the commercial salmon fishery that seen its heyday come and go, where the state today is very much in peril of the chinooks that my colleague spoke of, and the other aquatic resources.

3190. We have laws that he spoke of that are connected to our lineages and

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our place names and the territory. We have our Elders who have recently passed on that remember their grandparents would catch a salmon and they would look at its nose, they would look at its scales, and they could tell which system that salmon came from. They had an intimate relationship that has largely come and gone because much of the streams around our territory have been culverted in Vancouver or the lower mainland, or impacted through forestry and other industrial practices.

3191. When you go beyond the salmon fishing heyday and the collapse of the salmon fishery due to Western management practices, you then have oil, gas, and mining, which represents another succession of a gold rush mentality to access our resources outside of treaty, atop of our Aboriginal rights and title, where the legitimacy of the Crown is at question to issue rights to third-party interests atop of our Aboriginal rights and title, where we did not cede or surrender our title, our jurisdiction, and our authority to our homelands and waters.
3192. And you see it now with the real estate crisis, the affordability issue, not only in a major urban centre like Vancouver and the lower mainland, but it is that influx that continues to pose a significant threat, not only to Squamish people but you see the symptoms of that management system with the state of our orcas that are in danger. They're in peril.
3193. As mentioned in my previous statements we know where they used to calve, the orcas. We know where the octopus rearing is. We know where there used to be eelgrass and kelp; they're no longer there. My auntie said -- referred to Western science but our traditional knowledge is traditional science, it's Indigenous science built into our vocabulary. Where Western management has removed cultural and spiritual language from their Western management practices, we maintain that cultural and spiritual value built in and instilled in our lineages and in our Western -- or in our management practices.
3194. So we see the scarcity of resources that continues to be a demand with over 7 billion people globally, increasing -- projected to increase by 2100. We recognize the demand on our lands and resources but we need to move beyond the old narrative in Canada that tried to alienate us and marginalize us from decision-making, so we've continued to advocate for a framework that would look to share decision-making, economic participation, and environmental stewardship that takes what we're saying to you into practice.

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3195. That's something I don't feel assured of in sharing this with you today, that this is going to lead towards that kind of transformation and change collectively. So I remain optimistic, but nonetheless, the recent past will demonstrate that Canada will not listen to our traditional spiritual information, and I'm curious how you will weigh this, if at all; what this will mean to your decision-making.
3196. So, again, advocating for an improved relationship, because the state of the orca is a symptom of Western management practices. The state of the salmon is a symptom of colonial Western practices. The state of our Squamish Nation language and our culture is a symptom of colonialism and Western cultural practices that imposed regimes that were adversarial and detrimental to our entire way of life.
3197. The health indicators of our families as Indigenous people that my auntie spoke of; traditional foods versus Western foods have had a detrimental impact on our families' firsthand, diabetes in our families, and other health indicators.
3198. We would love to share with you places that are sacred to us in our territory, like Temtemixwtn, which is a portal into the spirit realm that connects us to a multitude of other realms of existence. I alluded to that briefly in the term "clayqustoi," the ability to converse in our spiritual context. There are a few portals in our territory that we believe very sacred but we've never disclosed those publicly.
3199. Our children are our future, and when we were paddling a couple summers ago, we did have a pod of orcas come underneath our canoes, which was a huge celebration for our young people to see the black and white just under the surface come right under our canoes. We considered that a blessing. It inspired our young people to find that connection and that awe-inspiring wonder that young people have to the natural world was invigorated.
3200. We also know from experience that when one of our prominent matriarchs or chiefs passes away, oftentimes the orcas will come into the village, such as in Burrard Inlet, and their presence shows us that there is a guardian spirit, that they will take our loved ones through those portals and transform them to continue their journey as a spiritual being.
3201. It's important for you to recognize that also what we're sharing isn't in

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- a museum, that it's a living culture; that we're not capsuled in time that tradition is 200 years ago, tradition is today. What we do today will someday be traditional. So it's a continuity of tradition.
3202. We're not an assimilated people, although there was an attempt under the guise of assimilation in Canada. We're not assimilated. We adapt.
3203. My colleague spoke of herring and eulachons and we're experiencing revitalization of herring biomass in At'kats'hm (phonetic) and Tokno'its (phonetic), known as Howe Sound. After decades of absence we're seeing the revitalization that has brought back orcas, resident porpoise, minke, greys, humpbacks.
3204. Moving towards Xay Temíxw, our land use planning exercises, our marine use planning exercises, we're not asking other levels of government permission for us to engage in those activities. We're mobilizing our members within our nation to look at our visioning on what's important to us and what we can protect, but also what areas are open and conducive for development and our participation in economic activity.
3205. So we're not adversarial to development it just has to meet our metrics, and we have metrics that have been instilled and practiced for thousands of years.
3206. There's areas like Papiak, in what is now Stanley Park, that were our octopus hunting grounds. I love octopus -- eating octopus. I can only typically eat it in sushi restaurants now. But it would be nice to harvest seafood from our own homelands and waters but the contamination is pretty severe in the seals and sea lions in the fats, where we rely on other First Nations for access to traditional foods.
3207. There's another term that came to my mind listening to my relatives in our language called eshelhekwiws. My late grandfather talked about this as having great love for one another, but he also referred to it as our connections to all of creation so that eshelhekwiws recognizes all the other beings as our family because of our old, old stories of transformation and connection.
3208. And another term my grandfather shared with me and my sister growing up was exex'eiek, which he said is very hard to translate. It's kind of like the Creator or creation. That we're all a part of that exex'eiek, that breath of

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- life, that energy that flows through all things in the universe that is sacred to us.
3209. That is what we represent through song, through dance, through ceremony, regalia, initiation ceremonies where you walk that life to honour your connections to creation.
3210. Our history is your history. We've been invisible in our own land for far too long, where the average person living, working, playing in our territory has no clue of whose lands they're on. They have no clue of who our heroes are, who our -- what our prominent mythology is that we shared insights with you today. Mountains transformed. Animals transformed. Places that are sacred to us. We would love to share that, but it has been systemically denied under Canadian oppressive legislation.
3211. There's areas like Nch'Kay that I spoke of earlier, Mount Garibaldi. That produced some of the best glassy obsidian on the west coast, next to Oregon. And the obsidians were traded far and wide. If you look at the tools that are in museums all over the world and you fingerprint them you'll see that a lot of the sources come from the outflows of some of our volcanoes in our territory which created a very strong economy where canoe-loads of obsidian would be traded across to these areas on Vancouver Island and throughout the Salish Sea Basin.
3212. So I implore you around the accountability of decision-making that we're simply relay runners, you know, we're really speaking on behalf of our future generations. And that loss of habitat, from our perspective, has been very detrimental to the continuity of our language and culture.
3213. So some terms in our language are associated with specific activities. Those activities have become obsolete because of marginalization or alienation. So we look to experts like my auntie to remember those old terms and revitalize them.
3214. So you see a lot of our young people getting back out onto the land and water to harvest and collect, but it means so much more to them when they can speak in their own language and understand that they are the direct embodiment of our ancestors.
3215. I think I'm going to leave it at that, that we're simply not a vanished race. That we are -- but we are invisible in our own lands. So these oral presentations, this would never be an option for my parents or my grandparents.

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And I welcome it that it is -- we are evolving as a society and maturing as a society to at least engage in dialogue with each other to delve into deeper understandings of one another. That it's not just about us swearing to you that we pledge to tell the truth but we expect you to also afford us the same respect.

3216. And, again, I invite you to our longhouses to witness firsthand the way we really live rather than us trying to describe to you in English what it means to be Squamish and the responsibilities that we carry.

3217. We do want to be a part of Canada but this has been a very challenging exercise when we see the guise of national interest imposed upon Squamish Nation, where we've heard that before. And that's why I cited gold rush, fur trade, salmon, deforestation, oil, gas and mining, real estate; it's all under the guise of national interest. That it meets the quality of life for you as Canadians, and Canadians are quite complacent on these matters, when Indigenous people still live in abject poverty, and that's unacceptable in this day and age.

3218. So this project and these oral submissions are directly related to that broader context of relationship and 150 years of systemic oppression. We can do better. Canadians deserve better. Our children deserve better. So that's why I'm here to share with you a small little piece of what it means to be Squamish.

3219. Again I'd love to keep going on and on to actually tell you stories, but I'm going to open it up at this time if you have questions or comments.

3220. Thank you.

3221. **MR. ARBEAU:** Thank you, Chief Campbell.

3222. If the Board has any questions or points of clarification?

3223. **THE CHAIRPERSON:** Mr. Duncanson, you have a question clarification?

3224. **MR. DUNCANSON:** If I could just confer for one minute, please, Madam Chair?

--- (A short pause/Courte pause)

3225. **MR. DUNCANSON:** So we don't have any questions. But on behalf

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of Trans Mountain, I'd like to thank each of you for coming and sharing your knowledge and perspectives.

3226. **THE CHAIRPERSON:** Member Murray?

3227. **MEMBER LYTLE:** Thank you, Madam Chair.

3228. And thank you, panel, for a very articulate and heartfelt rendering of your culture.

3229. I've heard a number of times over the past couple of days the concept of worldview. And it's a term that I've dedicated a lot of my life to studying. So my question is really whether, when Indigenous people use the concept of worldview, are they using that as sort of a bridging term, or does that concept come out of your culture? And if so, how do you see it coming out? How do you use it within your culture, and how do you use it for bridging across cultures?

3230. **CHIEF IAN CAMPBELL:** Yeah, thank you for your question.

3231. In my experience, it's a relatively new vocabulary for us. Growing up I never heard my Elders use the term worldview. They simply told us stories, exemplified the cultural practices, whether it was hunting, or fishing, or spiritual endeavors out on the land and in the water, canoeing, going to longhouses. It was often solely in our language, in Skwxwú7mesh snichim, the Squamish language, which is a dialect of the Coast Salish language family.

3232. The never explicitly said, "This is our worldview." I think that's a relatively new term. But we certainly embrace, in context to articulate to the broader community, our worldview, that why I started off with the universe and darkness, for example, is something we hear from cultures all over the world. So it's something we can readily identify in one another. The science community will call that the Big Bang theory.

3233. So we start from there and we sort of continue with the many chapters of change and transformation leading to modern present times and our aspirations for where we want to go in consideration of the information before us.

3234. So I think that, you know, I hope that we can mature as a society and start to embrace; again, my closing statement said our history is your history. For far too long the average Canadian did not have access to this information, or it

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was systemically denied. And I think today is an exciting opportunity to utilize modern smoke signals through the Internet and live streaming, so that any and everyone can hear these stories and understand that this is told through the Squamish lens, but it's a story of humanity.

3235. It's a story of us moving forward in the face of adversity; we survive, we adapt, we pick up the best tools available to us and we ultimately pass that baton to the next generation to continue to invigorate culture. That culture is never stagnant, that we must continue to draw upon our rich history and past, but we want to celebrate that with all Canadians. And that's something that has never been achieved to date.

3236. **MEMBER LYTLE:** I think I'm going to give you a bit of a podium here with my next question.

3237. That is, how important is your language to your culture/worldview? I think I heard some of that already, but I'd like to hear you go into a little bit more detail.

3238. And I was encouraged when you said that there's a growing resurgence, I think was the term you used, of interest by young people in the language. And we haven't heard that from all the other groups that we've been talking to. So I would really like to hear more about that and why you think that is. And perhaps some of things, perhaps, that you've done that others may want to think about doing as well.

3239. **ELDER VANESSA CAMPBELL:** (Speaking in Native language).

3240. Just letting you know that the language is the way our Elders convey to us their understanding of our world, for us to have an understanding of how they see the world, how they saw the world, so that we can hand that down. We can see it through the way they used our language.

3241. Every language has terms that are distinct because it's related to where that language came from. And so I know that in our lifetime, say, when I was a young child, and I would hear my Elders talk to each other in our language, but they weren't encouraging me to learn, they weren't encouraging people -- people didn't speak our language in public because it was penalized, because it was considered primitive or something. But when you come to learn our language and understand all the things it says about who we are and how we saw things, you

realize that that was false.

3242. Every human community or society has a complex relationship with their environment. And understanding it and sharing it and teaching other people about it, including your own family and future generations, comes through that language.
3243. In our lifetime, we have seen our language become free again. I can go on a bus now and young people that are learning our language; we talk to each other in our language. And right away people understand that it's something they've never heard before and they're very interested. And that really encourages our children to say, "Yes, this is important to who we are."
3244. So this is the work we've been doing. Both the young men here were people who learned our language and are still learning. And we have many young people now who are doing the same, building a positive connection, another positive connection in our community through the language.
3245. So something that was very negative, that was -- you could be beaten for speaking the language, you could be denied work, you could be shamed, all these things no longer apply. And it's become a very positive way to be who we are to each other.
3246. **MR. CHRIS LEWIS:** Thank you for the question. I'll tie it in a little bit to worldview just because I had some thoughts around that, and then I'll connect it back to language a little bit.
3247. As I mentioned in my opening statement, our worldview is very much place-based. And our place names, as you heard throughout our presentation here, tell us about who we are and where we come from, but also how to conduct ourselves in certain places. It connects to the worldview that we explain things in a spiritual sense. So if something goes wrong, for an example, something happens, our Elders will put it in a spiritual context and they'll relate it back to a story, either an origin story or a story of a place, where they say we weren't following the rules, we weren't following the teachings that were passed down to us.
3248. A prime example is in the story I mentioned where the Kai's (phonetic) went out to the Salmon People and found them and brought them back. The teaching that came back was that when we finish the salmon, we must bring

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- the carcass back to the water and place it in the river or the ocean. And we must not leave one bone behind because in our -- in the story, it talks about a reincarnation of the salmon. And if you do that, the salmon will come back in four years. It will come back. It will reincarnate.
3249. And so there's always been that teaching where it's just like, "What do I do with my bones," you know? I used to ask my grandfather that all the time. He goes, "Just bring it to the river and throw it in the river." And I would ask him why and he would tell me that story.
3250. As I got older, I kind of said, "We're just nutrient loading the river, Grandfather," when I started figuring it out. And he goes, "Yeah, that's what the scientists say," right? And he goes, "But we've been doing it since the beginning of time because if we don't do it, the salmon won't come back." And then he said, "We're nutrient loading because when those little ones hatch from the eggs, they will eat their parents. So we get to eat, they get to eat, everyone gets to eat and we have a balanced ecosystem."
3251. He wouldn't say "ecosystem"; he would use some other word, but I'm just trying to put it in a modern context here.
3252. So when things go wrong, our elders will say, "You didn't follow the way." And we have many chapters of change throughout our history. As Xàlek mentioned -- sekyú Siyam, that there's floods, famine, starvations, ice ages. Our people have reasons why that happened. They'll tell us we were out of balance with the natural rhythm of the land.
3253. And one of the questions I always have with my Elders is, I said, "There's this -- it's kind of like the wave. It's kind of like the tidal waters at Xwmelchstn that you're rolling." Our life and our history is kind of like this. So sometimes we're in times of prosperity and sometimes we're in recession and depression and then we kind of come up. Our stories have many chapters of change like that.
3254. As leaders, we tend to ask our Elders, "Where are we on that wave," I guess you would call it. Some would say, "We're on our way up," hence the language revitalization.
3255. The scary part about language revitalization and that it's happening is that a part of the language revitalization requires you to be out on the lands and

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- the waters to teach the person. So, hence, I mentioned that we used to harvest porpoise; we used to do -- harvest seals, sea lions, all those types of things. Those things do not happen any more. We don't see that actively happening in Burrard Inlet or within our Coast Salish waters. We have to go somewhere else to do it or rely on someone else or go to someone else's -- up north or somewhere to go and do that.
3256. What happens is a whole segment of the language gets lost because you're no longer using those words. What is the Skwxwú7mesh word to cut open a seal, you know? If we're not doing it, it's not getting transmitted. The Elders have a harder time remembering that word because they're not doing it.
3257. So, hence, it's very -- language and cultural revitalization is, very -- again, place-based, it's very activity based, and if we're not doing those activities it's very hard to retain those languages because the Elders will say, "I did that once when I was a really young child, but I might not remember the word." But I bet if you put a seal in front of them or a porpoise or a salmon or a herring or an eulachon and they start doing it with their hands, the language would just come out of them because it's very much activity based.
3258. So I just wanted to add that context in terms of that worldview aspects. So when things go wrong our people in our community will tell us we are out of line with those teachings and the spiritual realm.
3259. So thank you.
3260. **MEMBER LYTLE:** Sorry; I was going to thank you.
3261. **CHIEF IAN CAMPBELL:** Getting us fired up now. So I just wanted to add a little bit to what my colleagues have said.
3262. Thank you for your questions. My grandmother is 89 and she grew up in Steveston. And they were very much on the water her whole life. And she talks about the blatant racism that she experienced towards anyone of colour at that time in the thirties, forties, and how her father was quite ashamed to be Native. And he served in World War II. When he came back, he basically assimilated, denied his -- that he was First Nations. It was really tough when you look at each generation in the complex trauma.
3263. I mentioned in my presentation that I'm the first generation of my

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- family out of residential schools. So to see this resurgence is quite exciting because my grandmother uses a term called, "youth reach, Elders teach," and I spent a large part of my career working with young people, both in the school system and Child and Family Services, where often our young people were being labelled as "at risk".
3264. And it always made me writhe a little bit. I did not like that term "at risk" because our children were culturally deprived. Once we immersed them in the activities that Syetáxtn spoke of by getting them into the canoes, getting them into the hunting programs, going out on the spring break programs out on the land, the youth flourished. They started to then excel and they became hungry for mentors and hungry for more knowledge and more experience.
3265. I also had the privilege over the last number of years to attend much of the Murdered and Missing Indigenous Women Inquiries, where we listened firsthand to many of the families across the country articulate their trauma and that those were symptoms of poverty and discrimination and social issues plaguing First Nations. Very challenging to listen to, but nonetheless, very healing, that this isn't just a First Nations' story; this is a story of Canada.
3266. Also, going through a lot of the reconciliation events over the last number of years, we've listened to our Elders who have articulated their darkness that they've carried for decades since they were children being abducted by RCMP, being abducted by Indian agents, sent to residential schools where it was very strictly forbidden for them to speak language or to interface with their relatives or participate in traditional activities. Those Elders would often vomit. They would often cry. They would often scream because it was the first time they shed light on these deep pains that they carried.
3267. So we're seeing this pivotal moment where these stories are finally being told. And with that, it's allowing our young people to feel safe. As they all said, they can speak their language on the buses; they can learn it in the public schools. Three hours a week isn't going to learn fluency or proficiency; it's simply an opportunity to learn to read and write. We need to add more layers.
3268. So we've achieved different files such as the Sea-to-Sky Highway upgrade to Whistler where we put invisible presence of our language to showcase to the world that we're not a vanished race and to show everyone that there is an older way of describing relationship to the lands. And people have readily embraced that. And it's also instilled great pride in our young people to then get

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- into ambassador programs, tourism, showcasing and interfacing with tourism up in Whistler, where that's also been an opportunity to heal and to grow and to feel a part of the society rather than segregated.
3269. Our demographics are about 60 percent youth in our tribe, which is pretty similar amongst most First Nations in Canada where we're about 60 percent under the age of 25. So we have a huge demographic of young people who now, you know, can hold their MBA in one hand and they're also being able to go to ceremonies and speak their language or get up and drum and sing traditional songs and be involved in wearing their regalia.
3270. When I did my MBA a few years ago, I wore my full regalia when I went to the convocation simply because my Elders couldn't, my parents and my grandparents, it was not an option for them. They weren't allowed to go to university as Status Indians in Canada without enfranchising or disenfranchising; had to give up their status.
3271. So slowly but surely we're changing, but the language is an integral part of the culture and that's why I wanted to share a few of the key terms with you today like, (speaking in Native language) or (speaking in Native language) or some of those terms that are vital because it's not readily translatable into English. They're more -- broader terms that we must grow and mature and learn to understand what those terms mean. And we're fortunate to have Elders like our auntie here to help guide us in deeper understandings of those terminologies.
3272. So thank you.
3273. **THE CHAIRPERSON:** Member Scott.
3274. **MEMBER SCOTT:** I, too, wanted to thank you for your testimony today. I found it to be not only heartfelt, but measured in the delivery, and I thank you for that, as well as informative.
3275. My question is for Chief Ian Campbell. And in your testimony, near the end you made the comment that Squamish are not averse to development, as long as it meets your metrics. I think I understood what your metrics were from some of your earlier testimony, but I wondered if you would confirm what you meant by those metrics?
3276. **CHIEF IAN CAMPBELL:** Yeah, thank you for your question.

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3277. And we engaged in land use planning back in 2003 through extensive community consultation with our Squamish Nation members to look at territorial from the 30,000-foot level, sort of looking at the entire territory. Our membership felt safe to provide traditional information that their families held onto.
3278. We then were able to protect around 8 percent of our territory through what we call Kwekweyex Kwelhaynexw, which is very difficult to translate into English, but we settled on the term, “conservancies.” They represent about 8 percent of our territory, about 50,000 hectares.
3279. We also then engaged in economic activity such as the acquisition of Tree Farm Licence 38 from Interfor, where we’ve seen, for decades, truckload after truckload of old-growth forest being stripped from our territories, where others were benefitting while we were being marginalized onto Reserves.
3280. So our Reserves and our territory comprise .03 percent of our territory, so less than 1 percent has been allocated to Squamish under the Reserve system.
3281. So we had to be proactive to then remove ambiguity on where we see appropriate activity for development, and where we want to be involved in that activity. So forestry was one of those where we became one of the largest forest operators within our traditional territory.
3282. We also did a strategy on IPPs, Independent Power Projects, so small run-of-the-river hydro projects.
3283. So through our land use planning, we limited where proponents can apply for projects by not being reactive, but being proactive to say these areas are uncompromisable because of cultural and spiritual values, we will not allow or entertain development. While other areas we said, these are appropriate for development based on ecological knowledge, traditional knowledge, spiritual knowledge, as well as access to resources within our corridors and territory.
3284. We also have many examples of protocol agreements with our neighbouring First Nations where we were able to come together with the Lillooet Nation to the north of us around the 2010 Winter Olympics, as well as the Musqueam and Tsleil-Waututh so that we developed the four host First Nations to then be equal partners in the hosting and execution of the 2010 Winter Olympics and Paralympic Games.

3285. We didn't want beads and trinkets. We didn't want to say, "Go ahead, come in and just do whatever you please." We want to be fully involved in as partners. If we're going to do something, we want to look at decision-making, shared decision-making. We want to look at economic opportunities. So it's a triple bottom line, as well as environmental stewardship and social benefits or impacts.
3286. There are many examples of the MST, Musqueam, Squamish and Tsleil-Waututh here in Vancouver, that have come together to negotiate acquisitions of lands from the provincial and federal government, such as the Jericho Lands and other opportunities that are fee simple lands, but allow the nations to develop our corporate structures and proceed as new entrants in the market, to develop our market share in providing solutions to the affordability issue, as well as rental and long-term lease.
3287. Those are important aspects of where the nations were able to move beyond competition over scarcity of resources to a place of collaboration that then wasn't about solving all issues amongst our nations; it was about focusing and zeroing in on specific aspects of protocol agreements to allow us to demonstrate tangible results that will then allow us to then create revenues and assets and attract investment and partnerships.
3288. I should also cite, we were successful in conducting our own environmental assessment on the Woodfibre LNG project, which allowed the Squamish Nation to issue 25 legally binding conditions to the proponents, which the proponents have adhered to in agreeing to our process, which then, once we satisfied our environmental conditions, we were then able to move forward and contemplate the impact benefit agreement.
3289. But it wasn't until our criteria and metrics were met on effecting design changes and being fully involved in the stewardship and revitalization of Howe Sound that allowed the nation to then engage over multiple years with our membership to solicit feedback from our members on what their fears are, what their aspirations are, and where current case law is around Aboriginal rights of title, where we can advance a lot of these issues of UNDRIP and consent, free prior and informed consent. How do you actualize consent and move beyond simple consultation where you're checking boxes, to true and meaningful engagement where First Nations are involved in decision-making, as well as appropriate benefits throughout the life of the project that then must comply with

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environmental stewardship, first and foremost, and then move towards other monetary and real estate transactions?

3290. So those are a few high-level examples of the types of metrics that have been based off of traditional knowledge and applied in a modern context in exercising our jurisdiction and authority in our governance over our lands and waters.
3291. **MEMBER SCOTT:** So in listening to you and relating it to your earlier testimony, what you're describing as your metrics are expressions, if I can put it that way, of the framework that you described earlier, which was shared decision-making, shared economic benefit, and shared management of resources?
3292. **CHIEF IAN CAMPBELL:** M'hm.
3293. **MEMBER SCOTT:** Okay. Thank you.
3294. **CHIEF IAN CAMPBELL:** Yes, that's been the framework that many generations of Squamish have been advocating for in relationship with the Crown.
3295. **MEMBER SCOTT:** Thank you.
3296. **CHIEF IAN CAMPBELL:** My pleasure.
3297. **THE CHAIRPERSON:** Thank you. Those are all our questions.
3298. And I want to convey that we truly understand that this is not the ideal setting. But, like you said, we're kind of working with two worlds, your world and our world. And you mentioned it twice, about the fact that our history is your history. So today, that was a tiny piece, but we do appreciate it.
3299. And so you're sharing your story, and other First Nations have shared their stories as well, so it's cumulating.
3300. And we hope, like you say, that the recording of those transcripts, you know, are kind of a small testimony to those things.
3301. So thank you for coming and sharing the traditional knowledge that you were able to share with us today, even though not in the ideal setting.

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3302. We will consider all we have heard and we will decide on our recommendation in this hearing.
3303. We will reconvene this afternoon at 4:00 o'clock to hear from the Stó:lō Collective, which are your neighbour, we understand
3304. Thank you very much. And safe travels.
- Upon recessing at 2:09 p.m./L'audience est suspendue à 14h09
- Upon resuming at 4:09 p.m./L'audience est reprise à 16h09
3305. **THE CHAIRPERSON:** Before we commence our hearing today, the Board wishes to acknowledge with respect the Lekwungen-speaking peoples in whose traditional territory we are gathered, and the Songhees, the Esquimalt and the Saanich people whose historical relationships with the land continue to this day. It is with truth and respect we would like to acknowledge all the Indigenous ancestors of this place and reaffirm our relationship with one another.
3306. Good afternoon. Welcome to the Oral Traditional Evidence phase of the National Energy Board's hearing regarding the Trans Mountain Project Reconsideration. My name is Lyne Mercier; I'm the Chair of the Panel. With me on my left is Alison Scott, and on my right is Murray Lytle. We want to welcome everyone who is here today, both in the hearing room, and those listening in to the Webcast.
3307. As a matter of housekeeping, I'd like to describe the evacuation procedures in the event of an emergency. If the building's evacuation tone begins sounding and we are asked to leave the building, the muster point for the venue is the waterfront walkway. Please exit in an orderly fashion through the lobby. At the muster point, ensure your party is accounted for.
3308. In addition to the Panel, we have staff in the room to answer process-related questions that you may have. You are able to recognize them by their brass name tags.
3309. With respect to our schedule for hearing oral traditional evidence, today we have scheduled time to hear from two Indigenous groups. We had one earlier. We will normally plan to take breaks if it is required.

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3310. In order to be fair to all presenters we have allotted up to two hours to hear from you. If two hours is not enough, at the end of the session please feel free to file additional oral traditional evidence by electronic means, such as a video or some other method.
3311. Before we get underway, I would remind parties of the Panel's guidance in the Hearing Order and Procedural Directions in regards to oral traditional evidence.
3312. The Board understands that the Stó:lō Collective has an oral tradition for sharing knowledge from generation to generation, and this information cannot always be shared in writing.
3313. Sharing your traditional knowledge and stories about the use of your traditional territory is of value to us. We appreciate that you've chosen to be here today.
3314. Following oral traditional evidence, Trans Mountain, other intervenors, or the Board may have questions for the witnesses. If so, witnesses can choose whether they will answer questions orally, or at a later date in writing, or a combination of both.
3315. With that, I believe we're ready to get underway. Before I call on the Stó:lō Collective to present their oral traditional evidence, I'd like to have the representatives of the Proponent, Trans Mountain, introduce themselves.
3316. **MR. DUNCANSON:** Thank you, Madam Chair.
3317. Good afternoon. My name is Sander Duncanson. I am with the law firm Osler, Hoskin, and Harcourt representing Trans Mountain. With me is Cassie Richards, also from our office. To my left is Phil Symington with Trans Mountain. And closest to you is Jamie Andrews, also with Trans Mountain. So good afternoon.
3318. **THE CHAIRPERSON:** Thank you, Mr. Duncanson.
3319. I'd also ask if there are any other intervenors in the room who would like to introduce themselves or if there are any preliminary matters they would like to raise. And for the record, please indicate who you are and who you are representing.

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3320. **MR. MURRAY:** Thank you, Madam Chair. Thank you, Panel Members.
3321. My name is David Murray and I'm a Senior Policy Advisor with Natural Resources Canada. I am here as a representative of the Federal Crown to hear the witnesses' oral traditional evidence in relation to the reconsideration of the Trans Mountain Expansion Project.
3322. I do not intend to ask any questions today, but rather, I am here as a representative of several federal departments and agencies that are registered intervenors.
3323. If necessary, we will ask additional questions through the NEB's Information Request process.
3324. Finally, I'd like to note that I'm honoured to be present at this hearing in the traditional territory of the Coast Salish.
3325. Thank you.
3326. **THE CHAIRPERSON:** Thank you, Mr. Murray.
3327. I understand that you would wish to be affirmed to indicate that the information you're presenting is accurate truthfully and to the best of your knowledge.
3328. So, Ms. Comte, can you please proceed.

DALTON RICHARD SILVER: Affirmed

--- ORAL PRESENTATION BY/REPRÉSENTATION ORALE PAR STÓ:LŌ COLLECTIVE:

3329. **MS. WALKER:** Good afternoon. Before Chief Silver gets started, I just want to give a brief introduction to the Panel. My name is Joelle Walker. I'm counsel for the Stó:lō Collective.
3330. The Stó:lō Collective consists of 12 Stó:lō communities whose traditional territory is in the lower Fraser River watershed. Eight of those

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communities were involved in the judicial review in which the CBCN originally for the project was quashed.

3331. With me today is Chief Dalton Silver of the Sumas First Nation, who will be presenting the oral traditional evidence on behalf of the Collective. Chief Silver was an elected Councillor and Chief of the Sumas First Nation for 27 years. He has numerous other positions and leadership roles which I will let him describe in his oral traditional evidence.

3332. Chief Silver is here today to provide information on who the Stó:lō people are, the connectivity they have to their land, how they relate to that land and how they have used it throughout time.

3333. As a means of a brief overview, the members of the Stó:lō Collective are Coast Salish Indigenous people. They have inhabited, controlled, and relied on their traditional territory in the lower Fraser River watershed since time immemorial. The Stó:lō exercise Indigenous rights throughout this territory, including hunting, gathering, trapping, fishing and spiritual practices, and they are one of the few Indigenous peoples in Canada to have an established non-treaty right protected under Section 35 of the *Constitution Act*.

3334. This established right to fish for food and ceremonial purposes was affirmed by the Supreme Court of Canada in *Van der Peet*, acknowledged by the Crown during the consultation on this project, and recognized by the court in its reasons in the *Tsleil-Waututh* decision.

3335. The Stó:lō Collective are culturally, spiritually, physically, and psychologically interconnected to their land and this interconnectivity is evident in all of the areas that must be taken into account in assessing the environmental affects with respect to Aboriginal peoples identified in Section 5 of CEAA 2012.

3336. If Chief Silver feels comfortable, he may answer questions on the information he is sharing today, however, any technical or substantive questions should be addressed through the IR process.

3337. Before Chief Silver begins, we would also like to make a couple of brief comments on the NEB reconsideration hearing process itself.

3338. First, unfortunately, as we have advised in our correspondence of October 23rd, October 30th, and November 26th, due to the scheduling of this oral

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- traditional evidence hearing during Stó:lō Big House season, the provincial leadership gathering, which is also taking place in Vancouver today, and the difficulties in coordinating a dozen communities on an extremely tight and unilaterally imposed schedule not all of the traditional knowledge which bears on the issues being considered in this hearing can be shared with the Board today.
3339. In addition, we have learned through review of materials filed by other Indigenous intervenors in this hearing that the federal government intends to rely, to the extent possible, on the reconsideration hearing to fulfil its duty to consult with respect to project-related marine shipping. In the circumstances, the Collective is of the view that this process cannot discharge the Crown's constitutional obligation to consult and accommodate, in particular where the Stó:lō have an established right to fish. To date, neither the NEB hearing process, nor Canada, have adequately considered or taken into account this constitutionally protected right.
3340. Despite that, we are here today to share what we can to assist the Board in determining the issue before it.
3341. And so with that, I will pass it over to Chief Silver.
3342. **CHIEF DALTON SILVER:** Thank you, Joelle.
3343. I hope the microphone's working properly or -- I did turn it on.
3344. **THE CHAIRPERSON:** Ms. Walker, turn yours off.
3345. **CHIEF DALTON SILVER:** It's kind of kicking in and out. Oh, here it goes.
3346. Thanks very much, Joelle. And firstly, too, I would like to acknowledge the Lekwungen, the Songhees, the Esquimalt, the Saanich people, my Coast Salish relatives.
3347. As I mentioned earlier, I am (speaking in Native language) saying my name is (speaking in Native language) and I am Sema:th. The people on the Stó:lō, I am also Kw'ekw'e'l:qk. My name comes from the Chilliwack Tribe passed to me by my late grandfather.
3348. I'm part of the Coast Salish people as well. The Stó:lō are part of the

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Coast Salish. I also have blood ties to the Nlaka'pamux and up to the Secwepemc people in the interior, my Interior Salish relatives.

3349. I'm thankful to be here to talk about very important subject, the environment. I want to say I'm involved also at the Coast Salish level as a member of the Steering Committee for the Coast Salish Gathering. We're comprised of -- I think there are 50, 52 communities in southwestern British Columbia that have ties to the Coast Salish. There are 22 tribes in Washington State. I sit with a Steering Committee comprised of those in the south and us in the north. We have Spee Pots, a leader from Washington State is our southern co-Chair. Chilquauim, one of our leaders from here, actually, on Vancouver Island is our northern co-chair.
3350. Our main objective for meeting with the Coast Salish leadership is environment. It's one thing the Coast Salish Nation can get together on is environment, something that we've all come together on in the last 16 years. We gather annually when we can, either on this side of the border or that side of the border.
3351. As Joelle mentioned, I've been involved in the politics of our people for 27 years as a council member. Four years during that time I served as Chief for Yakwekwioose and the Ts'elxwéyeqw Tribe under traditional governance where I was asked by my uncle to come to the longhouse because he was going to perform a ceremony and I was going to be their Chief. I told him, "Well, I'm still elected council for Sumas," so I had to talk to our Elders at Sumas and they told me that, "You can't say no to that. The family is calling. It's an honour."
3352. So for a four-year term I served as chief for Yakwekwioose and elected council for Sumas. But being Stó:lō, both communities, my late grandfather, who I learned many, many things from said, "We are always brothers and sisters." And he mentioned that as well amongst the Coast Salish peoples to the island here and to the south, that we'll find relations amongst all those tribes in the Coast Salish Nation.
3353. I want to say that a lot of what I want to talk about I learned from my late grandfather, Th'eláchiyatel. He was also known as Chief Richard Malloway. I heard him speak in 1975, actually, talking about being involved in what was called the land question then for 40 years, for over 40 years. And actually, at the time he said, "We haven't got any answers yet. Been to Ottawa. Been to Victoria."

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3354. And he was also a member of the executive on what was once known as the North American Indian Brotherhood in the 1940s. He was the Secretary/Treasurer. He was also a founding member and on the executive of the Union of B.C. Union Chiefs at its formation in 1969.
3355. He never attended formal schooling. He learned to read and write at home. He was appointed as spokesman for the Stó:lō people when he was 19 years old because he had learned the English language.
3356. He was born in 1906. So he took me more or less under his wing when I had lost my father accidentally in 1971, so at 11 years old, actually, was the first time I'd attended a political meeting with the old Fraser East District Council at the time.
3357. My grandfather was also instrumental in maintaining the cultural ways of our people in the Fraser Valley. Joelle mentioned the Big House ceremonies, the longhouse ceremonies. Our winter ceremonies are starting now. Actually, I'll be back over here on Vancouver Island in Saanich on Saturday this week for a memorial potlatch where my relatives are involved there.
3358. The cultural ways of our people are such that there are still practices that we have that are not for public viewing. We have our sacred, sacred practices that we keep amongst ourselves.
3359. One of the things I really like to talk about is how sacred everything is to us. I've sat with a lot of different environment groups. I sit with fisheries groups, the Lower Fraser Fisheries Alliance; I'm on the executive council there. I'm a delegate to the Fraser Salmon Management Council, which is inclusive of tribes in Vancouver Island right up to the headwaters of the Fraser.
3360. I also sit with the Assembly of First Nations National Fisheries Committee, and I've been given the honour of speaking with them on occasion and speaking for them at Whitehorse. It was delegated to me.
3361. And I think in talking about these things, it's kind of a touchy subject for a lot of our people in that we've been more or less legislated out of control of our resources over the years. And I've talked with others at the national level, and internationally with our friends to the south, our relatives. And the strength of that in B.C. is that we have no formal arrangement whatsoever. Our inherent

rights have been acknowledged and protected.

3362. The governance of our natural resources has never been ceded or surrendered to anyone with no formal arrangements in our territories. There is hope now that we can move forward with the provincial and federal governments as they're talking now about government-to-government, nation-to-nation, and we're hopeful that that comes to fruition where we can assume that authority again over our territories and work together with the respective governments in looking after things as we're supposed to.

3363. I want to talk a bit about some stories that are being passed down. And as my grandfather was saying, people call that history, the oral histories of our people. In the past, before contact, one of the practices of Coast Salish peoples in looking after our loved ones that have gone to the other side, the burials are something that are fairly new to us because if you look at our historic burial mounds, they weren't really burials, per se. There was a little groove, more or less, in the ground and the mounds were built over them. A lot of work into those mounds.

3364. But before those were done, what our people did was build cedar boxes. One of the places my grandfather talked about was on Sumas Mountain where I live, where our ancestors that had gone, our loved ones that had gone, were put in the cedar boxes, they were tied in the trees. The boxes were not airtight. Over time -- and it was mentioned to me that our bodies are made up of about 80 to 85 percent water.

3365. Over time, when the remains of our ancestors were in those trees, the fluids, the flesh, the blood, the waters out of our ancestors ran down the trees and into the ground. When the bones were dried up, then our people would take them and wrap them. We had grave houses around our territories, much have been desecrated or gone now. But that was how we looked after our lost loved ones.

3366. And in saying that, over the millennia, thousands and thousands of years you look at that practice. We say we've been here since time immemorial. There have been, even here on Vancouver Island, footprints found 13,000 years ago. In my territory up the river, on the Stó:lō, there's a longhouse that's 12 or 13,000 years old.

3367. I was talking with government of today about opening that up for an interpretative centre to talk about the histories.

3368. Over those years, those thousands and thousands of years, you think about that. And I've been told and taught by our Elders the flesh and blood of our people, all around our territories in the Coast Salish area.
3369. The Coast Salish we talk of covered over 6,000 square miles of southwestern British Columbia and northwestern Washington State.
3370. The trees, the grasses, everything that grows has been nourished by our ancestors. Everything that we harvest, the plants that we use, the medicines, the foods, the animals come eat those grasses. All those plants grow along the waterways, provide food to those fish that help us survive, brought us sustenance. The affinity we feel for the nature around us, the s'iwes, the teachings of our people tell us those are our relatives.
3371. There's people saying in many different cultures in Indigenous communities, you'll hear people say, "All my relations." When that is said, we're talking about everything around us. It's not just your blood relatives, your cousins, your whatever, it's everything that's around us. There's a cycle that we know.
3372. And I've mentioned to others, if back in time, when we first made contact with the newcomers to our lands, and we talk about the management of resources -- our people say the mismanagement of our resources -- if we were treated equally at first contact, and our way of looking after things, our perspectives culturally, holistically, if they were put into the management decisions that have been happening over our territories, we would be in a lot better position today.
3373. One of the things one of my brothers talked about, before I came here was the orca. I said, well, those are my brothers and sisters. I am stóg:ya, the wolf.
3374. The Sema:th people are wolves. My mother's people, the Sq'ewá:lxw, are black bear. My relatives in the interior, coyote. Those, we are taught, are very close relatives. Our brothers and sisters.
3375. And you see, I'll talk about a story we have that I'm told started in a place in our territory, up on the Skagit, the Hozomeen.

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3376. Stóg:ya, the black wolf. He was leader of his tribe, I'll tell you. He was out in the woods and he was having trouble. He actually stumbled on the bushes. And yexwelat, the eagle, flew over.
3377. The animals all communicated then. There was a time our people talk about when we communicated with all the animals, with all the wildlife.
3378. But yexwelat, noticing that his brother on the ground was having trouble, asked him, "Is there something wrong?" And he being the chief of his tribe, or you would say the pack now, he said he was having trouble, his eyesight was bothering him, and he was the provider of his tribe. He was in the woods, he was hunting. But there was something wrong with his eyes, which is why he stumbled on that bush. He almost walked into a tree.
3379. And yexwelat told him of a big water that he's told of that can help him. He told him, "It's to the west and to the south of here." He says, "Brother, if you want, I can help you. It will fix your eyes."
3380. So stóg:ya, the wolf, said to him, "You would help me, brother?" He says, "I really need that help."
3381. So yexwelat told him -- the eagle, he told him, "You listen to me. You go this way." And he says, "If there's trees or anything in front of you, if there's an obstacle, you listen for my whistle, I'll tell you."
3382. So wolf left from up there. This place is up near Hope, and I'm told Hozomeen, between what is now the Town of Hope and the U.S. border.
3383. But anyway, wolf got closer and closer to the ocean. And yexwelat was telling him, "Watch for this. Watch for that. Watch for the creek around this tree." And when wolf got closer, he could smell the saltwater. He could smell that big water. And he started to run, faster and faster.
3384. And the eagle noticed the direction he was running. They had come to a clearing by then, and he knew the path right to the water, but there was a cliff, a big cliff that wolf was running towards.
3385. And eagle tried to warn him, he whistled to him and he told him to, "Slow down. This is not the place to go to the water. You're at a cliff."

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3386. And stóg:ya, being so excited, he wants to fix his eyes so he can help his people again, help his tribe. He wouldn't slow down. And then before he knew it, he ran off the edge of that cliff.
3387. And eagle, one who always helps everyone, very sacred to our people today, eagle went down to try and grab him and grabbed onto the top of him, on his back, but he was too late, the wolf was already jumped into the water. And the eagle, when he grabs on, when his talons grab on to something like a fish, he doesn't let go.
3388. Anyway, wolf hit the water and he swam. And he could feel the healing right away on his eyesight. And when he came up out of the water, he could see. And he dove into the water and he could see in the water. And he came up and he looked for eagle and he couldn't find him. He was wanting to thank him for saving him, for helping his eyesight.
3389. That story, for our people, is where the killer whale comes from.
3390. You see, when wolf came up, he found that he couldn't go back to the land. And when he looked around for eagle, he seen this fin on his back, which our people say is the eagle's wings, they folded up. And you see the white spot, white spots on the front of the killer whale, that comes from the white head of the bald eagle.
3391. And it's through these stories that I'll say that the orcas, the killer whales are my brothers and sisters, as my people are wolf.
3392. I just wanted to tell you some of these stories as to the stories passed down by our people from our ancestors. These stories will be passed down to more. More and more of our youth are wanting to know of their histories, of who they are and where they come from.
3393. I was told as a 13-year-old at a meeting of the Union of B.C. Indian Chiefs -- and really, I thought my grandfather had set me up, but there were a lot of great leaders at that gathering in Penticton. And one of the chiefs turned to me and said, "You young people here, know who you are and where you come from and learn as much as you can about who you are and where you come from because there will come a time when you need to pass that down to your young ones."

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3394. And so it's with these stories I just wanted to let you know how close we are to the lands, to the waters, to the wildlife. Everything around us, we say is our relations. The resources, the exploitation of those resources is very hurtful to a lot of our people. A lot of the places desecrated our sacred sites that go back in the histories of our people. One place where I come from goes back to a flood story, some say 11,000 years ago. I live there. I've been doing what I can to try and protect that place from desecration.
3395. One of the things talked about is the vessel traffic. And that's what I'm getting at, is the effects of vessel traffic are already great on that what sustains us. I'm taught in our language, there's a word, stiahtin, looks down. Stiahtin is everything that comes from the water that sustains us, not just the salmon, but everything that comes from the water. Mekw'stám means everything.
3396. We're taught that we need to look after that. There are places in our territory that remind us of those things. I seen a picture recently of the orca swimming and in the background, Kulshan. Kulshan, to us, is a very sacred place. People call him a mountain. We say he's an old man; people know as Mount Baker. You can see from where I live. A very sacred place, so sacred that some would say the Great Spirit actually lived there one time, you know?
3397. There are powers our people talk about, the powers of the earth, the powers of fire, the powers of water, the powers of the air. They say Kulshan; he's made up of that earth.
3398. The glacier there is year round. The waters that come from there go into many different rivers, go into the Chilliwack River, into the Baker, into the Skagit. At one time, there were waters there that came into Sumas Lake that is non-existent, a lake that once was on the shore, I lived on the shore of, one time. Our people did, the village we were at on the Stó:lō.
3399. The fire, they say, is inside him. The air, you can see. Sometimes on a cold day you see Mount Baker, Kulshan as we know him, is a volcano. Hasn't erupted for some time, but our people have stories, old stories of when he was angry and the fire came out of him. There's talk about -- there's old stories that tell of fish being washed up on the shores at Nooksack River that were actually cooked when they hit the banks on the other side, on the side of the mountain, from the lava hitting the water.
3400. And you see I talk about that place as a powerful place because the old

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stories of our people is we need to look after everything. Our people say, “S’olh temexw te ikw’elo,” this is our land. “Xolhemet to mekw’stam it kwelat,” we have to look after everything that belongs to us.

3401. If we don’t look after things the way we’re supposed to, if it’s us that are neglecting everything, that are destroying everything around us, the stories say Kulshan will get angry and he’ll spit that fire out. That’s a deterrent, I think, to our people to act in such a manner with everything around us that we need to hear, to listen, to try and abide by the s’iwesá:yhem, the teachings of our people. The s’iwesá:yhem, some people say is the laws of our people. And I would say that it’s time that the Indigenous laws of our people need to be heard, need to be recognized.
3402. There was a man, a Salish man from the south. This man was from Washington State, one of the Coast Salish peoples, Nisqually People. He said at the time at one time that the truth will guide us, and I really believe that. This man of -- we lost some few years back, the late Billy Frank, Junior, and he was such a strong advocate for the protection of fish, the protection of wildlife. He was still working when he was 86 years old. I was privileged and honoured to hear the last public speech he made at Seattle on a Thursday night. And Monday morning we lost him to heart attack.
3403. But he was such a strong advocate for our people. In the early days, he was arrested over 50 times for exercising his rights on the wildlife and on the fish, fishing and hunting and other things he was arrested for and for his protests against government officials for logging practices and other that were destroying habitat and wildlife.
3404. But people learned so much from this man, this Salish man, that ways were changed as to how management decisions were made in those areas in the United States. Actually, when he passed on, then-President Obama made a very good speech and acknowledged how he had taught people about managing the resources, managing wildlife, managing the environment.
3405. The effects of the vessel traffic are such that just the amount of fuels and things from derelict vessels, from vessels running, other things, even from recreational vehicles out on the waters, very detrimental to everything in the water. Everything that I was talking about is affected by that.
3406. I was talking with someone the other day and I said, "Why is it when

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Fisheries and Oceans are talking about tidal waters, they say that stops at the Mission Bridge" -- which is right in my territory -- "when we know the tidal waters go up much further than that?" My relatives at Sts'ailes, the fluctuations in the levels there, they know happen daily, and it's because of the tide on the Salish Sea. It goes right up to Harrison Lake. Those guys see the water levels change daily. And I'm sure it goes much further up than that.

3407. We talk about our territories, our traditional territories and things, and then the Coast Salish people and the Stó:lō people. Traditionally the Stó:lō people went from what is now Yale B.C., Huklath (phonetic), the village up there. It's our border in that area with my grandmother's people, the nlaka'pamux. It's a border that's always been recognized as Coast Salish, Interior Salish. But there are strong ties we have, and we're reaffirming this as our people have told us, our ancestors, and our old people are telling us now, the ties we have with the Interior Salish people were such in the past that we have to renew those. We can't forget.
3408. There's an Elder now that speaks of this. She's a professor at a university. She identifies as Salish. She won't say Interior Salish. She won't say Coast Salish. She says, "I am a Salish person."
3409. But historically the Stó:lō people were right down to the mouth of what is now the Fraser. I mentioned the rivers around us. The Stó:lō people have been there since time immemorial. We've talked about different rivers over here; say, the Cowichan River, the Nooksak River, the Skagit River. Our people would say the Nooksak Stó:lō, the Sumac Stó:lō, the Cowichan Stó:lō, Staele (phonetic) Stó:lō. But when we talk of the river that people have come to know as the Fraser there's no other name to it than Stó:lō. To us it's the river of rivers; Stó:lō, period. Our people would say the giver of life. So many things.
3410. We found ancestry remains of our people on the beach of the Stó:lō in an old village where we don't have Reserve land anymore, but we know for a fact we would never, ever have given up that village site. Many of our fishing sites there, Liumkatil (phonetic), that's the village. We took those remains and had ceremony and they were reinterred.
3411. The place was dug up during the building of the railway. When they did that, they desecrated many of our old burial mound sites. So they removed -- our ancestral remains were moved. Funny though some of them didn't get moved to places that we wanted them to.

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Oral Traditional Evidence**

3412. I work with a committee where we're repatriating some of our ancestor remains from museums. Actually, inquiries were made just down the road here at the Royal B.C. Museum to try and bring some of our ancestors home. The process has started.
3413. But before our ancestor remains were reinterred after much debate amongst our Elders -- I'll have to say at the time I was the youngest member of our Repatriation Committee, but that's changed a little bit now. But it was a long debate that we allowed some tests to be done on the ancestor remains.
3414. And one of the findings was that the diet of those people found on the banks of the Stó:lō was about 80 to 85 percent marine.
3415. So the reliance on what I mentioned earlier, that which comes from the water, was very heavy. We had hunters and we had fishermen. We had people that specialized in different aspects of our culture, the medicine people and others.
3416. One of the things, the effects on those stocks, on everything that's in the water, on the wildlife in general, the desecration of our sacred places, the places where we gather.
3417. We've seen the health of our people deteriorate. The onslaught of diabetes amongst our people is such that it's reached what people consider epidemic proportions. Health experts and others have pointed to causes of diabetes and other diseases amongst our people to the change in diet, the lack of access to our traditional foods, the lack of access to that which comes from the waters, and the destruction of that which comes from the waters.
3418. I think the vessel traffic that occurs now on the Salish Sea and at the mouth of the Stó:lō has already done so much damage that I don't know that we can recover from that. I don't know that the wildlife, I don't know that the fish and everything else, (speaking in Native language), as my Elder said, I don't know if that can recover.
3419. There were times when I was a young kid with my late father and my uncles and our relatives at Semiahmoo, we used to dig clams. I so much enjoyed that when I was a kid. My dad would get the crabs from our relatives there. We enjoyed a lot from the Salish Sea, as well as the Stó:lō.
3420. There are people talk about how poor we were growing up. We didn't

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- have the running water. We had the old outhouse outside that you had to be careful there might be a coyote or a bear or something walking around out there. But I was talking with one of my brothers and I said, “You know, when we were kids we had the gardens. Sure we pumped water from the ground but it was pure spring water from our old pumps. Our smoke houses were full. We had the salmon. We had the eulachon.” I talked to him, I said, “Remember walking out and pulling a cucumber out of the garden, going to the smokehouse and pulling off a couple sticks of eulachon, and then taking off to our swimming holes and things like that in the early summer.” I said, “People said we were poor.”
3421. Well, we didn’t have a whole lot as far as money went but we were rich with our resources. We always had deer. My father used to go with our relatives in the interior and hunt the moose. And we had fish all year round, whether it be smoked, whether it be salted, whether it’d be frozen.
3422. As a little kid I went and checked the smokehouse at 5 o’clock in the morning to make sure it was smoldering right. We had stacks of hard, smoked salmon inside that smokehouse between sheets of newspaper. That was our winter food supply.
3423. Our people were a lot healthier then.
3424. As we see the environment around us deteriorating, we also see ourselves deteriorating. And as I talked earlier about our kinship to everything around us, to the lands, to the environment, our people say, “The land is us and we are the land.” And that’s not just a spiritual saying. The practices I talked about earlier, that is very literal.
3425. Our own people look at certain places that they deem as very sacred and they see those places destroyed. That is why our people say that our Elders can feel that. They feel sick when they see those things, and their reasons for that are historic reasons.
3426. I’m glad to be able to be here. I’m not sure -- if I was going to come, I’m not sure that the words I share are going to be meaningful, because some of what I’ve talked of today are very sacred things. As I mentioned earlier, a lot of what we know, we keep amongst ourselves as Halq’eméylem, people of this land. Those words I say, Halq’eméylem, when we speak of the land, tém:éxw.
3427. As I mentioned earlier, I don’t know if I said it, our people say,

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“temexw te ikw'elo. Xolhemet mekw'stam,” this is our land; everything.

3428. Whether you look at it from our Indigenous laws, or as I mentioned, British common law, or international, everybody knows this. And yet we have to go through long, lengthy processes to try and prove this. And it all has to do with the richness of this land as people see the resources, the exploitation of that.
3429. I think we need to change those things around, to have people walk in our moccasins, as we say, have a real look around, know how close we are to everything.
3430. And the healing that is happening amongst our people, I think there's still lots to be done, but we've made some strides of late, I think, that are giving us hope, where the government is willing to recognize who we truly are. And we're hoping to one day take our proper place in our lands, and cogoverning alongside yourselves over our resources and our lands.
3431. The health of our people is dependent on everything around us. The revival of our cultural ways is such that young people are wanting to know more. There was a time, I think, through the residential schools -- and I heard someone talk of this, and I heard some of my Elders were so close to the cultural ways and some, after spending a dozen years in the residential schools; they didn't want anything to do with the cultural ways anymore.
3432. Our people are holding their heads up again and there's a great pride in who we are. You'll see that amongst our young people now.
3433. And I just want to say that I am hoping that the words I've shared here will lead to something; that maybe there is someone that is hearing me, and hopefully maybe someone that will actually listen to what is being said.
3434. And as I've said, I was kind of reluctant to come and speak of the things that I'm speaking of today, and it's very close to me. There's some other stories that are spoken of amongst our people, some of our people say you should write some of these things down, then it would not be oral. The tradition of our peoples is oral.
3435. A lot of what I talked about, some of these stories are passed down in the ceremonies, our winter ceremonies, stories passed down from the Elders. I'm hoping that some of what I shared is accepted by our ancestors, is what I'm

- thinking. I'm hoping that they're okay with me sharing.
3436. There are some things, the cultural practices, that I would like to talk about but we can't. The practices of our people are such that we need the clean environment, we need the clean water, we need the salmon and other fish species, other wildlife for carrying out those ceremonies. They're very sacred winter ceremonies that happen in our longhouses and in other places actually out in wildlife.
3437. I can say to you that there are ceremonies that my brothers and I carry out that are so sacred that our mother doesn't even know. There are sacred ceremonies that our sister and others carry out that, as the sons and the brother, we don't know. Those aren't our practices.
3438. There are cultural practices we have for young men coming into manhood that are being relearned. There are cultural practices we have for young women coming into womanhood that I wouldn't know, but my mother and my grandmother do.
3439. But those practices, we need all our relations to be pure; the wildlife, the water, everything around us.
3440. Our very cultural survival is reliant on this. There are many Elders here in Vancouver Island very instrumental in keeping that culture alive. As my grandfather used to say, "Keep the fire burning." We have to maintain that.
3441. Our brothers and sisters on the Salish Sea, whatever happens on the Stó:lō affects them. And to an extent, what happens on the Salish Sea, certain times of day, comes upriver. And the tidal fluctuations do not stop at the Mission Bridge, they go much beyond that.
3442. The knowledge of our people, of our environment is so much that I can only relay a bit of what I know today what I've been taught.
3443. There are many others, I think, who could speak of different aspects of our cultural ways, of the environment, of the effects that so-called progress has had on our peoples and the environment around us. We would need a lot more than two hours to relay that to anyone. And I would need a lot longer to say what I have said now if I would have maintained the full language of my people, the Halkomelem. Traditionally, as my grandfather I'd seen do many times, he spoke

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- first in our language. He would say it would take him 20 minutes to introduce himself.
3444. I didn't introduce myself totally as our ancestors used to. They talked about the lineage. They spoke of who their parents are. They spoke of who their matrilineal grandparents are, who their paternal grandparents are, and they went on to the great-grandparents and others.
3445. So traditionally, our other Coast Salish relatives would know exactly who they were by the time they finished the introduction. And then he would turn and talk in English to interpret those that are speaking English, to let them know what it is that he had just said.
3446. The language is coming back to our people. There's so much in our language. As I mentioned earlier, the s'iwes, the teachings of our people, shxweli is a word our people talk of that is so -- I haven't really heard the interpretation that I think would be satisfactory to our Elders and to our ancestors. The shxweli is the life in everything around us.
3447. I find it a little funny that scientists are discovering now things that our people had already known. The medicines that our people used, medicines that my grandmother talked about, and then I see a report in the news that scientists have discovered the medicinal qualities of such and such a berry and different things like that. I think, "Well, our grandma told us that a long time ago."
3448. So what I'm saying, if we had got to know each other much better those 150 years ago or more, we'd all be in a lot better place.
3449. I shared with someone that the management of the resources, we never had a problem over the thousand and thousand of years of conservation. We knew the cycles of the animals, of the wildlife, of the fish. We knew where they were going to be, when they were coming back. We didn't have any problems with the management of those, the interaction that we had with those, until we were, "discovered," as some people have said.
3450. I kind of say that in jest, but then the government still maintains this discovery position. I talk about the doctrine of discovery that is still used against our people in the courts, and that's one of the things that really has to change.
3451. And this land was not empty when this guy was lost out in sea and he

ended up landing on the shores.

3452. But I want to thank you. I don't even know how long I've been talking but I just wanted to share a few things with you and that what has already happened to our relations, with what's going on in our waters, if that was to increase, things are going to get worse. And we're looking to work with our neighbours and the respective governments to try and do what we can to make things better.

3453. And again, I thank you for your time. I could almost go on with some other things but I got to be careful as to what I say. It's got to meet the approval of some Elders that I have at home that with such a short time that we're given to prepare for this, there was an Elder I was trying to call to get a hold of and I was not able to confer to see if it was okay there was certain things that I could relay to you folks here today.

3454. But I want to thank you for hearing me and for listening to what it is that I had to contribute. I'm hoping as well that what I have shared is sufficient for relaying the thoughts of our people in the Stó:lō, those who I'm honoured to be here speaking on behalf of today, that I say (speaking in Native language).

3455. O siem.

3456. **MS. WALKER:** If the Panel has any questions, I can ask Chief Silver if he's comfortable answering those today or we could take those away and respond in writing, as well as any questions that Trans Mountain or the other intervenors may have.

3457. **THE CHAIRPERSON:** I'll start with Mr. Duncanson.

3458. **MR. DUNCANSON:** So Chief Silver, we don't have any questions for you, but thank you very much for coming here today and sharing your knowledge with us. It's much appreciated.

3459. Thank you.

3460. **THE CHAIRPERSON:** The Panel doesn't have any questions for you.

3461. And we want to thank you very much for coming, especially since we

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recognize that the timing was not ideal for you to come. So for that, we are very grateful that you kind of made arrangements to come.

3462. So we are thankful for the traditional knowledge that you were willing to share with us, and we will consider what we have heard as we decide on our recommendation in this hearing.

3463. And we will reconvene on Monday, December 3rd at 12:30, Nanaimo, to hear from the TWN.

3464. And we wish you safe travel, and thanks again.

3465. **CHIEF DALTON SILVER:** I just wanted to say again, thank you all. I know it's not an easy task you have. It's not an easy task we have. But I want to thank you again for hearing me,

3466. HÍSWKE.

--- Upon adjourning at 5:17 p.m./L'audience est ajournée à 17h17

November 30, 2018

Our File: 101024-038

VIA PARTICIPATION PORTAL

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2P 5J2

Attention: Sheri Young, Secretary of the Board

Dear Ms. Young,

**Re: Trans Mountain Expansion Project – Reconsideration
Hearing Order MH-052-2018 & File OF-Fac-Oil-T260-2013-03 59
Application of the Tsleil-Waututh Nation (“TWN”) and Notice of Motion (“Motion”)
and Application of Living Oceans Society and Raincoast Conservation Fund
(“Living Oceans”)**

We write in response to the Board’s letter dated November 21, 2018, requesting comments from Intervenor on the above-noted Applications and Motion, both of which were filed on November 16, 2018. We will deal with each individually below.

Living Oceans’ Motion – Request 1

In its Motion, Living Oceans requested that the Board require Trans Mountain to conduct a proper risk assessment of Project-related marine shipping that includes all species listed in the Species at Risk Act, SC 2002, c. 29 (“**SARA**”) that could be affected by Project-related marine shipping. Currently, the Board has identified 35 SARA-listed species that are likely to be affected by Project-related marine shipping.

The Stó:lō Collective supports the Motion in its entirety. The Stó:lō are one of few Indigenous peoples in this country to have an established (non-treaty) right under s. 35 of the Constitution Act, 1982. This established right to fish for food and ceremonial purposes was affirmed by the Supreme Court of Canada in *R. v. Van der Peet*, [1996] 2 SCR 507 after a long-fought court battle. Since then, courts have repeatedly recognized this established right, and the Crown has repeatedly conceded it in legal proceedings. Accordingly, the Stó:lō Collective requires from the proponent a complete risk assessment that identifies effects on all of the SARA-listed species that are likely to be affected by the Project, not only selected species. Until it has such a report, the Stó:lō Collective will not know the extent to which its established right to fish may be affected, directly or indirectly, by the Project.

TWN’s Application – Request 2

In its Application, TWN requested, pursuant to s. 21(1) of the National Energy Board Act, RSC 1985, c. N-7 (the “**Act**”), that the Board review its following determinations of October 12, 2018:

- (a) excluding Project-related marine shipping activities in the Exclusive Economic Zone (“**EEZ**”) from the “designated project” that must be assessed under the Canadian Environmental Assessment Act, 2012 (“**CEAA 2012**”);
 - (b) failing to conduct a de novo hearing because the Panel appointed to undertake this Reconsideration hearing did not hear the original evidence and submissions of the parties; and
 - (c) excluding the need for, and the socio-economic effects of the Project, from the List of Issues
- (the “**Determinations**”).

Specifically, TWN asserted that the Determinations were made in error, and requested they be corrected by:

- (a) including Project-related marine shipping in the EEZ as part of the “designated project” that must be assessed under CEAA 2012;
- (b) requiring a de novo hearing, owing to the addition of new panel members to conduct this Reconsideration hearing; and
- (c) including the need for, and the socio-economic effects of, the Project from the List of Issues.

The Stó:lō Collective supports TWN’s Application in its entirety, and specifically adopts the submissions made by TWN regarding the necessity of a de novo hearing at paragraphs 51-61 of its Application. The Board has repeatedly stated that intervenors are to file new evidence only, as all of the evidence previously filed and heard in the first hearing remains on the record and will be before the panel in this Reconsideration hearing. However, it is truly inconceivable that new panel members could review and consider all of the evidence from the previous hearing, in addition to new evidence filed in this Reconsideration hearing, within the 155-day period imposed by the Governor in Council, let alone render a decision on that evidence. If the same panel members who heard the evidence, procedural fairness necessitates a de novo hearing.

Living Oceans’ Application – Request 3

In its Application, Living Oceans also requested that the Board:

- (a) review its decision to limit the scope of the Reconsideration to Project-related marine shipping between the Westridge Marine Terminal (“**WMT**”) and the 12 nautical-mile territorial sea limit; and
- (b) issue a new decision that includes Project-related marine shipping between WMT and the outer boundary of Canada’s EEZ as part of the “designated project” under the CEAA 2012.

As with TWN’s request regarding the EEZ, the Stó:lō Collective supports the requests made in Living Oceans’ Application.

Accordingly, the Stó:lō Collective asks that the Board exercise its discretion pursuant to subsection 21(1) of the Act to review and vary the Determinations in accordance with the Applications brought by TWN and Living Oceans. The Stó:lō Collective further requests that the Board grant the orders sought in Living Oceans' motion.

Yours truly,

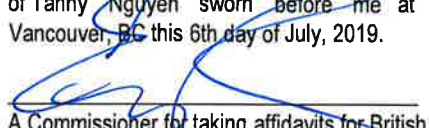
MILLER TITERLE LAW CORPORATION

A handwritten signature in black ink, appearing to read 'Joelle Walker', with a long horizontal flourish extending to the right.

Joelle Walker
joelle@millertiterle.com

cc: Trans Mountain, regulatory@transmountain.com

This is Exhibit GG referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British Columbia

Hearing Order MH-052-2018
OF-Fac-Oil-T260-2013-03 59

NATIONAL ENERGY BOARD

IN THE MATTER OF the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended ("**NEB Act**") and the Regulations made thereunder;

AND IN THE MATTER OF an application by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P. (collectively "**Trans Mountain**") for a Certificate of Public Convenience and Necessity and other related approvals pursuant to Part III of the NEB Act for the Trans Mountain Expansion Project ("**Project**");

AND IN THE MATTER OF the National Energy Board's (the "**Board**") reconsideration of aspects of its OH-001-2014 Report ("**Recommendation Report**") as directed by the Governor in Council ("**GIC**") through Order in Council P.C. 2018-1177 ("**OIC**").

OPENING STATEMENT OF THE INTERVENOR, STÓ:LŌ COLLECTIVE

December 5, 2018

Joelle Walker and Erin Reimer
Counsel for Stó:lō Collective
Miller Titerle Law Corporation
300 – 638 Smith Street
Vancouver, BC V6B 1E3

I. PROCEDURAL HISTORY

1. On September 20, 2018, through the OIC, the GIC referred aspects of the Recommendation Report on the Project back to the Board for reconsideration (“**Reconsideration Hearing**”). The GIC’s direction followed the August 30, 2018 decision of the Federal Court of Appeal (“**FCA Decision**”) that quashed the GIC’s approval of the Project.¹

2. The Stó:lō Collective was an intervenor in the first hearing before the Board to consider the Project (“**First Hearing**”) and on October 5, 2018, was granted intervenor status in the Reconsideration Hearing.²

3. On October 12, 2018, the Board issued Hearing Order MH-052-2018 (“**Hearing Order**”) that served to define the List of Issues, Amended Factors and Scope of the Factors for the Environmental Assessment under the *Canada Environmental Assessment Act, 2012* (“**CEAA 2012**”) process, and the timelines through which the hearing will be carried out.³

4. As directed by the Hearing Order, the purpose of this Opening Statement is to set out the Stó:lō Collective’s initial position on the Reconsideration Hearing and provide a summary of its new evidence.

II. THE STÓ:LŌ COLLECTIVE

5. The Stó:lō Collective continues to represent the interests of Aitchelitz, Soowahlie, Yakweakwioose, Leq’á:mél, Skawahlook, Skowkale, Squiala, Skwah, Sumas, Shxwhà:y Village, Tzeachten, and Scowlitz. Members of these Stó:lō villages or bands are Stó:lō people and Aboriginal peoples within the meaning of the *Constitution Act, 1982* and CEAA 2012. Aitchelitz, Shxwhà:y Village, Skowkale, Skwah, Soowahlie, Squiala, Tzeachten, and Yakweakwioose were also among the successful Indigenous applicants in the FCA Decision.

6. The Stó:lō are “People of the River”, being the Fraser River. Since time immemorial, the members of the Stó:lō Collective have inhabited, controlled and relied on S’ólh Téméxw, their traditional territory in the lower Fraser River watershed. The Stó:lō exercise Aboriginal rights throughout S’ólh Téméxw, including hunting, gathering, trapping and their established (non-treaty) right to fish.⁴

¹ 2018 FCA 153

² Ruling No. 1 to All Parties [NEB Filing ID A94624]

³ Hearing Order MH-052-2018 [NEB Filing ID A94793-3]

⁴ Integrated Cultural Assessment (“**ICA**”) dated March 2014, Introduction pp. 18-19 [NEB Filing ID A3Z4Z2, A3Z4Z3, A3Z4Z4, A3Z4Z5, A4C7K2]; Written Evidence of the Intervenor Stó:lō Collective filed

7. The Stó:lō have a deeply established connection to and reliance on salmon, sturgeon and other aquatic species, all of which are integral elements of their society, culture, economy, politics, and traditions. Water quality was and remains a core factor of this relationship.⁵

III. SUMMARY OF NEW EVIDENCE FILED IN THE RECONSIDERATION HEARING

8. In addition to the evidence filed in the First Hearing, the Stó:lō Collective will be relying on new evidence contained in the Affidavit of Shana Roberts, a project manager and researcher for the Stó:lō Research & Resource Management Centre. This new evidence includes details about:

- (a) the preparation of the ICA which was the Stó:lō Collective's key technical submission during the First Hearing; and
- (b) the Stó:lō Collective's inability to prepare additional technical submissions or update the ICA to more specifically address the environmental effects of Project-related marine shipping due to the timeline set by the GIC for the completion of the Board's reconsideration report ("**Reconsideration Report**").

9. Ms. Robert's evidence relates to the difficulties experienced by the Stó:lō Collective to fully participate in the Reconsideration Hearing due to the expedited schedule and limited capacity of the Stó:lō Collective, which is new evidence for the purposes of this Reconsideration Hearing. A copy of Ms. Roberts' affidavit has been filed separately.

10. In addition, on November 29, 2018, Chief Dalton Silver of the Sumas First Nation provided Oral Traditional Evidence on behalf of the Stó:lō Collective. Chief Silver's Oral Traditional Evidence included sharing of information and stories concerning Stó:lō's longstanding socio-cultural and socio-economic relations and values, and how Stó:lō well-being is linked to and dependent on the integrity of the land, air, water and resources of S'ólh Téméxw.

IV. POSITION ON RECONSIDERATION HEARING

A. The Reconsideration Hearing is Procedurally Unfair

11. At the outset, the Stó:lō Collective objects to the unrealistic timeline set by the GIC for completion of the Reconsideration Hearing and delivery of the Reconsideration Report. The

May 27, 2015 ("NEB Evidence"), Appendix 1 (Cultural Heritage Overview Assessment), [NEB Filing ID A4L7A3]

⁵ ICA section 12 p. 1; NEB Evidence, Appendix 1 (Cultural Heritage Overview Assessment)

GIC's imposition of a time limit of 155 calendar days for the completion of both the Reconsideration Hearing and the Board's submission of the Reconsideration Report to the GIC pursuant to section 53(5) of the NEB Act suggests that it is timing, and not procedural fairness, or the ability to fully canvas and consider the potentially significant adverse impacts of Project-related marine shipping on, *inter alia*, Aboriginal rights and title, the environment and species at risk, that is the most significant factor in the Reconsideration Hearing.

12. The unilaterally imposed and hurried schedule has also impacted on the ability of the Stó:lō Collective to provide Oral Traditional Evidence as outlined in the letters to the Board of October 23 and 30 and November 26, 2018, and to provide update or additional technical evidence focused solely on Project-related marine shipping as described in Ms. Robert's affidavit.⁶

B. The Reconsideration Hearing Cannot be Relied on to Fulfill the Duty to Consult

13. Canada has advised certain intervenors that it will be relying on the Reconsideration Hearing to the extent possible to fulfil its constitutional duty to consult with Indigenous intervenors. In such circumstances, "the Board's process serves the additional purpose of contributing to the extent possible to the constitutional imperative not to approve a project if the duty to consult was not satisfied".⁷ In addition, in Appendix 2 to the Board's letter of October 29, 2018 providing its reasons with respect to, *inter alia*, the List of Issues and the Amended Factors, the Board stated that it had amended the List of Issues to include Issue No. 6 – the potential impacts of Project-related marine shipping on Indigenous interests – to "more clearly reflect that the Board must carry out its responsibilities in a manner consistent with the *Constitution Act, 1982*, including subsection 35(1)".⁸ The Board went on to say that it will consider whether there has been adequate consultation and accommodation for the purposes of the Reconsideration Hearing consistent with the recognition of the rights recognized and affirmed in section 35.

14. It is the position of the Stó:lō Collective that the Reconsideration Hearing process as structured cannot fulfill this purpose as it does not in substance provide for an appropriate level of meaningful consultation, in particular, in the circumstances where Project-related marine shipping could have adverse impacts on the Stó:lō's constitutionally protected right to fish. The

⁶ Notice of Intent and Objection re Oral Traditional Evidence [NEB Filing ID A95070], Objection to Locations and Limitations re OTE Hearings [NEB Filing ID A95245], and Letter to NEB re Withdrawal from OTE Hearing [NEB Filing ID A96126], respectively

⁷ FCA Decision at para. 526

⁸ Appendix 2 to Letter from Board dated October 29, 2018 at p. 7 [NEB Filing ID A95187-5]

Stó:lō Collective has repeatedly raised concerns over the potential impacts with Canada and Canada has repeatedly failed to grapple with them.⁹ Further, unlike following the First Hearing where the consultation process expressly contemplated a Phase III in which outstanding concerns were supposed to be addressed by Canada following the release of the Recommendation Report, to date, Canada has not advised of further avenues for meaningful consultation and accommodation in order to fulfill its duty prior to any reconsideration by the GIC of approval of the Project.

C. Significance of Environmental Effects of Project-related Marine Shipping

15. Section 5(c)(i) of CEAA 2012 provides that environmental effects to be taken into account in relation to a designated project are, with respect to Aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on:

- health and socio-economic conditions;
- physical and cultural heritage;
- the current use of lands and resources for traditional purposes; or
- any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

16. Given the Stó:lō Collective's cultural, spiritual, physical and psychological interconnection to S'ólh Téméxw, any impact from Project-related marine shipping could have environmental effects on all of the areas identified in section 5(c)(i) of CEAA 2012, posing a significant threat to the cultural integrity of the Stó:lō. To date, neither Canada nor Trans Mountain have put forward sufficient measures to mitigate these risks.

All of which is respectfully submitted this 5th day of December, 2018.



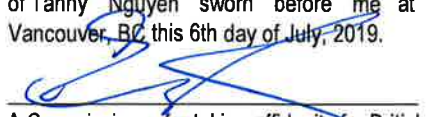
Joelle Walker
Counsel for Stó:lō Collective



Erin Reimer
Counsel for Stó:lō Collective

⁹ See for example FCA Decision at paras. 712, 723 and 726-7

This is Exhibit HH referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British Columbia

Hearing Order MH-052-2018

OF-Fac-Oil-T260-2013-03 59

NATIONAL ENERGY BOARD

IN THE MATTER OF the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended and the Regulations made thereunder;

AND IN THE MATTER OF an application by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P. for a Certificate of Public Convenience and Necessity and other related approvals pursuant to Part III of the NEB Act for the Trans Mountain Expansion Project ("**Project**");

AND IN THE MATTER OF the National Energy Board's (the "**Board**") reconsideration of aspects of its OH-001-2014 Report ("**Recommendation Report**") as directed by the Governor in Council ("**GIC**") through Order in Council P.C. 2018-1177 ("**OIC**").

WRITTEN EVIDENCE OF THE INTERVENOR, STÓ:LŌ COLLECTIVE

December 5, 2018

Joelle Walker and Erin Reimer
Counsel for Stó:lō Collective
Miller Titerle Law Corporation
300 – 638 Smith Street
Vancouver, BC V6B 1E3

I. INTRODUCTION

1. On September 20, 2018, through the OIC, the GIC referred aspects of the Recommendation Report on the Project back to the Board for reconsideration (“**Reconsideration Hearing**”). The GIC’s direction followed the August 30, 2018 decision of the Federal Court of Appeal that quashed the GIC’s approval of the Project.¹

2. The Stó:lō Collective was an intervenor in the first hearing before the Board to consider the Project (“**First Hearing**”) and on October 5, 2018, was granted intervenor status in the Reconsideration Hearing.²

3. On October 12, 2018, the Board issued Hearing Order MH-052-2018 (“**Hearing Order**”) that served to define the List of Issues, Amended Factors and Scope of the Factors for the Environmental Assessment under the *Canada Environmental Assessment Act, 2012* process, and the timelines through which the hearing will be carried out.³

4. As directed by the Hearing Order, this new written evidence of the Stó:lō Collective relates solely to issues identified in the List of Issues and is not duplicative of evidence filed in the First Hearing.

II. SUMMARY OF NEW EVIDENCE FILED IN THE RECONSIDERATION HEARING

5. In addition to the evidence filed in the First Hearing, the Stó:lō Collective will be relying on new evidence contained in the Affidavit of Shana Roberts, a project manager and researcher for the Stó:lō Research & Resource Management Centre, which is attached as Appendix I hereto. This new evidence includes details about:

- (a) the preparation of the Integrated Cultural Assessment (“**ICA**”)⁴ which was the Stó:lō Collective’s key technical submission during the First Hearing; and
- (b) the Stó:lō Collective’s inability to prepare additional technical submissions or update the ICA to more specifically address the environmental effects of Project-related marine shipping due to the timeline set by the GIC for the completion of the Board’s reconsideration report.

¹ 2018 FCA 153

² Ruling No. 1 to All Parties [NEB Filing ID A94624]

³ Hearing Order MH-052-2018 [NEB Filing ID A94793-3]

⁴ [NEB Filing ID A3Z4Z2, A3Z4Z3, A3Z4Z4, A3Z4Z5, A4C7K2]

6. Ms. Robert's evidence relates to the difficulties experienced by the Stó:lō Collective to fully participate in the Reconsideration Hearing due to the expedited schedule and limited capacity of the Stó:lō Collective, which is new evidence for the purposes of this Reconsideration Hearing.

All of which is respectfully submitted this 5th day of December, 2018.



Joelle Walker
Counsel for Stó:lō Collective



Erin Reimer
Counsel for Stó:lō Collective

Appendix I

Affidavit of Shana Roberts sworn December 5, 2018

NATIONAL ENERGY BOARD

IN THE MATTER OF the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended ("**NEB Act**") and the Regulations made thereunder;

AND IN THE MATTER OF an application by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P. (collectively "**Trans Mountain**") for a Certificate of Public Convenience and Necessity and other related approvals pursuant to Part III of the NEB Act for the Trans Mountain Expansion Project ("**Project**");

AND IN THE MATTER OF the National Energy Board's ("**Board**") reconsideration of aspects of its OH-001-2014 Report ("**Reconsideration Hearing**") as directed by the Governor in Council ("**GIC**") through Order in Council P.C. 2018-1177 ("**OIC**").

AFFIDAVIT #1 OF SHANA ROBERTS

I, Shana Roberts, Project Manager and Researcher, with an address for service for these proceedings c/o Miller Titerle Law Corporation, 300 – 638 Smithe Street, Vancouver, British Columbia V6B 1E3, AFFIRM THAT:

1. I am the Project Manager and Researcher for the Stó:lō Research & Resource Management Centre ("**Stó:lō RRM**"), and as such I have personal knowledge of the facts and matters hereinafter deposed to, save and except where the same are stated to be based on information and belief and where so stated I verily believe the same to be true.
2. I swear this affidavit on behalf of the Stó:lō Collective.
3. The Stó:lō Collective is a group of communities who share common interests and territory in the lower Fraser River watershed. It was granted intervenor status in the initial Board hearing on the Project ("**First Hearing**"). For the purposes of this Reconsideration Hearing, the Stó:lō Collective represents the interests of Aitchelitz, Soowahlie, Yakwekwioose, Leq'á:mél, Skawahlook, Skowkale, Squiala, Skwah, Sumas, Shxwhà:y Village, Tzeachten, and Scowlitz.
4. The Stó:lō RRM offers a range of professional and technical services to Stó:lō communities, including those related to:
 - (a) archeological resource management;
 - (b) archives;

- (c) cultural interpretation and events;
- (d) cultural resource management;
- (e) curation;
- (f) educational tours;
- (g) environmental resource management;
- (h) fisheries management;
- (i) geographic information systems;
- (j) lands management; and
- (k) research.

Background

5. I received a Master's Degree in environmental design from the University of Calgary in or about 2009 and a Bachelor of Arts from the University of the Fraser Valley (formerly the University College of the Fraser Valley) in or about 2005.
6. I have worked with Stó:lō communities and entities since 2013 as follows:
 - (a) from about 2013 until about 2014, I was a Research Manager for Ts'elxwéyeqw Tribe Management Ltd. ("**TTML**"); and
 - (b) since in or about 2014, I have worked for the Stó:lō RRMC as a Project Manager and Researcher.

(TTML and Stó:lō RRMC, together, the "**Stó:lō Entities**").
7. My work with the Stó:lō Entities has included the following responsibilities:
 - (a) reviewing technical information and evidence regarding the Project for information-sharing within the communities;
 - (b) assisting with environmental impact assessments;
 - (c) reviewing proposed permit conditions for the Project;
 - (d) preparing climate change adaptation policies;
 - (e) navigating the regulatory processes of the First Hearing, such as preparing, reviewing, and responding to information requests, Notice of Motions, letters, and procedural directions, as applicable;
 - (f) providing, hosting and conducting workshops, council meetings, and meetings between technical working groups, political working groups, other First Nations organizations and Trans Mountain;
 - (g) collecting environmental and economic development information related to the Project;

- (h) assisting at main table meetings with Federal and Provincial governments;
- (i) coordinating tripartite and working group meetings and taking minutes thereof;
- (j) hiring necessary consultants; and
- (k) researching and reviewing information relating to s. 35 rights in Canada, other treaty agreements in principal and final agreements, and specific case studies and law.

The Project

8. Since in or about 2014, I have worked with Trans Mountain on the Project, to the extent that Stó:lō communities are affected, to communicate and advocate for Stó:lō interests.
9. The Stó:lō communities traditional language is Halq'eméylem. "S'ólh Téméxw" means "our world" or "our land" in Halq'eméylem and refers to Stó:lō traditional territory. One of my main responsibilities was and continues to be ensuring that Stó:lō's s. 35 Aboriginal rights are included in discussions relating to Project-based effects, direct or indirect, on S'ólh Téméxw.
10. During the First Hearing, in or about March 2014, the Stó:lō Collective provided Trans Mountain with its key technical submission, the Integrated Cultural Assessment ("ICA"), which was prepared by TTML, Stó:lō RRM, and Human Environment Group. I assisted in preparing the ICA for the Stó:lō Collective. The ICA was intended to form the basis for constructive and meaningful consultation with the Crown. It identifies potential impacts within S'ólh Téméxw that could be caused by the Project, such as impacts on Stó:lō traditional activities, culture, lands, and resources.
11. In developing the ICA, we worked with Stó:lō community members to identify and review:
 - (a) historic and contemporary Stó:lō uses of S'ólh Téméxw;
 - (b) geotechnical data and Indigenous knowledge relating to natural hazards in the S'ólh Téméxw;
 - (c) hydrologic data and Indigenous knowledge relating to water and waterways in the S'ólh Téméxw; and
 - (d) ground-truthing, data and Indigenous knowledge relating to fish and fish habitat in the S'ólh Téméxw.
12. The ICA was based on surveys, interviews, meetings, and workshops held with over 200 community members. It looked at eleven traditional activities, many of which represent the exercise of the Stó:lō's Aboriginal rights, to determine if these activities would be impacted by the Project and rated those impacts as high, medium or low. Seven activities (fishing, spiritual, manufacture of cultural items, travel corridors, governance, economic activities and community programs and services) were identified as potentially highly impacted. Four activities (gathering, settlement, hunting and trapping, and inter-nation gathering) were identified as potentially of medium impact.

13. The ICA concluded that the Project poses a significant risk and represents a significant threat to the cultural integrity and survival of core relationships at the heart of Stó:lō worldview, identity and well-being. It warned that if the Project were approved without deep, meaningful consultation and accommodation of Stó:lō land management goals, rights and title, and decision-making, the Project would negatively impact Stó:lō governance.
14. The ICA also concluded that fishing and spiritual activities – two critically important rights – would have “[s]ignificant post-mitigation adverse impacts”. It concluded that the Project represented a significant threat to the cultural integrity of the Stó:lō, and, as planned, “would significantly jeopardize the survival of the unique Indigenous lifeway of the Stó:lō and unjustifiably infringe upon Stó:lō’s Aboriginal rights, protected under s. 35 of the Canadian *Constitution*.”
15. Accordingly, the ICA included 89 recommendations (“**89 Recommendations**”) which, if implemented by Trans Mountain or the Crown, would mitigate the Project’s adverse effects on Stó:lō communities. The 89 Recommendations included measures to mitigate the Project’s impacts on the Stó:lō’s governance and established fishing rights, including the impact of oil spills into or near the Fraser River.
16. The ICA took approximately 12 months to complete.
17. The Board did not adopt any of the 89 Recommendations in its terms and conditions for the Project, nor did Trans Mountain provide a substantive response to the 89 Recommendations during the First Hearing.

The Reconsideration Hearing

18. The Stó:lō Collective has faced significant hardship participating substantively in this Reconsideration Hearing due to the 155-day timeline imposed by the GIC in the OIC.
19. Some examples of the Stó:lō Collective’s inability to participate substantively are:
 - (a) the Stó:lō Collective cannot prepare another integrated cultural assessment of, or update the ICA to include, Project-related marine shipping, as this would likely require months of information-gathering;
 - (b) there is limited time and capacity to engage with specialists and experts regarding the effects of Project-related marine shipping on marine ecosystems, tidal waters, and foreshore, all of which would require modelling and other intricate scientific processes;
 - (c) while there is some basic knowledge of hydrology and water-bitumen interactions available to the Stó:lō Collective, there remains limited understanding of the fate of diluted bitumen as it relates to the foreshore, brackish and fresh-water estuaries along the Fraser River, as well as its effects on the unique system of the Fraser River, such as its wandering gravel bed, meandering river, and the ancient streams that are tributaries therein. Amassing this knowledge requires new studies, which would take time and resources, both of which are not available to the Stó:lō Collective in the present circumstances;
 - (d) the Stó:lō Collective could not review and respond adequately to the evidence filed by Canada and Trans Mountain in the Reconsideration Hearing, as,

collectively, Canada and Trans Mountain filed over 8,000 pages of evidence to which the Stó:lō Collective initially only had three weeks to respond; and

- (e) the Stó:lō Collective does not employ a wildlife or marine biologist who could have researched and prepared a report, from either an Indigenous or Western perspective, of the species that could be affected by Project-related marine shipping, which, combined with the extremely short timelines imposed by the Board and GIC has forced the Stó:lō Collective to rely on what has been filed by Trans Mountain and Canada.
20. Consequently, the extremely short timeline does not allow for a holistic approach to the review of the impacts of Project-related marine shipping, which the Stó:lō Collective believes to be missing from Trans Mountain and Canada's filed evidence. The Stó:lō Collective worries that there will be impacts, including socio-economic, health and wellbeing, and spiritual, that are not being fully recognized.

AFFIRMED BEFORE ME

at Chilliwack, British Columbia,
on December 5, 2018


A commissioner for taking affidavits
for British Columbia

Dan Fogarty, Articled Student
Miller Titerle Law Corporation
300 – 638 Smithe Street
Vancouver, BC V6B 1E3


SHANA ROBERTS

National Energy
Board



Office national
de l'énergie

This is Exhibit II referred to in the Affidavit of
Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
7 December 2018

Mr. Shawn H.T. Denstedt
Osler, Hoskin & Harcourt LLP
Suite 2500, 450 – 1st Street SW
Calgary, AB T2P 5H1
Email regulatory@transmountain.com

Dear Mr. Denstedt:

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018**

**Ruling No. 18 – Trans Mountain notice of motion for an extension to reply evidence
deadline in relation to specific evidence**

On 6 December 2018, Trans Mountain filed a notice of motion requesting an extension to the
deadline to file any reply evidence it may have in relation to:

- i) any evidence from Tsleil-Waututh Nation (TWN) that the Board may decide to treat
confidentially (in relation to TWN's 4 December 2018 request for such treatment);
- ii) any evidence from Pacheedaht First Nation (Pacheedaht) that the Board may decide to treat
confidentially (in relation to Pacheedaht's 5 December 2018 request for such treatment);
and
- iii) any evidence of the Indigenous Caucus for the Trans Mountain Indigenous Advisory and
Monitoring Committee (IAMC) that was not successfully uploaded to the public registry
by the 5 December 2018 deadline, due to filing issues.

In its notice of motion, Trans Mountain notes that it had not yet received the unredacted
information for which TWN and Pacheedaht have sought confidential treatment, nor had it
received the IAMC's documents for which filing issues prevented its uploading to the public
registry.

Trans Mountain also notes that the current deadline for it to file reply evidence is
11 December 2018, which is four business days after the deadline for intervenors' evidence. It
asks for six days to respond to the specific evidence described above, once it receives it (in
relation to any confidential evidence) or once it appears on the public registry (in relation to the
IAMC's documents).

.../2

Suite 210, 517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

517, Dixième Avenue S.-O., bureau 210
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Canada

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Facsimile/Télocopieur : 403-292-5503
www.neb-one.gc.ca
Telephone/Téléphone : 1-800-899-1285
Facsimile/Télocopieur : 1-877-288-8803

On 6 December 2018, the IAMC filed a [letter](#) in response to Trans Mountain's notice of motion. It notes that two of the filings it attempted to upload showed in its filing receipt, but do not appear online. The IAMC spoke to a Board Process Advisor, but the issue was not resolved by the evidence deadline. The IAMC notes that its counsel spoke with Trans Mountain's counsel and it was agreed to share the documents electronically, which was done at 1:37 pm Mountain time on 6 December 2018. The IAMC submits that Trans Mountain did not have access to the two subject documents for 21 hours after the intervenor evidence deadline. Therefore, the IAMC suggests an extension of one day for Trans Mountain's reply evidence.

Views of the Board

The Board notes that, on 6 December 2018, it issued [Ruling No. 17](#), granting TWN's request and advising the Parties how to proceed with sharing the subject information. The Board has not yet ruled on Pacheedaht's request. The Board confirms that the IAMC's documents were successfully uploaded on 6 December 2018.

The Board is of the view that, as a matter of procedural fairness, Trans Mountain should be afforded an appropriate amount of time to review the evidence it receives prior to being required to file any reply evidence particular to that information.

The Board has decided to provide Trans Mountain with four days to file reply evidence in relation to TWN's confidential evidence, once it receives the unredacted information. Similarly, if the Board grants Pacheedaht's request, Trans Mountain will have four days to file reply evidence in relation to Pacheedaht's confidential evidence, once it receives the unredacted information. In either case, the Board cannot indicate the specific deadlines prior to confirmation that Trans Mountain has received any unredacted information.

Due to the expedited nature of this Reconsideration, the Board encourages the efficient sharing of the unredacted information, in accordance with terms agreeable to the relevant Parties.

In the case of the IAMC's documents, Trans Mountain received the information one day late, so the deadline of **11 December 2018** remains unchanged.

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

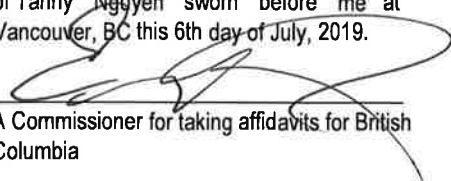
Original signed by L. George for

Sheri Young
Secretary of the Board

Attachment

c.c. All Parties

This is Exhibit JJ referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British
Columbia

Hearing Order MH-052-2018
File OF-Fac-Oil-T260-2013-03-59

NATIONAL ENERGY BOARD

IN THE MATTER OF the National Energy Board Act, R.S.C. 1985,
c. N-7, as amended ("**NEB Act**") and the Regulations made
thereunder;

AND IN THE MATTER OF an application by Trans Mountain
Pipeline ULC as General Partner of Trans Mountain Pipeline L.P.
(collectively "**Trans Mountain**") for a Certificate of Public
Convenience and Necessity and other related approvals pursuant
to Part III of the NEB Act for the Trans Mountain Expansion Project
("**Project**");

AND IN THE MATTER OF the National Energy Board's (the
"**Board**") reconsideration of aspects of its OH-001-2014 Report as
directed by the Governor in Council through Order in Council P.C.
2018-1177.

STÓ:LŌ COLLECTIVE

INFORMATION REQUEST #1 TO GOVERNMENT OF CANADA

December 17, 2018

Joelle Walker and Erin Reimer
Counsel for Stó:lō Collective

Miller Titerle Law Corporation
300 – 638 Smith Street
Vancouver, BC V6B 1E3

1. Impact Assessment and Exercised Established or Asserted Fishing Rights and/or Assertion of a Range of other Aboriginal Rights in the Vicinity of the WMT.

Reference: A95292-17 Annex 04.C.01 – A6J6R4 - Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Project including Relevant Annexes (the “**CAR**”)

Preamble: As outlined in the CAR, there are specific Stó:lō communities identified as having rights in the Salish Sea near the vicinity of the Westridge Marine Terminal (the “**WMT**”). The CAR concludes that, with the exception of effects on the Southern Resident Killer Whale population, the magnitude of effects of Project-related marine vessel traffic on traditional marine resource uses, activities, and sites is low.

The CAR describes, amongst other things, the following findings at page 84:

- Despite Burrard Inlet being a heavily urbanized environment, Aboriginal groups have managed to sustain minimal levels of harvesting while pursuing re-establishment of certain species, and remediation of polluted areas.
- The Crown understands that there are five Aboriginal group entities that either exercise established or asserted fishing rights and/or assert a range of other Aboriginal rights in the vicinity of the WMT: Tsleil-Waututh Nation, Squamish Nation, Musqueam Indian Band, First Nations of the Hul’qumi’num Treaty Group, and four Stó:lō groups (Shxw’ōw’hámél, Soowahlie, Skawahlook, and Seabird Island).
- Regarding the impacts of Project-related marine shipping, marine travel supporting potential marine harvesting in the vicinity of the WMT has been limited for quite some time, but has the potential to be further limited given increased traffic in the waters surrounding the WMT. The Vancouver Fraser Port Authority has been slowly making changes to its navigation channels and anchorages to align with modern demands; however, the Crown notes that the Project would result in more Project-related marine shipping in eastern Burrard Inlet and potential conflicts with Aboriginal groups.
- In general, the Crown considers there is a low possibility of navigational impacts affecting access to marine harvesting activities. Vessel traffic from the WMT will utilize existing deep-sea navigational channels and constraints for vessel interactions with these channels will remain unchanged. The Crown notes that Project-related impacts on navigation and cultural practices – specifically in eastern Burrard Inlet in proximity to the WMT – will exist for the lifetime of the Project, and will occur daily. While navigation is already significantly affected by

deep-sea vessel traffic in Burrard Inlet, the existing four anchorages south and east of Cates Park will be occupied consistently if terminal operations commence, which is not the case currently.

Request: We request the following:

- (a) Please provide a rationale for the conclusion that only those four Stó:lō groups have asserted or exercised rights within Burrard Inlet and the Salish Sea.
- (b) Please provide a foundation for the conclusion that increased marine traffic within the Salish Sea and increased anchoring outside of the Burrard inlet will have a low impact on Aboriginal rights.

2. The Fate of Diluted Bitumen

Reference:

- A95292-42 Annex 06.D.19 – A6J6T9 – A study of the 46-year-old Arrow oil spill: Persistence of oil residues and variability in oil contamination along Chedabucto Bay, Nova Scotia, Canada
- A95292-43 Annex 06.D.20 – A6I6U0 – Occurrence, source and ecological assessment of petroleum related hydrocarbons in intertidal marine sediments of the Bay of Fundy, New Brunswick, Canada
- A95292-48 Annex 06.D.24 – A6J6U5 – Flow Behaviour of Oil: What Makes Diluted Bitumen Different?
- A95299-3 Annex 06.D.29 – A6J6Y2 – Meso-scale studies on the penetration and retention of diluted bitumen in different types of shorelines, Northern British Columbia, Canada
- A95299-15 Annex 6.D.41 – A6J6Z7 – Fate of photodegraded dilbit in Seawater. Use of Cold Lake Blend and Access Western Blend with natural solar light in Ottawa, Canada over winter and summer seasons to assess the impact of sunlight on the chemical fate of dilbit
- A95299-23 Annex 07.G.06 – A6J7A5 – An estimate of the sinking rate of spilled diluted bitumen in sediment laden coastal waters

Preamble: All of the above-referenced documents discuss the fate of diluted bitumen through a variety of different lenses and a variety of different geographical locations. All of these locations are outside the geographical bounds and the watershed boundaries of the Fraser River Watershed and the Burrard Inlet and as such there is reason to question the validity of using such scientific studies

that investigate the fate of diluted bitumen in the discourse of the Salish Sea within the area defined through the Reconsideration Hearing. The environmental conditions contained in the methodology of these studies do not investigate the specific conditions of the Pacific Ocean, particularly the Strait of Juan de Fuca.

Request: We request answers from the Department of Fisheries and Oceans and the Department of Environment and Climate Change to the following questions:

- (a) Do the above-referenced case studies provide an accurate review of hydrocarbon in intertidal marine sediments given the difference in water temperatures, salinity and intertidal areas within the Pacific (especially the Fraser River)?
- (b) Are the above-referenced case studies an accurate review of weathering, degradation and natural attenuation given the differences in water temperatures, salinity, atmospheric pressures, temperatures, and storm confluences?
- (c) Given that the area of the Strait of Juan de Fuca, also known as the insular belt, is made up of metamorphic grades of rock, is it appropriate to compare the bedrock platforms overlaid with sedimentary rock of northern British Columbia with that of the insular belt metamorphic rocks?
- (d) Given that the Strait of Juan de Fuca has variable density stratification and temperature compared to the Douglas Channel in northern British Columbia, can the study located at Annex 07.G.06 accurately predict the fate of diluted bitumen within the Strait of Juan de Fuca or the Salish Sea?
- (e) Is it appropriate to use in this Reconsideration Hearing the findings of studies that do not investigate the fate of diluted bitumen in similar scenarios and similar conditions of the Pacific Ocean/Salish Sea and the Strait of Juan de Fuca?

3. Duty to Consult

Reference: A95463-2 - Notice of Motion of Squamish Nation - A6J9Z9

Preamble: Based on a review of filings made to date in the Reconsideration Hearing, it appears Canada has advised certain intervenors that it will be relying on the Reconsideration Hearing to the extent possible to fulfil its constitutional duty to consult with Indigenous intervenors. In such circumstances, “the Board’s process serves the additional purpose of contributing to the extent possible to the constitutional imperative not to approve a project if the duty to consult was not

satisfied”. At page 4 of Squamish Nation’s Notice of Motion¹ dated November 5, 2018, for example, Squamish references a letter dated October 5, 2018 that it received from the Minister of Natural Resources, Amarjeet Sohi which stated, among other things, that Canada intends to rely on the Board’s hearing process to the extent possible to fulfill its duty to consult in connection with the Reconsideration.

The Supreme Court of Canada has confirmed that the Crown may rely on steps taken by an administrative body to fulfil the duty to consult, in part or in full, so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances.² However, where the Crown intends to rely on a regulatory process to discharge the duty to consult, it should be made clear to the affected Indigenous groups that the Crown is so relying.³ In addition, if the Board does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval.⁴

Request:

- (a) Is the Crown in fact relying, to the extent possible, on the Board’s hearing process to fulfill its duty to consult in connection with the Reconsideration?
- (b) What are the Crown’s plans for fulfilling its duty to consult should the Board’s hearing process fall short of satisfying the Crown’s constitutional obligations?
- (c) Is Canada relying, to the extent possible, on the strength of claim assessments conducted in the first hearing on the TMEP, or is it conducting new assessments?
- (d) If Canada is conducting new assessments:
 - (i) what is Canada’s assessment of Stó:lō’s strength of claim in relation to Aboriginal title and rights?
 - (ii) how did Canada identify Stó:lō’s specific Aboriginal rights?

¹ NEB Filing ID A95463-2.

² *Clyde River v. Petroleum Geo-Services Inc.*, 2017 SCC 40 [“**Clyde River**”] at para. 30; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 [“**Chippewas**”] at para 32.

³ *Chippewas*, para 44; *Clyde River*, para 23.

⁴ *Chippewas*, para. 32.

- (iii) what methodology is Canada using to assess potential adverse impacts to Stó:lō's rights and interests from Project-related marine shipping?
 - (iv) what is Canada's assessment of the potential adverse impacts to Stó:lō's rights and interests from Project-related marine shipping, including section 35 rights to fish, hunt and gather?
- (b) What procedural aspects of consultation with First Nations has the Crown delegated to Trans Mountain in this Reconsideration?

This is Exhibit KK referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.

National Energy
Board



Office national
de l'énergie

A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
27 December 2018

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Dear Mr. Smith, Mr. Seaman, and Ms. Tuytel:

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report (Report) as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018
Ruling No. 22 – Applications for review from Living Oceans Society (Living Oceans)
and Raincoast Conservation Foundation (Raincoast), and Tsleil-Waututh Nation
(TWN)**

A. BACKGROUND

Upon receipt of Order in Council P.C. 2018-1177 dated 20 September 2018 (the OIC), the Board sought comments on a number of matters, including:

- 1) whether, “on a principled basis,” Project-related marine shipping should be included in the “designated project” to be assessed under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012);
- 2) the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012, and the draft List of Issues to be considered in the Reconsideration hearing; and
- 3) the design of the hearing process to be used for the Reconsideration.

The Board received numerous comments on these general matters, including comments from TWN and Living Oceans/Raincoast.

.../2

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In its 5 October 2018 [letter](#), the Board sought additional, focused comments from the Parties on the following limited issue:

Assuming Project-related marine shipping is included in the “designated project” to be assessed under the CEAA 2012, should the designated project be defined as including:

- a) Project-related marine shipping between the Westridge Marine Terminal (WMT) and the territorial sea limit; *or*
- b) Project-related marine shipping between the Westridge Marine Terminal and the outer boundary of Canada’s economic exclusion zone (EEZ)?

Many Parties provided comment on this spatial limit issue, including [TWN](#) and [Living Oceans/Raincoast](#).

On 12 October 2018, the Board issued various [decisions](#) regarding, amongst other things, the inclusion of Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit in the “designated project” to be assessed under the CEAA 2012, the confirmed List of Issues, and design of the hearing process. On 29 October 2018, the Board issued [reasons](#) for its decision regarding the spatial limit for its assessment of Project-related marine shipping (Spatial Limit Decision),¹ as well as [reasons](#) for its conclusions on the List of Issues and the process to be used for the Reconsideration hearing (Process Design Decision).²

On 16 November 2018, the Board received a [review application](#) from TWN, in which it requests that the Board revisit the conclusions made as part of, or flowing from, [Hearing Order MH-052-2018](#), including that the Board:

- a) determine that Project-related marine shipping in the EEZ forms part of the “designated project” to be assessed under the CEAA 2012 in this Reconsideration hearing;
- b) determine that a *de novo* hearing is required in view of the newly-reconstituted Panel Members involved in this Reconsideration hearing not hearing the original evidence and submissions of the Parties (the **De Novo Hearing Review – addressed in Part E of this ruling**); and
- c) determine that the need for and the socio-economic effects of the Project must be included in the List of Issues (the **Need for and Socio-Economic Effects Review – addressed in Part F of this ruling**).

On 16 November 2018, Living Oceans/Raincoast jointly filed their own [review application](#), requesting that the Board:

- a) review its decision to limit the scope of the Reconsideration to Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit; and
- b) issue a new decision that includes Project-related marine shipping between the WMT and the outer boundary of Canada’s EEZ as part of the “designated project” under the CEAA 2012.

The relief sought in Part a) of TWN’s request is essentially the same as Living Oceans/Raincoast’s request. Accordingly, these requests will collectively be referred to as the **Spatial Limits Review (addressed in Part D of this ruling)**.

¹ Board, Spatial Limit Decision (29 October 2018) ([A6J4X5](#)).

² Board, Process Design Decision (29 October 2018) ([A6J4X7](#)).

On 21 November 2018, the Board established a [comment period](#) for all Parties with respect to the review applications. With consideration to the expedited nature of the Reconsideration, the Board decided to receive submissions on both the threshold question and the merits at the same time.

TWN filed [supplemental information](#) on the threshold question and merits on 27 November 2018. Living Oceans/Raincoast did not file supplemental information. A number of intervenors filed comments in support of the review applications. The [Government of Alberta](#) (Alberta) and [Trans Mountain](#) provided submissions opposing the review applications. On 6 December 2018, [TWN](#), [Living Oceans](#), and [Raincoast](#) provided reply comments.

B. GENERAL PRINCIPLES ON AN APPLICATION FOR REVIEW

Subsection 21(1) of the *National Energy Board Act* (NEB Act) provides that the Board may review, vary, or rescind any decision made by it. Part III of the *National Energy Board Rules of Practice and Procedure, 1995* (Rules) describes the procedures and grounds for a review. There is no automatic right of review of a Board decision. The Board's power to review its decisions is discretionary, and must be exercised sparingly and with caution.³

The Board considers applications for review through a two-step process. In the first step, also known as Phase I, the Board considers the threshold question of whether the applicant has raised a doubt as to the correctness of the Board's decision. The grounds that the Board will consider in deciding whether the applicant has raised a doubt as to the correctness of the decision include, but are not limited to, any error of law or jurisdiction, changed circumstances or new facts that have arisen since the close of the original proceeding, or facts that were not placed in evidence in the original proceeding and that were then discoverable by reasonable diligence.⁴ The Board agrees with the submissions made by TWN in reply that these grounds are disjunctive.

If the Board, in its discretion, finds that the threshold for Phase I is met, then the Board will proceed to the second step (or Phase II) to review the decision on the merits.

C. DISPOSITION

The Board has considered the submissions filed in relation to the review applications and has decided the following:

- The Spatial Limits Review is denied on the merits.
- The De Novo Hearing Review is denied on the threshold question. In the event the Board erred in determining the threshold question, the merits of the review have been considered. The De Novo Hearing Review is also denied on the merits.
- The Need for and Socio-Economic Effects Review is denied on the threshold question.

Accordingly, TWN and Living Oceans/Raincoast's applications for review are dismissed.

The Board's full reasons are below. The Board has carefully considered all submissions filed in relation to these review applications, but has focused its reasons on those portions of the submissions which the Board has found to be most relevant to whether the applicants have raised

³ Board Filing Manual at 50-2; Board Ruling No. 3, NOVA Gas Transmission Ltd. Application for the Sundre Crossover Project, Hearing Order GH-002-2017 – Applications to Review Ruling No. 2, Amending Order AO-001-GH-002-2017 (27 October 2017) at 3 ([A87308](#)).

⁴ Rules, para 44(2)(b).

a doubt as to the correctness of the decisions, or their merits, as appropriate. The Board's reasons must be read as a whole to ensure that individual elements are not taken out of context.

D. SPATIAL LIMIT REVIEW

1. Executive summary of the Spatial Limit Review

The Board considered the new facts and submissions raised in the reviews regarding statutory interpretation, the Federal Court of Appeal's decision in *Tsleil-Waututh Nation*,⁵ the Governor in Council's (GIC) direction in the OIC, the Canadian Environmental Assessment Agency's (CEA Agency) Guide to Preparing a Description of a Designated Project under the CEAA 2012⁶ (CEA Agency Guidance), and environmental assessment (EA) considerations. The Board examined new evidence regarding Trans Mountain's proposal for voluntary route adjustments in relation to a special Deviation Point within the EEZ. The Board finds that this information does not materially change its original findings regarding the lack of certain or established routes within the EEZ and the extent of Trans Mountain's ability to direct and influence shipping in the EEZ.

Many of the arguments raised in the reviews are similar or identical to those from the comment process for the original Spatial Limit Decision. Such comments essentially invite the Board to reweigh arguments it has already considered in the course of its initial reasons on an issue that the Court has said is not one of pure statutory interpretation, but rather a mixed question of fact and law heavily suffused by evidence.

Many Parties disagreed with the Board's findings regarding EA considerations, but failed to provide evidence or facts to support their views. Parties did not provide the Board with detailed evidence regarding the specific locations of routes within the EEZ. Parties did not adequately explain how an EA could be carried out in a meaningful way in the EEZ where the route of the tankers is uncertain. Lastly, none of the Parties were able to provide an example of an EA under the CEAA 2012 that considered project-related marine shipping outside of the territorial sea where the primary physical activities for a project are onshore.

The Board's original decision to limit its assessment of Project-related marine shipping to the territorial sea was not arbitrary; it was made after weighing numerous factors. Faced with the possibility of delineating its assessment of Project-related marine shipping to the extent of the territorial sea, the EEZ, or indeed a foreign port, the Board conducted a principled analysis and chose a middle ground informed by the facts and the law heavily suffused by evidence. The new facts and submissions do not warrant overturning the Board's Spatial Limit Decision. The Board has decided to confirm the Spatial Limit Decision and deny Living Oceans/Raincoast's and TWN's requests to include Project-related marine shipping in the EEZ as part of the "designated project" to be assessed under the CEAA 2012.

2. Phase I – Have the applicants raised a doubt as to the correctness of the Spatial Limit Decision?

The issue of whether Project-related marine shipping should be included in the "designated project" to be assessed under the CEAA 2012 turns on whether Project-related marine shipping is a "physical activity that is incidental" to the pipeline component of the Project, as that phrase

⁵ *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 391 [*Tsleil-Waututh Nation*].

⁶ (Updated March 2015), online: <<https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/guide-preparing-description-designated-project-under-canadian-environmental-assessment-act-2012.html>>.

is used in section 2 of the CEEA 2012.⁷ In *Tsleil-Waututh Nation*, the Court stated that “[t]his is not a pure issue of statutory interpretation. Rather, it is a mixed question of fact and law heavily suffused by evidence.”⁸ An important component of this analysis of fact and law is the appropriate spatial limit of Project-related marine shipping.

The Board’s Spatial Limit Decision was based on careful consideration of the factual record before it, the statutory scheme, the CEA Agency Guidance, and submissions from various Parties with diverging views that the geographic extent should be at the border of the territorial sea, the border of the EEZ, or indeed extend to the final destination of the marine shipping associated with the Project.

TWN, Living Oceans/Raincoast, and various intervenors assert that the Spatial Limit Decision is both factually and legally incorrect. The Board notes that many of the legal arguments raised are similar or identical to those raised previously in the comment process for the original Spatial Limit Decision. The Board is of the view that a review application is not an opportunity to re-argue the same points previously raised. Other information raised was previously available and should have been brought forward during the earlier comment process. Further, although TWN, Living Oceans/Raincoast, and various intervenors submit that routes within the EEZ are known and can be identified with certainty, none of them provided new evidence to demonstrate the actual location of these routes. Disagreement with how the Board weighed the facts and the law is not sufficient to raise a doubt as to the correctness of the Spatial Limit Decision.

Despite the above, the Board does find that new facts have arisen, which may be relevant to its Spatial Limit Decision. TWN asserts that Trans Mountain’s direct evidence filed on 31 October 2018 regarding a special Deviation Point within the EEZ “clearly suggests” that Trans Mountain “can force ships to follow a particular route in the EEZ.”⁹ While, arguably, this should have been more properly included in TWN’s review application as opposed to its reply, the Board will still consider the submission. The Deviation Point may have relevance to routing within the EEZ and the extent of Trans Mountain’s ability to direct and influence shipping in the EEZ. The Board is mindful of the fact that it should not be delving deeply into the merits or weighing evidence at this step. Given that Phase I is meant to be an initial threshold merely requiring a *prima facie* case, the Board finds that there is a doubt as to the correctness of the Spatial Limit Decision to warrant a review of the decision on its merits. In light of this, the Board finds there is no need to look further at the other new facts in the context of Phase I.

3. Phase II – Review of the merits of the Spatial Limit Decision

3.1 New facts

The Board will start with addressing the new facts raised by the Parties. TWN provides information on its cultural relationship with Southern resident killer whale (SRKW), economics of the Project, and an oil spill on Husky Energy’s SeaRose floating production platform in Canada’s EEZ off the coast of Newfoundland & Labrador. The Board is of the view that TWN has not adequately explained how these facts are directly relevant to the analysis of what is “incidental” and what constitutes a “designated project” under the CEEA 2012.

Living Oceans/Raincoast and TWN also rely on the fact that an updated recovery strategy for SRKW has been released identifying new critical habitat for SRKW, most of which falls within the EEZ. The Board is of the view that neither Living Oceans/Raincoast nor TWN have justified

⁷ *Supra* note 5 at para 391.

⁸ *Ibid.*

⁹ TWN reply comments in connection with TWN’s application for review of November 16, 2018 (6 December 2018) at 7 ([A96516](#)).

how the presence of critical habitat within the EEZ ought to drive the definition of “designated project” under the CEAA 2012. The Board is not persuaded that this new critical habitat for SRKW has much relevance to the five criteria set out in the CEA Agency Guidance or the Board’s overall analysis of what is “incidental.” However, the identification of critical habitat for SRKW is an additional consideration for the Board when it looks at the environmental effects of the designated project under paragraph 5(1)(b) of the CEAA 2012. The Board discusses environmental effects in the EEZ in greater detail below in Section 3.5 – EA Considerations.

Another new fact is Trans Mountain’s direct evidence regarding routing in relation to a special Deviation Point within the EEZ. In particular, TWN submits:

[I]t is clear that Trans Mountain, through its existing Tanker Acceptance Standards or through new ones, can force ships to follow a particular route in the EEZ. Indeed, pp. 50-51 of Trans Mountain’s own direct evidence clearly suggests that Trans Mountain can do so. There, Trans Mountain itself sets out additional factors regarding how it can exercise “care and control” over Project-related marine shipping in an area “largely outside the 12 nm limit...”¹⁰

Trans Mountain’s evidence in this regard is contained in a chapter of its direct evidence titled “Topic 3: Southern Resident Killer Whale” under the subheading “Measure 1: Special Routing Instructions.” The evidence is provided in the context of Trans Mountain identifying three new plausible mitigation measures to address effects of Project-related marine shipping on SRKW. In its evidence, Trans Mountain states the following:

As discussed above, Trans Mountain is aware that the continental shelf off SWVI (largely outside the 12 nm limit), including Swiftsure and La Pérouse Banks, has recently been proposed as Northern and Southern Resident Killer Whale critical habitat.

In light of this, and incorporating guidance of the IMO on routing to mitigate effects of shipping in sensitive areas, **subject to receiving support from the responsible authority, TC, and confirmation from DFO** concerning potential environmental benefits, Trans Mountain would be prepared to take the following **voluntary steps** for passage of Project-related shipping:

- i) Noting in the WMTROG a special Deviation Point in the vicinity of 48° 07’ N¹¹ and 126° 07’ W, **bearing about 242° x 50 nm** from the Buoy J. It is approximately 50 nm distance from the west coast of Vancouver Island and the Olympic Peninsula; this location is within Canada’s EEZ.
- ii) Project-related vessels **would be requested to include** the Deviation Point as part of the vessel’s passage plan both for arrival and departure.
- iii) Project-related vessels (arriving and departing) **would be requested to proceed** at not more than 12 knots when transiting between the Deviation Point and Buoy J, **safe navigation permitting and, for arriving vessels, if feasible to do so given pilot and berthing arrangement.**
- iv) The current route advice for departing tankers would be adjusted to take effect from the vessels’ final departure from the Deviation Point.
- v) The area is within the coverage of MCTS Prince Rupert Traffic who would be the body charged with monitoring the above requirements.

¹⁰ *Ibid.* at 7.

¹¹ Trans Mountain made the correction from 46° 07’ N to 48° 07’ N in a 4 December 2018 letter ([A6L4H0](#)).

...

Trans Mountain recognizes that numerous factors need to be considered in assessing possible marine shipping route alternatives and that **could require cross-border discussions between relevant agencies in Canada and the US**. However, **if this measure were to be supported by DFO and approved by TC**, Trans Mountain is prepared to consider requesting **voluntary route adjustments** to protect productive foraging grounds as described above and to apply those adjustments to existing tanker traffic, subject to **monitoring** by MCTS [Emphasis added].¹²

The WMTROG (WMT Regulations and Operations Guide) was filed as part of Trans Mountain's evidence. The WMTROG is stated to be based on "international and local requirements, procedures, best practices and guidance" found in various documents.¹³ It explicitly states that Trans Mountain "provides the instructions in this guide for convenience only, and takes no responsibility for their accuracy or currency, as the official rules and procedures may be revised at any time,"¹⁴ though Trans Mountain does reserve the right to deny berth access to any vessel in breach of the WMTROG.¹⁵ Trans Mountain states that the WMTROG is a guide and includes advice on requirements of the WMT.¹⁶

The Board finds that TWN's characterization of Trans Mountain's ability to "force ships to follow a particular route in the EEZ" is overstated. Trans Mountain's direct evidence, viewed objectively, is that Trans Mountain is prepared to request that Project-related vessels include a set "Deviation Point" approximately 50 nautical miles into the EEZ as part of the vessel's passage plan. Trans Mountain is also apparently prepared to request that vessels proceed at no more than 12 knots, safe navigation permitting and if feasible given pilot and berthing arrangements. These route adjustments are voluntary. All of these proposals are subject to the support of Transport Canada and Fisheries and Oceans Canada (DFO) and are subject to monitoring by parties other than Trans Mountain. The assessment of possible marine shipping route alternatives could also require cross-border discussions between relevant agencies in Canada and the United States (US).

Trans Mountain's level of "control" associated with this special Deviation Point remains consistent with the Board's findings in its Spatial Limit Decision:

Trans Mountain does have the ability to direct or influence the carrying out of some aspects of marine shipping, primarily through its Tanker Acceptance Standard ... a couple of requirements also apply in the EEZ. However, this is far from the level of direction Trans Mountain exerts over the pipeline component of the Project (for example, the ability to direct the shutdown of the pipeline, at any point in time, in the event of a safety concern). Once a tanker leaves the WMT, Trans Mountain's ability to enforce any requirements is very minimal.¹⁷

Keeping in mind that this evidence regarding the Deviation Point has yet to be fully tested in this proceeding, it is not clear to the Board at this stage whether adding the Deviation Point to a passage plan means that vessels would be requested to travel in a straight line from Buoy J to the Deviation Point. In any event, this is merely a proposal subject to support from Transport

¹² Trans Mountain direct evidence (31 October 2018) at 50-51 ([A95280-2](#)).

¹³ WMTROG (10 October 2018) at s. 1.2.3; 10 ([A6J6H7](#)).

¹⁴ *Ibid* at s. 1.2.5; at 11.

¹⁵ *Ibid* at s. 3.1.3.1; at 13.

¹⁶ Trans Mountain response to Board Reconsideration Information Request No. 1 (10 December 2018) at 81 ([A96565-2](#)).

¹⁷ *Supra* note 1 at 14.

Canada, DFO, and, possibly, US agencies. The currently proposed Deviation Point only extends 50 nautical miles into the EEZ from Buoy J. Thus, even if vessels were somehow requested to follow a straight line from the Buoy J to the Deviation Point (which is not clear at this stage), that accounts for only a fraction of the distance into the EEZ, and still leaves a large area of open ocean within which ships could follow any number of routes, subject to the 270° west heading limit. The Board is of the view that the potential route adjustments related to the Deviation Point would not create a delineated route. Therefore, the new evidence regarding the Deviation Point does not warrant overturning the Board's Spatial Limit Decision.

3.2 *Tsleil-Waututh Nation and the OIC*

Living Oceans/Raincoast and TWN submit that the geographical extent of the marine shipping was not directly in issue before the Court in *Tsleil-Waututh Nation*, and they question the Board's reliance on the Court's conclusion that "[g]iven the Board's approach to the assessment and its findings, the Board's report was adequate for the purpose of informing the GIC about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups."¹⁸ This conclusion of the Court was also referenced in the GIC's [explanatory note](#) to the OIC.¹⁹

In its Spatial Limit Decision, the Board recognized that the OIC and *Tsleil-Waututh Nation* did not give express instruction regarding the geographic extent of the marine shipping to be included in the "designated project."²⁰ However, based on the record before them, both the GIC and the Court were aware of the 12-nautical-mile spatial limit used in the Board's original assessment of Project-related marine shipping. If either were of the view that there was a glaring deficiency, they had the opportunity to make their concerns known. In any event, this factor was just one among many in the factual and legal matrix faced by the Board in reaching its conclusion. Therefore, this argument does not warrant overturning the Board's Spatial Limit Decision.

3.3 Statutory interpretation

Turning to the principles of statutory interpretation, the Board must reiterate that many of the legal arguments raised in the review are similar or identical to those from the comment process for the original Spatial Limit Decision. However, in the interest of clarity and transparency, the Board is providing reasons for some of the arguments regarding statutory interpretation.

TWN, Living Oceans/Raincoast, and various intervenors take issue with the Board's interpretation of "designated project" and "incidental." For example, some Parties argue that shipping within the EEZ is still incidental to the Project since the causal connection is the same. In another example, Living Oceans/Raincoast state that the Board unduly emphasized one purpose of the CEAA 2012 (timeliness) over others. Such comments essentially invite the Board to reweigh arguments it has already considered in the course of its initial reasons on an issue that the Court has said is not one of pure statutory interpretation, but rather a mixed question of fact and law heavily suffused by evidence. The fact that some Parties have a different view than the Board, or a preference for more weight to have been put on some factors compared to others, does not mean that the Board erred in its original decision. A different outcome than that desired by some Parties is not necessarily an incorrect outcome under the law.

¹⁸ *Supra* note 5 at para 439.

¹⁹ Canada Gazette Part I, Vol 152, No 39 (29 Sept 2018) at 3279.

²⁰ *Supra* note 1 at 10.

TWN submits that the “plain language of CEAA 2012 must indeed dominate” supporting the conclusion that “physical activities of any kind (whether incidental or not) that occur in the EEZ are part of the ‘designated project’ that must be assessed.”²¹ TWN further states there is “no ambiguity present which would allow the Board to resort to purposive, policy or practical considerations to disregard the plain language of CEAA 2012.”²² The Board is of the view that TWN’s emphasis on “plain language” is inconsistent with the guiding principle of statutory interpretation, which requires that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament.”²³ TWN re-argues the same points it already made and ignores the different interpretations outlined in the Board’s Spatial Limit Decision, which indicate a degree of ambiguity in the definition of “designated project” with respect to what is “incidental.”²⁴

The Board also considered arguments regarding the *Taseko* case,²⁵ which, at the time of these reasons, remains good law. While TWN did note some distinguishing features of that case, as noted by Alberta, that case remains the only judicial consideration of the phrase “incidental to.” In particular, the Board remains of the view that the requirement of “proximity” discussed in that case remains relevant, and is indeed consistent with the intention of Parliament in the CEAA 2012 that some reasonable limits must exist within the EA process. It is, in the Board’s view, entirely possible to maintain some limits and, at the same time, fulfill the letter and spirit of the CEAA 2012. In any event, the *Taseko* case was only one factor considered along with many other factors that the Board took into account in its original reasons.

Therefore, the arguments regarding statutory interpretation do not warrant overturning the Board’s Spatial Limit Decision.

3.4 CEA Agency Guidance

Living Oceans/Raincoast and TWN only reference certain components of the CEA Agency Guidance criteria. The Board notes that no Party seriously disputed the Board’s findings regarding the following criteria:

- i) The nature of the proposed activities and whether they are subordinate or complementary to the designated project
- ii) Whether the activity is within the care and control of the proponent
- iv) Whether the activity is solely for the benefit of the proponent or is available for other proponents as well

The Board does not believe it is necessary to revisit its analysis of the five CEA Agency criteria in great detail, but will address submissions made by the Parties in relation to Criteria iii) and v).

- iii) *If the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to “direct or influence” the carrying out of the activity*

²¹ TWN application for review of Board Hearing Order MH-052-2018 (16 November 2018) at 11 ([A95819](#)). The same argument was also put forward in TWN’s comments on the spatial limit of Project-related marine shipping (9 October 2018) at 2 ([A94687](#)).

²² *Ibid* at 12.

²³ *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 at para 21.

²⁴ *Supra* note 1 at 11. Specifically, an alternative to TWN’s interpretation of “designated project” and “federal lands” was put forward by BC Nature and Nature Canada, Living Oceans, and Raincoast.

²⁵ *Canada (Canadian Environmental Assessment Agency) v Taseko Mines Limited*, 2018 BCSC 1034.

The degree to which Trans Mountain can “direct or influence” the carrying out of marine shipping is discussed earlier in these reasons. The new evidence regarding the Deviation Point does not change the Board’s findings in relation to Criterion iii).

TWN sought to elevate this criterion by claiming that the Board is “again impermissibly looking to rewrite the relevant section of CEAA 2012, but this time to state that it ‘includes any physical activity that is incidental to those physical activities *and that the proponent controls in the same manner as all other physical activities.*’”²⁶ To be clear, Trans Mountain’s limited ability to control marine shipping in the EEZ is merely one factor that the Board considered under the CEA Agency Guidance for interpretation of the term “incidental.”

Accordingly, this criterion still slightly leans against being incidental outside of the territorial sea.

v) *The federal and/or provincial regulatory requirements for the activity*

There was much argument regarding the regulatory regime applicable to marine shipping in the EEZ, including the *Oceans Act* and the *United Nations Convention on the Law of the Sea*, as well as the extent of Parliamentary authority over the protection of the marine environment. While it is true that Parliament has some authority to regulate marine shipping in the EEZ, it is very clearly not as extensive as its authority to regulate within the territorial sea. None of the arguments raised change the Board’s underlying conclusion that, beyond the territorial sea, Parliament’s authority over shipping is materially reduced. Accordingly, this criterion still slightly leans against being incidental outside of the territorial sea.

Therefore, a reassessment of the CEA Agency Guidance does not warrant overturning the Board’s Spatial Limit Decision.

3.5 EA considerations

The Board’s analysis in its Spatial Limits Decision was heavily informed by the facts and the Board’s technical expertise in relation to conducting an EA. Many Parties disagreed with the Board’s findings regarding EA considerations, but failed to provide evidence or facts to support their views.

None of the submissions have changed the Board’s view that knowing the project location or route is fundamental to conducting an EA.²⁷ The Board disagrees with TWN’s characterization that the Spatial Limit Decision “turned on this issue,”²⁸ but the lack of a certain route by vessels transiting the EEZ remains crucial to the Board’s ability to conduct an EA and was one of several important considerations in the Spatial Limit Decision.

TWN, Living Oceans/Raincoast, and various intervenors submit that routes within the EEZ are known and can be identified with certainty. Specifically, TWN points to Trans Mountain’s Tanker Acceptance Standard, which requires departing vessels to steer a course no more northerly than due West (270°) upon exiting the Juan de Fuca Strait to take the shortest route out of the EEZ, and the fact that there are a limited number of destinations for tankers (namely California and Asia).

²⁶ Supra note 21 at 9 (emphasis in original).

²⁷ Supra note 1 at 15.

²⁸ Supra note 21 at 4.

None of the Parties referred to any facts that call into question the Board's previous finding: "given that there are no defined shipping lanes in the EEZ – a vast area of ocean – no shipping 'route' for the Project can be identified with any degree of certainty."²⁹ Of particular significance is the fact that Parties have not provided the Board with detailed evidence regarding the specific locations of routes within the EEZ.

The 270° northerly limit raised by TWN was already considered by the Board in its Spatial Limits Decision.³⁰ There is a large area of open ocean south of the 270° northerly limit. Trans Mountain submits that there is an infinite number of routes that outbound ships could take in Canada's EEZ and remain in compliance with the Vessel Acceptance Standard, which only provides a northerly limit, to access markets in the US and the Pacific Rim.³¹ Even accepting TWN's argument that "movements to Washington State do not require transit within or through the EEZ,"³² the Board is of the view that there are still many possible routes within the EEZ to other destinations, including California and Asia. Further, weather, sea conditions, and hazards could all influence the most direct route out of the EEZ – in terms of time or distance.³³ The Board notes that the 270° northerly limit only applies to departing ships; the Board accepts that inbound ships can come from anywhere and, thus, from nearly any direction.³⁴

In contrast to the EEZ, designated shipping lanes in Canada's territorial sea require vessels to navigate in accordance with conditions set out in *Canada Shipping Act, 2001* and its regulations, including maps and charts that outline the designated shipping routes and are subject to enforcement.³⁵ Parliament does have limited authority, in accordance with international rules and standards, to implement ship routing measures in the EEZ to protect sensitive areas, but no such routing measures have been prescribed in Canada's EEZ. The Board cannot assess something that does not currently exist.

Living Oceans/Raincoast submit that extending the definition of "designated project" into the EEZ "would be useful in protecting the environment and reducing harm in a more complete manner than under the current Spatial Limit Decision" because "the geographical scope of the environmental assessment and its outcomes would be more complete if it included the entire area."³⁶ Importantly, as was the case with the Spatial Limit Decision, the Board must emphasize that none of the Parties adequately explained how an EA could be carried out in a meaningful way in the EEZ where the route of the tankers is uncertain.³⁷

TWN also provides examples of two offshore drilling projects within the EEZ, where the CEA Agency is assessing associated marine shipping activities in the EEZ as part of the designated project under the CEAA 2012. The Board is of the view that TWN has not adequately explained

²⁹ *Supra* note 1 at 15-16.

³⁰ *Supra* note 1 at 14 & 16. The Board is aware that the wording of this requirement has slightly changed in the updated versions of the WMTROG (10 October 2018) at s.14.12.1, at 73 ([A6J6H7](#)) and Master's Declaration and Vessel Information Checklist which forms part of the Trans Mountain Vessel Acceptance Standard (formerly known as the Tanker Acceptance Standard) (11 November 2018) at s.2.7.11, at 12 ([A6L2A5](#)). However, the primary concept of the 270° northerly limit remains the same.

³¹ Trans Mountain's reply to intervenor motion and applications of 16 November 2018 (4 December 2018) at 10 ([A96389](#)).

³² *Supra* note 21 at 8.

³³ See, for example, Trans Mountain's responses to information request from Pacheedaht First Nation (18 June 2014) response 1.07.2 at 76 ([A3Y3X4](#)).

³⁴ *Supra* note 31 at 10.

³⁵ *Supra* note 31 at 10.

³⁶ Living Oceans/Raincoast reply on application for review of spatial limit decision (6 December 2018) at 2-3 ([A96514](#)).

³⁷ *Supra* note 1 at 16.

how the assessment of marine support vessels for Mobile Offshore Drilling Units with known locations within the EEZ has any bearing on this case. In the Spatial Limit Decision, the Board already found that EAs of designated projects where the primary activities themselves have an identified location in the EEZ, such as offshore drilling, can be distinguished from the current situation.³⁸ TWN has merely provided an example of the former and the Board already considered this. The Board finds it telling that none of the Parties were able to provide an example of an EA under the CEAA 2012 that considered project-related marine shipping outside of the territorial sea where the primary physical activities for a project are onshore.

Living Oceans/Raincoast further submit that, in making the Spatial Limit Decision, the Board relied on unproven facts regarding the decline in probability and consequence of marine incidents with distance from the coast. As an expert tribunal, the Board has the discretion to determine the relevance and weight of the evidence before it. In this case, the Board was also mindful of the extensive record from both the OH-001-2014 Certificate hearing and this Reconsideration.³⁹ The Board notes that Living Oceans/Raincoast did not provide opposing evidence to contradict the contested statement. In any event, this was only one of many factors that the Board balanced in its overall reasons.

Lastly, the Board does not agree with the suggestion that environmental effects in the EEZ will be ignored if the EEZ is not included in the definition of “designated project.” The Board reiterates that it is important to distinguish the *effects* from the designated project from the extent of the designated project itself. The environmental *effects* of the project can still be considered under paragraph 5(1)(b) of the CEAA 2012 even if they occur in the EEZ or elsewhere outside of Canada. The Government of Canada’s evidence also discusses the Oceans Protection Plan, Whales Initiative, and other measures to preserve and restore marine ecosystems and habitats. Transport Canada is leading a Cumulative Effects of Marine Shipping initiative, which includes work on regional cumulative effects assessments.⁴⁰ It also remains open to the Minister of Environment and Climate Change to consider whether a regional study of marine shipping in the large area of the EEZ would be useful.⁴¹ These tools and initiatives are not an “excuse to avoid the mandatory requirements of CEAA 2012 and SARA” as alleged by Living Oceans/Raincoast.⁴² Rather, they are a way to address overall regional cumulative environmental effects in the EEZ, whereas a project-specific assessment in this case “would produce speculative, as opposed to meaningful, information about project impacts and, accordingly, would not be useful as a planning and decision-making tool for the GIC.”⁴³

Therefore, the arguments regarding EA considerations do not warrant overturning the Board’s Spatial Limit Decision.

³⁸ *Supra* note 1 at 18.

³⁹ For example, past evidence related to this point include Transport Canada, A Review of Canada’s Ship-source Oil Spill Preparedness and Response Regime – Setting the Course for the Future (15 November 2013) at 10-13 ([A4L7F7](#)); WSP Canada Inc., Risk Assessment for Marine Spills in Canadian Waters, Phase 1, Oil Spills South of the 60th Parallel (January 2014) at 72-88 ([A4L7L4](#)).

⁴⁰ Federal Authorities direct evidence (31 October 2018) at 27-29 ([A6J6L9](#)). The spatial and temporal boundaries for the regional cumulative effects assessment of marine shipping activities (including for South Coast British Columbia) are not yet known as these will be developed collaboratively through ongoing engagement. Response to Board Information Request No. 1 to Federal Departments and Agencies (10 December 2018) IR 1.27 at 182 ([A6L8X5](#)).

⁴¹ CEAA 2012, ss 73-77.

⁴² *Supra* note 36 at 4.

⁴³ *Supra* note 1 at 16.

E. DE NOVO HEARING REVIEW

1. Executive summary of the De Novo Hearing Review

TWN filed a review application alleging, with respect to the Reconsideration hearing, a legal error by the Board in “failing to conduct a *de novo* hearing because the Panel appointed to undertake this Reconsideration hearing did not hear the original evidence and submissions of the parties.”⁴⁴

The Board finds that “he who hears must decide” is ousted expressly or by necessary implication. The Board considered that the nature of the focused Reconsideration is different than the original hearing. The Board also took into consideration that the NEB Act expressly provides that any quorum of the Board is “the Board.” The Board provides that Members have term limits, and that temporary members, as well as permanent members, may be assigned to hearings. The Chair of the Board has discretion in assigning Panels, and time limits are part of the scheme of the legislation. Section 53 contains different requirements than section 52. Section 53 is analogous to section 21 where review and variance applications are heard by any quorum of the Board.

In the relevant factual circumstances of this case, one of the original Panel Members’ term had expired and the GIC did not re-appoint him as a Board Member. Had only two of the original three Panel Members on the section 52 application been assigned to the Reconsideration, quorum requirements under the NEB Act would have been violated. If a *de novo* hearing had been set out, as TWN requests, the Reconsideration would have been unlikely to have concluded within the time limit set by the GIC. A *de novo* hearing would also have been inconsistent with the direction of the Federal Court of Appeal and the requirements of the OIC.

2. Factual background

On 16 December 2013, Trans Mountain filed its application with the Board for a Certificate of Convenience and Necessity and other relief.

On 9 July 2014, the Chair of the Board, pursuant to subsection 6(2) of the NEB Act, assigned a Panel of three Board Members (David Hamilton – presiding, Phil Davies, and Alison Scott) to consider the Project application.⁴⁵ Two of the Board Members, David Hamilton and Alison Scott, were temporary Members appointed under terms prescribed by the GIC.⁴⁶

A Hearing Order was issued, the scope of issues was identified in the List of Issues, and evidence and argument were received. On 16 May 2016, the Board issued its OH-001-2014 Report, including its recommendations, to the GIC under section 52 of the NEB Act and the CEAA 2012.

On 30 August 2018, the Federal Court of Appeal quashed the GIC’s approval of the Project. One of the reasons for quashing the GIC’s approval was that “the Board erred in unjustifiably excluding Project-related marine shipping from the Project’s definition.”⁴⁷ As a result of this conclusion, the Court directed that the GIC “must refer the Board’s recommendations and its terms and conditions back to the Board or its successor for reconsideration.”⁴⁸ The Court

⁴⁴ *Supra* note 21 at 2.

⁴⁵ Record of Decision of the Chair, Assignment of Panel (9 July 2014).

⁴⁶ In David Hamilton’s case, the [OIC](#) re-appointed him as a temporary Member of the Board, to hold an office for a term of three years, effective 1 July 2015. The GIC did not re-appoint David Hamilton after his term expired.

⁴⁷ *Supra* note 5 at para 468.

⁴⁸ *Ibid.* para. 769

directed that the Board reconsider on a principled basis whether Project-related shipping is incidental to the Project. If so, the Board was also to reconsider the application of section 79 of the *Species at Risk Act* (SARA) and the Board's EA, including the Board's significance recommendation under the CEAA 2012 and any other matter the GIC should consider appropriate.⁴⁹

On 20 September 2018, through the OIC,⁵⁰ the GIC referred specific aspects of the Board's Report for the Project back to the Board for reconsideration. The GIC referred back to the Board for reconsideration "the recommendations and all terms and conditions set out in its 19 May 2016 report ... **that are relevant to addressing the issues specified by the Federal Court of Appeal in paragraph 770 of *Tsleil-Waututh Nation***" [emphasis added]. The GIC further directed that the Board conduct the reconsideration taking into account environmental effects of Project-related marine shipping in view of the requirements of the CEAA 2012 and section 79 of the SARA. As directed by the OIC, the Board must complete its reconsideration by 22 February 2019 (within 155 calendar days after the Order was made).

On 24 September 2018, the Chair of the Board, pursuant to subsection 6(2) of the NEB Act, assigned a Panel of three Board Members (Lyne Mercier – presiding, Alison Scott, and Murray Lytle) to conduct the Reconsideration of the recommendation report on the Project pursuant to section 53 of the NEB Act.⁵¹ The Panel was assigned by the Chair of the Board to "make all decisions with respect to the National Energy Board's work in response to the 20 September Order in Council ... for reconsideration of the Report." At the time of the Panel assignment by the Chair of the Board, David Hamilton's appointment as a NEB Act section 4 temporary Member had expired. Prior to the end of his term, pursuant to subsection 16(6), the Chair of the Board had authorized David Hamilton to continue to inquire into, hear, and conclude certain specific proceedings that were already underway.⁵²

On 26 September 2018, the Board requested comment on a number of matters, including on the design of the hearing process to be used for the Reconsideration.

TWN provided submissions that:

[T]he case law and the Board's own rules recognize that a full *de novo* hearing is required as a consequence of the Board appointing a new panel for the Reconsideration Hearing. The age-old maxim of natural justice that 'he who decides must hear' applies to the Board. There is no statutory authority for the new panel members appointed by the Board to form opinions on evidence and submissions they did not hear, and agree with findings and conclusions they did not make. This clear breach of natural justice constitutes a reviewable error of law or jurisdiction.⁵³

In making its argument on this point, TWN referred the Board to *Johnny v. Adams Lake Indian Band*,⁵⁴ amongst other authorities.

⁴⁹ *Ibid.* para 770

⁵⁰ *Supra* note 19.

⁵¹ As referenced in Board letter (26 September 2018) at 1 ([A94153](#)).

⁵² Record of Decision of the Chair (20 June 2018).

⁵³ TWN comments on the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012, the draft List of Issues, and the design of the hearing process (3 October 2018) at 1-2 ([A612W8](#)).

⁵⁴ 2017 FCA 146 [*Johnny*].

After considering a number of comments received, the Board issued a Hearing Order MH-052-2018 and the List of Issues for the Reconsideration on 12 October 2018. On 29 October 2018, the Board issued the reasons for its decisions reached on 12 October 2018. On the issue of the *de novo* hearing that TWN has requested, the Board stated in part:

The rule that “he who hears must decide” does not apply where legislation expressly, or by necessary implication, ousts its application. In this case, the legislative scheme ousts the application of this rule. The addition of the reconsideration provision in the NEB Act in 2012 indicates Parliament’s intention to have an option that is distinct from a new project application. Subsection 53(2) provides specific authorization for the GIC to “direct the Board to conduct the reconsideration taking into account any factor specified in the order.” It is clear from this wording that Parliament intended that the Board could be directed to reconsider specific issues only, in which case there is no requirement for a *de novo* hearing or for all previous evidence heard orally to be reheard.

A careful reading of the NEB Act suggests that the legislation does not require a reconsideration to be carried out by the same Panel, but it does not prevent it either. Section 53 does not refer to the Board Panel, but says only that any recommendation can be referred back to “the Board.” Under the NEB Act, any quorum of the Board is “the Board” and can carry out the statutory obligations of the Board. The fact that an exception to quorum requirements exists for the original section 52 proceeding (see subsection 7(2.1)), but not for the section 53 reconsideration, also indicates that the reconsideration does not require the same Panel.

The rule that “he who hears must decide” can also be ousted by necessary implication in these circumstances. The legislation does not set a limit on the number of times that a report can be reconsidered. It would not be practical to expect the original Panel Members to remain available through an unlimited number of reconsiderations.⁵⁵

TWN now seeks a review of that determination.

3. Brief summary of comments in the review application

TWN’s comments⁵⁶ in support of its application included the following:

- While TWN agrees that the rule of “he who hears must decide” does not apply where legislation expressly or, by necessary implication, ousts its application, neither exception applies here.
- The same Panel must hear the Reconsideration that heard all previous evidence in the previous hearing, otherwise a *de novo* hearing is required.
- The plain meaning of “reconsideration” ought to be used, and quorum requirements referenced in the Board’s original decision as being different under section 52 then section 53 of the NEB Act “does not comport with a *Rizzo Shoes*⁵⁷ analysis.
- Practical considerations may only be considered when there is genuine ambiguity and, here, the plain meaning of “reconsideration” is obvious.

⁵⁵ *Supra* note 2 at 16-17.

⁵⁶ See TWN’s review application, *supra* note 21; TWN supplemental filing in support of TWN’s application for review (27 November 2018) ([A96156](#)); and reply, *supra* note 9.

⁵⁷ *Supra* note 23.

- The structure of the NEB Act leads to the opposite conclusion that the Board found since the Board is described as a “court of record” under section 11 of the NEB Act and is subject to fairness requirements.
- Cases from the Supreme Court of Canada, including *Ocean Port Hotel*,⁵⁸ directed that “courts will not lightly assume that legislators intended to enact procedures that run contrary to” fundamental principles of natural justice, and that a sound interpretation will always depend on statutory language, the nature of an agency’s task, and the type of decision it is required to make.
- To depart from the standard established by the Supreme Court requires “irresistible clearness.”
- When Trans Mountain submits that the Board is master of its own process, such an argument is misplaced because “he who decides must hear” is a principle of natural justice and not evidence.
- Reviewing a written transcript of past oral evidence is insufficient, particularly when singing and ceremony is involved.

A number of other intervenors provided comments supporting TWN’s review application. Many of the comments were consistent with those of TWN or, in many cases, were less detailed.

Trans Mountain and Alberta argue that there is no need for a *de novo* hearing. Their comments included the following points:

- Most of TWN’s arguments and case references simply repeat previous arguments and merely disagree with the result. The threshold question takes more than repeating an argument to raise doubt about correctness.
- Alberta cites *Consolidated Bathurst*⁵⁹ for the application of *audi alteram partem* rule where the Supreme Court discussed that the essence of the rule is that parties have a fair opportunity of answering the case against them. Citations by Alberta include paragraph 26 where the Court stated: “it has long been recognized that the rules of natural justice do not have a fixed content, irrespective of the nature of the tribunal and of the institutional constraints it faces.”
- For Indigenous intervenors, there was no impediment to providing whatever oral traditional evidence they wished during the Reconsideration.
- Alberta submits that the NEB Act ousts the application of the “he who decides must hear” rule. It points specifically to section 53 that provides for a referral back to “the Board” and that the Board includes “all Board Members.” It references that the Federal Court of Appeal also directed that the Reconsideration could be heard “by the Board or its successor.” Alberta also points to term limits, the unlimited number of reconsiderations that could occur, and the discretion of the Chair of the Board.
- Similar to Alberta’s arguments, Trans Mountain points to section 53 of the NEB Act as indicating an intention by Parliament to have an option distinct from a new project application. Further reference is made to the quorum provisions and the intention of Parliament to avoid an inflexible requirement.

⁵⁸ *Ocean Port Hotel v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para. 21.

⁵⁹ *IWA, Local 2-69 v Consolidated Bathurst Packaging Ltd*, [1990] 1 SCR 282 [*Consolidated Bathurst*].

- Trans Mountain focuses on the limited and discrete issues properly referenced in the OIC and identified by the Federal Court of Appeal, and these issues will be determined by the Panel assigned to the Reconsideration. It further states that the Reconsideration Panel will have access to all past filings, but that the Reconsideration Panel is not “rehearing” the original evidence or matters already decided.
- Trans Mountain points to *CRTC* where the Supreme Court found that the overarching scheme in that case did not require the imposition of a strict rule.⁶⁰
- Trans Mountain states that the GIC remains the final decision-maker.

4. Phase I – Has TWN raised a doubt as to the correctness of the Board’s decision not to have a *de novo* hearing?

The Board considers that many of the legal arguments raised and cases cited are similar or identical to those raised previously in comments received about the design of the hearing process for the Reconsideration. There are no new facts that were not discoverable at the time of the Board’s original decision not to have a *de novo* hearing. Any additional Court precedents referred to now could also have been discussed during that initial comment process.

With respect to its argument alleging an error of law, TWN agrees with the legal test the Board used: the Rule of “he who hears must decide” does not apply where legislation expressly, or by necessary implication, ousts its application. However, TWN disagrees with the Board’s previous determination that “the legislative scheme ousts the application of this rule.” In TWN’s original submissions, it acknowledged the time limit set by the OIC. It also discusses the case law on the *de novo* issue from the Supreme Court of Canada and Federal Court of Appeal, including the *Johnny* case which TWN discusses further in its review application.

Essentially, TWN does not like the conclusion reached after the Board considered TWN’s comments on hearing process at first instance, and TWN has re-argued the same points raised initially in somewhat more detail. TWN acknowledges that the Board relied in-part on an interpretation of subsection 53(2) that allows the GIC to direct a focused reconsideration hearing, but TWN argues the plain meaning of “reconsideration” ought to be used and that quorum requirements referenced in the Board’s original decision as being different under section 52 then section 53 of the NEB Act “does not comport with a *Rizzo Shoes* analysis.” Other than focusing on plain meaning, TWN does not say how the specific language of section 53, or the Board’s conclusion about quorum requirements, was an error of law.

TWN does include some brief comment about section 11 of the NEB Act and argues that taking into account this section will lead to an opposite conclusion than the Board found. However, TWN provides very little analysis regarding the overall structure of the NEB Act, or to sections other than section 11 that may have relevance, including those previously discussed by the Board.

The Board is mindful that it should not delve deeply into the merits or weighing evidence at this step and that Phase I is meant to be an initial threshold merely requiring a *prima facie* case. However, in this case the Board is of the view that TWN has not met the initial threshold requirement of establishing a *prima facie* case that an error of law was made in the circumstances of the Reconsideration. As the Board has stated previously:

⁶⁰ *Canadian Radio-Television & Telecommunications Commission v CTV Television Network Ltd. et al*, [1982] 1 SCR 530 [CRTC].

[A] review request is not an opportunity to re-argue the same points previously raised, or to provide new argument that could have been raised in the Original Motion.⁶¹

Here, TWN has provided a similar argument to the one it previously provided prior to the Board's decision on the *de novo* hearing issue. TWN disagrees with the Board's past conclusions without raising a *prima facie* case that a legal error was made, although largely it merely re-argues points that the Board previously considered. While not delving fully into all the case law discussed by all Parties, in *Ocean Port Hotels*,⁶² which TWN has cited, the Court stated: "interpretation will always depend on statutory language." The Board is of the view that TWN has provided minimal analysis about the overall statutory language of the NEB Act.

As a result of TWN failing to raise a doubt as to correctness, its review application is dismissed. However, should it be determined that the Board erred in its Phase 1 determination, the Board has gone on to consider the merits of TWN's arguments.

5. Phase II – Review of the merits of the Board's decision not to have a *de novo* hearing

5.1 Legal test

TWN, Trans Mountain, and Alberta agree that the Board used the correct legal test for determining if the rule that "he who hears must decide" applies in this case. At issue is whether the NEB Act expressly or, by necessary implication, ousts its application in the specifics of this Reconsideration.

As stated by the Supreme Court of Canada in *Consolidated Bathurst*:

[I]t has long been recognized that the rules of natural justice do not have a fixed content, irrespective of the nature of the tribunal and of the institutional constraints it faces. This principle was reiterated by Dickson J. (as he then was) in *Kane v. University of British Columbia Board of Governors*, [1980] 1 S.C.R. 1105 at 1113, 18 B.C.L.R. 124, [1980] 3 W.W.R. 125, 110 D.L.R. (3d) 311, 31 N.R. 214: 2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [*Ridge v. Baldwin*, at p. 850] is only 'fair play in action'. In any particular case, the requirements of natural justice will depend on 'the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth', per Tucker L.J. in *Russell v. Duke of Norfolk*, at p. 118. **To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.**

[Emphasis added.] The main issue is whether, given the importance of the policy issue at stake in this case and the necessity of maintaining a high degree of quality and coherence in Board decisions, the rules of natural justice allow a full Board meeting to take place subject to the conditions outlined by the Court of Appeal and, if not, whether a procedure which allows the parties to be present, such as a full Board hearing, is the only acceptable alternative.

Consistent with its decision in *Consolidated Bathurst*, the Supreme Court in *Ocean Port Hotel* discussed that it will not lightly assume that legislators intended to depart from the "he who hears must decide" principle and that it will depend **"on all circumstances, and in particular on the**

⁶¹ Board Ruling No. 122 – Pro Information Pro Environment United People's Network – 30 December 2015 request for a review of Ruling No. 101, 1 March 2016 ([A4Y4G2](#)).

⁶² *Supra* note 58.

language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make” [emphasis added].⁶³ As *Consolidated Bathurst* and other cases such as *Ocean Port Hotel* make clear, when deciding if this requirement of natural justice applies, it is necessary to look in detail at the nature of the Reconsideration, the language of the legislation, and the relevant factual circumstances. Those points will form the structure of the Board’s analysis.

5.2 Nature of the Reconsideration

As detailed above in the factual background, the Federal Court of Appeal directed that the Board reconsider, on a principled basis, whether Project-related marine shipping is incidental to the Project. If so, the Board is to reconsider the application of section 79 of the SARA and the Board’s EA, including the Board’s significance recommendation, under the CEAA 2012, and any other matter the GIC should consider appropriate.

The GIC, in its OIC, limited the reconsideration of the recommendations and terms and conditions to all those “that are relevant to addressing the issues specified by the Federal Court of Appeal in paragraph 770.” The Board, therefore, considers that the subject matter of the Reconsideration is distinct from a new project application and is focused on marine shipping that is incidental to the Project and on the application of the CEAA 2012 and section 79 of the SARA. While there can be changes to recommendations and certain conditions, it is a much more narrow mandate than the OH-001-2014 Certificate hearing. As a result, the List of Issues for the Reconsideration is also narrower than the original hearing. There have also been some changes in Parties, with a number of intervenors from the original hearing not participating in the Reconsideration, and new intervenors being added after submitting applications to participate.⁶⁴

TWN appears to assume that the original hearing and the Reconsideration hearing are the same. They are not. Section 53 allows the GIC to direct the Board to take into consideration only “factor(s) specified in the order.” Consistent with the direction of the Federal Court of Appeal, the GIC has directed the Board to conduct a focused reconsideration that is different than the scope of the original hearing. While the Board will have to reconsider its recommendation under the CEAA 2012 about significance, as well as its section 52 NEB Act recommendation about the present and future public convenience and necessity for the Project, the Board will only be considering changes related to the List of Issues in the Reconsideration. While Parties may refer to previous evidence as it is relevant to the List of Issues, the Board will not be reconsidering all of the benefits and burdens of the Project.

The Chair of the Board assigned a Panel for the original hearing and the Panel issued its Report. More than two years after the original Report was issued, the Federal Court of Appeal quashed the Project certificate. The Federal Court of Appeal directed that the Board’s recommendations must be referred back to “the Board or its successor, for reconsideration.” The resulting OIC then outlined specific factors for the reconsideration and imposed a time limit. The Chair of the Board then assigned a specific Panel consistent with both his authority under subsection 6(2) of the NEB Act and the direction of the Federal Court of Appeal.

Cases such as *Johnny*, which are relied on by TWN, are not helpful in understanding the specific nature of a reconsideration as set out under section 53 of the NEB Act. Here, the Board is dealing with a focused reconsideration about Project-related marine shipping and will submit a report and recommendations to the GIC. This can be contrasted to the facts in *Johnny* which involved a

⁶³ *Supra* note 56.

⁶⁴ The OH-001-2014 Certificate hearing had approximately 400 intervenors. The Reconsideration hearing has approximately 120 intervenors. Approximately 73 per cent of current intervenors were intervenors in the original hearing.

decision to remove a Councillor made by an elected Community Panel. In *Johnny*, some of the Members of the Community Panel were not present for significant portions of the oral evidence where credibility was at issue and yet they still participated in the removal decision. *Johnny* is not analogous to this Reconsideration.

5.3 Language of the legislation

At issue is whether the language of the NEB Act either expressly or, by necessary implication, ousts the strict application of “he who hears must decide.” The interpretation of the NEB Act must be based on the modern principle of interpretation, which requires the words in the statute to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the NEB Act and the intention of Parliament.⁶⁵

Section 11 refers to the Board as a “Court of record,” but it is one of a number of relevant sections, and it is not determinative. The Board disagrees that a plain reading of the word “reconsideration” is determinative as TWN does not appear to consider the language and provisions surrounding this term.

There are a number of sections of the NEB Act relevant to interpreting Parliament’s intent. These include the following:

- Board means the National Energy Board established by section 3.
- Section 4 allows for temporary Members appointed on terms the GIC may prescribe.
- Subsection 6(2) provides the Chair of the Board with discretion as to the formulation of any Panel of the Board.
- Subsection 7(2) establishes quorum requirements. As the original decision of the Board stated,⁶⁶ any quorum of the Board is “the Board” and can carry out the statutory obligations of the Board.
- Subsection 7(2.1) provides an exemption to quorum requirements for the original section 52 proceeding, but not for a section 53 reconsideration.
- Subsection 6(2.2) authorizes the Chair of the Board to take measures appropriate to ensure a time limit is met under section 52. Such authorization does not apply for section 53.
- Subsection 11(4) requires that “all applications and proceedings before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit provided for under this Act, if there is one.”
- Section 21 provides that the Board may review, vary and rescind any decision or order made by it.
- Section 52 sets out a broad list of factors that the Board may have regard to in preparing a report under this section.
- As discussed previously, section 53 provides for the option for the GIC to direct the Board to conduct a focused reconsideration “taking into account any factor specified in the order.”
- Section 53 also provides that the GIC may specify a time limit within which the Board must complete its reconsideration.

⁶⁵ *Supra* note 23.

⁶⁶ *Supra* note 2 at 16.

- Subsection 53(9) allows the GIC to refer the Board’s reconsideration report back to the Board for reconsideration again. There is no limit to the number of times a reconsideration can be directed.

Parliament expressly provides that, under the NEB Act, any quorum of the Board is “the Board” and can carry out the statutory obligations of the Board. Section 53 states that the GIC may refer the recommendation, or any terms and conditions, “back to the Board for reconsideration.” Had Parliament intended that only the original Panel Members could participate in a reconsideration, different language could have been used. Subsection 6(2) provides the Chair of the Board with broad authority in assigning a Panel of the Board.

Section 53 is analogous to section 21 where “the Board” may review, vary, or rescind any decision or order made by it. There is no time limit for when a review application may be filed. In some instances, the original Panel Members will hear a review application and, in other instances, the reviewing Panel may include different Members as they are a quorum of the Board.

Parliament would have known that it has appointed temporary Members as well as permanent Members, all with term limits. Such Members will not necessarily be available or eligible for any number of reconsiderations under section 53. Parliament also intended that reconsiderations require a quorum of three Board Members. As Alberta states, since nothing in the NEB Act precludes the reconsideration of a recommendation where a Board Member’s term has expired, by necessary implication, it follows that such a Member could be replaced.

Given the quorum requirements under section 53, it is not logical or practical that the GIC could specify a time limit under section 53, but yet if not all three original Members are available or eligible for assignment that a strict application of “he who hears must decide” would be required and a rehearing of the entire proceeding would follow. Focused hearings and time limits under section 53 would have no meaning if a *de novo* hearing were frequently required due to quorum requirements. It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.⁶⁷

For all of these reasons, a purposive approach to interpreting the NEB Act, expressly or by necessary implication, ousts the application of “he who hears must decide.”

While the language of the legislation is clear and persuasive, it is also informative to consider the relevant factual circumstances.

5.4 Relevant factual circumstances

As the Court directed in *Consolidated Bathurst*, it is necessary to look at the relevant factual circumstances in this situation.

In this case, the OIC directing a focused reconsideration was issued almost 2.5 years after the original Board Report was issued. When the Chair of the Board assigned a Panel of the Board to the Reconsideration, one of the original Panel Members’ (David Hamilton) term had expired. At that time, David Hamilton was only a Board Member for the limited purpose of concluding specific proceedings under subsection 16(6). David Hamilton was not re-appointed as a Board member by the GIC, and the Chair of the Board did not appoint him as a Member of the Reconsideration Panel. Had only two of the original Panel Members been assigned to hear the Reconsideration, quorum requirements under subsection 7(2) would not have been satisfied.

⁶⁷ *Supra* note 23 at para 27; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis Canada, 2014) at §10.4.

Directing a *de novo* hearing would not have been consistent with the direction of the Federal Court of Appeal or the OIC. It is also highly unlikely that a *de novo* hearing could have been completed in anywhere close to the time limit specified in the OIC.

In the context of this Reconsideration hearing, the Board is of the view that Indigenous intervenors and other Parties have a fair opportunity to answer the case. Just as an opportunity for Indigenous intervenors to present oral traditional evidence was provided in the original hearing, it has also been provided in this Reconsideration hearing. Decisions about what evidence to provide in the Reconsideration were left to each Indigenous intervenor.⁶⁸ Also, much of the evidence in the original hearing was written, as is the case in this Reconsideration hearing.

Notwithstanding that the procedural fairness owed in the Reconsideration is significant, it remains unchanged that the GIC is the ultimate decision-maker and will make its decision based on the entire record before it.

The overall factual circumstances support that the Board's initial decision on this issue was correct and should not be varied.

F. NEED FOR AND SOCIO-ECONOMIC EFFECTS REVIEW

Phase I – Has TWN raised a doubt as to the correctness of the Board's decision to exclude the need for and socio-economic effects of the Project from the List of Issues?

TWN submits that the economics of the Project have changed materially since the Board's OH-001-2014 Report was issued, and that new evidence is required as a result of a "wide range of issues" in connection with the justification analysis under the CEAA 2012 and the Board's consideration of the public interest under the NEB Act.⁶⁹ TWN further submits that "[i]t goes without saying that the Project is not in the public interest and the environmental effects it will visit upon the environment cannot be justified in the circumstances because it is not needed and it is uneconomic."⁷⁰ Various other intervenors provided comments in support of TWN. For example, Georgia Strait Alliance states that "it would not be reasonable for the Board to come to a justification recommendation by trying to weigh on the same scale the current information regarding Project-related marine shipping along with three-year-old evidence regarding other aspects of the Project."⁷¹ Trans Mountain and Alberta provided comments opposing TWN's Need for and Socio-Economic Effects Review.

The Board is not persuaded that the submissions raise a doubt as to the correctness of its Process Design Decision as it relates to the need for and socio-economic effects in the List of Issues. TWN's submissions in its review application are almost identical to its comments provided during the Board's initial comment process, which the Board already considered in its Process Design Decision. The Board must reiterate that a review application is not an opportunity to re-argue the same points previously raised. TWN fails to make an arguable case that there was any error of law or of jurisdiction. Although TWN filed evidence regarding Project need and economics, it does not adequately explain the basis for expanding the List of Issues in a manner that is inconsistent with the direction in the OIC and *Tsleil-Waututh Nation*.

⁶⁸ *Supra* note 2 at 17.

⁶⁹ *Supra* note 21 at 18-19.

⁷⁰ *Supra* note 9 at 15-16.

⁷¹ Georgia Strait Alliance comments on motion and applications (30 November 2018) at 4 ([A96424](#)).

TWN's review application does not change the Board's findings in relation to this issue:

The Board is also not persuaded that it should re-examine issues that are outside of the GIC's direction in the OIC. In the Board's view, it is consistent with the purpose of section 53 of the NEB Act for the GIC to direct the Board to conduct a reconsideration focused on a specific issue or issues. To interpret section 53 as requiring new evidence or *de novo* findings on all issues, despite the direction in the OIC, would not be consistent with the statutory scheme of the NEB Act, including the requirement for expeditious proceedings under subsection 11(4). In this case, the OIC was specific about the issues the Board was to reconsider under the CEAA 2012 and the SARA. The Board was not directed to reconsider all issues from the OH-001-2014 Certificate hearing, nor does paragraph 770 of the Federal Court of Appeal's decision speak to all issues. The Board accepts that, as time passes, there will always be some changes in facts and short-term changes in markets. However, the need for the Project is not negated by short-term market fluctuations. As the Board stated in its OH-001-2014 Report, "[t]here is always a degree of uncertainty in projecting the long term utilization of transportation facilities since utilization is influenced by many variables, including supply, market development and the evolution of transportation infrastructure overall."⁷²

Further, no Party dealt with the Board's reference to Condition 57, the "commercial support" condition, which ensures that the pipeline will be used and useful.

Lastly, while TWN's and other intervenors' submissions on this topic focused on the "need for" the Project, the grounds for review also include the Board's apparent decision to exclude the socio-economic effects of the Project from the List of Issues. The Board is of the view that this is not an accurate characterization of its treatment of socio-economic effects. In its Process Design Decision, the Board clarified the List of Issues by adding a footnote to explain that all references to environmental effects in the List of Issues include health and socio-economic matters as described in section 5 of the CEAA 2012.⁷³ None of the Parties adequately addressed this clarification.

The Board is not persuaded that TWN has raised a doubt as to the correctness of the Board's Process Design Decision with respect to the need for and socio-economic effects in the List of Issues. Therefore, the Need for and Socio-Economic Effects Review is denied.

G. CONCLUSION

For the reasons above, TWN's and Living Oceans/Raincoast's applications for review are dismissed.

Yours truly,

Original signed by L. George for

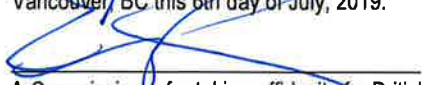
Sheri Young
Secretary of the Board

c.c. All Parties

⁷² *Supra* note 2 at 11-12.

⁷³ *Supra* note 2 at 10.

This is Exhibit LL referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British
Columbia

Hearing Order MH-052-2018

Board File OF-Fac-Oil-T260-2013-03-59

Responses of:

**Environment and Climate Change Canada,
Fisheries and Oceans Canada and Canadian Coast Guard,
Health Canada, Natural Resources Canada,
Parks Canada Agency and
Transport Canada**

to

Information Request of Stó:lō Collective

**Trans Mountain Expansion Project
Reconsideration**

Question #	Stó:lō Collective 1 - Impact Assessment and Exercised Established or Asserted Fishing Rights and/or Assertion of a Range of other Aboriginal Rights in the Vicinity of the WMT
Reference:	A95292-17 Annex 04.C.01 – A6J6R4 - Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Project including Relevant Annexes (the “CAR”)
Preamble:	As outlined in the CAR, there are specific Stó:lō communities identified as having rights in the Salish Sea near the vicinity of the Westridge Marine Terminal (the “WMT”). The CAR concludes that, with the exception of effects on the Southern Resident Killer Whale population, the magnitude of effects of Project-related marine vessel traffic on traditional marine resource uses, activities, and sites is low. The CAR describes, amongst other things, the following findings at page 84: • Despite Burrard Inlet being a heavily urbanized environment, Aboriginal groups have managed to sustain minimal levels of harvesting while pursuing re-establishment of certain species, and remediation of polluted areas. • The Crown understands that there are five Aboriginal group entities that either exercise established or asserted fishing rights and/or assert a range of other Aboriginal rights in the vicinity of the WMT: Tsleil-Waututh Nation, Squamish Nation, Musqueam Indian Band, First Nations of the Hul’qumi’num Treaty Group, and four Stó:lō groups (Shxw’ōw’hámél, Soowahlie, Skawahlook, and Seabird Island). • Regarding the impacts of Project-related marine shipping, marine travel supporting potential marine harvesting in the vicinity of the WMT has been limited for quite some time, but has the potential to be further limited given increased traffic in the waters surrounding the WMT. The Vancouver Fraser Port Authority has been slowly making changes to its navigation channels and anchorages to align with modern demands; however, the Crown notes that the Project would result in more Project-related marine shipping in eastern Burrard Inlet and potential conflicts with Aboriginal groups. • In general, the Crown considers there is a low possibility of navigational impacts affecting access to marine harvesting activities. Vessel traffic from the WMT will utilize existing deep-sea navigational channels and constraints for vessel interactions with these channels will remain unchanged. The Crown notes that Project-related impacts on navigation and cultural practices – specifically in eastern Burrard Inlet in proximity to the WMT – will exist for the lifetime of the Project, and will occur daily. While navigation is already significantly affected by deep-sea vessel traffic in Burrard Inlet, the existing four anchorages south and east of Cates Park will be occupied consistently if terminal operations commence, which is not the case currently.
Request:	We request the following: (a) Please provide a rationale for the conclusion that only those four Stó:lō groups have asserted or exercised rights within Burrard Inlet and the Salish Sea.

	(b) Please provide a foundation for the conclusion that increased marine traffic within the Salish Sea and increased anchoring outside of the Burrard inlet will have a low impact on Aboriginal rights.
Response:	(a) As outlined in the 2016 Crown Consultation and Accommodation Report Appendix for the Stó:lō Collective (representing at that time: Aitchelitz First Nation, Kwaw-Kwaw-Apilt First Nation, Leq'á:mel First Nation, Shxwhá:y Village, Skawahlook First Nation, Skwah First Nation, Soowahlie Indian Band, Sq'éwlets First Nation, Squiala First Nation, Sumas First Nation, Tzeachten First Nation, and Yakweakwioose First Nation) [MH-052-2018; A95292-17, Annex 4.C.01, PDF page 429-470], the Crown's understanding of concerns raised by the Stó:lō Collective in 2016, including the Crown's conclusion of the impacts of the Project to Stó:lō Collective members' rights and title, and the depth of consultation owed to the Stó:lō Collective are described in further detail in Appendix C.19 of the CAR including input from individual communities of the Stó:lō Collective. The Crown's depth of consultation assessment is iterative and is expected to evolve as the NEB reconsideration hearing unfolds and as Indigenous communities, governments and nations engage in re-initiated consultations with the Crown. The Crown's interpretation of depth of consultation owed and impacts on rights will continue to be updated in collaboration with members of the Stó:lō Collective to ensure a thorough understanding of potential or established rights, and any potential impacts of the Project on those rights. (b) Please refer to response to information request 1a.
Responding FA:	Natural Resources Canada

Question #	Stó:lō Collective 2 – The Fate of Diluted Bitumen
Reference:	• A95292-42 Annex 06.D.19 – A6J6T9 – A study of the 46-year-old Arrow oil spill: Persistence of oil residues and variability in oil contamination along Chedabucto Bay, Nova Scotia, Canada • A95292-43 Annex 06.D.20 – A6I6U0 – Occurrence, source and ecological assessment of petroleum related hydrocarbons in intertidal marine sediments of the Bay of Fundy, New Brunswick, Canada • A95292-48 Annex 06.D.24 – A6J6U5 – Flow Behaviour of Oil: What Makes Diluted Bitumen Different? • A95299-3 Annex 06.D.29 – A6J6Y2 – Meso-scale studies on the penetration and retention of diluted bitumen in different types of shorelines, Northern British Columbia, Canada • A95299-15 Annex 6.D.41 – A6J6Z7 – Fate of photodegraded dilbit in Seawater. Use of Cold Lake Blend and Access Western Blend with natural solar light in Ottawa, Canada over winter and summer seasons to assess the impact of sunlight on the chemical fate of dilbit • A95299-23 Annex 07.G.06 – A6J7A5 – An estimate of the sinking rate of spilled diluted bitumen in sediment laden coastal waters
Preamble:	All of the above-referenced documents discuss the fate of diluted bitumen through a variety of different lenses and a variety of different geographical locations. All of these locations are outside the geographical bounds and the watershed boundaries of the Fraser River Watershed and the Burrard Inlet and as such there is reason to question to the validity of using such scientific studies that investigate the fate of diluted bitumen in the discourse of the Salish Sea within the area defined through the Reconsideration Hearing. The environmental conditions contained in the methodology of these studies do not investigate the specific conditions of the Pacific Ocean, particularly the Strait of Juan de Fuca.
Request:	We request answers from the Department of Fisheries and Oceans and the Department of Environment and Climate Change to the following questions: (a) Do the above-referenced case studies provide an accurate review of hydrocarbon in intertidal marine sediments given the difference in water temperatures, salinity and intertidal areas within the Pacific (especially the Fraser River)? (b) Are the above-referenced case studies an accurate review of weathering, degradation and natural attenuation given the differences in water temperatures, salinity, atmospheric pressures, temperatures, and storm confluences? (c) Given that the area of the Strait of Juan de Fuca, also known as the insular belt, is made up of metamorphic grades of rock, is it appropriate to compare the bedrock platforms overlaid with sedimentary rock of northern British Columbia with that of the insular belt metamorphic rocks? (d) Given that the Strait of Juan de Fuca has variable density stratification and temperature compared to the Douglas Channel in northern British Columbia,

	can the study located at Annex 07.G.06 accurately predict the fate of diluted bitumen within the Strait of Juan de Fuca or the Salish Sea? (e) Is it appropriate to use in this Reconsideration Hearing the findings of studies that do not investigate the fate of diluted bitumen in similar scenarios and similar conditions of the Pacific Ocean/Salish Sea and the Strait of Juan de Fuca?
Response:	(a) Environment and Climate Change Canada The studies were undertaken at different locations than the waters of southern British Columbia. Two of the studies are laboratory only. One is directly concerned with Pacific coastal shorelines: Annex 06.D.29, which examined several northern BC coast types. None of the ECCC studies (in Annex 06) directly report on conditions of the southern BC coast at this time. Collectively, these references, along with others ECCC has submitted into evidence and those from partner departments, are very valuable in understanding the range of behaviours possible in the waters of southern BC. While more work is pending, at this time, these studies provide a foundation of knowledge that answer many of the questions of how oil sands products, including diluted bitumen, may behave in the coastal waters of southern BC if spilled. The south coast of BC and the Fraser River is a priority research area for ECCC and others. This area has an extensive shoreline data set collected over many years by several agencies. At this time, ECCC utilizes shoreline data collected by the Province of British Columbia (BC) and shared with ECCC for spill preparedness and response related activities. Specific details on the date of the BC data would be available from the Province. Fisheries and Oceans Canada While not specific to the Salish Sea, the referenced papers provide data on hydrocarbon behaviour over a range of temperature, salinity and substrate types in the environment, as well as under controlled lab conditions. Taken together, the data may be used to make predictions for the fate and behaviour of oil in areas in which oil spills have not occurred. (b) Environment and Climate Change Canada A95292-42 Annex 06.D.19 - A6J6T9 reflects coastal Atlantic conditions, A95292-43 Annex 06.D.20 - A6J6U0 reflects those in the Bay of Fundy. A95299-3 Annex 06.D.29 - A6J6Y2 reports on studies of A95292-48 Annex 06.D.24 - A6J6U5 and A95299-15 Annex 06.D.41 - A6J6Z7 are laboratory studies reporting on examinations of temperature and salinity factors that may influence oil flow behaviour and chemical fates, respectively. Collectively, these references, along with others ECCC has submitted into evidence and those from partner departments, are very valuable in understanding the range of behaviours possible in the waters of southern BC. While more work is pending, at this time, these studies provide a foundation of knowledge that answer many of the questions of how oil sands products, including diluted bitumen, may behave in the coastal waters of southern BC if spilled.

Fisheries and Oceans Canada

The individual referenced papers cited provide insight on hydrocarbon behaviour over a range of temperature, salinity and substrate types in the environment, as well as under controlled lab conditions. DFO has not integrated the results to provide a review of weathering, degradation and natural attenuation, given the differences in water temperatures, salinity, atmospheric pressures, temperatures, and storm confluences.

(c) Environment and Climate Change Canada

Collectively, these references, along with others ECCC has submitted into evidence and those from partner departments, are very valuable in understanding the range of behaviours possible on those shorelines considered. While more work is pending, at this time, these studies provide a foundation of knowledge that answer many of the questions of how oil sands products, including diluted bitumen, may behave in the rock formations of southern BC if spilled.

The south coast of BC area, including the Strait of Juan de Fuca are priority areas for ECCC and others. In the past few years, several groups including the Indigenous Nations, ECCC and the Department of Fisheries and Ocean have undertaken work to update the shoreline data set. This included aerial overflights and ground surveys at selected location. The Burrard Inlet is one of the pilot areas in the Area Response Planning Initiative and recently surveyed in 2018. The Burrard Inlet shoreline data has been segmented and is currently being reviewed for quality control. Fact Sheets providing an overview of the survey are included as Stó-lō Collective 2-1 Annex: Current Condition Shoreline Survey, July 10 to July 16, 2018 and Stó-lō Collective 2-2 Annex: Updating Shoreline Information for the Central-North British Columbia Coast.

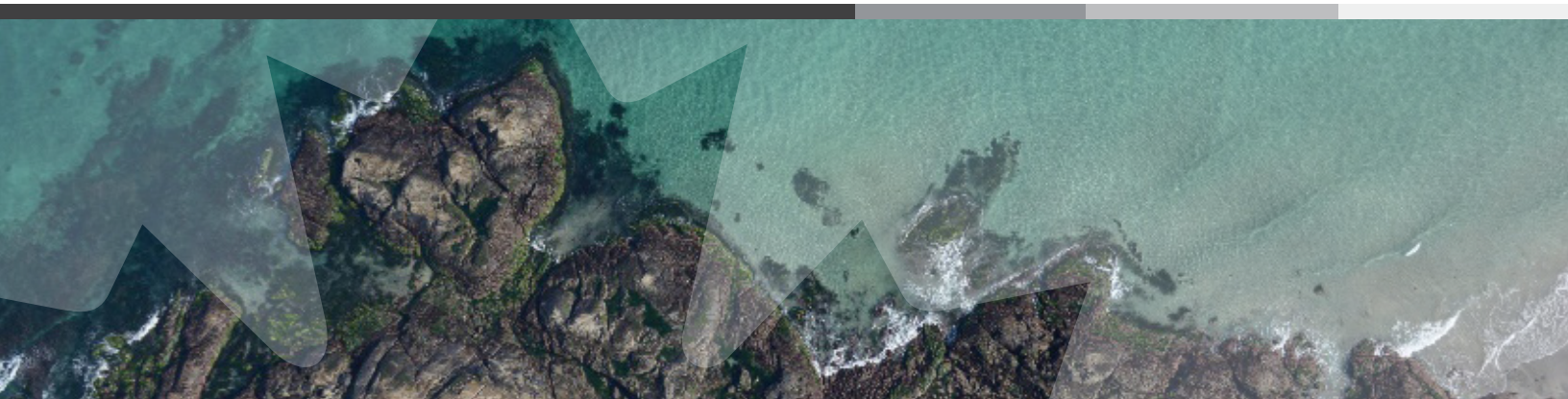
(d) Fisheries and Oceans Canada

The model equations developed in A95299-23 Annex 07.G.06 – A6J7A5 are idealized but quite general and not specific to Douglas Channel. However the application to Douglas Channel uses temperature and salinity profiles from Douglas Channel in both winter and summer. Therefore the results presented are specific to Douglas Channel. Application to other regions, such as the Strait of Juan de Fuca or the Salish Sea, would require temperature and salinity profiles for those regions. Note that the model is an idealized model and many processes are simplified. As stated in Section 6 Discussion and Summary (page 343) ‘Thus the sinking ratios here are best thought of as first estimates of the upper bounds on the sinking ratios.’

(e) Natural Resources Canada

With the accumulated knowledge from previous spill events of petroleum products from diesel to conventional crudes to diluted bitumen to bunker fuels into water environments, supplemented with lab- and tank-scale testing under specific conditions, there is sufficient knowledge to understand the range of behaviours that diluted bitumen may have if spilled in the Pacific Ocean/Salish Sea and the Strait of Juan de Fuca. In particular, there is scientific consensus (Reference 1) that behaviour of all crudes including diluted bitumen will depend upon the environmental conditions of the spill. As well, there is consensus that the behaviour of diluted bitumen products falls within the range of behaviours found for

	petroleum crude oils and products and so current spill response technologies for recovery of both floating and sunken oils can be used. However, as diluted bitumen viscosity increases relatively quickly after a spill, use of spill treatment agents such as dispersants have relatively short windows of opportunity for use. For any specific site there will be a range of conditions over different times of the year so behaviour at that site can be variable. Research simulations of spill conditions are closest to field spill scenarios in open tank systems. Under conditions tested to date (Reference 2), diluted bitumen oil masses tested have floated on fresh water for at least 21 days, allowing time for surface recovery. Portions of diluted bitumen have been found to submerge in fresh water after it has been exposed to salt water due to its tendency to pick up water (Reference 3) i.e. if it picks up salt water first, it will be more dense than fresh water and so submerge. However, research continues to develop more detailed knowledge particularly around the effects of air and water temperatures on the oil components distribution in the environment, and the resulting impacts on weathering processes and toxicity. References: 1) DFO. 2018. Status Report on the Knowledge of the Fate and Behaviour of Diluted Bitumen in the Aquatic Ecosystems. DFO Can. Sci. Advis. Sec. Sci. Resp. 2018/018 (Annex 7.G.3, Page 1 of 360). 2) Dettman, H.D., H. Farooqi, and B. Namsechi, “Test Tank Study of Diluted Bitumen and Conventional Crude Weathering in Fresh Water”, presented at the Fortieth AMOP Technical Seminar, Calgary, Alberta, October 2017. (Annex 9.C.8) 3) King, T.; Robinson, B.; Cui, F.; Boufadel, M.; Lee, K.; and Clyburne, J. 2017. An oil spill decision matrix in response to surface spills of various bitumen blends. Environmental Science: Processes & Impacts, 19(1), 929-939
Responding FA:	Environment and Climate Change Canada, Fisheries and Oceans Canada, and Natural Resources Canada



CURRENT CONDITION SHORELINE SURVEY JULY 10 TO JULY 16, 2018

Environment and Climate Change Canada (ECCC) Emergency Science and Technology Section is an internationally recognized research Centre with an established oil spill research and development program focused on addressing shoreline issues. Under the Oceans Protection Plan, these scientists are carrying out a number of studies to gather current data about the conditions of the shoreline throughout Canada. This work is important because shorelines are environmentally essential to ecosystems and are key resources to protect.

The coastlines surveyed to date include the Douglas Channel, Grenville Channel and a number of islands along the eastern side of Hecate Strait British Columbia, including Haida Gwaii Island; Port Hawkesbury and the Straits of Canso, Nova Scotia; Saint John and the Bay of Fundy, New Brunswick; and Parc National du Bic, near the community of Baie du Ha Ha in Quebec.

In British Columbia, from July 10 to July 16, 2018, ECCC shoreline specialists will be conducting scientific survey

of selected shorelines throughout the priority coastline of the Burrard Inlet, in the Port of Vancouver area and Indian Arm. This work will be done with partners, including the Tsleil-Waututh Nation, Fisheries and Oceans Canada, local municipal government, the Province of British Columbia, and industry. ECCC is collaborating with many agencies to collect as much data as possible across all scientific fields.

The survey will include measuring the slope of the shoreline, taking photos, digging a few test pits to determine the types and depth of sediments and taking sediment samples. All surveys are being done at low tide so that scientists can study the exposed shoreline zones.

The environmental data gleaned from these studies will be used to strengthen our science-based decision-making and will help protect our marine environments and communities from the potential effects of spills and day-to-day vessel operations.





The ground survey will take place at specific sites around the Inlet.

July 10, 2018	7:45am	Jug Island Beach	July 13, 2018	1:30pm	Cates Park
July 10, 2018	10:15am	Belcarra Park	July 14, 2018	12:00pm	Stearman Beach
July 11, 2018	8:00am	Camp Jubilee	July 14, 2018	2:00pm	Ambleside Beach
July 11, 2018	11:15am	Bishop Creek Flats	July 15, 2018	1:15pm	Barnet Marine Park
July 12, 2018	10:00am	Crab Park	July 15, 2018	2:45pm	Old Orchard Park, East side
July 12, 2018	11:45am	Harbour View Park	July 16, 2018	1:15pm	English Bay
July 13, 2018	11:30am	Maplewood Mudflats	July 16, 2018	2:45pm	Spanish Banks

For additional information please contact

Emergencies Science and Technology Section, Environment and Climate Change Canada, Ottawa, ON,
Tel.: 613-998-9622.

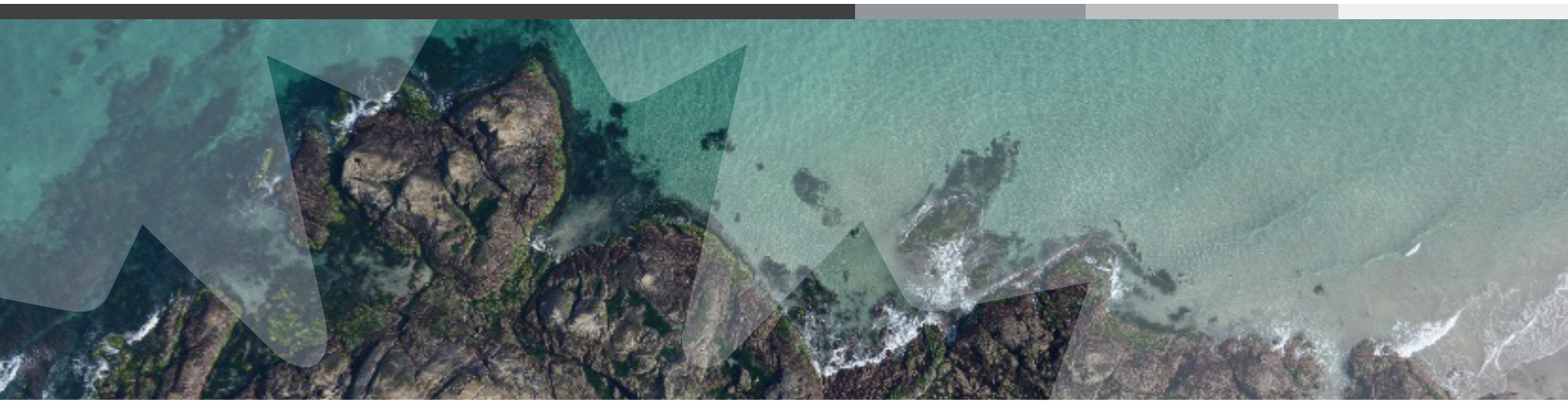
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Photos: Shoreline Aerial Surveys © Sonia Laforest

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INVENTAIRE DE L'ÉTAT ACTUEL DU LITTORAL DU 10 AU 16 JUILLET 2018

La Section des urgences – Science et technologie d'Environnement et Changement climatique Canada (ECCC) est un centre de recherche de renommée internationale qui a un programme établi de recherche et de développement sur les déversements de pétrole qui est axé sur les questions touchant le littoral. Dans le cadre du Plan de protection des océans, ces scientifiques réalisent des études pour recueillir des données actuelles sur l'état du littoral partout au Canada. Ce travail est important parce que le littoral est essentiel sur le plan environnemental pour les écosystèmes et qu'il est une ressource essentielle à protéger.

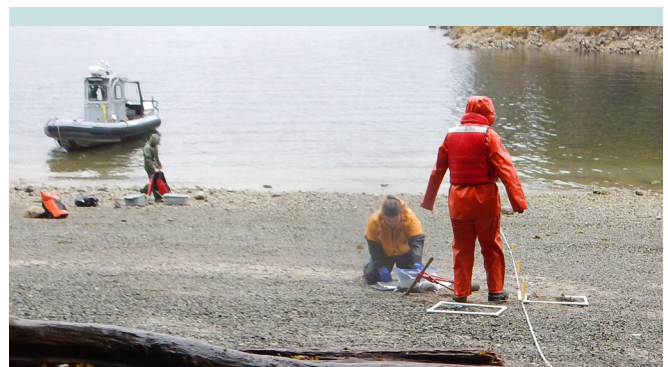
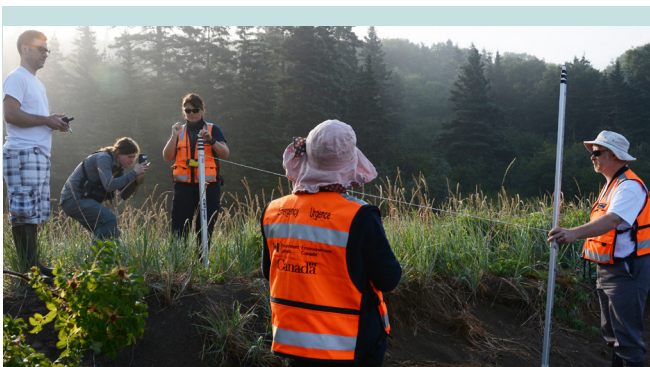
Jusqu'à présent, des inventaires du littoral ont été effectués dans le chenal Douglas, le chenal Grenville et plusieurs îles du côté est du détroit Hecate, en Colombie-Britannique, dont les îles Haida Gwaii; à Port Hawkesbury et dans le détroit de Canso, en Nouvelle-Écosse; à Saint John et dans la baie de Fundy, au Nouveau-Brunswick; au parc national du Bic, près de la collectivité de la baie du Ha! Ha!, au Québec.

En Colombie-Britannique, du 10 au 16 juillet 2018, les spécialistes du littoral d'ECCC effectueront un

inventaire scientifique de rivages sélectionnés le long de la côte prioritaire du bras de mer Burrard Inlet, dans le secteur du port de Vancouver et à Indian Arm. Ce travail sera réalisé avec des partenaires, dont la Nation Tsileil-Waututh, Pêches et Océans Canada, les municipalités locales, la Province de la Colombie-Britannique et l'industrie. ECCC collabore avec de nombreux organismes pour recueillir le plus de données possible dans tous les domaines scientifiques.

L'inventaire comprendra la mesure de la pente du littoral, la prise de photos, le creusage de quelques trous d'exploration pour déterminer les types et la profondeur des sédiments ainsi que le prélèvement d'échantillons de sédiments. Tous les relevés ont lieu à marée basse pour permettre aux scientifiques d'étudier les zones exposées du littoral.

Les données environnementales tirées de ces études serviront à renforcer notre processus décisionnel scientifique et contribueront à la protection de nos milieux marins et collectivités maritimes contre les effets possibles de déversements et de la navigation quotidienne.





Les relevés de terrain seront effectués à des endroits déterminés autour du bras de mer.

Le 10 juillet 2018 à 7 h 45 plage Jug Island

Le 10 juillet 2018 à 10 h 15 parc Belcarra

Le 11 juillet 2018 à 8 h camp Jubilee

Le 11 juillet 2018 à 11 h 15 plaine Bishop Creek Flats

Le 12 juillet 2018 à 10 h parc CRAB

Le 12 juillet 2018 à 11 h 45 parc Harbour View

Le 13 juillet 2018 à 11 h 30 vasière Maplewood Mudflats

Le 13 juillet 2018 à 1 h 30 parc Cates

Le 14 juillet 2018 à 12 h plage Stearman

Le 14 juillet 2018 à 14 h plage Ambleside

Le 15 juillet 2018 à 13 h 15 parc marin Barnet

Le 15 juillet 2018 à 14 h 45 parc Old Orchard, côté est

Le 16 juillet 2018 à 13 h 15 baie English

Le 16 juillet 2018 à 14 h 45 banc Spanish Bank

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Science et technologie d'Environnement et Changement climatique Canada, à Ottawa (Ontario).
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Photos : Relevés aériens du rivage © Sonia Laforest

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Also available in English



UPDATING SHORELINE INFORMATION FOR THE CENTRAL-NORTH BRITISH COLUMBIA COAST

SHORELINE CHARACTERIZATION

Environment and Climate Change Canada has created a database that contains a range of information that describes Canada's coast and shoreline. This information helps emergency responders to better plan and prepare for potential marine pollution events. For example, knowing what the shore looks like helps emergency officers better plan their onsite response and clean-up activities in the event of a spill. The database can also provide important information about the state of the shore prior to a pollution event.

Environment and Climate Change Canada always welcomes new information that meets established standards to expand its database to better support environmental emergencies preparedness and response.



HOW IS THE SHORELINE CHARACTERIZED?

There are two complementary ways to characterize the shoreline, both with their own standards.

1) COLLECTING GEOTAGGED VIDEOS

- Low-altitude helicopter surveys are conducted along the British Columbia coast to capture video of the shoreline.
- The camera focuses primarily on the upper part of the intertidal zone (the area of the shore between the high- and low-watermark). An audio commentary provides additional information, including a broader description of the shore.
- These videos can be viewed in a web-portal. Any location along the flight path can be selected, and a moving cursor shows the helicopter's location.

2) CREATING A SHORELINE DATABASE

- Shoreline segmentation means that the shoreline is split into segments and classified in a GIS (Geographic Information System).
- Each segment identifies the physical characteristics of the shoreline geomorphology in a database. Examples include substrate types (hard rock, semi-lithified sediment, sand, mud) and landform types (beaches, cliffs, shore platforms, rocky slopes).
- Interpreters divide the shoreline into alongshore segments according to changes noted in the upper intertidal zone. Other biological data (such as bird colonies, eelgrass meadow or kelp bed, marine mammal breeding/foraging areas) is also collected and incorporated in the database.



PRODUCTS

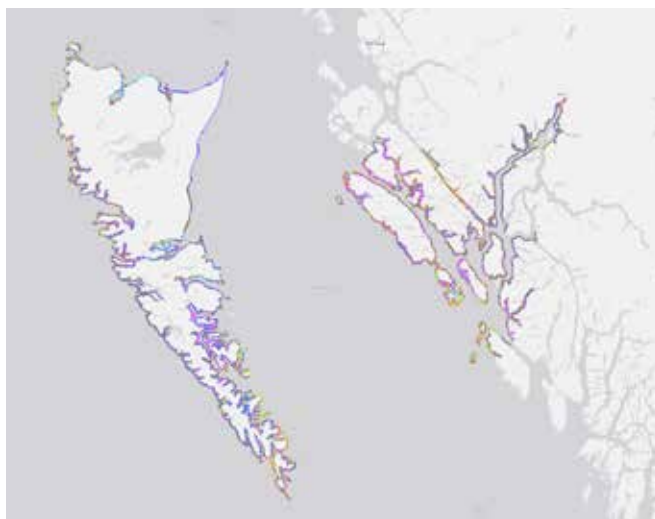
- The shoreline classification and its data can be combined with other coastal information in a database to produce maps that can be used when making decisions around events such as spills.
- Geo-located photos and videos can be easily accessed and viewed through various web-portals.



PROGRESS AND NEXT STEPS

- The shoreline characterization for the Kitimat-Douglas Channel area, including Haida Gwaii, has been completed using 2013-2015 aerial imagery.
- Environment and Climate Change Canada is currently working to complete the mapping of the BC coast from Alaska to Washington, beginning with the North/Central region. Interested partners and stakeholders may contribute information to this mapping project, provided it meets certain standards. In addition, flights may be undertaken in 2018-2019.

ECCC SHORELINE TYPE



- | | |
|--------------------------|--|
| ■ Bedrock Cliff/Vertical | ■ Mixed Sediment Beach or Bank |
| ■ Bedrock Platform | ■ Mixed and Coarse Sediment Tidal Flat |
| ■ Bedrock Sloping/Ramp | ■ Mud Tidal Flat |
| ■ Boulder Beach or Bank | ■ Pebble/Cobble Beach or Bank |
| ■ Man-Made Permeable | ■ Sand Beach or Bank |
| ■ Marsh | ■ Sand Tidal Flat |

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Photos: Shoreline Aerial Surveys © Sonia Laforest

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Aussi disponible en français



MISE À JOUR DES DONNÉES SUR LES RIVAGES DE LA CÔTE CENTRE NORD DE LA COLOMBIE-BRITANNIQUE

CARACTÉRISATION DES RIVAGES

Environnement et Changement climatique Canada a créé une base de données diverses qui décrivent les côtes du Canada. Ces données aident les intervenants en cas d'urgence à mieux se préparer à d'éventuels incidents de pollution marine. Par exemple, en sachant de quoi le rivage a l'air, ces intervenants peuvent mieux planifier leur intervention sur place et les activités de nettoyage en cas de déversement. La base de données peut également renseigner sur l'état du rivage avant un épisode de pollution.

Environnement et Changement climatique Canada accepte volontiers de nouvelles données qui satisfont aux normes établies et qu'il ajoute à sa base de données afin de mieux soutenir les activités de préparation et d'intervention en cas d'urgence environnementale.



COMMENT CARACTÉRISE-T-ON LES RIVAGES?

Il y a deux façons complémentaires de caractériser les rivages, et chacune a ses propres normes.

1) TOURNAGE DE VIDÉOS GÉOLOCALISÉES

- Des relevés par hélicoptère volant à basse altitude sont effectués le long de la côte de la Colombie-Britannique (C.-B.) pour tourner des vidéos du rivage.
- La caméra est braquée principalement sur la partie supérieure de la zone intertidale (la partie du rivage qui se trouve entre les laisses de haute et de basse mer). Des commentaires audio donnent des renseignements supplémentaires qui décrivent plus largement le rivage.
- Ces vidéos peuvent être visionnées dans un portail Web. On peut choisir tout endroit le long de la trajectoire de vol, et un curseur mobile montre la position de l'hélicoptère sur la carte.

2) CRÉATION D'UNE BASE DE DONNÉES SUR LES RIVAGES

- La segmentation du rivage consiste à le diviser en segments et à classer ceux-ci dans un SIG (système d'information géographique).
- Les caractéristiques physiques de la géomorphologie de chaque segment sont présentées dans une base de données, par exemple le type de substrat (roc, sédiments semilithifiés, sable, vase) et le type de relief (plage, falaise, plateforme littorale, pente rocheuse).
- Les interprètes divisent le rivage en segments selon les changements observés dans la zone intertidale supérieure. Des données biologiques (p. ex. colonie d'oiseaux, herbier de zostères ou de laminaires, aire de reproduction ou d'alimentation de mammifères marins) sont également recueillies et intégrées à la base de données.



PRODUITS

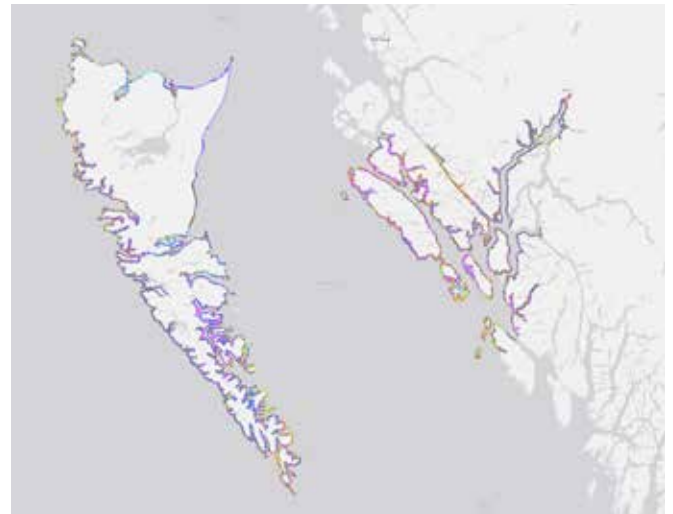
- Les données de classification des rivages peuvent être combinées avec d'autres renseignements sur les côtes afin de produire des cartes utiles pour prendre des décisions en cas de déversement.
- Les photos et vidéos géolocalisées peuvent être facilement visionnées au moyen de divers portails Web.



PROGRÈS ACCOMPLIS ET PROCHAINES ÉTAPES

- Les rivages dans la région de Kitimat et du chenal Douglas, y compris Haida Gwaii, ont été caractérisés au moyen d'images aériennes obtenues de 2013 à 2015.
- Environnement et Changement climatique Canada s'affaire actuellement à terminer la cartographie de la côte de la C. B., depuis l'Alaska jusqu'à l'État de Washington, en commençant par la région centre-nord. Les partenaires et intervenants intéressés peuvent contribuer à ce projet de cartographie en fournissant des renseignements qui satisfont à certaines normes. En outre, d'autres vols pourraient être effectués en 2018-2019.

TYPE DE RIVAGE SELON ECC



- | | |
|-----------------------------------|---|
| ■ Falaise rocheuse/vertical | ■ Marais |
| ■ Plateforme rocheuse | ■ Plage ou berge à sédiments mixtes |
| ■ Rampe rocheuse | ■ Batture à sédiments mixtes et grossiers |
| ■ Plage ou berge de blocs rocheux | ■ Batture vaseuse |
| ■ Structure anthropique perméable | ■ Plage ou berge de cailloux/galets |
| | ■ Plage ou berge de sable |
| | ■ Batture sablonneuse |

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Photos : Relevés aériens du rivage © Sonia Laforest

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Also available in English

Question #	Stó:lō Collective 3 – Duty to Consult
Reference:	A95463-2 - Notice of Motion of Squamish Nation - A6J9Z9
Preamble:	Based on a review of filings made to date in the Reconsideration Hearing, it appears Canada has advised certain intervenors that it will be relying on the Reconsideration Hearing to the extent possible to fulfil its constitutional duty to consult with Indigenous intervenors. In such circumstances, “the Board’s process serves the additional purpose of contributing to the extent possible to the constitutional imperative not to approve a project if the duty to consult was not satisfied”. At page 4 of Squamish Nation’s Notice of Motion¹ dated November 5, 2018, for example, Squamish references a letter dated October 5, 2018 that it received from the Minister of Natural Resources, Amarjeet Sohi which stated, among other things, that Canada intends to rely on the Board’s hearing process to the extent possible to fulfill its duty to consult in connection with the Reconsideration. The Supreme Court of Canada has confirmed that the Crown may rely on steps taken by an administrative body to fulfil the duty to consult, in part or in full, so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances.² However, where the Crown intends to rely on a regulatory process to discharge the duty to consult, it should be made clear to the affected Indigenous groups that the Crown is so relying.³ In addition, if the Board does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval.⁴ ¹ NEB Filing ID A95463-2. ² Clyde River v. Petroleum Geo-Services Inc., 2017 SCC 40 [“Clyde River”] at para, 30; Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2017 SCC 41 [“Chippewas”] at para 32. ³ Chippewas, para 44; Clyde River, para 23. ⁴ Chippewas, para. 32.
Request:	(a) Is the Crown in fact relying, to the extent possible, on the Board’s hearing process to fulfill its duty to consult in connection with the Reconsideration? (b) What are the Crown’s plans for fulfilling its duty to consult should the Board’s hearing process fall short of satisfying the Crown’s constitutional obligations? (c) Is Canada relying, to the extent possible, on the strength of claim assessments conducted in the first hearing on the TMEP, or is it conducting new assessments? (d) If Canada is conducting new assessments: (i) what is Canada’s assessment of Stó:lō’s strength of claim in relation to Aboriginal title and rights? (ii) how did Canada identify Stó:lō’s specific Aboriginal rights?

	(iii) what methodology is Canada using to assess potential adverse impacts to Stó:lō's rights and interests from Project-related marine shipping? (iv) what is Canada's assessment of the potential adverse impacts to Stó:lō's rights and interests from Project-related marine shipping, including section 35 rights to fish, hunt and gather? (b) What procedural aspects of consultation with First Nations has the Crown delegated to Trans Mountain in this Reconsideration?
Response:	(a) The Crown will be relying on the NEB public hearing process to the extent possible to fulfil the legal duty to consult related to the reconsideration of Project-related marine shipping. The Crown has articulated this at several points, including in a letter from the Minister dated October 5, 2018 which was sent to all Indigenous groups on the Crown consultation list [A95026-1 Government of Canada Letter to Crown List, October 5 - A6J1T4]. The legal duty to consult rests with the Crown as per s.35 of the Constitution Act, 1982. However, the courts have affirmed that Canada can rely on existing regulatory processes, to the extent possible, to fulfill this responsibility. In this regard, the National Energy Board (NEB) review process is an effective means of gathering, distributing, and assessing information regarding any adverse impacts the Project may have on potential or established Aboriginal and Treaty rights. This approach avoids duplication and ensures that the NEB, which has broad powers to set conditions for the Project, has full access to relevant information on potential adverse impacts on Indigenous interests, including potential or established Aboriginal and treaty rights. (b) The Crown will re-engage in Phase III consultations, outside of the reconsideration hearing, with all potentially impacted Indigenous communities, governments and nations to meaningfully fulfill its duty to consult and, where appropriate, accommodate impacts to Aboriginal and Treaty rights. The Consultation Team has been mandated to engage in meaningful two-way dialogue and discuss the concerns of Indigenous communities, governments, and nations, including agreeing to accommodation measures, where appropriate (following Cabinet approval where required) to address those concerns. This will be an ongoing back-and-forth conversation between representatives of the Indigenous community, government, or nation, and the Crown. (c) The 2016 Crown Consultation and Accommodation Report Appendix for Stó:lō Collective (representing at that time: Aitchelitz First Nation, Kwaw-Kwaw-Apilt First Nation, Leq'á:mel First Nation, Shxwhá:y Village, Skawahlook First Nation, Skwah First Nation, Soowahlie Indian Band, Sq'éwlets First Nation, Squiala First Nation, Sumas First Nation, Tzeachten First Nation, and Yakweakwioose First Nation) [MH-052-2018; A95292-17, Annex 4.C.01, PDF page 429-470] provides the results of a preliminary strength of claim assessment, as well as background information, references, and context for the Crown's analysis of strength of claim, potential adverse

impacts, and the depth of consultation owed to Stó:lō Collective for the purposes of the environmental assessment and regulatory review under CEAA, 2012 and the NEB Act.

The Crown will re-engage in Phase III consultations, outside of the Reconsideration Hearing, with all impacted Indigenous communities, governments and nations to meaningfully fulfill its duty to consult through understanding, and identifying measures to avoid, mitigate or accommodate impacts, where appropriate, to Aboriginal and Treaty rights impacted by the Project. Through this process, the Crown's interpretation of the depth of consultation owed and potential impacts on rights of the project will continue to be updated in collaboration with each Indigenous community, government, or nation, to ensure a thorough understanding of potential or established rights, and any potential impacts of the Project on those rights.

- (d) The Crown's current understanding of Stó:lō Collective members' strength of claim in relation to Aboriginal title and rights in relation to the Project comes from their CAR Appendix (representing at that time: Aitchelitz First Nation, Kwaw-Kwaw-Apilt First Nation, Leq'á:mel First Nation, Shxwhá:y Village, Skawahlook First Nation, Skwah First Nation, Soowahlie Indian Band, Sq'éwlets First Nation, Squiala First Nation, Sumas First Nation, Tzeachten First Nation, and Yakweakwioose First Nation) [MH-052-2018; A95292-17, Annex 4.C.01, PDF page 435]:

The Crown's preliminary assessment of the Stó:lō Collective's Aboriginal title claim over the section of the Project running through approximately 195 km of the Stó:lō asserted traditional territory, as delineated by the Stó:lō Nation writ area, will also range from weak to strong.

As outlined in the 2016 Crown Consultation and Accommodation Report [MH-052-2018; A95292-17, Annex 4.C.01, PDF page 39], strength of claims are determined based on information currently available to government, and are subject to change should case law change or additional information become available, including any information that may be provided during consultation.

The Crown's purpose of assessing preliminary strength of claim information is to understand the nature and scope of Aboriginal and Treaty rights, whether established or asserted, so that the Crown can ensure that consultation is sufficiently broad and deep to address the potential adverse impacts that the Project could have on these rights, and to ensure that accommodation measures, if required, are appropriate. The starting point for these assessments is to work with information that the Crown has in hand, but Indigenous communities, governments and nations are invited to provide information that they believe could assist the Crown in understanding the nature and scope of the rights held or asserted by them.

The Crown's interpretation of depth of consultation owed, including an assessment of strength of claim and impacts on rights, will continue to be updated in collaboration with members of the Stó:lō Collective to ensure a thorough understanding of potential or established rights, and any potential impacts of the Project on those rights.

	(e) The Crown has a responsibility to determine whether the legal duty to consult has been adequately fulfilled and sufficient information is available to inform a decision on the Project. A recommendation on whether to approve the Project will only be considered by the Governor-in-Council once it is satisfied that: (1) the Crown has adequately fulfilled its duty to consult and that consultations with potentially impacted groups have been offered and/or carried out in a meaningful and responsive manner; and (2) accommodations have been considered, where appropriate, and responses have been provided to Indigenous communities, governments and Nations. The legal duty to consult rests with the Crown as per s.35 of the Constitution Act, 1982. The Crown has not delegated the procedural aspects of its duty to consult to the Project proponent. Trans Mountain Corporation (TMC) is a Crown Corporation, owned by the Canada Development Investment Corporation (CDEV), which is accountable to the Parliament of Canada through the Minister of Finance. TMC owns the operating entities of Trans Mountain, including Trans Mountain Pipeline ULC (TMP ULC), the project proponent, and Trans Mountain Canada Inc. (TMCI), the operator of the pipeline. Representatives of TMCI will be part of the consultation and accommodation process and participate in meetings with representatives of Indigenous communities, governments, and nations, where appropriate, although the ultimate responsibility for ensuring that the duty is adequately fulfilled remains with the Crown under the leadership of the Minister of Natural Resources. The Crown can, however, rely on existing regulatory processes, to the extent possible, to fulfill the duty to consult. As such, the Crown will rely, to the extent possible, on the National Energy Board (NEB) review process to fulfill this duty. The NEB review process is an effective means of gathering, distributing, and assessing information regarding any adverse impacts the Project may have on potential or established Aboriginal and treaty rights. This approach avoids duplication and ensures that the NEB which has broad powers to set conditions for the Project, has full access to relevant information on potential adverse impacts on Indigenous interests, including potential or established Aboriginal and treaty rights. In addition, the NEB process requires the proponent to work with and potentially accommodate Indigenous communities, governments and Nations impacted by the Project. The NEB filing manual provides information to the proponent on the requirement to engage with potentially affected Indigenous communities, governments and nations. This does not constitute delegation of the duty to consult. In addition to the Crown's direct consultation with Indigenous groups and consultation through the NEB, the Crown will also rely on the conduct of all of the proponent's past and future consultation activities, where appropriate, to fulfill its duty to consult.
Responding FA:	Natural Resources Canada

National Energy
Board



Office national
de l'énergie

This is Exhibit MM referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
7 January 2019

To: All Parties

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177
MH-052-2018
Raincoast Conservation Foundation notice of motion to file late evidence – comment
process**

On 7 January 2019, the Board received a notice of motion from Raincoast Conservation Foundation in which it seeks to file late evidence.

Before deciding on this request, the Board will accept comments on it from Trans Mountain and the intervenors on or before **3:00 pm Pacific time (4:00 pm Mountain time) on 9 January 2019**.

Raincoast Conservation Foundation may file reply comments on or before **3:00 pm Pacific time (4:00 pm Mountain time) on 10 January 2019**.

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

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Calgary, Alberta T2R 0A8

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January 9, 2019

Our File: 101024-038

BY PARTICIPATION PORTAL

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2P 5J2

Attention: Sheri Young, Secretary of the Board

Dear Ms. Young,

**Re: Trans Mountain Expansion Project ("Project") – Reconsideration
Hearing Order MH-052-2018 & File OF-Fac-Oil-T260-2013-03 59
Notice of Motion of Raincoast Conservation Foundation ("Raincoast") to file late
evidence ("Motion")**

Pursuant to the letter of the National Energy Board ("**Board**") dated January 7, 2019, we write to notify the Board of the Stó:lō Collective's support for the Motion. As with all marine life located in British Columbia's coastal waters, the health of the southern resident killer whales and the effect of the Project thereon is of great concern the Stó:lō Collective.

As an administrative body, the Board owes a duty of fairness to participants which has been described as including a duty to ensure that decisions are made "with an opportunity for those affected by the decisions to put forward their views and evidence fully and have them considered by the decision-maker."¹ The Board has itself acknowledged its responsibility to conduct a hearing that is procedurally fair and that "this requires that the 'parties [are] entitled to a meaningful opportunity to present their cases fully and fairly.'"² As the master of its own procedure, the Board can and should make an effort to have all relevant evidence before it when rendering its decision in this Reconsideration Hearing.

Further, the Supplementary Giles Report was only very recently released (dated January 7, 2019) and is directly relevant to the Board's consideration of the effects of Project-related marine shipping on the southern resident killer whale population. Accordingly, the Stó:lō Collective requests that the Board grant Raincoast's Motion to late-file the Supplementary Giles Report.

¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 22 ["**Baker**"].

² NEB Ruling No. 9 – Squamish and TWN Notices of Motion for Extension [NEB Filing ID A95640-1], "Views of the Board" citing *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 235.

Yours truly,

MILLER TITERLE LAW CORPORATION

A handwritten signature in black ink, appearing to read 'Joelle Walker', with a long horizontal flourish extending to the right.

Joelle Walker

joelle@millertiterle.com

National Energy
Board



Office national
de l'énergie

This is Exhibit OO referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
10 January 2019

To: All Parties

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018
Procedural Direction No. 4 – Affidavits and written argument-in-chief, including
comments on draft conditions and recommendations**

A. Upcoming deadlines

Consistent with Procedural Direction No. 3, the Board will receive affidavits adopting evidence, written argument-in-chief, and reply argument according to the following timeline:

Step	Deadline (3:00 pm Pacific time (4:00 pm Mountain time))
Marine technical advisor files written argument-in-chief	15 January 2019
All Parties file affidavits adopting their written evidence	17 January 2019
Trans Mountain and Federal Departments and Agencies ¹ file written argument-in-chief	17 January 2019
Intervenors (other than Federal Departments and Agencies) file written argument-in-chief	22 January 2019
Trans Mountain files reply argument	25 January 2019

The Board has decided that it does not require oral summary argument. The Board did receive a letter from Tsleil-Waututh Nation on 9 January 2019 requesting that oral summary argument be held, as well as some comments in relation to it. The Board's Hearing Order was clear that oral summary argument was optional and may only be held "if needed and time permits." The Board is not persuaded that such argument is necessary. This takes into consideration that the

.../2

¹ The Federal Departments and Agencies are denoted on the List of Parties with the prefix "AA."

Board provided additional time for intervenors to prepare their evidence and an opportunity for Indigenous groups to provide oral traditional evidence at two locations on Vancouver Island. There is not sufficient time to also have oral summary argument, nor is oral argument considered necessary given the specific focus in the Reconsideration hearing and the List of Issues.

It is up to the Board's discretion whether it considers written versus oral argument to be the most helpful in making its decision or recommendation. As stated in the Hearing Order, "[t]he Parties should include all pertinent argument in their written argument-in-chief, as [oral summary argument] may not be held." The Board looks forward to considering written final argument from the Parties.

Parties that wish to comment on draft conditions and recommendations must include these comments in their written argument-in-chief. When filing written argument-in-chief, each Party must serve all other Parties. See the Hearing Order for information on how to file and serve documents.

B. Adoption of written evidence by affidavit

Throughout the hearing process, evidence has been filed on the public record. All documents on the public record can be found in the Board's online [public registry](#). As required by subsection 37(4) of the *National Energy Board Rules of Practice and Procedure, 1995*, the Board directs each Party that filed written evidence **in the Reconsideration hearing** to file with the Board and serve on all Parties an affidavit or affidavits adopting that evidence.

Adopting evidence means making a statement under oath, by way of an affidavit, that the evidence was prepared by you, or under your direction and control, and that it is truthful to the best of your knowledge and belief. Trans Mountain and intervenors must file their affidavits by 17 January 2019. If a Party filed evidence that was prepared by an expert and did not include their CV/résumé at the time of filing that evidence, that Party should file their expert's CV/résumé by this deadline as well.

In some instances, Trans Mountain or intervenors will not be able to adopt all parts of their evidence, if it was not prepared by them or under their direction and control. This may include documents that were prepared by third parties with which Trans Mountain or the intervenor has no connection (e.g., newspaper articles). Evidence that cannot be adopted is unsworn and remains on the public record.

To assist Parties in understanding and completing this process, the Board is including two forms of affidavits as **Appendix 1** to this procedural direction (Board staff will email the Parties fillable electronic versions).

- **Part A** is for Parties that have prepared their **own** evidence.
- **Part B** is for consultants, experts, or other individuals that have prepared evidence **for** a Party. Parties are responsible for ensuring that the applicable affidavit(s) is filed in relation to the evidence filed by them or on their behalf.

Affidavits must be signed by a Notary Public or Commissioner for Oaths.

Any evidence on the Board's record that has not been adopted and sworn (or affirmed) will be treated by the Board as unsworn evidence. Unsworn evidence may not be given as much weight (i.e., consideration) as evidence given under oath or solemn affirmation.

C. Argument-in-chief

In this Reconsideration hearing, Parties will file argument-in-chief **in writing**. Trans Mountain will also have the opportunity to file written reply argument. A Party may also choose not to undertake argument-in-chief.

Argument-in-chief is a Party's chance to persuade the Board to take certain positions on the issues and evidence at hand and on the Reconsideration as a whole. Parties may choose to address the weight that ought to be given to any evidence, or how the Board should consider conflicting evidence that is on the public record. A Party may also, during argument-in-chief, make submissions to the Board about matters within the List of Issues.

Argument-in-chief **must** be based upon evidence that is already on the record. **No new evidence can be provided during argument-in-chief**, and the Board will **not** consider any new evidence introduced.

A Party may refer to any filed evidence in their argument-in-chief, regardless of the Party that filed it. In other words, a Party is **not** limited to referring only to its own evidence. While there is no page limit for written argument-in-chief, Parties are encouraged to be as clear and concise as possible and to organize their views effectively.

D. Draft conditions and recommendations

The Board is releasing draft conditions (**Appendix 2**) and draft recommendations (**Appendix 3**) for comment by the Parties. All comments on draft conditions and recommendations must be included in the Parties' written argument-in-chief.

Releasing the draft conditions and recommendations at this time is not an indication of the Board's forthcoming recommendation to the Governor in Council (GIC) to either approve or deny the Project application.

As the conditions and recommendations are drafts, Parties are reminded that any of them may be deleted or modified. Parties may make comments and suggestions about the draft conditions and recommendations, and they may also suggest any additional conditions and recommendations for the Board's consideration. Any suggestion should include a justification to assist the Board in assessing its merits.

What are conditions?

Regardless of what the Board sets out in its Reconsideration Report, subsection 53(7) of the *National Energy Board Act* (NEB Act) requires the Board to set out in the report all the terms and conditions that it considers necessary or desirable in the public interest, should the Project be approved by the GIC.

The purpose of conditions is to mitigate potential risks and effects associated with a project so that the project can be designed, constructed, operated, and abandoned in a safe manner that protects the public and the environment. Conditions outline requirements that a company must meet in relation to a project. The draft conditions that are the focus of this Reconsideration are intended to reduce or eliminate the effects of Project-related marine shipping in accordance with the requirements of the *Canadian Environmental Assessment Act, 2012* and the *Species at Risk Act*. These also include the conditions that were explicitly listed in Order in Council P.C. 2018-1177. However, the remaining conditions from the Board's OH-001-2014 Recommendation Report would still apply to the overall Project.

The Board also intends to modify Condition 2 – compliance with commitments, as per below (modification in red text):

Without limiting Conditions 3, 4 and 6, Trans Mountain must implement all of the commitments it made in its Project application or to which it otherwise committed on the record of the OH-001-2014 proceeding **and the MH-052-2018 Reconsideration proceeding.**

This modified condition would ensure that Trans Mountain is accountable for all of the commitments it made during this Reconsideration hearing.

Conditions would be attached to any Board regulatory instruments (e.g., certificate of public convenience and necessity, or orders) if the Project were to be approved by the GIC. The conditions outline requirements that are within the scope of the Board's regulatory authority and which Trans Mountain, as the proponent, would be required to meet in order for the Project to be carried out. Conditions imposed by the Board are legally binding, and are enforced pursuant to the NEB Act.²

What are recommendations?

For the GIC's consideration in deciding whether or not to approve the Project, the Board intends to issue recommendations for measures to mitigate, avoid, or lessen the effects of Project-related marine shipping that are within the authority of the GIC, but are beyond the scope of the Board's regulatory authority. This is consistent with the direction of the Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*:

² For information on how the Board verifies company compliance with conditions, as well as on the Board's overall approach to compliance, see Appendix 1 of the Board's 16 April 2014 [letter](#) when it released draft conditions for viewing during the OH-001-2014 Certificate hearing.

“While the Board lacked authority to regulate marine shipping, the final decision-maker was not so limited... the Governor in Council required the Board’s exposition of all technically and economically feasible measures that are available to avoid or lessen the Project’s effects on the Southern resident killer whale.”³

Unlike conditions, recommendations would not be attached to any Board regulatory instruments or enforced by the Board. Recommendations are also generally beyond the control of Trans Mountain. Further, certain marine shipping-related conditions from the Board’s OH-001-2014 Recommendation Report may be revised into recommendations to the GIC, as marine shipping is not directly within Trans Mountain’s control and is not within the Board’s regulatory authority (as found by the Federal Court of Appeal in *Tsleil-Waututh Nation*).

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

Attachments

³ 2018 FCA 153 at para 456 [*Tsleil-Waututh Nation*].

Appendix 1

Part A – Affidavit for Parties

**IN THE MATTER OF
NATIONAL ENERGY BOARD
HEARING ORDER MH-052-2018**

**Trans Mountain Pipeline ULC
Application for the Trans Mountain Expansion Project
National Energy Board reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177 (Reconsideration)**

AFFIDAVIT OF _____
(Print name of Party)

I, _____, of _____, in the
Province/Territory of _____, MAKE OATH [OR AFFIRM] AND SAY AS
FOLLOWS:

1. I am a Party in the National Energy Board MH-052-2018 Reconsideration hearing (the Hearing).
2. I filed evidence in the Hearing on _____(date(s)).
3. The evidence I filed and that I hereby adopt consists of the following **(list all evidence, including responses to information requests [IRs])**:
4. The written evidence set out in Paragraph 3 above was prepared by me or under my direction and control and is accurate to the best of my knowledge and belief.

SWORN [OR AFFIRMED] BEFORE ME

at _____,
in the Province/Territory of _____,
this _____day of _____, 2019. _____
(Name of Party)

A Notary Public or Commissioner for Oaths
in and for the Province/Territory of _____
Expiry Date of Commission

Part B – Affidavit for persons who prepared evidence on behalf of a Party

**IN THE MATTER OF
NATIONAL ENERGY BOARD
HEARING ORDER MH-052-2018**

**Trans Mountain Pipeline ULC
Application for the Trans Mountain Expansion Project
National Energy Board reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177 (Reconsideration)**

AFFIDAVIT OF _____
(Name)

I, _____, of _____, in the
Province/Territory of _____, MAKE OATH [OR AFFIRM] AND SAY AS
FOLLOWS:

1. I prepared evidence on behalf of _____ who is a Party in the National
Energy Board MH-052-2018 Reconsideration hearing (the Hearing).
2. I am advised by _____ (**name of Party**) and do believe that the
evidence I prepared was filed as evidence in the Hearing on _____
(**date(s)**).
3. The evidence I filed and that I hereby adopt consists of the following (**list all evidence,
including responses to information requests [IRs]**):
4. The written evidence set out in Paragraph 3 above was prepared by me or under my
direction and control and is accurate to the best of my knowledge and belief.

SWORN [OR AFFIRMED] BEFORE ME

at _____,
in the Province/Territory of _____,
this _____ day of _____, 2019.

(**Name of person who prepared
evidence on behalf of Party**)

A Notary Public or Commissioner for Oaths
in and for the Province/Territory of _____
Expiry Date of Commission _____

Appendix 2 Draft conditions for comment

The defined terms for the conditions remain the same as outlined in pages 413 to 415 of the Board's OH-001-2014 [Recommendation Report](#).

In particular, for the purposes of the conditions and recommendations, the “**Project**” is defined to mean the Trans Mountain Expansion Project in all its components, including pipeline construction, reactivation, and changes to operating conditions resulting in operation as Line 1 and Line 2; deactivation, reactivation, construction, and operation of or at the respective pump stations; decommissioning of two tanks and construction and expanded operation at the existing Edmonton, Sumas, and Burnaby Terminals and the Westridge Marine Terminal; construction and operation of the new delivery pipelines; and all infrastructure. The Project does **not** include Project-related marine shipping.

From the OH-001-2014 Certificate hearing:

Condition 91 – [proposed amendments](#)

Plan for [marine spill prevention and response](#) commitments

Trans Mountain must file with the NEB, **at least 2 months prior to commencing construction**, a plan describing [how it will ensure](#) that it will meet the requirements of Condition 133 regarding [marine spill prevention and response](#). The plan must be prepared in consultation with Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority, Vancouver Fraser Port Authority, British Columbia Coast Pilots, Western Canada Marine Response Corporation, Fisheries and Oceans Canada and the Province of British Columbia, and must identify any issues or concerns raised and how Trans Mountain has addressed or responded to them.

Trans Mountain must provide the plan to the above-mentioned parties at the same time as it is filed with the NEB.

From the OH-001-2014 Certificate hearing:

Condition 131 – [proposed change from a condition to a recommendation](#)

Marine Public Outreach Program

The Board is proposing a recommendation to the federal government which has the necessary authority to address such matters. See draft Recommendation 12.

From the OH-001-2014 Certificate hearing:

Condition 132 – [proposed amendments](#)

Marine Mammal Protection Program

Trans Mountain must file with the NEB, **at least 3 months prior to commencing operations**, a Marine Mammal Protection Program that focuses on [mitigating effects from the Project and associated cumulative effects, and on fulfilling Trans Mountain's commitments as a terminal operator with regard to Project-related marine shipping](#). The program must include:

- a) the goals and objectives of the program, including a discussion on how they align with the objectives of applicable Fisheries and Oceans marine mammal Recovery Strategies and Action Plans;
- b) a summary of the issues related to marine mammals [from the Project and](#) from Project-related marine vessels;
- c) a summary of the initiatives that Trans Mountain has supported or undertaken to-date, including the goals of each initiative and how they relate to the [goals and](#) objectives of the program;
- d) a discussion of the outcomes or progress updates of the initiatives identified in c), and how these outcomes have met or are contributing to the objectives of the program; [\[previous e\) and f\) deleted\]](#)
- e) any other initiatives that Trans Mountain intends to undertake or support in the future that are relevant to the program; and
- f) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the program, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding, [MH-052-2018 Reconsideration proceeding](#) and/or pursuant to Condition 97, had the opportunity to review and comment on the information.

**From the OH-001-2014 Certificate hearing:
Condition 133 – [proposed amendments](#)**

[Confirmation of marine spill prevention and response commitments](#)

Trans Mountain must file with the NEB, **at least 3 months prior to loading the first tanker at the Westridge Marine Terminal with oil transported by the Project**, confirmation, signed by an officer of the company that:

- a) [Trans Mountain has included in its Vessel Acceptance Standard and Westridge Marine Terminal Regulations and Operations Guide a requirement for tankers nominated to load at the Westridge Marine Terminal to have a suitable arrangement for the proposed enhanced tug escort between the Westridge Marine Terminal and Bouy J prior to departure. The tug escort should be suitable for foreseeable meteorological and ocean conditions and be based on tanker and cargo size.](#)
- b) An enhanced marine oil spill response regime capable of delivering 20,000 tonnes of capacity within 36 hours of notification, with dedicated resources staged within the study area is in place.

**From the OH-001-2014 Certificate hearing:
Condition 134 – [proposed amendments](#)**

[Updated Vessel Acceptance Standard and Westridge Marine Terminal Regulations and Operations Guide](#)

Trans Mountain must file with the NEB, **at least 3 months prior to loading the first tanker at the Westridge Marine Terminal with oil transported by the Project, and thereafter on or before 31 January of each of the first five years after commencing operations**, an updated Vessel Acceptance Standard [and Westridge Marine Terminal Regulations and Operations Guide](#), and a summary of any revisions made to each.

**From the OH-001-2014 Certificate hearing:
Condition 144 – proposed amendments**

Ongoing confirmation of marine spill prevention and response commitments

Trans Mountain must file with the NEB, **on or before 31 January of each year after commencing operations** confirmation, signed by an officer of the company, that it is continuing to meet the requirements of Condition 133 regarding Trans Mountain's marine spill prevention and response commitments.

Trans Mountain must provide each filing to Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority, Vancouver Fraser Port Authority, British Columbia Coast Pilots, Western Canada Marine Response Corporation, Fisheries and Oceans Canada and the Province of British Columbia at the same time as it is filed with the NEB. If a particular party mentioned above requests that it not be provided the annual filing, Trans Mountain may cease providing it to that party.

From the OH-001-2014 Certificate hearing:

Condition 151 – no proposed amendments (while listed in the Governor in Council's Order in Council P.C. 2018-1177, this condition does not relate to Project-related marine shipping)

Post-construction environmental monitoring reports

Trans Mountain must file with the NEB, **on or before 31 January following the first, third, and fifth complete growing seasons after completing final clean-up**, a post-construction environmental monitoring report for the Project that must include:

- a) a description of the valued components or issues that were assessed or monitored;
- b) measurable goals for each valued component or issue;
- c) monitoring methods for each valued component or issue, results of the monitoring, and a comparison to the defined measurable goals;
- d) corrective actions taken, their observed success, and their current status;
- e) identification on a map or diagram of the locations where corrective actions were taken;
- f) any further corrective actions planned and a schedule for monitoring and reporting; and
- g) a summary of its consultations with appropriate government authorities and any potentially affected Aboriginal groups and affected landowners/tenants. In the environmental monitoring report filed after the fifth full growing season after completing clean-up,

Trans Mountain must include:

- i) an assessment of the effectiveness of mitigative and corrective actions and how learnings have been or will be applied to Trans Mountain's Environmental Protection Program;
- ii) a detailed description of all valued components or issues for which the measurable goals have not been achieved during the duration of the post-construction monitoring program; and
- iii) an evaluation of the need for any further corrective actions, measurable goals, assessments, or monitoring of valued components or issues, including a schedule for those.

All filed post-construction environmental monitoring reports must address issues related, but not limited, to: soils; weeds; watercourse crossings; riparian vegetation; wetlands; rare plants, lichens and ecological communities; municipal tree replacement; wildlife and wildlife habitat; fish and fish habitat; marine fish and fish habitat; marine mammals; marine birds; and species at risk.

Appendix 3 Draft recommendations for comment

The defined terms for the conditions remain the same as outlined in pages 413 to 415 of the Board’s OH-001-2014 [Recommendation Report](#).

In particular, for the purposes of the conditions and recommendations, the “**Project**” is defined to mean the Trans Mountain Expansion Project in all its components, including pipeline construction, reactivation, and changes to operating conditions resulting in operation as Line 1 and Line 2; deactivation, reactivation, construction, and operation of or at the respective pump stations; decommissioning of two tanks and construction and expanded operation at the existing Edmonton, Sumas, and Burnaby Terminals and the Westridge Marine Terminal; construction and operation of the new delivery pipelines; and all infrastructure. The Project does **not** include Project-related marine shipping.

Overall health of the Salish Sea	
	Recommendation 1: The Governor in Council should develop and implement a regional cumulative effects management plan that assesses the overall environmental state of, and cumulative effects on, the Salish Sea, and use that better understanding to help inform a long-term approach to managing those cumulative effects, as well as informing the consideration of future proposed projects. This plan should include, but not be limited to: a) consideration of the many impacts on the Salish Sea, including contamination from point and diffuse land-based sources, the multiple impacts on salmon and other fish stocks, and the impacts from all vessel traffic; b) incorporation of the work the federal authorities are already planning in the area, such as under the Coastal Environmental Baseline Program and the Cumulative Effects of Marine Shipping initiative (including its regional cumulative effects assessment); c) development of short-, medium-, and long-term targets for addressing cumulative effects, including consideration of the feasibility of reducing total underwater noise, strike/collision risk of vessels with marine species, and key contaminant levels over time; and d) any monitoring necessary to help determine the extent of cumulative effects, the success of measures to manage those effects, and progress towards meeting targets.
	Recommendation 2: The Governor in Council should report publicly, on an annual basis, on the oversight, progress, and status of initiatives and measures to address cumulative effects on, and to support the health of, the Salish Sea, including but not limited to: a) progress on addressing Recommendation 1 above; b) the Ocean Protection Plan, the Whales Initiative, and any other relevant commitments made by federal authorities during the Board’s MH-052-2018 Reconsideration hearing; c) relevant initiatives and measures being undertaken by others, such as the marine shipping measures of the Enhancing Cetacean Habitat and Observation Program (ECHO) Program; d) species status updates for <i>Species at Risk Act</i>-listed species, including any relevant measures proposed in recovery documents under the <i>Species at Risk Act</i>; e) progress on addressing Recommendations 3 through 13 below; and

- f) consultation activities related to these initiatives and measures, including with Indigenous peoples and other marine users.

The reporting should include an explanation of how these various initiatives and measures work together, the identification of any notable gaps, and plans for how those gaps will be addressed.

Species

Recommendation 3: The Governor in Council should implement, with support from industry, a marine bird monitoring program to better understand impacts of all vessel use within the Salish Sea on marine bird species, including species at risk. This program would allow for the implementation of adaptive measures by the Government of Canada to avoid or reduce marine bird mortality and sensory disturbance.

Recommendation 4: The Governor in Council should expedite the work in completing the feasibility study for establishing a Southern Strait of Georgia National Marine Conservation Area, publicly report on the outcomes of that study, and (if considered feasible) proceed to establish it.

Recommendation 5: The Governor in Council should implement a suite of measures to offset both the increased underwater noise and the increased strike risk posed to Species at Risk Act-listed marine mammal and fish species (including Southern resident killer whale) due to Project-related marine shipping, at each relevant section of the marine shipping route (i.e., Strait of Georgia, Boundary Pass, Haro Strait, Juan de Fuca Strait, and out to the 12-nautical-mile territorial sea limit), and at the relevant times of year. Each offset measure should apply to all appropriate vessels for that measure (i.e., not limited to Project-related vessels). There should be periodic reporting that includes measured or estimated underwater noise and strike risk due to Project-related marine shipping, and the extent over time to which that additional noise and strike risk has been offset by measures that apply to all appropriate vessels.

Recommendation 6: As part of Recommendation 5 to offset the underwater noise and strike risk added by Project-related marine shipping, the Governor in Council should further consider each of the following specific measures, each applicable to all appropriate vessels (i.e., not limited to Project-related vessels), and publicly report on the feasibility of each (including consideration of socio-economic effects):

- slowdowns in each section of the marine shipping route (i.e., Strait of Georgia, Boundary Pass, Haro Strait, Juan de Fuca Strait, and out to the 12-nautical-mile territorial sea limit) and that apply to all appropriate vessels;
- potential limits on the number of whale watching boats (and/or their time on water);
- explicit noise reduction targets for regularly operating ferries in the area;
- identification of specific whale congregation and migration areas (including for resident killer, humpback, grey, and fin whales, as well as basking shark) and consideration of specific routing and speed restrictions in those areas; and
- further incentives and requirements for quiet vessel design to address underwater noise over the long term.

Marine oil spill response	
	Recommendation 7: The Governor in Council should review and update federal marine shipping oil spill response requirements. This review should include consideration of the following: • updating response organization standards; • response planning methodologies; • public reporting by response organizations to promote transparency of information; • inclusion of Indigenous peoples and local communities in response planning; and • a requirement for additional response resources on all ocean-going vessels.
Marine shipping safety	
	Recommendation 8: The Governor in Council should develop a regulatory framework for making enhanced tug escort mandatory in the Salish Sea for appropriate ocean-going vessels, including Project-related tankers. The framework should include oversight and enforcement mechanisms.
	Recommendation 9: The Governor in Council should, in conjunction with relevant United States regulatory authorities, consider the need for a Canada/United States Transboundary Vessel Traffic Risk Assessment.
Greenhouse gases	
	Recommendation 10: The Governor in Council should accelerate the development and implementation of greenhouse gas reduction measures related to marine shipping that would support the final International Maritime Organization Strategy in year 2023 for reducing greenhouse gas emissions. These measures could include, but not be limited to: a) facilitating the use of low-carbon alternate fuels (such as liquefied natural gas) for marine vessels by developing any necessary marine safety regulatory framework, training programs, and bunkering infrastructure requirements; and b) market-based measures, such as providing economic incentives for industry investment in the development and use of energy efficient technologies, and offsetting any increases in ship emissions. In implementing the measures, the Governor in Council could also consider a mechanism to establish and monitor such reductions and to develop regulations under an appropriate legislation.
Indigenous Advisory and Monitoring Committee	
	Recommendation 11: The Governor in Council should, in conjunction with Transport Canada and the Canadian Coast Guard, facilitate opportunities, as appropriate, to engage and seek feedback from the Indigenous Advisory and Monitoring Committee on the marine safety system, including on the marine inspections and enforcement regime; in addition to identifying engagement opportunities for Project-related marine shipping activities that intersect with Canadian Coast Guard operational programs.

Small vessel safety	
	Recommendation 12: (in place of Condition 131 from the OH-001-2014 Certificate hearing): The Governor in Council should, in conjunction with the Pacific Pilotage Authority and Transport Canada, continue engagement and awareness activities targeting recreational boaters, fishing vessel operators, and operators of small vessels with respect to safety of navigation and prevention of collisions with larger vessels. This should include incorporating the resources and information that Trans Mountain has already provided or will provide to the Pacific Pilotage Authority, such as applicable information on Project-related vessel timing and scheduling.
	Recommendation 13: The Governor in Council should accelerate the development and implementation of the Enhanced Maritime Situational Awareness initiative and the proposed extension of the Automatic Identification System to smaller passenger vessels.



This is Exhibit PP referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British Columbia

January 14, 2019

Our File: 101024-038

BY PARTICIPATION PORTAL

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2P 5J2

Attention: Sheri Young, Secretary of the Board

Dear Ms. Young,

**Re: Trans Mountain Expansion Project ("Project") – Reconsideration
Hearing Order MH-052-2018 & File OF-Fac-Oil-T260-2013-03 59
Adoption of Written Evidence by Affidavit**

In Procedural Direction No. 4, issued by the National Energy Board ("**Board**") on January 10, 2019, the Board instructed Parties to swear (or affirm) affidavits adopting their respective written evidence filed in the Reconsideration Hearing, and file those affidavits with the Board by January 18, 2019. We write to inform the Board that the Stó:lō Collective will not be filing such an affidavit, as its written evidence, filed on December 5, 2018, was provided in the form of an affidavit and therefore does not require further adoption.

If you have any questions, please contact us as soon as possible.

Yours truly,

MILLER TITERLE LAW CORPORATION



Joelle Walker

joelle@millertiterle.com

National Energy
Board



Office national
de l'énergie

This is Exhibit QQ referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
14 January 2019

Ms. Dyna Tuytel
Ecojustice
800, 744 – 4th Avenue SW
Calgary, AB T2P 3T4
Email dtuytel@ecojustice.ca

Dear Ms. Tuytel:

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project**

**National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018**

**Ruling No. 27 – Raincoast Conservation Foundation (Raincoast) notice of motion to
file late evidence**

A. Notice of motion

On 7 January 2019, the Board received a notice of motion from Raincoast in which it seeks leave to file late evidence in this Reconsideration hearing.

Raincoast submits that two 3 January 2019 articles discuss the compromised state of two Southern resident killer whales (SKRWs) and that one of the articles quotes Dr. Deborah Giles, the author of a report on SKRW that Raincoast previously filed in this hearing. Raincoast seeks to file as evidence a 7 January 2019 supplementary report prepared by Dr. Giles on the impacts of any potential loss of the two SKRWs on the SKRW population (Supplemental Report).

Raincoast states that effects on SKRW are central to this Reconsideration and that the Supplemental Report would assist the Board as it would ensure that the Board has the most up-to-date information on this issue. It is of the view that the benefit to the Board of having the Supplemental Report outweighs the prejudice that might result from its late filing. Raincoast does not believe that the brief report that updates the existing information, even at this time, is unduly burdensome.

.../2

Suite 210, 517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

517, Dixième Avenue S.-O., bureau 210
Calgary (Alberta) T2R 0A8

Canada

Telephone/Téléphone : 403-292-4800
Facsimile/Télécopieur : 403-292-5503

www.neb-one.gc.ca
Telephone/Téléphone : 1-800-899-1265
Facsimile/Télécopieur : 1-877-288-8803

B. Comments received

Intervenors

By the 9 January 2019 deadline [set](#) by the Board, several comments were received by Parties in support of the motion, included the following:

- Raincoast was diligent in bringing its notice of motion one business day after the discovery of the evidence, which did not exist by the evidence deadline.
- In [Ruling No. 23](#), the Board granted much broader relief in allowing a Party to file late evidence inadvertently omitted from its direct evidence filing. Raincoast's evidence is a highly relevant factual development of limited scope.
- It is essential for the Board to consider the potential death of two reproductive-aged SRKWs against the backdrop of a proposed Project that another Panel of the Board has already found is likely to result in significant adverse effects to SRKW and Indigenous cultural uses associated with them.
- The Board must have the benefit of the most up-to-date evidence on such a key, relevant issue to ensure that it can issue a report upon which the Governor in Council (GIC) can reasonably rely in making its decision on the Project. An update on the status of SRKW health would assist the Board in this respect.
- There would be minimal, if any, prejudice to other Parties at this stage of the hearing. Minimal steps have occurred since direct evidence was filed. Trans Mountain's and the Federal Departments and Agencies' 17 January 2019 deadline for written argument-in-chief affords a reasonable window to consider the Supplemental Report, in light of the Board's and Parties' existing expectations to make expeditious submissions in this hearing.
- As an administrative body, the Board owes a duty of fairness to participants which has been described as including a duty to ensure that decisions are made "with an opportunity for those affected by the decisions to put forward their views and evidence fully and have them considered by the decision-maker." In [Ruling No. 9](#), the Board acknowledged its responsibility to conduct a hearing that is procedurally fair and that "this requires that the parties [are] entitled to a meaningful opportunity to present their cases fully and fairly."
- If admitted, the highly probative nature of the Supplemental Report outweighs any risk of potential prejudice to another Party that may exist.

The [Department of Justice Canada](#) (representing various Federal Departments and Agencies) took no position.

Trans Mountain

[Trans Mountain](#) requests that the notice of motion be denied. Its submissions include the following:

- Accepting the late evidence at this stage in the process would prejudice Trans Mountain and other Parties by impacting subsequent deadlines. If accepted, Trans Mountain would require time to review and, if needed, reply to it. The Parties would need the ability to ask information requests (IRs), as appropriate, of Raincoast and Trans Mountain. These steps would jeopardize the current timeline for final argument and the Board's report to Cabinet, which is due on 22 February 2019.
- Without the above procedural steps, the credibility of the Supplemental Report would be untested and could not be relied upon without significant prejudice to Trans Mountain.
- In denying motions to file late evidence in [Ruling No. 105](#) and [Ruling No. 109](#) in the OH-001-2014 Certificate hearing, the Board held that "[t]he later in the process participants seek to file evidence, the greater the prejudice is likely to be to other participants." This is because the closer that a proceeding is to completion, the more steps need to be re-done if new evidence is accepted and the more difficult it becomes for the Board to mitigate overall delays.
- The Supplemental Report is consistent with evidence already on the record regarding the endangered status of the SRKW and its declining populations, and would provide no further assistance to the Board in determining the issues before it. Similarly, it is consistent with Trans Mountain's position that the environmental effects being experienced in the Salish Sea, including on SRKW, are regional and industry-wide issues requiring multi-party programs and solutions. It does not contain new information that would assist in developing such mitigation.
- The Board has recognized that there will always be further reports and studies that come into existence as time passes, but the bar remains high for admittance of new information at the late stage of a hearing.
- The probative value of the Supplemental Report is low and does not outweigh the significant prejudice that would be suffered by Trans Mountain and other Parties if admitted.

Raincoast's reply

In [reply](#), Raincoast's submissions include the following:

- No Party, other than Trans Mountain, suggested that granting the notice of motion may prejudice them.
- Trans Mountain did not file reply evidence concerning Dr. Giles' previous report, or test any of Raincoast's evidence, including Dr. Giles' evidence. Trans Mountain raised the spectre of needing to take these steps, but not whether it would actually do so. In light of its comments that the Supplemental Report is consistent with evidence already on the

record and with its position on the nature of the environmental effects on SRKW, it seems that Trans Mountain would have no reason to do so. Similarly, Trans Mountain did not take the opportunity to test Dr. Giles' credibility when it had the opportunity to ask IRs about her previous report.

- In response to IRs, the Parties have recently filed a large quantity of new evidence that the Parties will have no opportunity to test.
- Trans Mountain contradicts itself in saying that admitting the evidence will cause "significant prejudice," while also saying that the evidence contains no new information.

C. Views of the Board

In considering requests for filing late evidence, the Board considers:

- whether the evidence is relevant;
- whether there is a justifiable reason for the late filing;
- the prejudice that other Parties may suffer if the request were granted; and
- the probative value of the evidence weighed against any prejudice to other Parties at the current stage of the hearing.

There is no dispute that the Supplemental Report prepared by Dr. Giles is relevant to one or more issues the Board is considering in this Reconsideration hearing.

The Board is not persuaded that there is a justifiable reason for the late filing. Raincoast references newspaper articles dated 3 January 2019 containing various opinions, and states that the notice of motion was filed shortly thereafter. The Board does not find the newspaper articles or the information contained in them to be a convincing reason for the late filing. The Board would have expected Raincoast to explain why the information and conclusions expressed in the Supplemental Report were new, such that they could not be obtained at an earlier date. The Board is not convinced that the conclusions in the Supplemental Report were unavailable prior to the filing of the notice of motion.

Even if there was a justifiable reason for the late filing, the Board is of the view that the probative value of the Supplemental Report does not outweigh the prejudice to Trans Mountain. The Board places more weight on its reasons regarding the probative value and prejudice than on whether there was a justifiable reason for the late filing.

The Board does not agree with the position adopted by several Parties that there would be minimal prejudice to Trans Mountain because of the upcoming steps in the hearing. Consistent with previous Board Ruling No. 105 and Ruling No. 109, the later in the process Parties seek to file evidence, the greater the prejudice is likely to be to other Parties. In this particular case, and given the nature of the rights at stake, the Board finds that written argument-in-chief is not adequate for Trans Mountain to respond to the Supplemental Report. As a matter of procedural fairness, the Board is of the view that it would need to provide an opportunity to Trans Mountain for additional reply evidence.

The Board has previously stated that it is extremely constrained in its ability to accommodate further extensions to the hearing process.¹ While this should not suggest that extensions are impossible where warranted, at this late stage of the hearing (just prior to final argument), adjustments to the hearing process will only be made where justified. Any delays to the hearing process may impact the Board's ability to prepare its Reconsideration Report within the time limit set by the GIC.

Regarding probative value, the Board accepts Trans Mountain's submission that the Supplemental Report is consistent with evidence already on the record regarding the endangered status of the SRKW and its declining populations. While the Supplemental Report contains some information that is not currently available on the hearing record, the Board has always recognized that there will always be new reports and studies that will come into existence at future time periods, and which the Board will be unable to consider in its recommendation.

While all requests to file new evidence are treated on their merit, the Board has been clear that in the later stages of a hearing, the bar for admission of late evidence is generally quite high (see Ruling No. 105 and Ruling No. 109). In this case, Raincoast has presented the Supplemental Report to the Board well after the passing of deadlines for evidence and testing of evidence. The prejudice to Trans Mountain that would result from accepting the Supplemental Report is high, and it outweighs the probative value of the Supplemental Report. In addition, the Raincoast has failed to persuade the Board that there is a justifiable reason for the late filing.

For the above reasons, the Board denies the notice of motion. The Supplemental Report will not form part of the Board's evidentiary record for this Reconsideration.

For any questions, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

c.c. All Parties

¹ See [Ruling No. 9](#) to Squamish Nation regarding its motion for an extension to the deadline for intervenor evidence.

National Energy
Board



Office national
de l'énergie

This is Exhibit RR referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

File OF-Fac-Oil-T260-2013-03 59
16 January 2019

To: All Parties

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project
National Energy Board (Board) reconsideration of aspects of its Recommendation
Report as directed by Order in Council P.C. 2018-1177
MH-052-2018
Erratum to Ruling No. 27 – Raincoast Conservation Foundation (Raincoast) notice
of motion to file late evidence**

On 14 January 2019, the Board released Ruling No. 27 regarding Raincoast's 7 January 2019 notice of motion to file late evidence.

The Board has identified a typographical error in one sentence within the ruling. On PDF page 5, the Board had stated:

The prejudice to Trans Mountain that would result from accepting the Supplemental Report is high, and does not outweigh the probative value of the Supplemental Report.

Consistent with the view it expressed previously on PDF page 4, the Board intended for that sentence to read as follows:

The prejudice to Trans Mountain that would result from accepting the Supplemental Report is high, and it outweighs the probative value of the Supplemental Report.

The Board has updated Ruling No. 27 in the online public registry to reflect this correction.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

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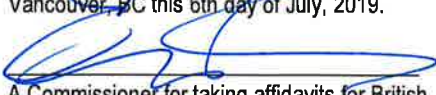
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This is Exhibit SS referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.


A Commissioner for taking affidavits for British Columbia

Hearing Order MH-052-2018
OF-Fac-Oil-T260-2013-03 59

NATIONAL ENERGY BOARD

IN THE MATTER OF the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended ("**NEB Act**") and the Regulations made thereunder;

AND IN THE MATTER OF an application by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P. for a Certificate of Public Convenience and Necessity ("**CPCN**") and other related approvals pursuant to Part III of the *NEB Act* for the Trans Mountain Expansion Project ("**Project**");

AND IN THE MATTER OF the National Energy Board's (the "**Board**" or "**NEB**") reconsideration of aspects of its OH-001-2014 Report ("**2016 Recommendation Report**") as directed by the Governor in Council ("**GIC**") through Order in Council P.C. 2018-1177 ("**OIC**").

ARGUMENT-IN-CHIEF OF THE INTERVENOR, STÓ:LŌ COLLECTIVE

January 22, 2019

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But when we talk of the river that people have come to know as the Fraser there's no other name to it than Stó:lō. To us it's the river of rivers; Stó:lō, period. Our people would say the giver of life.¹

I. OVERVIEW

A. Background to the Reconsideration Hearing

1. Today, in continuity with thousands of years of history, the Stó:lō occupy and use *S'ólh Téméxw*, the lower Fraser River watershed of southwestern British Columbia. The Stó:lō Collective are Halkomelem-speaking Coast Salish people, culturally interlinked with many Coast Salish and culturally, spiritually, physically, psychologically, and economically interconnected with the land and resources of *S'ólh Téméxw*. The Project, if approved, will have direct and significant adverse impacts on *S'ólh Téméxw* and the ability of the members of the Stó:lō Collective, both present and future generations, to exercise their constitutionally protected inherent and established rights.
2. Due to the clear impacts on their rights and title that will result from the Project, the Stó:lō Collective has participated extensively in the regulatory approval process for the Project from the outset. They have done so in order to voice concerns about the risks posed to the Stó:lō Collective and ultimately to the Stó:lō's way of life. Five years later, the Stó:lō Collective is still waiting on a substantive response to their concerns.
3. Due to the federal government's decision in 2018 to purchase the Project, it has now placed itself in the shoes of Project proponent. As a result, Trans Mountain Corporation ("**TMC**") is now a Crown Corporation, owned by the Canada Development Investment Corporation, which is accountable to the Parliament of Canada through the Minister of Finance. TMC owns the operating entities of Trans Mountain, including Trans Mountain Pipeline ULC, the project proponent, and Trans Mountain Canada Inc., the operator of the pipeline.² The Trans Mountain entities, past and present, will be referred to collectively throughout this Argument as "**TM Canada**".
4. On September 20, 2018, through the OIC, the GIC referred aspects of the 2016 Recommendation Report released by the Board in May 2016 on the Project back to the Board for reconsideration ("**Reconsideration Hearing**"). The GIC's direction followed

¹ NEB Hearing Transcript for Oral Traditional Evidence Hearing on November 29, 2018 ("**OTE Hearing**") [NEB Filing ID A6L2F4], Stó:lō Collective at para. 3409.

² Canada Response to Information Request of Stó:lō Collective [NEB Filing ID A97002-5].

the August 30, 2018 decision (“**TWN Decision**”) of the Federal Court of Appeal (“**FCA**”) that quashed the GIC’s original approval of the Project.³

5. The Stó:lō Collective was formed for the sole purpose of coordinating and representing the interests of its membership in the regulatory approval process for the Project. It applied for and was granted intervenor status at the first NEB regulatory hearing concerning the Project (“**First Hearing**”) and, on October 5, 2018, the Stó:lō Collective was granted intervenor status in the Reconsideration Hearing.⁴
6. On October 12, 2018, the Board issued Hearing Order MH-052-2018 (“**Hearing Order**”) that served to define the List of Issues, Amended Factors and Scope of the Factors for the Environmental Assessment under the *Canada Environmental Assessment Act, 2012* (“**CEAA 2012**”) process, and the timelines through which the hearing will be carried out.⁵

B. The TWN Decision

7. In the TWN Decision, the FCA found, *inter alia*, that:
 - (a) the Board unjustifiably defined the scope of the Project under review to not include project-related tanker traffic which led to unacceptable deficiencies in the 2016 Recommendation Report, meaning that the GIC could not rely on it;⁶ and
 - (b) while Canada acted in good faith and selected an appropriate framework for consultation with First Nations, Canada’s execution of that framework resulted in an “unreasonable consultation process that fell well short of the required mark”.⁷
8. On the scope of the Project, the FCA found, *inter alia*, that, as the Board only considered mitigation measures through “the limited lens of its regulatory authority”, it:
 - (a) failed to take proper account of mitigation measures that could be taken outside of its regulatory authority;
 - (b) did not recommend any specific mitigation measures concerning to Project-related marine shipping in the 2016 Recommendation Report; and
 - (c) simply encouraged other regulatory authorities to “explore any such initiatives”.⁸

³ 2018 FCA 153 (“**TWN Decision**”).

⁴ NEB Ruling No. 1 to All Parties, October 5, 2018 [NEB Filing ID A94624].

⁵ NEB Hearing Order MH-052-2018, October 12, 2018 [NEB Filing ID A94793-3].

⁶ TWN Decision at para. 5.

⁷ *Ibid* at para. 762.

9. As a result of the Board's flawed scoping decision, the FCA found that the Board failed to engage all necessary legal requirements and thereby failed to provide the GIC with a legally sufficient report. Further, the FCA found that the 2016 Recommendation Report and recommendations contained therein were sufficient to put the GIC "on notice that the Board had unjustifiably excluded Project-related shipping from the Project's definition", and by simply relying on the Board's flawed 2016 Recommendation Report, the GIC – who had the ultimate decision-making authority – "could not functionally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires".⁹
10. On consultation, the FCA found, *inter alia*, that:
 - (a) Canada deployed note-takers to meet with the Indigenous applicants and transmit their concerns to Crown decision-makers, which would later be incorporated in the Crown Consultation Report, to Crown decision-makers;
 - (b) Crown decision-makers were rarely present, if at all. Rather than being a mechanism through which meaningful consultation could take place, the Joint Federal/Provincial Crown Consultation and Accommodation Report finalized in late November 2016 ("**CAR**") amounted to a 'what we heard' report wherein Canada diarized the Indigenous applicants' concerns while failing to address them;
 - (c) Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue; and
 - (d) the Indigenous applicants were entitled to a dialogue that demonstrated that Canada not only heard but also gave serious consideration to the specific and real concerns the Indigenous applicants put to Canada, gave serious consideration to proposed accommodation measures, and explained how the concerns of the Indigenous applicants impacted Canada's decision to approve the Project.¹⁰

⁸ *Ibid* at paras. 434, 438, and 456.

⁹ *Ibid* at para. 470.

¹⁰ *Ibid* at paras. 558, 563, 575, 591, and 603.

11. The Stó:lō Collective submits that the FCA's findings must be front of mind for the Board when reconsidering the issues in this hearing. The Reconsideration Hearing arises as part of a broader context in which Indigenous communities have expended substantial time and resources to ensure that they are adequately consulted and, where necessary, their Aboriginal rights and title are accommodated in relation to the Project only to be faced with a series of processes in which the Crown, a Crown regulator, or a proponent that is now owned by the Crown systematically fails to engage in the meaningful dialogue that true reconciliation demands.
12. The Stó:lō Collective and other Indigenous communities and organizations impacted by the Project have been forced to pursue recognition and accommodation of their constitutionally protected rights through: a regulatory hearing process that Canada has acknowledged is broken and requires modernization; a judicial review that was the largest of its kind before the FCA in which the Court expressly held that Canada failed in its constitutional obligations; and now in a Reconsideration Hearing that has been driven by unreasonable timelines dictated by the GIC which have curtailed the ability of the Indigenous intervenors to put forward their views and evidence fully.

C. Summary of Position on Reconsideration Hearing

13. It is the Stó:lō Collective's position on the Reconsideration Hearing that:
 - (a) The timeline imposed by the GIC for completion of the Reconsideration Hearing was unrealistic, favoured Canada and TM Canada, and led to a lack of procedural fairness overall;
 - (b) The Board cannot find that there has been adequate consultation through the Reconsideration Hearing because, *inter alia*:
 - (i) the process has failed to provide in substance an appropriate level of deep consultation; and
 - (ii) the Crown has failed to conduct a justification analysis of the infringements on the Stó:lō Collective's established right to fish;
 - (c) Despite the Stó:lō Collective's limited ability to put forward new evidence specific to Project-related shipping, a review of its previous technical submission, the oral traditional evidence and expert reports tendered by other intervenors

demonstrates that the Project impacts, including impacts from Project-related marine shipping, pose a significant risk to the cultural integrity of the Stó:lō Collective;

- (d) The Board has insufficient evidence before it to assess the adequacy of mitigation measures to address impacts of Project-related marine shipping in *S'ólh Téméxw* and the Fraser River; and
 - (e) In its report following the Reconsideration Hearing, the NEB should:
 - (i) not recommend that the GIC approve the Project; and
 - (ii) include the specific Project conditions which the Stó:lō Collective previously requested and which have never been properly considered by the NEB, TM Canada or Canada, nor incorporated into Project planning.
14. The Stó:lō Collective submits that the evidence on the hearing record from the First Hearing and the Reconsideration Hearing establishes that the Project, inclusive of Project-related marine shipping:
- (a) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances;
 - (b) will infringe the Stó:lō Collective's proven Aboriginal rights; and
 - (c) is not in the public interest.
15. As a result, the Board should:
- (a) recommend that required consultation occurs before it issues its report or recommend against Project approval because of inadequate consultation;
 - (b) find that the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances;
 - (c) find that the Project, inclusive of Project-related marine shipping, would seriously and permanently impair the Stó:lō Collective's ability to exercise its Aboriginal harvesting, cultural, and spiritual rights, as well as its established fishing rights; and
 - (d) recommend that a CPCN not be issued for the Project.

II. THE STÓ:LŌ COLLECTIVE: PEOPLE OF THE RIVER

A. The Stó:lō Collective

16. The Stó:lō Collective continues to represent the interests of Aitchelitz, Soowahlie, Yakwekwioose, Leq'á:mél, Skawahlook, Skowkale, Squiala, Skwah, Sumas, Shxwhà:y Village, Tzeachten, and Scowlitz. Members of these Stó:lō villages or bands are Stó:lō people and Aboriginal peoples within the meaning of the *Constitution Act, 1982* ("**Constitution**") and CEAA 2012. Aitchelitz, Shxwhà:y Village, Skowkale, Skwah, Soowahlie, Squiala, Tzeachten, and Yakwekwioose were also among the successful Indigenous applicants in the TWN Decision.
17. As an intervenor in the First Hearing, the Stó:lō Collective participated by, *inter alia*: filing technical and other written evidence;¹¹ issuing and responding to IRs;¹² bringing motions;¹³ and making written¹⁴ and oral summary argument.¹⁵
18. In this Reconsideration Hearing, the Stó:lō Collective has participated by, *inter alia*: filing letters of comment, objections, letters of support for motions of other intervenors, written evidence; as well as issuing IRs; providing Oral Traditional Evidence ("**OTE**"); and filing written Argument-in-Chief.¹⁶

¹¹ Stó:lō Collective Written Evidence, May 27, 2015 ("**NEB Evidence**") [NEB Filing ID A70240 (A4L7A2, A4L7A3, A4L7A4, A4L7A5, A4L7A6, A4L7A7, A4L7A8, A4L7A9, A4L7C0, A4L7C1, A4L7C2, A4L7C3, A4L7C4)].

¹² Stó:lō Collective Information Request No. 01 to Trans Mountain [NEB Filing ID A60225 (A3W6X8)]; Stó:lō Collective Comment on Adequacy of IR#1 Response [NEB Filing ID A61519 (A3Y8J4, A3Y8J5, A3Y8J6, A3Y8J7, A3Y8J8, A3Y8J9, A3Y8K0)]; Stó:lō Collective Round 2 Information Request [NEB Filing ID A65456 (A4G6F9, A4G6G0, A4G6G1, A4G6G2, A4G6G3, A4G6G4)]; Stó:lō Collective Round 2 IR's re-submission [NEB Filing ID A65488 (A4G7E6)]; Stó:lō Collective Letter re TM Response to NEB IR#3 [NEB Filing ID A68505 (A4J4F6)]; Stó:lō Collective Letter re TM Response to Stó:lō Collective Round 2 IRs [NEB Filing ID A68509 (A4J4G1)]; Stó:lō Collective Letter re TM Response to NEB IR#6 [NEB Filing ID A71939 (A4S3J8)]; and Stó:lō Collective IR45 Response [NEB Filing ID A71257 (A4R4T5)].

¹³ Stó:lō Collective Motion to request increased number of participants [NEB Filing ID A73706 (A4V1A6)].

¹⁴ Stó:lō Collective Final Argument [NEB Filing ID A75127 (A4X5T3, A4X5T4, A4X5T5)].

¹⁵ NEB Hearing Transcript for Oral Traditional Evidence Hearing on January 21, 2016 [NEB Filing ID A4X7K0], Stó:lō Collective at paras. 13978-14130.

¹⁶ Letter of Comment regarding Reconsideration Hearing [NEB Filing ID A94494]; Objection to Locations and Limitations re OTE Hearings [NEB Filing ID A95245]; Response to Notice of Motion of Squamish Nation [NEB Filing ID A95575]; LT NEB re TWN and Living Oceans Applications and Motion [NEB Filing ID A96297]; Opening Statement and Written Evidence [NEB Filing ID A96432]; and LT NEB re Raincoast Notice of Motion [NEB Filing ID A97159].

B. Stó:lō People + S'ólh Téméxw

19. The Stó:lō are “People of the River”, being the Fraser River, or to the Stó:lō, the “river of rivers”.¹⁷ Since time immemorial, the members of the Stó:lō Collective have inhabited, controlled and relied on *S'ólh Téméxw*, their traditional territory in the lower Fraser River watershed. The Stó:lō exercise Aboriginal rights throughout *S'ólh Téméxw*, including hunting, gathering, trapping and their established (non-treaty) right to fish.¹⁸
20. The Stó:lō are Halkomelem-speaking Coast Salish people who live in many villages in *S'ólh Téméxw*. The Stó:lō are culturally, spiritually, physically, psychologically and economically interconnected with *S'ólh Téméxw*. Stó:lō identity is based in enduring activities, such as fishing, language (Halkomelem), stories, songs and storytelling, and protection of cultural practices.¹⁹
21. The Stó:lō have a deeply established connection to and reliance on salmon, sturgeon and other aquatic species, all of which are integral elements of their society, culture, economy, politics, and traditions. Water quality was and remains a core factor of this relationship.²⁰
22. The Stó:lō maintain a wide range of political, socio-cultural, and economic ties, including occupation, use, and management of the land and resources within *S'ólh Téméxw*. The Stó:lō- Coast Salish have a long history of defending their lands from unwelcome outsiders.²¹
23. Stó:lō identity and societal health, including an interconnected set of spiritual, mental, physical, emotional relations are linked to and dependent upon the integrity of the land, air, water, and resources constituting *S'ólh Téméxw* and the Stó:lō cultural landscape.²² The activities of Stó:lō within *S'ólh Téméxw* provide a holistic view of economic, social, political, environmental, and spiritual connectivity; one cannot be successful or healthy without the other, for all things have shxwelí (spirit) and all things are interconnected.

¹⁷ OTE Hearing at para. 3409.

¹⁸ Integrated Cultural Assessment (“ICA”) dated March 2014, Introduction, pp. 18-19 [NEB Filing ID A3Z4Z2, A3Z4Z3, A3Z4Z4, A3Z4Z5]; NEB Evidence, Appendix 1 (Cultural Heritage Overview Assessment) [NEB Filing ID A4L7A3].

¹⁹ CAR, Appendix C-19 – Stó:lō Collective [NEB Filing ID A6J6R4], p. 1008.

²⁰ ICA, Section 12, p. 1; NEB Evidence, Appendix 1 (Cultural Heritage Overview Assessment); OTE Hearing at para. 3436.

²¹ *Ibid* at Introduction, p. 18.

²² *Ibid* at Introduction, p. 18.

C. Stó:lō Established Fishing Rights have not Been Considered

24. The Stó:lō are one of few Indigenous peoples in this country to have an established (non-treaty) right under s. 35 of the *Constitution*. This established right to fish for food and ceremonial purposes was affirmed by the Supreme Court of Canada (“**SCC**”) in *R. v. Van der Peet* after a long-fought court action.²³
25. Canada has acknowledged the Stó:lō Collective’s established right to fish in the Fraser River.²⁴ Despite this acknowledgement, at no time has Canada provided any analysis of how that constitutionally protected right to fish has been taken into account. Similarly, during the First Hearing, contrary to the requirement that the Board interpret its responsibilities in a manner consistent with section 35(1) of the *Constitution*,²⁵ the Board undertook no consideration of the fact that it was dealing with an established rights holder and that Project impacts and mitigation measures must be considered through that lens.
26. The terms and conditions included in the 2016 Recommendation Report provide no specific protection of the Stó:lō Collective’s established fishing rights.

D. Stó:lō Collective’s Participation in the First Hearing + Development of ICA

27. The Stó:lō Collective participated extensively in the First Hearing and expended substantial time and resources to be active intervenors despite significant reservations about the ability of the Board’s process to provide an appropriate level of consultation.
28. As part of its participation, in March 2014, the Stó:lō Collective provided TM Canada with its key technical submission, the Integrated Cultural Assessment (“**ICA**”) prepared by Ts’elxwéyeqw Tribe Management Limited, Stó:lō Research And Resource Management Centre, and Human Environment Group (“**ICA Authors**”). The ICA was intended to form the basis for constructive and meaningful consultation with the Crown. It identifies potential impacts within *S’olh Temexw* that could be caused by the Project, such as impacts on Stó:lō traditional activities, culture, lands, and resources.²⁶
29. In developing the ICA, the ICA Authors worked with Stó:lō community members to identify and review:

²³ [1996] 2 SCR 507 (“*Van der Peet*”).

²⁴ CAR, Appendix C-19 – Stó:lō Collective, p. 16.

²⁵ 2016 Recommendation Report [NEB Filing ID A77045], p. 45.

²⁶ Affidavit #1 of Shana Roberts, sworn December 5, 2018 at para. 10 [NEB Filing ID A96432-2].

- (a) historic and contemporary Stó:lō uses of *S'ólh Téméxw*;
 - (b) geotechnical data and Indigenous knowledge relating to natural hazards in the *S'ólh Téméxw*;
 - (c) hydrologic data and Indigenous knowledge relating to water and waterways in the *S'ólh Téméxw*; and
 - (d) ground-truthing, data and Indigenous knowledge relating to fish and fish habitat in the *S'ólh Téméxw*.²⁷
30. The ICA was based on surveys, interviews, meetings, and workshops held with over 200 community members and took approximately 12 months to complete. It looked at eleven traditional activities, many of which represent the exercise of the Stó:lō's Aboriginal rights, to determine if these activities would be impacted by the Project and rated those impacts as high, medium or low. Seven activities (fishing, spiritual, manufacture of cultural items, travel corridors, governance, economic activities and community programs and services) were identified as potentially highly impacted. Four activities (gathering, settlement, hunting and trapping, and inter-nation gathering) were identified as potentially of medium impact.²⁸
31. The ICA concluded that the Project poses a significant risk and represents a significant threat to the cultural integrity and survival of core relationships at the heart of Stó:lō worldview, identity and well-being. It warned that if the Project were approved without deep, meaningful consultation and accommodation of Stó:lō land management goals, rights and title, and decision-making, the Project would negatively impact Stó:lō governance.²⁹
32. The ICA also concluded that fishing and spiritual activities – two critically important rights – would have “[s]ignificant post-mitigation adverse impacts”, and that, as planned, the Project “would significantly jeopardize the survival of the unique Indigenous lifeway of the Stó:lō and unjustifiably infringe upon Stó:lō's Aboriginal rights, protected under s. 35 of the *Constitution*.”³⁰

²⁷ *Ibid* at para. 11.

²⁸ *Ibid* at paras. 12 and 16.

²⁹ *Ibid* at para. 13.

³⁰ *Ibid* at para. 14.

33. Accordingly, the ICA included 89 recommendations (“**89 Recommendations**”) which, if implemented by TM Canada or the Crown, would mitigate the Project’s adverse effects on Stó:lō communities. The 89 Recommendations included measures to mitigate the Project’s impacts on Stó:lō governance and established fishing rights, including the impact of oil spills into or near the Fraser River.³¹
34. The Board did not adopt any of the 89 Recommendations in its terms and conditions for the Project included with the 2016 Recommendation Report, nor did TM Canada provide a substantive response to the 89 Recommendations during the First Hearing.³² Similarly, to date, the 89 Recommendations have not been addressed by the Crown.
35. In the course of the TWN Decision, the FCA found:

...The ICA also contained 89 recommendations which, if implemented by Trans Mountain or the Crown, were believed by Stó:lō to mitigate the Project’s adverse effects on Stó:lō.

To illustrate the nature of the recommendations, section 17.2 of the ICA deals with recommendations to mitigate the Project’s impact on fisheries. Section 17.2.1 deals with Management and Planning in the context of fisheries mitigation. The recommended Management and Planning mitigation measures are:

17.2.1 Management and Planning

5. Stó:lō Fishing representatives will participate in the development and review of Fisheries Management Plans and water course crossing EPPs before construction and mitigation plans are finalized.
6. Stó:lō representatives will provide input on proposed locations for Hydrostatic test water withdrawal and release.
7. [The proponent] will consult with Stó:lō representatives to develop the Emergency Response Plans in the study area.
8. Stó:lō representatives will consult with community members to determine appropriate restoration plans for water crossings including bank armouring, seed mixes or replanting requirements.
9. Stó:lō fishing representatives must be notified if isolation methods will not work and [the proponent] is considering another crossing method.
10. Stó:lō representatives must be notified as soon as a spill or leak, of any size, is detected.

³¹ *Ibid* at para. 15.

³² *Ibid* at para. 17.

11. During water quality monitoring program, anything that fails to meet or exceed established guidelines will be reported to a Stó:lō Fisheries Representative within 12 hours.

These measures are specific, brief and generally measured and reasonable. If implemented they would provide more detail to the Board's generic conditions on consultation and require timely notification to the Stó:lō of events that may adversely impact their interests.

During the Board's Information Request process, the Stó:lō pressed Trans Mountain to respond to their 89 recommendations but Trans Mountain did not provide a substantive response. Instead, Trans Mountain provided a general commitment to work with Stó:lō to develop a mutually-acceptable plan for implementation.

The Board did not adopt any of the specific 89 recommendations made by the Stó:lō in its terms and conditions.³³ [Emphasis added]

E. Project Interference with the Stó:lō Collective's Rights + Title

36. TM Canada's existing pipeline and the Project's proposed new pipeline route cross approximately 195 km of *S'olh Temexw*, including by the base of Sumas Mountain and across a valley that was once Sumas Lake, which was an important feature for certain Stó:lō communities. Seven Project facilities (Hope Station, Wahleach Station, Sumas Station, Sumas Tank Farm, Port Kells Station, Burnaby Terminal and Westridge Marine Terminal) fall within *S'olh Temexw*.³⁴
37. The proposed pipeline right-of-way is immediately adjacent to a number of the Stó:lō Collective's members' communities and First Nation Reserves, crossing Grass No. 15 Reserve and Tzeachten IR No. 13.³⁵
38. The Project's new pipeline proposes to cross 131 waterbodies within *S'olh Temexw*. Of these, 84 have defined as bed and bank, 59 are designated as fish bearing and 31 are considered sensitive fish bearing. Over 240 Stó:lō fisherman rely on fish from these waterways for various purposes.³⁶
39. The Project will directly affect the established Aboriginal rights and title of the Stó:lō Collective and represents yet another in a series of linear corridors (including Highway #1, two railroads, the existing TM Canada pipeline, hydro lines, and roads) that have severed the Stó:lō from the Fraser River. The cumulative effects of all of these linear

³³ TWN Decision at paras. 682-686.

³⁴ CAR, Appendix C-19 – Stó:lō Collective, p. 8.

³⁵ *Ibid*, p. 8.

³⁶ ICA, Section 5, pp. 10-11.

corridors is to leave Stó:lo with very few places where they can access the river that gives them their name.³⁷

40. Although the timing of the Reconsideration Hearing meant it was not possible to undertake any further studies specific to Project-related marine shipping, on the basis of the evidentiary record, there is no doubt that Project-related marine shipping will exacerbate the Project's interference with the Stó:lo Collective's use of its land and resources for traditional purposes.

III. POSITIONS ON RECONSIDERATION HEARING

A. The Reconsideration Hearing is Procedurally Unfair

(i) A Significant Degree of Fairness is Owed

41. The Stó:lō Collective has repeatedly reminded the Board that it owes intervenors a significant degree of procedural fairness in this Reconsideration Hearing, and that the intervenors are entitled to "a meaningful opportunity to present their cases fully and fairly".³⁸

42. The FCA explained the Board's duty of procedural fairness in the TWN Decision:

The Board, as a public authority that makes administrative decisions that affect the rights, privileges or interests of individuals, owes a duty of procedural fairness to the parties before it. However, the existence of a duty of fairness does not determine what fairness requires in a particular circumstance.

It is said that the concept of procedural fairness is eminently variable, and that its content is to be decided in the context and circumstances of each case. The concept is animated by the desire to ensure fair play. The purpose of the participatory rights contained within the duty of fairness has been described to be:

... to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.³⁹ [Emphasis added]

³⁷ *Ibid*, Section 7, p. 15.

³⁸ Letter of Comment regarding Reconsideration Hearing [NEB Filing ID A94494]; Objection to Locations and Limitations re OTE Hearings [NEB Filing ID A95245]; Response to Notice of Motion of Squamish Nation [NEB Filing ID A95575]; LT NEB re TWN and Living Oceans Applications and Motion [NEB Filing ID A96297]; Opening Statement and Written Evidence [NEB Filing ID A96432]; and LT NEB re Raincoast Notice of Motion [NEB Filing ID A97159].

³⁹ TWN Decision at paras. 230-231 citing *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 ("**Baker**") at para 22.

(ii) The Timeline is Unreasonable

43. The Stó:lō Collective has consistently communicated its concerns with the timing and process of this Reconsideration Hearing.⁴⁰ The Stó:lō Collective submits that the unrealistic 155 calendar days (“**Timeline**”) unilaterally set by the GIC for completion of the Reconsideration Hearing and delivery of its report has resulted in various breaches of the Board’s duty of procedural fairness owed to intervenors.⁴¹
44. The Timeline’s consequential, negative effects on the Reconsideration Hearing as a meaningful opportunity to present cases fully and fairly cannot be overstated. The GIC’s position on when this process must be concluded suggests that it is timing, and not procedural fairness, or the ability to fully canvas and consider the potentially significant adverse impacts of Project-related marine shipping on, *inter alia*, Aboriginal rights and title, the environment and species at risk, that is the most significant factor in the Reconsideration Hearing. This is particularly concerning in light of the fact that (as discussed below) Canada is in a position of conflict. The Timeline favours Canada and TM Canada, who have the resources and capacity to fully participate in the Reconsideration Hearing despite significant time pressures. Indigenous intervenors like the Stó:lō Collective do not.
45. Further, the Timeline has impacted the ability of the Stó:lō Collective to provide OTE as outlined in the letters to the Board of October 23 and 30 and November 26, 2018, and to provide updated or additional technical evidence focused solely on Project-related marine shipping as described in Ms. Robert’s affidavit.⁴²

⁴⁰ Letter of Comment regarding Reconsideration Hearing [NEB Filing ID A94494]; Notice of Intent and Objection re Oral Traditional Evidence [NEB Filing ID A95070]; Objection to Locations and Limitations re OTE Hearings [NEB Filing ID A95245]; Response to Notice of Motion of Squamish Nation [NEB Filing ID A95575]; LT NEB re Withdrawal from OTE Hearing [NEB Filing ID A96126]; LT NEB re TWN and Living Oceans Applications and Motion [NEB Filing ID A96297]; Opening Statement and Written Evidence [NEB Filing ID A96432]; Information Request #1 of the Stó:lō Collective [NEB Filing ID A96753]; and LT NEB re Raincoast Notice of Motion [NEB Filing ID A97159].

⁴¹ Letter of Comment regarding Reconsideration Hearing [NEB Filing ID A94494]; Notice of Intent and Objection re Oral Traditional Evidence [NEB Filing ID A95070]; Objection to Locations and Limitations re OTE Hearings [NEB Filing ID A95245]; Response to Notice of Motion of Squamish Nation [NEB Filing ID A95575]; LT NEB re Withdrawal from OTE Hearing [NEB Filing ID A96126]; LT NEB re TWN and Living Oceans Applications and Motion [NEB Filing ID A96297]; Opening Statement and Written Evidence [NEB Filing ID A96432]; Information Request #1 of the Stó:lō Collective [NEB Filing ID A96753]; and LT NEB re Raincoast Notice of Motion [NEB Filing ID A97159].

⁴² Notice of Intent and Objection re Oral Traditional Evidence [NEB Filing ID A95070]; Objection to Locations and Limitations re OTE Hearings [NEB Filing ID A95245]; Letter to NEB re Withdrawal from OTE Hearing [NEB Filing ID A96126]; and Affidavit #1 of Shana Roberts, sworn December 5, 2018 at para. 19 [NEB Filing ID A96432-2].

(iii) Limitations on Written Evidence

46. The Stó:lō Collective has faced significant hardship participating substantively in this Reconsideration Hearing due to the Timeline, including:
- (a) The Stó:lō Collective cannot prepare another integrated cultural assessment of, or update the ICA to include, Project-related marine shipping, as this would likely require months of information-gathering;
 - (b) There is limited time and capacity to engage with specialists and experts regarding the effects of Project-related marine shipping on marine ecosystems, tidal waters, and foreshore, all of which would require modelling and other intricate scientific processes;
 - (c) While there is some basic knowledge of hydrology and water-bitumen interactions available to the Stó:lō Collective, there remains limited understanding of the fate of diluted bitumen (“**dilbit**”) as it relates to the foreshore, brackish and fresh-water estuaries along the Fraser River, as well as its effects on the unique system of the Fraser River, such as its wandering gravel bed, meandering river, and the ancient streams that are tributaries therein. Amassing this knowledge requires new studies, which would take time and resources, both of which are not available to the Stó:lō Collective in the present circumstances;
 - (d) The Stó:lō Collective could not review and respond adequately to the evidence filed by Canada and TM Canada in the Reconsideration Hearing, as, collectively, Canada and TM Canada filed over 8,000 pages of evidence to which the Stó:lō Collective initially only had three weeks to respond; and
 - (e) The Stó:lō Collective does not employ a wildlife or marine biologist who could have researched and prepared a report, from either an Indigenous or Western perspective, of the species that could be affected by Project-related marine shipping, which, combined with the extremely short timelines imposed by the Board and GIC has forced the Stó:lō Collective to rely on what has been filed by TM Canada and Canada.⁴³

⁴³ Affidavit #1 of Shana Roberts, sworn December 5, 2018 at para. 19 [NEB Filing A96432-2].

47. Consequently, the extremely short timeline does not allow for a holistic approach to the review of the impacts of Project-related marine shipping, which the Stó:lō Collective believes to be missing from TM Canada and Canada's filed evidence. As described in Part IV of this Argument relating to Project impacts, the evidence establishes that there will be impacts, including socio-economic impacts, health and wellbeing, and spiritual impacts for the Stó:lō Collective, that are not being fully recognized.⁴⁴ It is deeply troubling that the Timeline dictated an inevitably unfair process from the outset.

(iv) Limitations on Oral Traditional Evidence

48. In its correspondence with the Board on OTE sessions for the Reconsideration Hearing, the Stó:lō Collective expressed, *inter alia*, concern and frustration over the locations chosen for the OTE sessions – Nanaimo and Victoria – as both are located on Vancouver Island and imposed undue travel requirements on Elders. The Stó:lō Collective also explained that webcam sessions were an inappropriate, and frankly insensitive, substitute for traditional hearings conducted in person. Despite the Stó:lō Collective's numerous inquiries, the Board did not provide an adequate reason for choosing two locations on Vancouver Island, nor did it agree to add a location in the lower mainland for its many Indigenous intervenors who are located on the mainland of British Columbia.⁴⁵
49. In addition to the issues with the locations chosen, the Stó:lō Collective advised the Board that the date range chosen for the OTE sessions conflicted with the Stó:lō Bighouse season. Consequently, many of the traditional knowledge holders were occupied with Bighouse duties and providing spiritual and ceremonial support thereof. Accordingly, the Stó:lō Collective advised that these dates and locations would prevent their Elders from providing OTE entirely.⁴⁶
50. Further, the Stó:lō Collective advised the Board that the date the Board unilaterally scheduled for the Stó:lō Collective to provide OTE – November 29, 2018 – was also the date reserved by the Province of British Columbia and the First Nations Leadership Council to hold the 4th annual BC Cabinet and First Nations Leaders' Gathering in

⁴⁴ *Ibid* at para. 20.

⁴⁵ Notice of Intent and Objection re Oral Traditional Evidence [NEB Filing ID A95070]; Objection to Locations and Limitations re OTE Hearings [NEB Filing ID A95245]; and Letter to NEB re Withdrawal from OTE Hearing [NEB Filing ID A96126].

⁴⁶ *Ibid*.

Vancouver. Other Stó:lō Collective members who may have otherwise been able to attend the OTE session in Victoria, BC, were occupied with the Leadership Gathering.⁴⁷

51. On October 30, 2018, the Stó:lō Collective filed a letter with the Board objecting to the locations chosen for the OTE sessions, and requested that the Board consider holding a session in the lower mainland. The Board also received letters containing similar requests from Shxw'ōwhámel First Nation, Little Shuswap Lake Indian Band and Squamish Nation. Rather than objecting to the locations chosen, Squamish Nation stated that it intended to provide OTE but only in the form of a sacred ceremony performed and discussed in the Squamish longhouse at Xwmelch'stn, in confidence, and with a limited audience present and no recording devices (collectively, the "**OTE Objections and Requests**").⁴⁸
52. In response to the OTE Objections and Requests, on October 31, 2018, the Board filed a request for comments from other intervenors regarding the locations chosen for the OTE sessions. Presumably, the Board wanted more opinions to inform its decision regarding OTE session locations.⁴⁹
53. The Board received letters from Stk'emlupsemc te Secwepemc of the Secwepemc Nation and Musqueam Indian Band, as well as from the Province of BC supporting the Board hearing matters in Indigenous communities. TM Canada filed comments on November 2, 2018, stating that it did not take a position on the location of the OTE sessions.⁵⁰
54. Despite the support from other Indigenous intervenors, the Province of BC, and the indifference of TM Canada, on November 7, 2018, the Board denied the OTE Objections and Requests, finding that it was procedurally fair to host all OTE sessions on, and make Elders and knowledge keepers travel to, Vancouver Island. Again, the Board cited the

⁴⁷ *Ibid.*

⁴⁸ Objection to Locations and Limitations re OTE Hearings [NEB Filing ID A95245]; Notice of Intent re Oral Traditional Evidence [NEB Filing ID A95072]; SFN LT NEB re Notice of Objection re Location for OTE [NEB Filing ID A95202]; Little Shuswap Lake Indian Band – Objection to in-Person Sessions to Provide Oral Traditional Evidence [NEB Filing ID A95281]; LT Squamish Nation to NEB re Intention to Provide Oral Indigenous Traditional Evidence [NEB Filing ID A95073]; and Letter to NEB from Squamish Nation re Oral Traditional Evidence [NEB Filing ID A95303].

⁴⁹ NEB Letter – Oral Indigenous Traditional Evidence Locations – Comments [NEB Filing ID A95289].

⁵⁰ SSN Comments on Location of Hearing OTE [NEB Filing ID A95402]; Musqueam Comments on Location of Oral Traditional Evidence Sessions [NEB Filing ID A95405]; Province of BC – Response Letter [NEB Filing ID A95399]; and Trans Mountain Letter to NEB re Location of Oral Traditional Evidence Sessions [NEB Filing ID A95377].

GIC's imposed Timeline, stating that the limited time for the Board to hear OTE was a factor in its decision and that the "mere inconvenience" of elders traveling to Vancouver Island "does not amount to unfairness".⁵¹

55. Fortunately, Chief Dalton Silver was able to attend and provide OTE on behalf of the Stó:lō Collective but the fact remains that, rather than a process that was reflective of cultural practices, the Board structured a process for OTE that was unduly burdensome, unaccommodating and restrictive.

(v) Limitations Imposed by the Board's Rulings

56. In addition to those indicated above, the Board has imposed other limitations throughout the Reconsideration Hearing that have prejudiced the intervenors' involvement in this process, including but not limited to:
- (a) Imposing a one-week timeline to allow comments on: the draft amended factors and scope thereof; the environmental assessment under CEAA 2012;⁵² the draft list of issues to be considered in the Reconsideration Hearing; and the design of the Reconsideration Hearing process itself. Despite the efforts of the intervenors on this short timeline, the ultimate Hearing Order and Procedural Direction No. 1 do not appear to incorporate the comments provided to the NEB by those intervenors;⁵³
 - (b) Providing only a 15-day extension for intervenors to file response materials to the over 8,000 pages of opening statements and direct evidence by TM Canada and the Federal authorities, only after receiving an extensive Notice of Motion from Squamish Nation⁵⁴ and comments from intervenors regarding the same;⁵⁵
 - (c) Not allowing intervenors to cross-examine TM Canada on its evidence, despite allowing TM Canada to question Elders and knowledge keepers on their OTE;⁵⁶

⁵¹ NEB Ruling No. 7 - Oral Indigenous Traditional Evidence Locations, Time Limitations and Costs [NEB Filing ID A95517].

⁵² NEB Letter – Application to Participate process and comment process [NEB Filing ID A94153-1].

⁵³ *Ibid.*

⁵⁴ Notice of Motion of Squamish Nation [NEB Filing ID A95463-2].

⁵⁵ NEB Ruling No. 9 – Notices of motion from Squamish nation and TWN for an extension to the deadline for intervenor evidence [NEB Filing ID A95640-1].

⁵⁶ NEB Procedural Direction No. 1 – Oral Indigenous Traditional Evidence [NEB Filing ID A94804].

- (d) Not allowing parties to make oral summary argument after unilaterally determining there is neither sufficient time nor need to hear oral argument;⁵⁷
 - (e) Dismissing applications and motions of Living Oceans Society and Raincoast Conservation Foundation (“**Living Oceans**”) and Tsleil-Waututh Nation requesting, *inter alia*, that the Board determine a *de novo* hearing of the Project was required due to the newly-reconstituted panel members involved in the Reconsideration Hearing not having heard the original OTE and oral submissions of the parties;⁵⁸
 - (f) Denying Living Oceans’ motion to require TM Canada to conduct a new risk assessment of Project-related marine shipping that includes all *Species at Risk Act*-listed species that may be affected by Project-related marine shipping;⁵⁹ and
 - (g) Denying Living Oceans’ motion seeking to late-file a 1.5-page report, prepared by Dr. Giles and dated January 7, 2019 (“**Supplementary Giles Report**”), which provides an update on the health of certain members of the southern resident killer whale population, despite the fact that the Supplementary Giles Report was highly relevant to the Board’s consideration of the effects of Project-related marine shipping on the southern resident killer whale population and that the Board has a responsibility to ensure that parties are provided a “meaningful opportunity to present their cases fully and fairly”.⁶⁰
57. While the Board attempted to justify all of these limitations by blaming the GIC’s Timeline, the fact remains that these limitations have rendered the Reconsideration Hearing so procedurally unfair that it cannot possibly be relied upon to inform a positive recommendation by the Board to the GIC.
58. In its Argument-in-Chief, TM Canada states that although the Timeline “did not allow for as much time as some of the Intervenors may have liked”, it was ultimately fair to all

⁵⁷ NEB Procedural Direction No. 4 – Affidavits and written argument-in-chief, including comments on draft conditions and recommendations [NEB Filing ID A97236-1].

⁵⁸ NEB Ruling No. 22 – Applications for Review from Living Oceans Society and Raincoast Conservation Foundation and Tsleil-Waututh Nation [NEB Filing ID A96969].

⁵⁹ NEB Ruling No. 24 – Notice of motion from Living Oceans Society and Raincoast Conservation Foundation regarding risk assessment of Project-related marine shipping [NEB Filing ID A97046-1].

⁶⁰ NEB Ruling No. 27 – Raincoast Conservation Foundation notice of motion to file late evidence [NEB Filing ID A97278-1].

parties.⁶¹ With respect, this conclusion is dismissive of the realities facing the Indigenous Intervenor. There is no equivalency between the capacity of TM Canada, a large Crown Corporation, owner of a multi-billion dollar existing pipeline and Project with employed technical staff at its disposal and experts at the ready, to participate fully in the Reconsideration Hearing and the capacity of the Indigenous Intervenor who, for the most part, do not have readily available staff that can be diverted to deal solely with the Reconsideration Hearing, unlimited resources or an army of experts waiting in the wings to prepare highly technical reports in mere weeks. The interests at stake for the Indigenous Intervenor required the Board to provide a greater degree of procedural protection in the circumstances.

59. Canada has recognized that the NEB needs modernization, including to ensure appropriate weight is given to traditional knowledge. Despite this, the GIC forced the Reconsideration Hearing under the current broken regulatory framework. Given Canada's acknowledgement concerning the NEB process, the Reconsideration Hearing should not have continued until that process is restructured to be able to meaningfully address the interests of First Nations.⁶²

B. The Board Must Find Consultation has been Inadequate

(i) The Process is Inadequate Generally

60. Canada has advised Indigenous intervenors that it will be relying on the Reconsideration Hearing to the extent possible to fulfil its constitutional duty to consult with Indigenous intervenors. In such circumstances, "the Board's process serves the additional purpose of contributing to the extent possible to the constitutional imperative not to approve a project if the duty to consult was not satisfied".⁶³ In addition, in Appendix 2 to the Board's letter of October 29, 2018 providing its reasons with respect to, *inter alia*, the List of Issues and the Amended Factors, the Board stated that it had amended the List of Issues to include Issue No. 6 – the potential impacts of Project-related marine shipping on Indigenous interests – to "more clearly reflect that the Board must carry out its responsibilities in a manner consistent with the *Constitution*, including subsection 35(1)".⁶⁴

⁶¹ Argument-in-Chief of TM Canada ("Argument of TM Canada"), p. 5 [NEB Filing ID A97422-2].

⁶² CAR, p. 147.

⁶³ TWN Decision at para. 526.

⁶⁴ Appendix 2 to Letter from Board dated October 29, 2018, p. 7 [NEB Filing ID A95187-5].

61. The Board went on to say that it will consider whether there has been adequate consultation and accommodation for the purposes of the Reconsideration Hearing consistent with the recognition of the rights recognized and affirmed in section 35.⁶⁵
62. While the Crown may choose to delegate procedural aspects of the duty to consult to the Board, the duty to consult will only be satisfied in such circumstances “if in substance”, and also procedurally, an appropriate level of consultation is provided. Ultimately, the legal responsibility for fulfilling the duty rests with the Crown alone as the “honour of the Crown cannot be delegated”.⁶⁶
63. The Reconsideration Hearing process in this instance has not, in substance, provided for an appropriate level of meaningful consultation between the Stó:lo Collective and the Crown. The procedural restraints imposed by the Board do not correspond to what was required to meet the requirements of deep consultation.
64. The same failings with the Reconsideration Hearing process outlined above concerning the lack of procedural fairness are also factors in the failure of this process to provide for adequate consultation.
65. First, the Timeline is entirely at odds with the legal obligations of the Crown and the interests of Indigenous peoples and undermines the legitimacy of consultation for the Project. Had the Crown instead engaged Indigenous peoples in determining an appropriate timeline for completing the Reconsideration Hearing and report, the resulting process would have moved closer to meeting the Crown’s legal obligations. Instead, the restrictive, time constrained process has provided limited (if any) opportunity for responsive, meaningful, two-way dialogue.
66. Second, the actual Reconsideration Hearing process fell far below the threshold required for consulting and accommodating the Stó:lo Collective:
 - (a) in this instance, the unilaterally-structured process did not create an appropriate mechanism for consultation, lacking any collaborative exchange with the Crown;
 - (b) the process placed an unreasonable burden on the Stó:lo Collective as intervenors to review significant volumes of evidence which it did not have capacity to investigate and challenge;

⁶⁵ *Ibid*, p. 7.

⁶⁶ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (“**Haida**”) at para 53.

- (c) with the exception of OTE, the Reconsidering Hearing was conducted solely in writing, and specifically precluded cross-examination. The IR process is not an adequate substitute; and
 - (d) between October 5, when Canada advised it would rely on the Reconsideration Hearing to fulfil its duty to consult and accommodate Indigenous intervenors and December 5, 2018, when the evidentiary record closed for intervenors, there was no direct engagement between the Stó:lō Collective and the Crown.
67. An imbalanced, one-way process does not contribute to the “mutual understanding” required in order for the Crown to fulfill the duty to consult.
68. For the consultation process to be meaningful, the Reconsideration Hearing must have provided an opportunity and capacity to engage fully in the Reconsideration Hearing process, to fully understand the impacts of Project-related marine shipping on the Stó:lō Collective, and to ensure that the Stó:lō Collective is able to communicate fully these impacts to the Board. The formal, adversarial nature of the Reconsideration Hearing and the voluminous evidence to be considered significantly limit the ability of this process to be meaningful. Overall the structure, rules, and the Timeline imposed are not conducive to nation-to-nation reconciliation, which underpins the Crown’s ability to consult and accommodate.
69. The Reconsideration Hearing has failed to provide a sufficient forum for meaningful consultation. The Stó:lō Collective submits that the Board must conclude that the Reconsideration Hearing has not been adequate to discharge any aspect of the Crown’s duty to consult and accommodate the Stó:lō Collective.

(ii) Failure to Consider Stó:lō Collective’s Established Right to Fish

70. The Stó:lō are one of few Indigenous peoples in this country to have an established (non-treaty) right to fish for food and ceremonial purposes. This established right is protected by s. 35 of the *Constitution*.
71. The Crown’s duty to consult and accommodate with respect to “potential, but yet unproven, interests” is grounded in the honour of the Crown. This duty to consult is distinct from the *fiduciary duty* that is owed in relation to particular *cognizable Aboriginal*

interests.”⁶⁷ The Stó:lō’s established fishing rights are “cognizable Aboriginal interests” giving rise to fiduciary obligations on the part of the Crown.

72. The Crown’s duty to consult and accommodate the Stó:lō as established rights holders clearly falls at the highest end of the *Haida* consultation spectrum, requiring “deep consultation”.⁶⁸ As the SCC stated in *Tsilhqot’in*: “The required level of consultation and accommodation is greatest where title [a form of right] has been established”.⁶⁹
73. Further, because the Stó:lō are established rights holders, consultation between the Crown and the Stó:lō Collective must include certain substantive elements. As noted in *Prophet River*, “it is without question that consideration of the issue of infringement of [established rights]” such as the Stó:lō’s fishing rights, “short of making an ultimate decision or determination, needs to be part of the consultation process”.⁷⁰
74. The Crown must consider whether its actions would constitute an infringement of an established right, and communicate that analysis on a timely basis as part of its consultation with the established rights holder. The requirement to communicate is essential to meet the “meaningful and responsive two-way dialogue” that the Crown agreed was necessary in this case. Failure to do so makes consultation inadequate.
75. Similarly, to uphold the Crown’s fiduciary duties, when considering and communicating on the issue of infringement, the Crown also ought to communicate why it considers any such infringement to be justified. Failure to do so also makes consultation inadequate.
76. The requirement that the Crown justify any infringement was first introduced in cases considering whether and when established Aboriginal rights may be lawfully infringed, which are not directly applicable here but which nevertheless inform this submission. In the leading case of *R. v. Sparrow*,⁷¹ the SCC unanimously held that the Crown must justify any *prima facie* infringement of established rights. Further, *prima facie* infringement is not a high burden to meet – to the contrary, an Indigenous rights holder

⁶⁷ *Haida* at paras. 27 and 54 (emphasis added).

⁶⁸ *Ibid* at paras. 27 and 54.

⁶⁹ *Haida; Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 (“*Tsilhqot’in*”) at para. 79.

⁷⁰ *Prophet River First Nation et al. v. Attorney General of Canada et al.*, 2015 FC 1030 at para. 53, aff’d 2017 FCA 15 at para. 47, leave denied 2017 CanLII 40511 (SCC).

⁷¹ [1990] 1 SCR 1075 (“*Sparrow*”).

need only show “government action has interfered with these rights in more than an insignificant or trivial way”.⁷²

77. Once *prima facie* infringement is established, the onus shifts to the Crown to justify its actions. In order for an infringement to be justified, the Crown must show the impugned action has a “compelling and substantial objective” and the proposed incursion is consistent with the Crown’s fiduciary duty towards Aboriginal people. The SCC in *Sparrow* further explained: “The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified”.⁷³
78. Requiring the Crown to consider and communicate whether any infringement can be justified ensures the established right is engaged with, and treated with the appropriate degree of respect by the Crown. Such an approach is necessary in order to uphold the honour of the Crown generally, and its fiduciary duty specifically. In *Tsilhqot’in*, the SCC recognized the importance of the Crown’s justification obligation stating at para. 82: “As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d’être* of the principle of justification. Aboriginals and non-Aboriginals are “all here to stay” and must of necessity move forward in a process of reconciliation.”⁷⁴
79. The obligation to justify infringements while engaging in consultation “may place a heavy burden on the Crown”, but it is necessary to uphold the honour of the Crown and ensure its fiduciary duty to Indigenous rights holders is fulfilled.⁷⁵ This approach also is consistent with the expectation articulated by the SCC in *Tsilhqot’in* that established rights require a justification analysis, and any compelling and substantial objective must be considered from the Aboriginal perspective, not just that of the general public.⁷⁶
80. If the Crown is not required to consider and communicate its infringement and justification analysis, then established rights holders may be treated no differently than

⁷² *Sparrow*, p. 1112; *R. v. Gladstone*, [1996] 2 SCR 723 at para. 43; *R. v. Morris*, 2006 SCC 59 at para. 53; *William v. British Columbia*, 2012 BCCA 285 at paras. 293-294, 322; rev’d on other grounds in *Tsilhqot’in*.

⁷³ *Sparrow* at para. 71; *Delgamuukw* at para 165; *Tsilhqot’in* at paras. 77, 80-88; *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 110.

⁷⁴ *Tsilhqot’in* at para. 82; *Haida* at para. 42; *Van der Peet* at para. 24.

⁷⁵ *Sparrow*, pp. 1114-1115.

⁷⁶ *Tsilhqot’in* at paras. 80-81.

asserted rights holders in the Crown's consultation process, improperly minimizing the significance of proven rights. The Crown is legally required to consider these issues in advance of a decision, and ought to be required to communicate them – it is consistent with the honour of the Crown and the principles of consultation.

81. The honour of the Crown, including its fiduciary duty, dictate that the justification analysis must be conducted in good faith, in a transparent manner and in consultation with the holder of the Aboriginal right. None of that has occurred to date.
82. It was clear early on in the consultation process that the Stó:lō Collective's established fishing rights would be infringed by the Project, and the Crown has acknowledged that fishing activities would be impacted throughout the lifetime of the Project as a result of, *inter alia*, Project-related marine shipping:

In the course of this review Canada acknowledges the Board's finding that "Project-related activities could result in low to moderate magnitude effects on freshwater and marine fish and fish habitat, surface water and marine water quality." Appendix 12 to the Board report defines a moderate impact to be one that, among other things, noticeably affects the resource involved.

Canada also acknowledges that during the operational life of the Project fishing and harvesting activities directly affected by the construction and operation of the Westridge Marine Terminal would not occur within the expanded water lease boundaries.

Further, impacts on navigation, specifically in eastern Burrard Inlet, would exist for the lifetime of the Project, and would occur on a daily basis. Project-related marine vessels also would cause temporary disruption to the Stó:lō Collective's marine fishing and harvesting activities. These disruptions are said "likely to be temporary when accessing fishing sites in the Burrard Inlet that require crossing shipping lanes, as community members would be able to continue their movements shortly after the tanker passes." This too would occur on a daily basis if the Westridge Marine Terminal were to serve 34 Aframax tankers per month.⁷⁷ [Emphasis added.]

83. These are clear examples of *prima facie* infringement of the Stó:lō's established right to fish. Once such infringements were established, the burden shifted to the Crown to justify it. Canada has not done so.
84. The Crown has provided no analysis to the Stó:lō Collective, and there is no evidence before the Board to suggest it considered specifically or in any detail any of: the nature and content of the Stó:lō's established fishing rights; the type and degree of

⁷⁷ TWN Decision at paras. 724-726.

infringement; or justification for that infringement. It failed to conduct this analysis despite acknowledging the Stó:lō have these established rights.⁷⁸

85. Both the 2016 Recommendation Report and the CAR's assessment of Project impacts are incomplete and wholly unsatisfactory when it comes to the Stó:lō's fishing rights and cannot be said to be a discussion of infringement of an established right. Neither discuss the Stó:lō's established fishing rights in any detail. Without discussing and understanding the substantive content of the fishing right, it is impossible to adequately and fairly discuss Project impacts, including those related to Project-related marine shipping. The discussion of impacts that does appear in the CAR is far too general to satisfy the constitutional requirement to consider infringement in this case.
86. The Crown's lack of analysis and engagement on this issue is particularly egregious in light of the risks associated with a spill or contamination affecting the Fraser River, and the weaknesses in the scientific evidence on the fate and distribution of dilbit after a spill.⁷⁹ As the Crown acknowledged in the CAR, the "interaction between oil and sediments is still an active area of research."⁸⁰
87. The Board cannot find consultation has been adequate when the Crown has failed entirely to provide any justification analysis either in the course of the Reconsideration Hearing or otherwise, with respect to the Stó:lō's established right to fish.
88. On this basis alone, it is submitted, the Crown's consultation with the Stó:lō Collective was deficient and the Board must not recommend the Project's approval unless or until sufficient consultation has occurred, including preparation by Canada of its justification analysis.

(iii) Canada Cannot Rely on the CAR to Bolster its Consultation Record

89. In its direct evidence in the Reconsideration Hearing, Canada filed the CAR that was before the GIC when the Project was approved. Despite the FCA finding in the TWN Decision that the CAR was a result of a flawed Phase III consultation process, Canada continues to rely on it.

⁷⁸ CAR, p. 84; CAR Appendix C-19 – Stó:lō Collective, p. 16.

⁷⁹ Expert Report prepared by PGL Environmental Consultants, "Potential Effects of Trans Mountain Expansion Project-Related Vessel Traffic", December 2018 ("**PGL Report**"), Appendix "A" to Opening Statement and Evidence of Stó:lō Tribal Council [NEB Filing ID A96442-1].

⁸⁰ CAR, p. 113.

90. It is deeply concerning that the Board, in preparing its report on the Reconsideration Hearing, will have before it information concerning strength of claim and Project impacts on Aboriginal rights and title from the Crown's out of date and inaccurate consultation report. While Canada has advised that it will be revising the CAR prior to any further decision on Project approval by the GIC, the Board will not have the benefit of such revisions – meaning the Board process (which the Crown has stated forms an important part of its consultation process) will rely on a record that both the FCA and the Crown have acknowledged is flawed.
91. The Stó:lō Collective submits that, to the extent Canada seeks to rely on the CAR for the purpose of demonstrating the adequacy of consultation, the Board should give it no weight. The CAR is not evidence of actual consultation; to the contrary, as found by the FCA, the CAR represented note-taking and not “meaningful, two-way dialogue in response to Stó:lō's real and valid concerns about matters of vital importance to the Stó:lō”.⁸¹

(iv) Past Engagement with TM Canada Should not be Considered to Assess Adequacy of Consultation

92. In its response to the Stó:lō Collective's Information Request in the Reconsideration Hearing concerning whether any aspects of the duty to consult had been delegated to the proponent, Natural Resources Canada advised that, “[i]n addition to the Crown's direct consultation with Indigenous groups and consultation through the NEB, the Crown will also rely on the conduct of all of the proponent's past and future consultation activities, where appropriate, to fulfill its duty to consult.”⁸²
93. The Stó:lō Collective has serious concerns about the Crown's reliance on any of TM Canada's past engagement activities, and submits that the Board should not consider such engagement efforts in determining the adequacy of consultation.
94. Between 2014 and 2016, the Stó:lō Collective, repeatedly advised the Crown of the issues it had with TM Canada's engagement efforts, including: TM Canada's failure to honour commitments, its failure to accurately record information, its failure to incorporate traditional ecological knowledge into Project plans, and a pattern of responding to the Stó:lō Collective's requests by claiming that issues will be “discussed” or information

⁸¹ TWN Decision at para. 720; see also paras. 718 and 727.

⁸² Natural Resources Canada Response to Information Request from Stó:lō Collective (“**NRCan IR**”) [NEB Filing ID A6Q5X1].

would be provided at some point in the future (that point rarely came). The Crown has never substantively responded to these concerns. In the circumstances, the Crown cannot rely on TM Canada's past conduct to fulfill any part of its duty to consult, because the Proponent routinely mischaracterized its consultative activities in the past and the Crown failed to independently confirm the accuracy of the record despite the Stó:lō Collective's serious concerns.⁸³

C. Canada's Conflict of Interest

95. The deficient Reconsideration Hearing process and inadequate consultation must also be viewed in the context of the conflict of interest Canada has placed itself in as a result of its purchase of the Project.
96. Now that the federal government has acquired an ownership interest in the Project, the Crown is in the unique and delicate position of holding multiple conflicting roles. It is the owner and developer of the Project, who will enjoy significant financial benefits should the Project proceed; the regulator of the Project, who is tasked with ensuring that it is designed, constructed and operated in accordance with Canadian laws; a fiduciary in respect of Indigenous peoples (particularly where the Project crosses reserve lands); the Crown, who holds a unique position *vis a vis* Indigenous people, and has an obligation to act honourably in its dealings with them; a signatory to the *United Nations Declaration on the Rights of Indigenous Peoples*, who has committed to upholding the principles of free, prior and informed consent; and a trustee in respect of reserve lands, who holds that land - some of which is impacted by the Project - for the benefit of Indigenous peoples.
97. These different and conflicting roles place the Crown in a very difficult position, particularly with respect to meeting its legal obligations to Indigenous peoples. Given its role of "honourable Crown" and fiduciary/trustee, the Crown will be held to the highest standard in navigating these conflicting roles.
98. In *Blueberry River Indian Band v. Canada*,⁸⁴ Justice McLachlin stated that, in circumstances where the Crown is in a position of conflict of interest because its interests compete directly with those of the aboriginal group for which it must act as a fiduciary, the government must ensure that it does not benefit "personally" from the

⁸³ Draft Issues Tracking Table for TMX – IR45 – Stó:lō Collective [NEB Filing ID A4R4T5].

⁸⁴ [1995] 4 SCR 344, 1995 CanLII 50 (SCC).

exercise of its fiduciary powers. If a conflict of interest is established, the Crown will bear the onus of showing that it did not derive any personal benefit from the situation:

The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J. C. Shepherd, *The Law of Fiduciaries* (1981), at pp. 157-59; and A. H. Oosterhoff: *Text, Commentary and Cases on Trusts* (4th ed. 1992). The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.⁸⁵

99. In the course of the decision, McLachlin J. upheld the following finding of the lower court:

Where there does exist a true fiduciary relationship such as in the case at bar, following the 1945 surrender, the same high degree of prudence and care must be exercised in dealing with the subject-matter to which the fiduciary duty relates, as in the case of a true trust (refer *Guerin et al. v. The Queen et al.*, *supra*, at page 376). The test to be applied is an objective one: good faith and a clear conscience will not suffice. It is also similar to a trust in another respect: where a trustee is in any way interested in the subject-matter of the trust, there rests upon him a special onus of establishing that all of the rights and interests both present and future of the beneficiary are protected and are given full and absolute priority and that the subject-matter is dealt with for the latter's benefit and to the exclusion of the trustee's interest to the extent that there might be a conflict. A similar onus rests on the Crown in the case at bar regarding the equitable obligation which it owed the plaintiffs.

...

It appears that, as in the case of *Kruger v. The Queen*, [1986] 1 F.C. 3 (C.A.), there existed in the case at bar a conflict of interest between the Department of Indian Affairs and The Director, The Veterans' Land Act: the former was seeking the best price available for the land and was interested in obtaining it immediately in order to purchase substitute reserves closer to the trap lines (See Exhibit 428). The latter, on the other hand, wanted to secure good agricultural land at the lowest possible price in order to allow the veterans to obtain a greater benefit from the purchase.

The statement of Heald J. at page 17 of the above cited report of the Kruger case is particularly relevant here:

Bearing in mind that it is the Crown which owes the fiduciary duty to the Indians, the facts of this case clearly raise the issue of conflict of interest, in my view. It seems evident that two Departments of the Government of Canada were in conflict concerning the manner in which the Indian occupants of Parcel A should be dealt with. The evidence seems to unquestionably establish that the officials of the Indian Affairs Branch were diligent in their efforts to represent the best interests of the Indian

⁸⁵ *Ibid.*, at para. 53.

occupants. On the other hand, the Department of Transport was anxious to acquire the additional lands in the interests of air transport. This situation resulted in competing considerations. Accordingly, the federal Crown was in a conflict of interest in respect of its fiduciary relationship with the Indians. The law is clear that "one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside" and that "Equity fashioned the rule that no man may allow his duty to conflict with his interest". On this basis, the federal Crown cannot default on its fiduciary obligation to the Indians through a plea of competing considerations by different departments of Government.⁸⁶ [Emphasis added.]

100. It is difficult in the circumstances to see past the apparent conflict between the Crown's role as fiduciary in respect of Indigenous peoples and, in particular the fiduciary duty it owes to the Stó:lō Collective arising from the Collective's cognizable Aboriginal interest, being their established fishing rights, and its role as ultimate owner of a Project that *prima facie* infringes that cognizable interest. Further, it is without question that the Crown will benefit if the Project is approved.
101. This conflict is even more glaring when comments by the federal government, including Prime Minister Trudeau and Finance Minister Morneau that the Project will proceed are considered.⁸⁷ The Crown cannot, on the one hand, pledge to ensure that no decision will be made until meaningful consultation has occurred, and on the other hand, assert that Project approval is a foregone conclusion. These competing, and potentially irreconcilable, interests are exemplified in the statements made in this Reconsideration Hearing. In response to the Information Request of the Stó:lō Collective, Natural Resources Canada stated that:

A recommendation on whether to approve the Project will only be considered by the Governor-in-Council once it is satisfied that: (1) the Crown has adequately fulfilled its duty to consult and that consultations with potentially impacted groups have been offered and/or carried out in a meaningful and responsive manner; and (2) accommodations have been considered, where appropriate, and responses have been provided to Indigenous communities, governments and Nations.⁸⁸ [Emphasis added.]

In contrast, TM Canada concludes the first paragraph of its Argument-in-Chief with the assertion, "Canada needs the Project now".⁸⁹ [Emphasis added.]

⁸⁶ *Apsassin v. Canada*, [1988] 3 FC 20 at paras. 56, 126-127.

⁸⁷ Minister Morneau Statement on the Trans Mountain Expansion Project, August 30, 2018 (Toronto, Ontario): <https://www.fin.gc.ca/news-nouvelles/speeches-discours/2018/2018-08-30-eng.asp>.

⁸⁸ NRCan IR at p. 19 [NEB Filing ID A6Q5X1].

⁸⁹ Argument of TM Canada, p. 1.

102. The Crown's competing interests cast doubt on the federal government's intentions, and without further action to address the conflict, the consultation cannot be said to be meaningful or that it upholds the honour of the Crown. To conduct the Reconsideration Hearing and to seek to remedy the failed Phase III under the spectre of this conflict of interest and the perception of bias is antithetical to reconciliation.

IV. PROJECT IMPACTS ON THE STÓ:LŦ COLLECTIVE

103. It is the Stó:lŦ Collective's position that this Reconsideration Hearing process is so inherently flawed that it cannot result in the Board recommending that the GIC issue a CPCN for the Project. However, in any event, it is imperative that the Board understand the significant adverse impacts the Project and Project-related marine shipping would have on the Stó:lŦ Collective, should it be approved.
104. The OTE and a review of impacts outlined in the ICA demonstrates that the loss of access to or availability of *S'ólh Téméxw* or the aquatic resources of the Fraser river would be devastating to Stó:lŦ culture and identity. The members of the Stó:lŦ Collective continue to rely on *S'ólh Téméxw* for food, educational, ceremonial, medicinal, and economic purposes. *S'ólh Téméxw* is integral to Stó:lŦ identity, and a risk to that land is a risk to that identity. Here that risk resulting from Project-related marine shipping cannot be negated.

A. Oral Traditional Evidence

105. In *Delgamuukw v. British Columbia*, the SCC stressed the importance of ensuring proper weight is given to OTE:

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 and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, *supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.) at p. 232. 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). This process must be undertaken on a case-by-case basis.⁹⁰

⁹⁰ [1997] 3 S.C.R. 1010 ("*Delgamuukw*") at para. 8.

106. On November 29, 2018, Chief Dalton Silver of the Sumas First Nation provided OTE on behalf of the Stó:lō Collective. The Stó:lō Collective submits that in considering this evidence, the Board must give it the same weight, and consider it on the same level of significance, as the scientific and technical evidence that has been tendered.
107. Chief Silver has been an elected council member and Chief of the Sumas First Nation for a total of 27 years, and, for a four-year term, he served as Chief for Yakwekwioose First Nation and, under traditional governance, the Ts'elxwéyeqw Tribe.⁹¹
108. Chief Silver's OTE was informed by knowledge passed down to him by his grandfather, Chief Richard Malloway. Chief Malloway was an executive member of the North American Indian Brotherhood in the 1940s and a founding member of the Union of British Columbia Union Chiefs. Chief Malloway did not attend formal school, but was taught to read and write and at 19 years old, was appointed spokesman for the Stó:lō. Chief Silver explained that his grandfather was instrumental in maintaining Stó:lō culture and ensuring the generational transfer of knowledge.⁹²
109. Chief Silver's OTE included sharing of information and stories concerning Stó:lō's longstanding socio-cultural and socio-economic relations and values, and how Stó:lō well-being is linked to and dependent on the integrity of the land, air, water and resources of *S'ólh Téméxw*.
110. Chief Silver began his OTE by explaining traditional Coast Salish burials to the Board. Historically, the Coast Salish would place their ancestors' remains in cedar boxes, which were then tied in trees. Over time, their ancestors' remains – fluids, flesh, blood – would run out of the boxes, down the trees, and into the ground. Because of this, the flesh and blood of Stó:lō people are all around their territories in the Coast Salish area:

The trees, the grasses, everything that grows has been nourished by our ancestors. Everything that we harvest, the plants that we use, the medicines, the foods, the animals come eat those grasses. All those plants grow along the waterways, provide food to those fish that help us survive, brought us sustenance. The affinity we feel for the nature around us, the s'iwes, the teachings of our people tell us those are our relatives.

There's people [sic] saying in many different cultures in Indigenous communities, you'll hear people say, "All my relations." When that is said, we're talking about

⁹¹ OTE Hearing at para. 3351.

⁹² OTE Hearing at para. 3353.

everything around us. It's not just your blood relatives, your cousins, your whatever, it's everything that's around us. ...⁹³

111. Chief Silver's explanation of Stó:lō interconnectedness indicates that the inevitable effects of Project-related marine shipping, and possible spills resulting therefrom, on the environment, salmon, the southern resident killer whales, and other Coast Salish communities, will impact the Stó:lō Collective as well. If there ever was a misconception that Project-related marine shipping would only affect First Nations living directly adjacent to the Salish Sea, Chief Silver's OTE on interconnectedness dispels this misconception.
112. Chief Silver told the Stó:lō story of how the orca came to be. By way of introduction, he described that he and his people are wolves, his mother's people are black bear, and his relatives in the interior are coyote. According to the story, Yexwelat, the eagle was trying to help Stóg:ya, the black wolf who was having trouble with his eyes. Yexwelat helped direct him to the ocean so that the salt water could fix his eyes, but ended up drowning in the ocean trying to save Stóg:ya. The story concludes with Stóg:ya looking for Yexwelat and discovering their transformation into the orca:

You see, when wolf came up, he found that he couldn't go back to the land. And when he looked around for eagle, he seen this fin on his back, which our people say is the eagle's wings, they folded up. And you see the white spot, white spots on the front of the killer whale, that comes from the white head of the bald eagle.

And it's through these stories that I'll say that the orcas, the killer whales are my brothers and sisters, as my people are wolf.⁹⁴

113. This story reveals that, despite being further inland, the Stó:lō have their own stories about and connection to the orca. The suffering resulting from the impacts on the southern resident killer whales as a result of Project-related marine shipping is felt throughout the interconnected Coast Salish community.
114. Moving inland from the coast, Project-related marine shipping could have detrimental effects on the Fraser River. In his OTE, Chief Silver explained the importance of the Fraser River to the Stó:lō peoples, stating:

But historically the Stó:lō people were right down to the mouth of what is now the Fraser. I mentioned the rivers around us. The Stó:lō people have been there since time immemorial. We've talked about different rivers over here; say, the

⁹³ OTE Hearing at paras. 3370-3371.

⁹⁴ *Ibid* at paras. 3390-3391.

Cowichan River, the Nooksak River, the Skagit River. Our people would say the Nooksak Stó:lō, the Sumac Stó:lō, the Cowichan Stó:lō, Staele (phonetic) Stó:lō. But when we talk of the river that people have come to know as the Fraser there's no other name to it than Stó:lō. To us it's the river of rivers; Stó:lō, period. Our people would say the giver of life.⁹⁵

115. Chief Silver went on to explain how a clean environment is essential to Stó:lō cultural integrity and security, stating:

The practices of our people are such that we need the clean environment, we need the clean water, we need the salmon and other fish species, other wildlife for carrying out those ceremonies. They're very sacred winter ceremonies that happen in our longhouses and in other places actually out in wildlife.

But...we need all our relations to be pure; the wildlife, the water, everything around us. Our very cultural survival is reliant on this."⁹⁶

116. Finally, regarding interconnectedness with other Coast Salish peoples, Chief Silver explained: "Our brothers and sisters on the Salish Sea, whatever happens on the Stó:lō affects them."⁹⁷

117. A similar sentiment was expressed by Tribal Chief Tyrone McNeil, member of the Seabird Island First Nation and tribal chief of the Stó:lō Tribal Council ("**STC**"), who presented OTE for the STC:

Just acknowledging that though I'm from Seabird and Stó:lō, Stó:lō people, the people of the river on the mainland of southwestern and British Columbia, that the people here are my relatives. We're Coast Salish, we're Halq'eméylem. We've got family connections, direct family connections, indirect family connections. We share a similar and common language, a similar and common culture, traditions, and a particular spirituality.

And it's in that sense here of being Coast Salish and in the past not having an opportunity to voice any concerns I or we may have with regards to the marine side of the proposed project, that I'm here today, as a Stó:lō person, as a Stó:lō leader, as a Coast Salish leader, within the context of extending my voice in support of my Coast Salish relatives, which I am obliged and obligated to do in such a way that over the course of this morning we'll be identifying concerns that are specific and direct to us as Stó:lō people, as somebody from Seabird Island, Sth'kwóllh of the Stó:lō people, but also some indirect that may more directly impact my Coast Salish relatives, who may be more directly impacted by all the

⁹⁵ *Ibid* at para. 3409.

⁹⁶ *Ibid* at paras. 3436, 3439-3440.

⁹⁷ *Ibid* at para. 3441.

aspects of marine, but because they are directly impacted, I'm indirectly impacted and our people are indirectly impacted.⁹⁸

B. Analysis of Impacts Based on ICA + Evidentiary Record

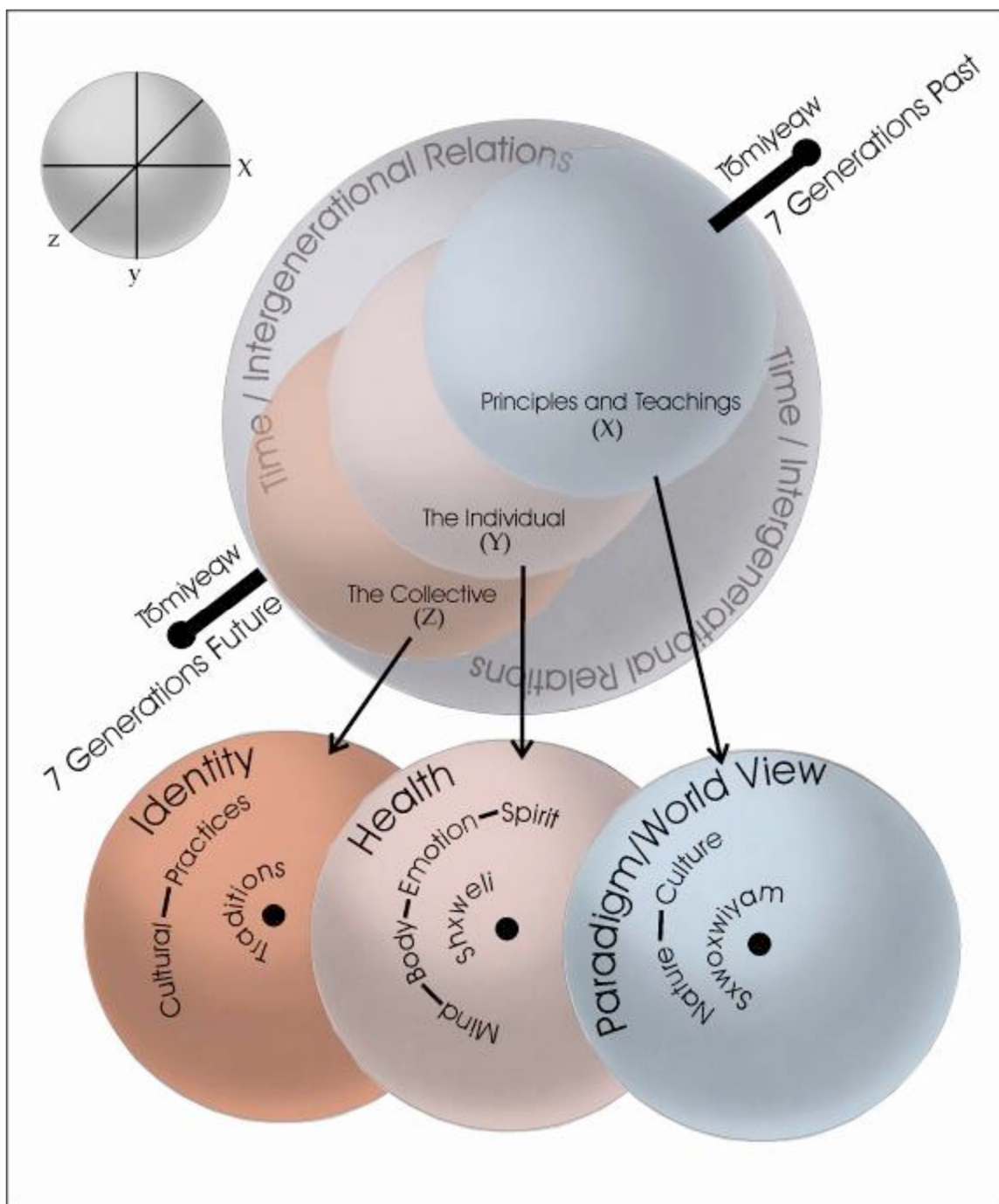
118. As described above, the ICA was a key technical submission from the Stó:lō Collective during the First Hearing. Due to the significant time restraints, the Stó:lō Collective has been unable to update the ICA to include specific analysis of the risks posed by Project-related marine shipping on Stó:lō rights, title and interest; however, for the purpose of ensuring that the Board has some understanding of the potential impacts of Project-related marine shipping on the Stó:lō Collective (albeit limited due to time constraints), the Stó:lō Collective has identified from the ICA and analyzed potential adverse impacts arising from Project-related marine shipping. In assessing these impacts, the Stó:lō Collective has also reviewed and relied on the oral traditional evidence presented by Chief Silver and other Coast Salish communities, and the written evidence filed in the First Hearing and the Reconsideration Hearing by Indigenous intervenors. The impact assessment provided for in this section is a result of that evidentiary review.
119. Stó:lō identity is not limited to tangible heritage or a geographically grounded place, but is based in enduring activities, such as fishing, language (Halkomelem), stories, songs, and storytelling, protection of cultural practices, and the protection from 'others' (i.e., non-Stó:lō). Many aspects of Stó:lō intangible heritage and traditional cultural expressions, including transformer narratives, songs, spiritual and cultural principles and practices, are shared among individuals and families of Stó:lō living throughout *S'ólh Téméxw* creating a collective identity that has both spatial and non-spatial linkages and connections. As a result, impacts to Stó:lō people and culture cannot be assessed or understood simply as a factor of 'spatial proximity' and direct spatial relations between the location of a resource or place of practice (i.e., site), an area of impact, and a particular community (i.e., reserve or Band).⁹⁹
120. Figure 1, below, provides a visual form of the main principles of Stó:lō culture. This image draws together some central concepts of Stó:lō culture described by Stó:lō community members in the ICA: identity, health, and paradigm.¹⁰⁰

⁹⁸ NEB Hearing Transcript for Oral Traditional Evidence Hearing on November 26, 2018 [NEB Filing ID A96127-1], Stó:lō Tribal Council at paras. 1253-1254.

⁹⁹ ICA, Introduction, pp. 18-19.

¹⁰⁰ ICA, Section 2, p. 14.

Figure 1 – Four Interconnected Dimensions of Stó:lō Culture



(i) Method and Process for ICA Impact Rating

121. The ICA was developed using participatory methods. A combination of interviews, focus groups, field studies and research provided community perspectives on how they felt their culture would be affected by the Project. The ICA prioritized and attempted to establish a Stó:lō worldview and epistemology as a fundamental framework within which to carry out its assessment of potential impacts to Sto:lo cultural heritage. The Stó:lō Cultural Model developed for the ICA portrays aspects of Sto:lo culture that are already under extreme pressure. Similarly, the impact rating criteria reflect Stó:lō perceptions of magnitude, duration, societal impact, and likelihood.¹⁰¹
122. Throughout the ICA, the ICA Authors use the Stó:lō Cultural Model which schematically depicts, according to the Stó:lō Collective's worldview, a suite of Stó:lō values and the inter-connected relations between people, places and things. The ICA uses this model, and a series of unique impact rating criteria to evaluate potentially linked environmental, social and economic effects that may be associated with the Project.¹⁰²
123. Stó:lō leadership and citizens prefer an impact rating method that allows them to track individual effects, but also allows comparison of the magnitude of different effects across different areas of interest (i.e. compounding effects to cultural values stemming from distinct impacts to water quality, spiritual sites and traffic etc.). For this reason, the Stó:lō model portrays Project impacts using different line types and different colours. The different line types illustrate how linkages between cultural activities and values have changed over time. For example, a solid line indicates a strong direct link between an activity and a cultural value, while a dotted line indicates that only very few people carry out the activity or that there are very few places to carry out the activity, severely diminishing the opportunity to instil this value.¹⁰³
124. The ICA Authors also employ different colours to help illustrate how the linkages between cultural activities and values may be affected by the Project. The Project's conformance with Stó:lō views of cultural sustainability (i.e., satisfying the needs of present generations without compromising the ability of future generations to meet their own needs) was a key consideration in determining significance of the impacts on the environmental and sociocultural aspects assessed in this ICA. An impact was

¹⁰¹ ICA, Section 2, p. 4.

¹⁰² ICA, Section 2, p. 7.

¹⁰³ ICA, Section 2, pp. 11-12.

considered significant if it weakened a cultural value linkage to the point that it compromised this objective. To assist in making the determination of significance, the level of importance of the impact and the likelihood of occurrence were considered, as shown in Table 2-11 below.¹⁰⁴

Colour Code	Line used on cultural model	Predicted Residual Impact Level
RED		Highly Significant Adverse Effect
YELLOW		Moderate Significant Adverse Effect
GREEN		Moderate or Highly Significant Positive Effect
GREY		Not significant Effect

Table 2-3: ICA Colour Legend for Cultural Model and Cultural Value Tables

¹⁰⁴ ICA, Section 2, p. 15.

		Likelihood		
		Unlikely	Likely	Highly Likely
Importance	Low	No to Low Adverse Effect Not significant	Moderate significant adverse effect	Moderate significant adverse effect
	Medium	Moderate significant adverse effect	Moderate significant adverse effect	High Significant adverse effect
	High	Moderate significant adverse effect	High Significant adverse effect	High Significant adverse effect

Table 2-11: ICA Table for Determination of Significance

125. The Stó:lō Cultural Model showing threats to inter-linked aspects of Stó:lō cultural integrity has been used throughout this section to illustrate impacts of the Project, inclusive of Project-related marine shipping on these traditional activities that will be adversely affected.
126. In addressing impacts, the Stó:lō Collective has looked at: general Project concerns, including spill risks, air quality, and oil spill trajectory; and how the Project, including Project-related marine shipping, adversely impacts specific Stó:lō traditional activities and cultural values.

(ii) Potential Adverse Impacts from Project-Related Marine Shipping

127. The potential adverse impacts identified from Project-related marine shipping that are of significant concern to the Stó:lō include:
- (a) Cumulative impacts of “acceptable losses” of dilbit during filling at Westridge Marine Terminal (“WMT”). Sufficient research on the nature of dilbit in marine, riverine, foreshore, and estuary environments within the Salish Sea has not been conducted and without fully comprehending the nature of dilbit in in this context, there is limited ability for emergency response planning or clean up;
 - (b) Cumulative impacts of air pollution as a result of increased vessel traffic, and/or due to spills. Airborne factors of contamination present a constant issue

impacting the wind dry salmon fishery in the Fraser Canyon, yet no emergency response plan for air as it relates to the pollution factors of a dilbit spill or marine traffic has been provided; and

- (c) Impact of spill or leak from the oil transport vessel or ATB at any point within the Salish Sea which will have long-term consequences in the marine, riverine, foreshore, and estuary environments and air.

128. As a result, the ability to scope sufficient mitigation measures is compromised.

(iii) Air Quality Concerns Resulting from Project-Related Marine Shipping

129. In 2015, the intervenor, Metro Vancouver, retained Levelton Consultants Ltd. (“**Levelton**”) to compile a report that assesses the effects of spilled dilbit on air quality (“**Levelton Report**”).¹⁰⁵ Levelton modeled air contaminant emissions at English Bay, First Narrows Bridge, Second Narrows Bridge, and WMT using the reasonable worst-case oil spill volumes estimated in a report conducted by Nuka Research Planning Group LLC.¹⁰⁶ The Levelton Report predicts that a spill would result in exceedances for a majority of pseudo components. This could exacerbate regional air quality issues in the Fraser Valley due to capture and release in snow caps, plants, and to meteorological effects. As stated in their Argument-in-Chief filed in the First Hearing, Tsleil-Waututh identified that there are gaps in the available information due to the study area being reduced and not all meteorological conditions considered.¹⁰⁷
130. Stó:lō people do not anticipate direct Project impacts on their ability to maintain the dry rack fishery of the Fraser Canyon, however there are concerns related to Project contributions to regional air quality issues and the contamination of the fish being wind

¹⁰⁵ Tsleil-Waututh Nation’s Record of Written Evidence, Volume 9 of 9, Appendix 5: Air Quality Impacts from Simulated Oil Spills in Burrard Inlet & English Bay, Air Quality Dispersion Modelling Report, submitted by Levelton Consultants Ltd., May 11, 2015, p. 1393 [NEB Filing ID A4L6C4].

¹⁰⁶ Oil Spill Response Analysis, Part 1, prepared by Nuka Research and Planning Group, LLC for Tsleil-Waututh Nation, City of Vancouver, and Tsawout First Nation, filed on December 2, 2015 [NEB Filing ID A4W1L4] (originally filed with the NEB by TWN on May 26, 2015 as Exhibits C358-13-18 to C358-13-22 [NEB Filing ID A70206]).

¹⁰⁷ Written Argument-in-Chief of the Intervenor Tsleil-Waututh Nation, January 12, 2015 at para. 173 [NEB Filing ID A4X4V2] citing TWN’s Record of Written Evidence, Volume 9 of 9, Appendix 5: Air Quality Impacts from Simulated Oil Spills in Burrard Inlet & English Bay, Air Quality Dispersion Modelling Report, submitted by Levelton Consultants Ltd., May 11, 2015, p. 1393 [NEB Filing ID A4L6C4].

dried. A thorough assessment of air quality effects was beyond the scope of the ICA, however this is a known area of significant concern among the Stó:lō people.¹⁰⁸

131. The following figures, contained within the Levelton Report, illustrate the predicted results of a “potential worst case oil spill” involving the Project in different spill locations along the coast:
 - (a) English Bay;
 - (b) Second Narrows; and
 - (c) WMT.¹⁰⁹
132. In addition, for each spill location, the maximum predicted concentrations at each receptor from 12 meteorological scenarios have been analyzed to represent the potential spatial distribution for four spill locations.¹¹⁰
133. The figures include indications of the acute inhalation exposure limit and “Protective Action Criteria” (“**PAC**”) from the US Department of Energy Emergency Management Issues Special Interest Group. The PAC was used as an additional health exposure guideline, in order to predict the potential health effects to the general public if they were exposed to a particular hazardous chemical if a spill were to occur. PAC have three theirs of exposure limits for each chemical:
 - (a) PAC-1: Mild, transient health effects;
 - (b) PAC-2: Irreversible or other serious health effects that could impair the ability to take protective action; and
 - (c) PAC-3: Life-threatening health effects.¹¹¹
134. Figures 4-2, 4-10, and 4-14 below, contained within Levelton Report, each show the maximum predicted one-hour contour plot of benzene, indicating the contours of the acute inhalation, PAC-1, ad PAC-2 exposure limits for different spill locations along the coast.

¹⁰⁸ ICA, Section 5, pp. 56.

¹⁰⁹ Levelton Report, p. 1418.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, p. 1393.

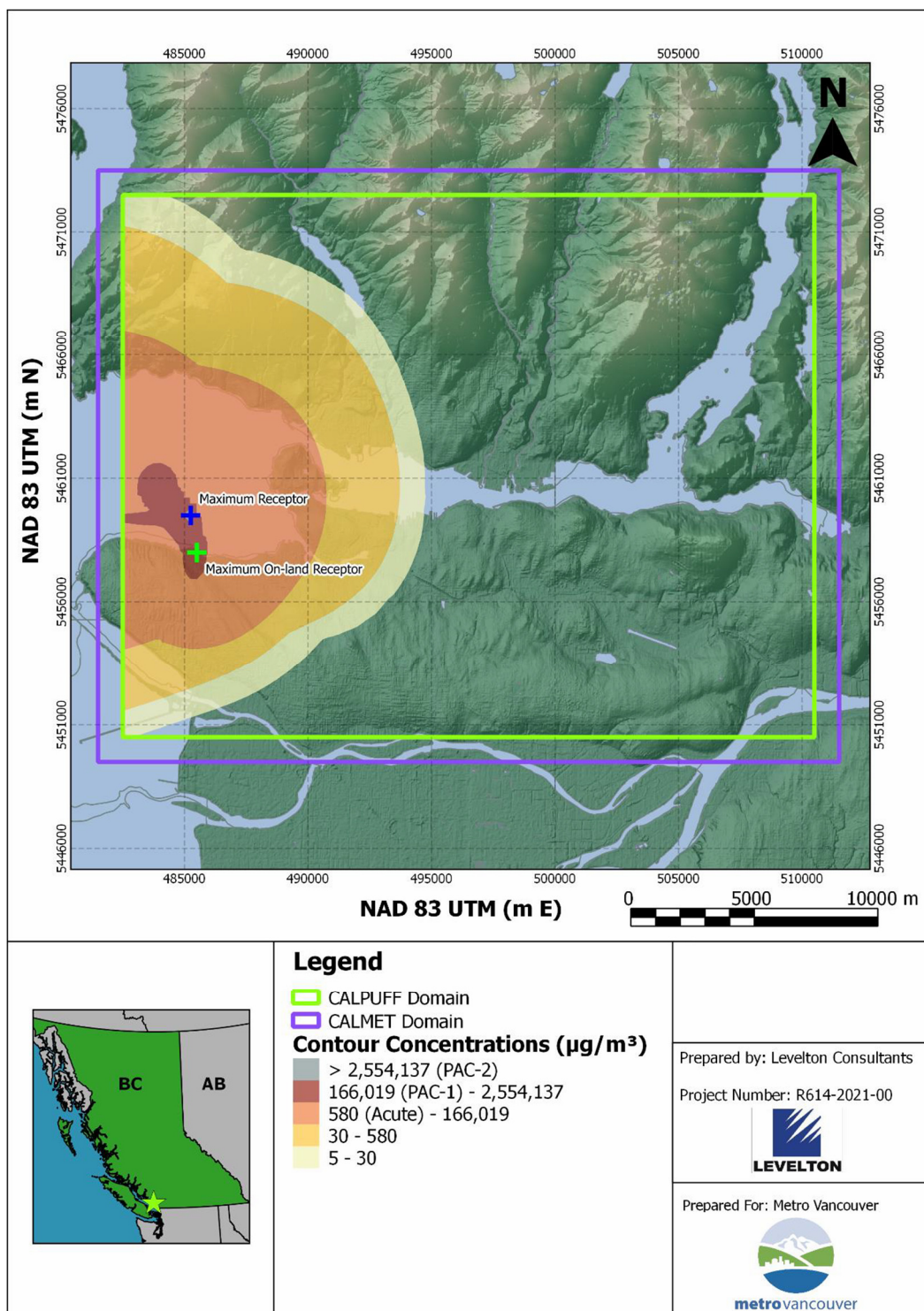


Figure 4-2 Acute Inhalation, PAC-1, and PAC-2 Exposure Levels Contour for Benzene for an English Bay Spill

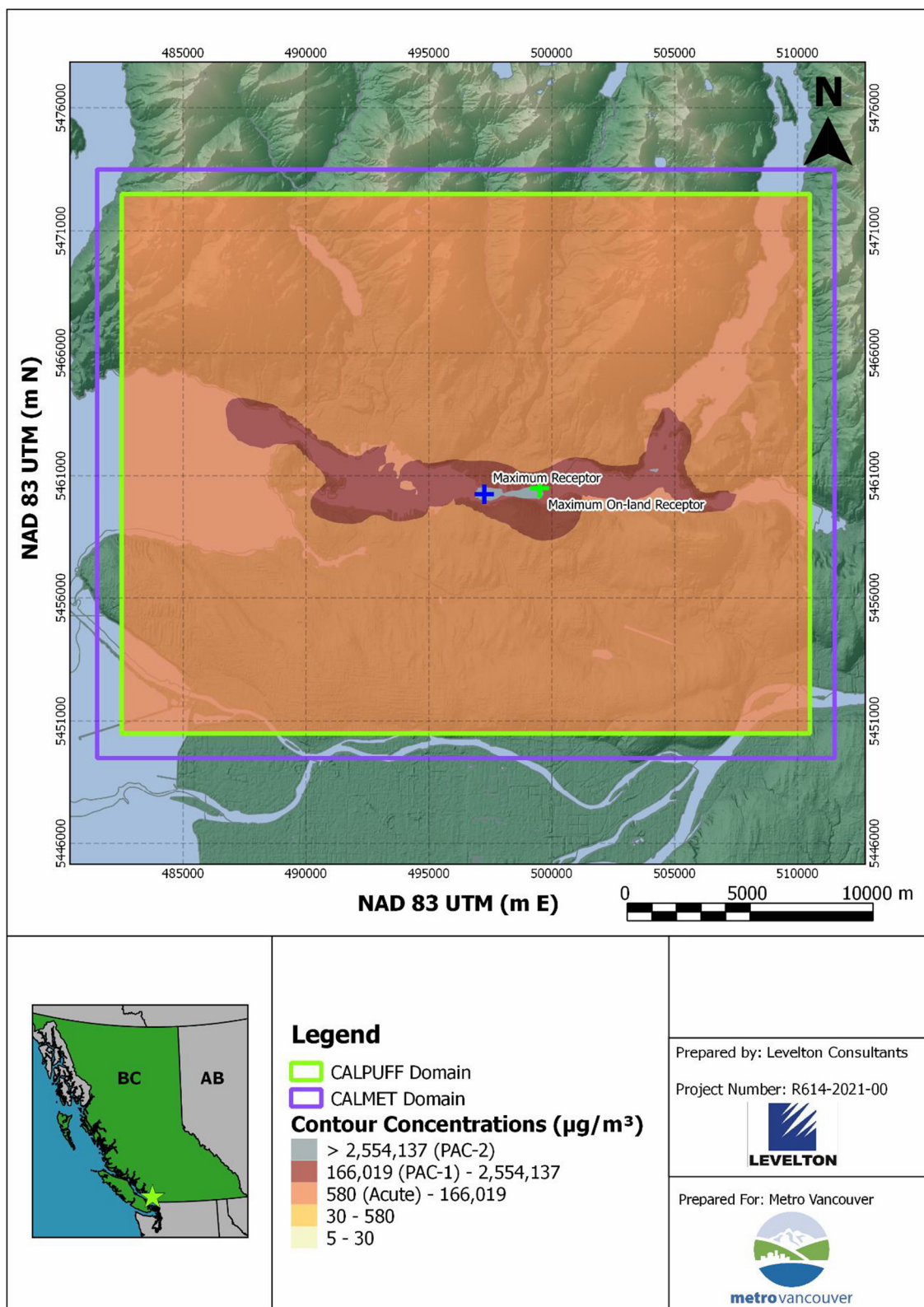


Figure 4-10 Acute Inhalation, PAC-1, and PAC-2 Exposure Level Contours for Benzene for a Second Narrows Spill

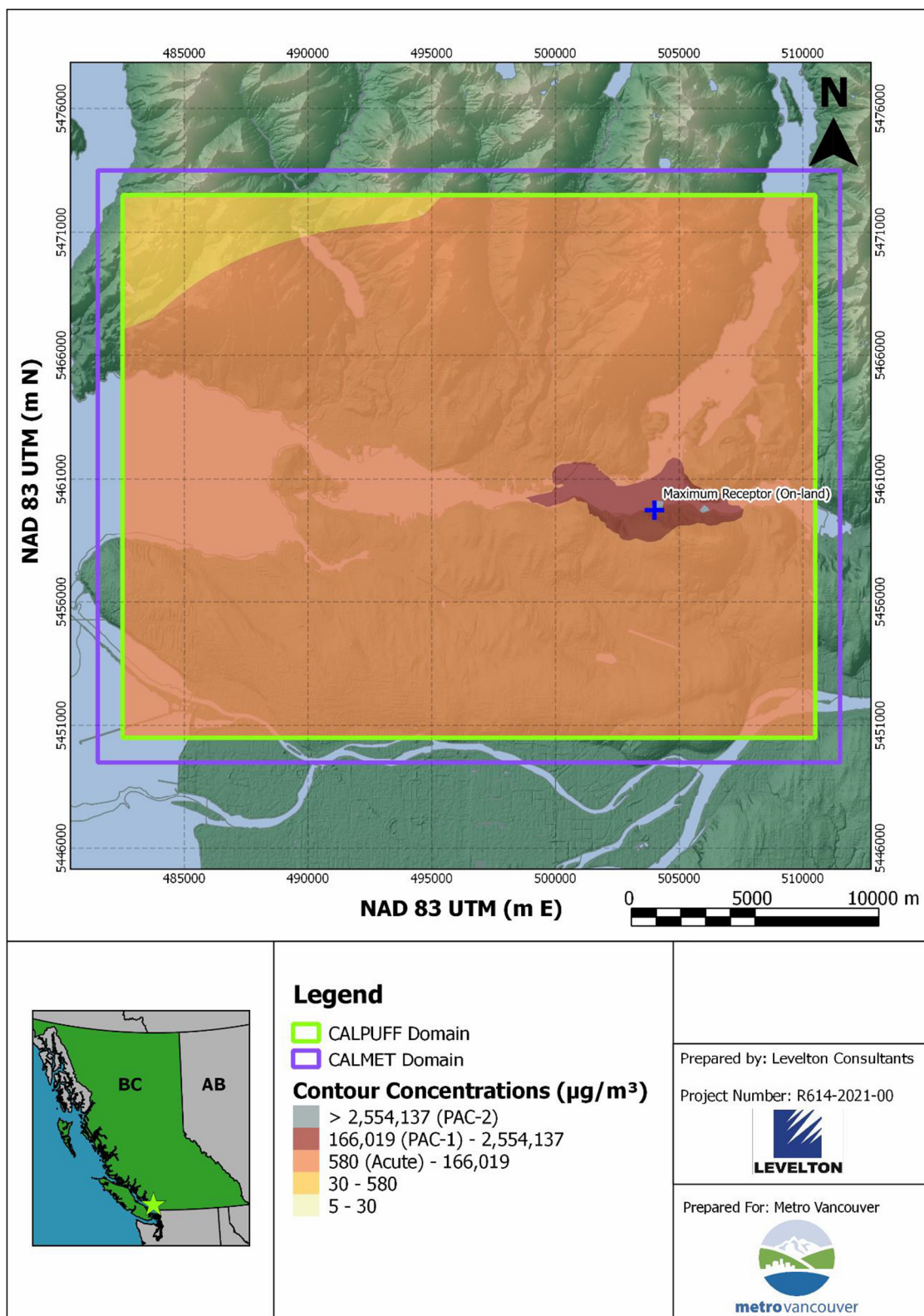


Figure 4-14 Acute Inhalation, PAC-1, and PAC-2 Exposure Level Contours for Benzene for a Westridge Terminal Spill

135. The Stó:lō Collective raised air quality in the course of Phase III consultation with Crown:

The Stó:lō Collective has highlighted air quality as a key environmental concern in relation to the Project, particularly that pipeline development, terminal operation and marine shipping could increase the number of air pollutants within Stó:lō territory including in the Chilliwack area where the effects of air quality on cultural foods such as wind-dried salmon are well known. The Stó:lō Collective explained that air is funneled through the Fraser Valley and transports contaminants directly to their territory as seen by airport developments in Richmond and Abbotsford (another consideration overlooked by the NEB). In relation to environmental protection, the Stó:lō Collective commented at the September 23, 2016 meeting with the Crown that the last time they heard from the proponent was over a year ago and that since then, the Stó:lō Collective has asked about filing additional evidence and what they can do to move the process forward. The proponent responded that environmental experts were already in the field, which has left the Stó:lō Collective largely out of the process taking place within their territory; a fact which they deemed disappointing as they are the primary experts of their land.¹¹²

136. No steps have been taken by Canada in response to these concerns.

(iv) Assessment of Spill Risk and Fate and Effect of Oil Spills from the Project

137. According to a study assessing the spill risk for the Project (“**Spill Risk Study**”) which was provided by Tsleil-Waututh Nation, the probability of a tanker spill is greater than what has been provided by TM Canada, based on several proven and highly respected methodologies.¹¹³ The Spill Risk Study concluded that the modeling application used by TM Canada is inaccurate and unreliable.¹¹⁴ The study compared tanker spill probabilities using the TM Canada application, the United States Oil Spill Risk Analysis (“**OSRA**”) model, and the Vessel Traffic Risk Assessment (“**VTRA**”) model. Whereas the TM Canada application found that the likelihood of a spill within the next 30 years is 10 percent, the OSRA and VTRA models estimated that the risk was in fact between 52 and 89 percent without a tug, and 41 percent with a tug and that such risk increases in a 50-year scenario.¹¹⁵
138. According to an expert report prepared by Jeffrey W. Short, Ph.D. in 2015 for Tsleil-Waututh Nation, the City of Vancouver, and Living Oceans Society (“**Short Report**”):

¹¹² CAR, Appendix C-19 – Stó:lō Collective, p. 16.

¹¹³ TWN's Record of Written Evidence, Volume 5 of 9, Appendix 1: An Assessment of Spill Risk for the Trans Mountain Expansion Project p. 954 [NEB Filing ID A4L6A6].

¹¹⁴ *Ibid.*, p. 810 [NEB Filing ID A4L6A6].

¹¹⁵ *Ibid.*

The Salish Sea, and especially Burrard Inlet and the Fraser River estuary, is one of the most ecologically important coastal marine habitats along the entire Pacific coast of North America. It is seasonally inhabited by over a million sea and shorebirds, including more than 30% of the global population of snow geese. It is one of just 6 sites along the west coast of North America of international and hemispheric importance. It is the only site of comparable ecological importance from the Canadian border with the State of Washington to the Copper River delta in Alaska.¹¹⁶

The Fraser River is the largest single salmon-producing river on the Pacific coast of North America (including Alaska), supporting runs of sockeye salmon (*Oncorhynchus nerka*) that can number in the tens of millions, along with major runs chinook (*O. tshawytscha*), chum (*O. keta*), pink (*O. gorbuscha*) and coho (*O. kisutch*) salmon, as well as steelhead trout (*O. mykiss*).⁴ These returning adult salmon support several species of marine mammals, including the endangered southern resident killer whale (*Orcinus orca*) stock, commercial fisheries worth millions of dollars, and subsistence harvests for First Nations that depend on them for maintaining their cultural heritage as well as for nutrition. Juvenile salmon out-migrating from the Fraser River depend on the estuary's high biological productivity and in turn provide forage for the seabirds and other fish species.¹¹⁷

The combined aggregations of extraordinarily high densities and numbers of sea- and shorebirds, marine mammals and fish make them especially vulnerable to potentially devastating mortalities should a major oil spill occur in Burrard Inlet or the Fraser River estuary as a result of the Project. Seabirds and shorebirds are particularly sensitive to both internal and external oil exposure, and their foraging habits, preening behaviour and resting requirements lead to frequent contact with surface oil when present. Petroleum exposure alters feather microstructure, compressing plumage so that it loses its buoyancy, insulating function, and flight capability. Birds contaminated at sea thereby succumb from drowning, hypothermia, starvation, or dehydration.¹¹⁸

139. In the Short Report, Dr. Short is clear that a spill could cause significant ecological consequences including devastating impacts to fish, including juvenile salmon, free-swimming suspension feeders, adult salmon, sub-adult salmon, indirect contamination of prey, and jellyfish. This impact will not only directly impact the inherent rights of Stó:lō but will impact their culture, socio-economic, social, psychological, spiritual and physical health.¹¹⁹

¹¹⁶ TWN's Record of Written Evidence, Volume 7 of 9, Appendix 3: Fate and Effect of Oil Spills from the Trans Mountain Expansion Project in Burrard Inlet and the Fraser River Estuary, prepared by Dr. Jeffrey W. Short, dated May 11, 2015 at paras. 66-68, Appendix 1: Curriculum Vitae, pp. 1205-1216 [NEB Filing ID A4L6A8].

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

140. Dr. Short recognized, and included in his report, that oil spills can cause mortality of marine mammals, including harbor seals, sea otters, Orca whales, and have indeterminate impacts on river otters, harbor porpoise, Dall's porpoise, Pygmy Sperm and Grey whales, and many more species located in the Salish Sea that rely on intertidal and marine habitats for sustenance.¹²⁰ Moreover, there is high potential of high mortality rates for waterfowl.¹²¹

141. Of critical note is Dr. Short's conclusion that:

In addition, a small, medium or credible worst-case scenario sized spill has the potential to contaminate tens of kilometers of shorelines on time scales of decades.

In summary, the seasonally high abundances of sea- and shorebirds in the Fraser River estuary, dilbit occur there. These mortalities could lead to population-level ecosystem perturbations both regionally and farther afield if substantial proportions of species' populations are killed. Ensuing ecosystem perturbations in the Fraser River estuary might lead to disruptions in the recruitment of many other aquatic species, either because of higher consumption of plankton by forage fish released from predation by seabirds, or by poor nutritive value of forage fish for their seabird, marine mammal, and other fish that consume them. These effects should be evaluated by a comprehensive food-web analysis of the marine ecosystem.¹²²

(v) Oil Spill Trajectory and Impacts

142. Tsleil-Waututh Nation provided a study conducted by Dr. Jerry Galt that models oil spill trajectory. This study demonstrates that the interconnectedness of the Burrard Inlet, the Howe Sound, and the Fraser River tides, winds, and water movements.¹²³ Following the review of TWN's Oil Spill Trajectory Modeling, the first 24 hours of an instantaneous release and that of a continuous release are drastically different in consideration of oil spill trajectory due to tidal cycles, both ebb and flood tide. The latter, continuous release, having a greater propensity for contamination within tidal waters, intertidal waters and related foreshores. As noted by Chief Dalton Silver, the tidal impacts on the Fraser River extend as far upriver as to reach Harrison Lake and, potentially, beyond.

I was talking with someone the other day and I said, "Why is it when Fisheries and Oceans are talking about tidal waters, they say that stops at the Mission

¹²⁰ *Ibid*, pp. 84, 10, and 71.

¹²¹ *Ibid*. p. 81.

¹²² *Ibid*, p. 74.

¹²³ TWN's Record of Written Evidence, Volume 6 of 9, Appendix 2: Oil Spill Trajectory Modeling Report, prepared by Dr. Jerry Galt, Glenwest Systems Inc., dated March 26, 2015 [NEB Filing ID A4L7Y7], pp. 7, 15, and 20.

Bridge" -- which is right in my territory -- "when we know the tidal waters go up much further than that?" My relatives at Sts'ailes, the fluctuations in the levels there, they know happen daily, and it's because of the tide on the Salish Sea. It goes right up to Harrison Lake. Those guys see the water levels change daily. And I'm sure it goes much further up than that.¹²⁴

143. The tidal nature of the Fraser River referred to in Chief Silver's evidence is a specific example of where traditional knowledge is critical in order to properly understand the Project's impacts, and in particular significant adverse environmental effects resulting from Project-related marine shipping, such as oils spills.
144. This is also an example of where the Board in the 2016 Recommendation Report placed too much reliance on TM Canada and lost the benefit of considering this important traditional knowledge in the course of the First Hearing:

The Stó:lō representative stated that, among other things, Trans Mountain was directed by the Board to include Indigenous knowledge in Project planning, but did not. By way of example, the Stó:lō explained that the Fraser River is a tidal (at least up to Harrison River), meandering river, with a wandering gravel bed that is hydrologically connected to many wetlands and waterways crossed by the Project. A map of historical waterways was provided in the ICA, along with a table listing local and traditional knowledge of waterways crossed by the Project. None of this information was considered in Trans Mountain's technical reports. In Stó:lō's view, Trans Mountain's assumptions and maps about the Fraser River were wrong and did not include their traditional knowledge. A year after the ICA was provided to Trans Mountain the Stó:lō met with Trans Mountain's fisheries manager who had never seen the ICA or any of the technical information contained in it.¹²⁵

145. As part of its consultation "note-taking", Canada noted the concerns over traditional ecological knowledge:

At both the April 13, 2016 and September 23, 2016 meetings with the Crown, the Stó:lō Collective provided examples of relevant Traditional Ecological Knowledge (TEK) which they felt should have been considered within the Project design, the environmental assessment, and mitigation planning. They noted that this knowledge has been ignored by the proponent. Such examples include the in-depth knowledge of historic waterways and complex hydrologic systems of the lower Fraser Valley, knowledge related to historic flooding, connectivity between wetlands and waterways, landslides and historic cycles of fish species and seasonal variations affecting fish habitat. The Stó:lō Collective also provided multiple examples of important traditional use sites, for instance the locations of bathing sites identified by First Nations within the 150 metre (m) RoW alignment at Bridal Veil Falls near Chilliwack, which did not appear on the proponent's detailed alignment sheets; nor did important wetland areas targeted for medicinal

¹²⁴ OTE Hearing at para. 3406.

¹²⁵ TWN Decision, para. 688.

plant gathering, or harvesting areas for cultural species (such as eels traditionally used for harvesting sturgeon). Riverbank harvesting areas and various other spiritual and cultural sites also seemed to have been overlooked by the proponent in its more detailed planning work, which is alarming to the Stó:lō Collective.¹²⁶

146. The Stó:lō Collective has repeatedly stressed the importance of consulting with traditional knowledge holders due to the nature of the Fraser River, which is tidal (at least up to Harrison River), with a meandering gravel bed that is hydrologically connected to many wetlands and waterways. The Stó:lō Applicants also advised it was critical to ensure its people's' traditional ecological and other knowledge was fully integrated into Project planning (ie. field surveys, mapping and development of protection plans), and asked the Crown to require such a Project Condition. However, this particular issue has never been addressed.¹²⁷
147. It is clear that further work, study, and an appreciation of relevant traditional knowledge is required in order to understand the full scope of potential adverse impacts from Project-related marine shipping.

(vi) Stó:lō Fishing Practices

148. As stated in the ICA, fishing is a foundational aspect of Stó:lō society, culture, economy, politics and traditions. Stó:lō have customary laws and protocols that have been used since time immemorial in establishing and maintaining their fishing rights.¹²⁸
149. Today, over 240 Stó:lō fishermen rely on fish from the waterways, whether for food, social, ceremonial, or commercial purposes, providing food to Stó:lō families within Salish (both Coast and Interior Salish) territories. *Sia:teleq* are recognized caretakers of specific fishing spots. They are knowledgeable and practicing fishermen, and well respected elders of the Stó:lō community; today fewer Stó:lō people have a marked fishing spot that is taken care of by one individual. The title of *Sia:teleq*, therefore, is inherited by right.¹²⁹
150. Based on DFO sources and the table below, it is estimated that on an annual basis Stó:lō fishermen collectively harvest at least 2,000 – 2,700 lbs of salmon per individual household for food, a total of 2,700 lbs of salmon for ceremonial use, and a total of 1,800

¹²⁶ CAR, Appendix C-19 – Stó:lō Collective, p. 13.

¹²⁷ TWN Decision, para. 688.

¹²⁸ ICA, Section 5, p. 1.

¹²⁹ *Ibid*, p. 9.

lbs for social use. These calculations are based on an average of figures provided by DFO reports (2011-2013). Based on research conducted for the Project, ceremonial consumption accounted for approximately 6,075 lbs of salmon annually in support of Winter Dances alone that occur in Bighouses (9) listed in the ICA. This does not account for wind dried salmon, or consumption associated with other social or ceremonial gatherings that take place throughout the year. The commercial industry varies between types and other mitigating factors, such as borrowing versus owning a net, and varies from year to year due to the annual variation in population returns.¹³⁰

Reach of Fraser (KP for TMEP)	Food (lbs)	Social (lbs)	Ceremonial (lbs)	Commercial (lbs)
(1013 - 1042) - set net sites	2000 per household	1800	2700	
(1016-1018.5; 1029-1035 1035.5-1046) Drifting	2000 per household			
(1032-1033.1; 1033.4-1034) Beach seining and drifting				1,301,675 - 8,400,000 depending on type of fish (chum versus pink)

SOURCE: DFO RECORDS FOR ANNUAL ABORIGINAL FSC HARVEST (2011-2013); PERSONAL COMMUNICATIONS WITH STÓ:LŦ COMMERCIAL FISHERS

Table 5-5: Estimated Annual Harvest for Food, Social, and Ceremonial Purposes

151. Traditional methods, shared knowledge and learned stories surrounding the waterways of *S'ólh Téméxw* are not only passed on through *sxwóxwiyám* (narratives of the distant past “when the world was out of balance and not quite right”), but provides context for place names, and understanding of traditional property rights/laws, customary laws of inheritance and encourages use of the Halq'eméylem language.¹³¹

¹³⁰ ICA, Section 5, p. 29. Original source of Table 5-5 is the DFO records for annual Aboriginal FSC Harvest (2011-2013) and personal communications with Stó:lŦ commercial fishers.

¹³¹ *Ibid*, p. 30.

152. Based on information collected for the ICA including that from Stó:lō expert fishers and fisheries managers, approximately 2,213 Stó:lō individuals/households rely on fish. At least 420 Stó:lō people fish as part of a crew for commercial economic opportunity, and approximately 240 Stó:lō fishers have attachments to ancestral sites as *Sia:teleg* (caretakers of specific fishing spots) and all Stó:lō communities have an interest in the waterways crossed by the Project.¹³² The impact on the established right to fish must also be considered in light of the marked decrease in the availability and abundance of fish experienced by Indigenous communities across BC, including the Stó:lō Collective, as a result of government fisheries regulation and the rise of commercial fisheries that have grown to exclude extensive Indigenous participation:

When I was growing up, it was every weekend June to September every weekend, now it is just waiting, waiting, waiting, and we only get the one weekend, then have to wait for three weeks or more before we can go out there again, and you know it affects the families that practice culturally. You know my family we don't sell our fish, because we need our fish for the winter, we are a fish people, my mom eats fish for breakfast, lunch, and dinner, and so we need and we freeze or can it, wind dry it.¹³³

(vii) Project Impacts on Stó:lō Fishing Rights

153. It is clear from the OTE presented by Coast Salish knowledge keepers that fishing and protection of aquatic resources are extremely important to the Stó:lō and other Coast Salish people:

I think the vessel traffic that occurs now on the Salish Sea and at the mouth of the Stó:lō has already done so much damage that I don't know that we can recover from that. I don't know that the wildlife, I don't know that the fish and everything else, (speaking in Native language), as my Elder said, I don't know if that can recover.

There were times when I was a young kid with my late father and my uncles and our relatives at Semiahmoo, we used to dig clams. I so much enjoyed that when I was a kid. My dad would get the crabs from our relatives there. We enjoyed a lot from the Salish Sea, as well as the Stó:lō.¹³⁴

...

In terms of the types of fishing resources we have, it's predominantly salmon, but there's -- that's the known that everyone in the country, I think, knows that B.C. has salmon, but the majority of them come up the Fraser River. And we also, in our traditional territory, have, over time, accessed sturgeon, eulachon, herring,

¹³² *Ibid* Section 5, p. 47.

¹³³ *Ibid* Section 5, p. 164.

¹³⁴ OTE Hearing at paras. 3418-3419.

halibut, seals. Whatever is in the water, either fresh water or salt water, we've harvested over time and utilized as a part of our economy. And we did have a very vibrant economy.

And the people who accompanied this gentleman traded with that ship. They traded fish and they traded other goods. So it's been our economy for time immemorial.

The declaration on the right, the Musqueam declaration, attests to that. Musqueam has been and aspires to regain its self-governing and self-sustaining economy. The population is very strong in terms of what we are committed to in terms of upholding our rights. We know what our rights are, and fishing is always present. It's ever-present.

And some of the old-timers could actually tell which creeks fish came from, the salmon. They could tell you that they were going to spawn in the Musqueam Creek or the Chilliwack Creek or, you know, just by looking at the fish. So it's really a science that's undocumented in terms of how Aboriginal people can work with the fish.¹³⁵

...

When the Salmon return to the Fraser, our community is vibrating. It's -- everybody is -- there's -- everybody's getting ready. We have Elders teaching our youth how to mend nets, where to fish, when to fish, what species we are trying to target at various points of the year. And that's a key point that I wanted to make here today was that, in terms of traditional resources, a vast majority of them are no longer accessible to Musqueam within our reserve lands.

Only through traditional protocols with various neighbouring First Nations are we able to harvest other aquatic -- sorry -- other resources, including deer and elk.

So we're protectors of the river, along with our neighbours and on behalf of our neighbours at times, and also for the people who are further up the river who harvest the salmon that go up the Fraser River but don't have direct access at the mouth.¹³⁶

...

And I talked a little bit about how we lived seasonally. We lived at Təmtə́míxʷtən Mountain in the winter time. We were up at Inlailawatash in the fall time preserving food for the winter. In the spring and the summer, we lived along here and of course, around July and August we all went to the Fraser, which has the best, in my humble opinion, Sockeye salmon run.

The second story that Gabriel shared the first time was about Waut-Salk, who was one of our more important -- well, not more important -- he was an important figure, hereditary leader of our people, and two young men. These boys were up

¹³⁵ NEB Hearing Transcript for Oral Traditional Evidence Hearing on October 20, 2014 [NEB Filing ID A4D4G7], Musqueam Indian Band at paras. 3570, 3573, 3574, and 3594.

¹³⁶ *Ibid* at paras. 3580, 3581, and 3677.

here at Inlailawatash and they were messing around with the salmon that were in the river. They say that the salmon was so plentiful you could walk across the river and not get wet because there were so many fish in the river.

So Waut-Salk took the fish away because the boys were abusing them and the people were afraid because then if they didn't preserve enough fish for the winter, they wouldn't survive the winter. So the boys were made to apologize. And I'm telling you the Reader's Digest version, but know that the boys learned that there are consequences to your actions and those actions impact not just the individuals, but the entire community.

And Waut-Salk brought the fish back after the boys apologized.

And that shows the management of the resources and that our people took care of our environment. And as I said, there are consequences to actions in the same way that there will be consequences when oil spills occur.¹³⁷

154. Applying the methodology outlined in the ICA, Figure 2 below illustrates the potential impacts from Project-related marine shipping on Stó:lō fishing.

¹³⁷ NEB Hearing Transcript for Oral Traditional Evidence Hearing on November 26, 2018 [NEB Filing ID A96350-1], Tsleil-Waututh Nation, paras. 3546, 3548-51.

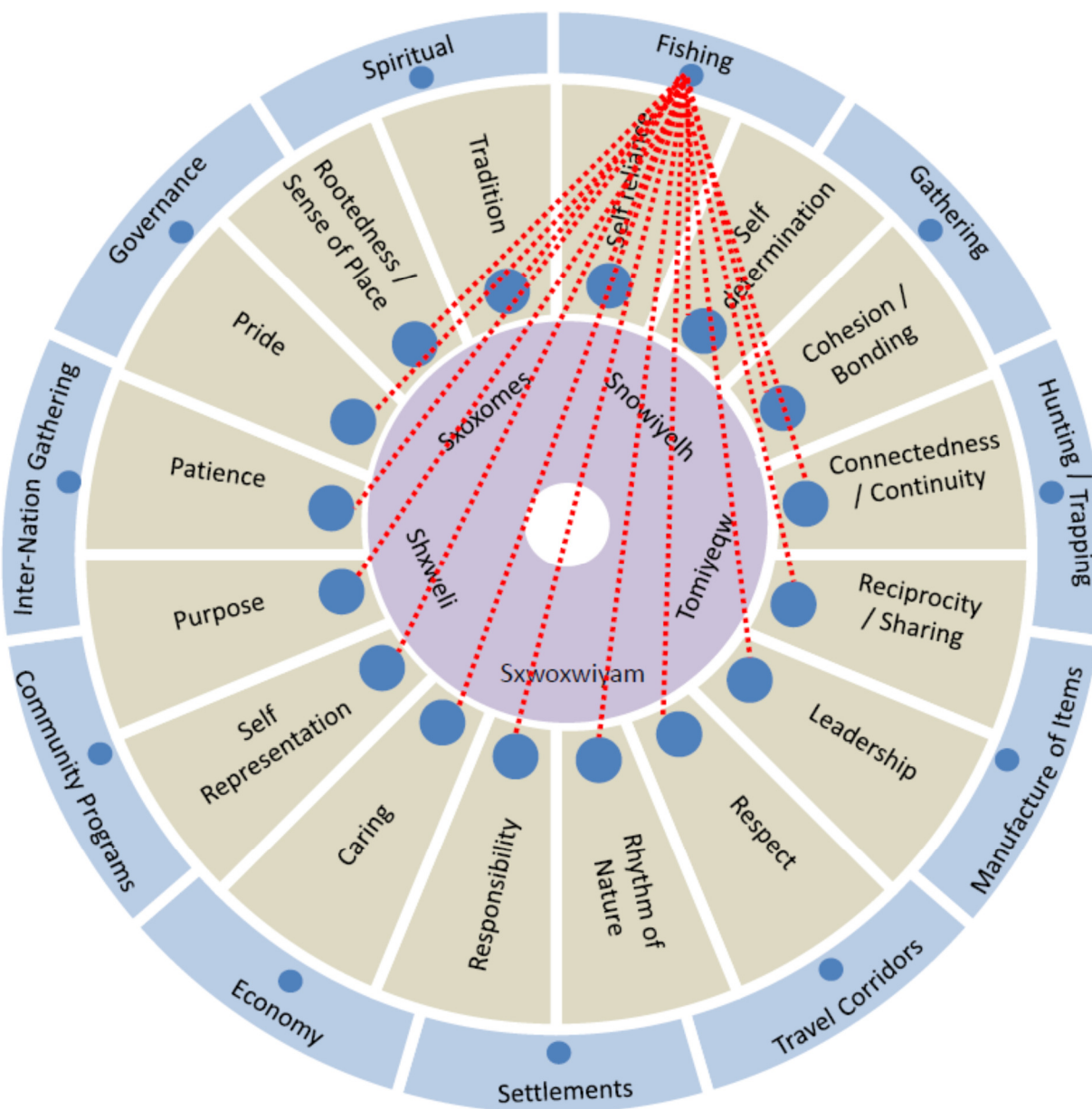


Figure 2 – Potential impacts of Project-Related Marine Shipping on Stó:lō Fishing

155. The following areas of concern have the potential to have significant adverse impacts on Stó:lō fishing rights:

- (a) Air pollution – vessels and spills;
- (b) Cumulative impacts of minor spills in the Salish Sea from the source point of WMT;
- (c) Impact of spill or leak from a tanker; and

(d) Impact of spill or leak from an ATB.

156. As noted in Tsleil-Waututh Nation's written evidence in 2014,¹³⁸ and as their export report shows,¹³⁹ there is a high spill probability which has the potential to affect air and water quality. While air quality impacts may only linger for the short term, an oil spill will have long term consequences to fish, fish habitat and the marine, foreshore, and estuary environments. All of these environments are integral to the survival of the different types of salmon on which the Stó:lō rely and to which they are culturally tied.

(viii) Stó:lō Spiritual Activities

157. Spiritual activities have always been a critically important element of Stó:lō culture that establish bonds that are central to individual and collective relations with the land and resources of *S'ólh Téméxw*. Shxwelí is a central means of connection between people and what is generally viewed as 'nature' or the environment. Stó:lō have cultural a belief that all things are interconnected: mental, physical, emotional, spiritual (individually) and spiritual (collective) and this interconnection to all things ensures individual and collective health¹⁴⁰. Spiritual activities are an essential part of Stó:lō cultural practices that are incorporated within their social fabric:¹⁴¹

The cultural ways of our people are such that there are still practices that we have that are not for public viewing. We have our sacred, sacred practices that we keep amongst ourselves.

And I think in talking about these things, it's kind of a touchy subject for a lot of our people in that we've been more or less legislated out of control of our resources over the years. And I've talked with others at the national level, and internationally with our friends to the south, our relatives. And the strength of that in B.C. is that we have no formal arrangement whatsoever. Our inherent rights have been acknowledged and protected.

The trees, the grasses, everything that grows has been nourished by our ancestors. Everything that we harvest, the plants that we use, the medicines, the foods, the animals come eat those grasses. All those plants grow along the waterways, provide food to those fish that help us survive, brought us sustenance. The affinity we feel for the nature around us, the s'iwes, the teachings of our people tell us those are our relatives.

¹³⁸ Written Argument-in-Chief of the Intervenor Tsleil-Waututh Nation, January 12, 2015 [NEB Filing ID A4X4V2] at para. 173.

¹³⁹ Tsleil-Waututh Nation's Record of Written Evidence, Volume 9 of 9, Appendix 5: Air Quality Impacts from Simulated Oil Spills in Burrard Inlet & English Bay, Air Quality Dispersion Modelling Report, submitted by Levelton Consultants Ltd., May 11, 2015, p. 1393 [NEB Filing ID A4L6C4].

¹⁴⁰ ICA, Introduction, p. 18.

¹⁴¹ ICA, Section 7, p. 1.

There's people saying in many different cultures in Indigenous communities, you'll hear people say, "All my relations." When that is said, we're talking about everything around us. It's not just your blood relatives, your cousins, your whatever, it's everything that's around us. There's a cycle that we know.

And I've mentioned to others, if back in time, when we first made contact with the newcomers to our lands, and we talk about the management of resources -- our people say the mismanagement of our resources -- if we were treated equally at first contact, and our way of looking after things, our perspectives culturally, holistically, if they were put into the management decisions that have been happening over our territories, we would be in a lot better position today.¹⁴²

158. For the Stó:lō, each person has a place, a role, a special understanding within the world; each person has a gift, and understanding these gifts, roles, and places is to be thankful and grateful to the Spirit. It is an understanding of balance: with nature, with the physical and psychological, between and among relationships between each other, between people and the environment, and a balance of health between all these things.¹⁴³
159. There are specific physical landmarks and sacred places that are integral to Stó:lō identity, which are related to traditions and stories, that create balance and continuity. Stories that integrate change and integrate specifics of the effects of those changes help the generations to understand and to heal from the experiences.¹⁴⁴
160. Based on interviews carried out for the ICA, over 360 individuals who are known as dancers and up to 75% of the Stó:lō population within *S'ólh Téméxw*, participate in seasonal ceremonies and/or cultural events each year. Participation in these events has been steadily increasing over the last several years. People travel from many different Coast Salish communities (for example, Lummi, Nooksack, Musqueam, Squamish, Cowichan, Capilano, Chemainus, East Saanich, Lower Skagit, Upper Skagit, Tulalip) as well as many of the Stó:lō communities, to attend events hosted in *S'ólh Téméxw*.¹⁴⁵ Critically important to the well-being of this system (i.e., a spiritual political-economic system of production, distribution, consumption and reproduction), are dependent relationships on the Stó:lō cultural landscape, education processes, and resources – particularly salmon and cedar.¹⁴⁶

¹⁴² OTE Hearing, pp. 3358, 3361, 3370-72.

¹⁴³ ICA, Section 7, p. 4.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, p. 10.

¹⁴⁶ *Ibid.*, p. 15.

(ix) Project Impacts on Stó:lō Spiritual Activities

161. There has been extensive damage to Stl'áleqem (a gift exchange at a gathering or feasting event) sites within *S'ólh Téméxw* and more face ongoing disturbance due to development. For example, the loss and intrusion of several bathing sites, in Chilliwack, Sumas, Cheam and Wahleach. Of particular significance is the loss of over 199 streams and Sumas Lake, in *S'ólh Téméxw*, which had powerful connection to Stó:lō and Coast Salish spirituality.¹⁴⁷
162. Applying the methodology outlined in the ICA, Figure 3 below illustrates the potential impacts from Project-related marine shipping on Stó:lō spirituality.

¹⁴⁷ ICA, Section 7, p. 3.

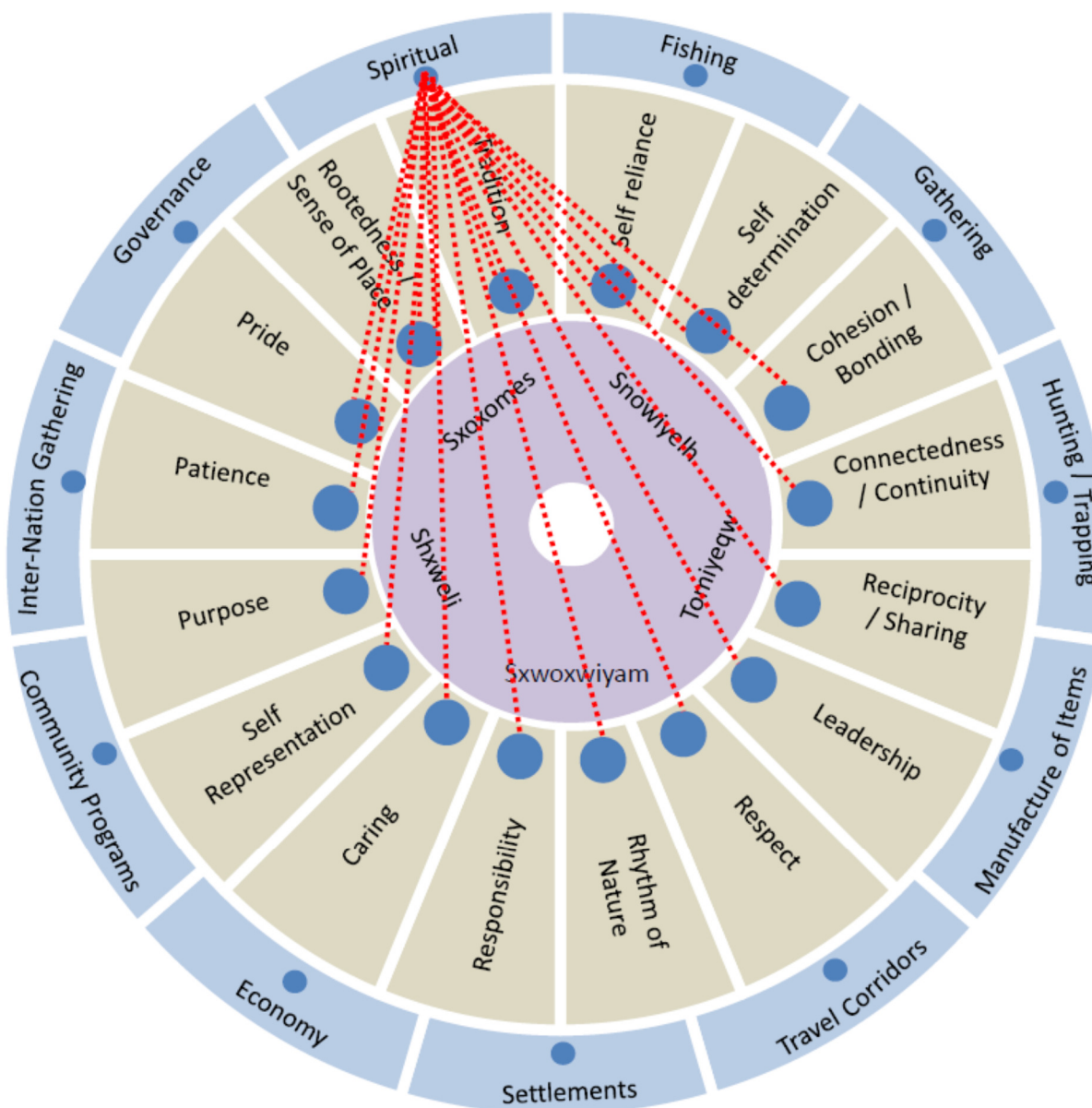


Figure 3 – Potential impacts of Project-Related Marine Shipping on Stó:lō Spirituality

163. Due to the inherent connectivity of spirituality with air, land, water, four-legged, winged, finned, two legged, and so forth, any impact on any of them has a correlated impact on the spirituality of Stó:lō.
164. If there is an impact to fish or migratory birds, there is an impact to the syuwel, to the Big House, to the spiritual connection to the species and its shxwelí, to the connections to the gifts from the creator the sxexó:mes (all our gifts). This greatly impacts the core principles of Stó:lō tradition and culture: sxexó:mes, snoweyelh (teachings, principles, or

laws), tomiyeqw (great-great-grandparents/aunts/uncles and great-great-great-grandchildren/nieces/nephews), shxwelí, and sxwōxwiya:m. The sxwōxwiya:m provide understanding of the transformation times of Xa:als, the Creator, and the transformation of Stó:lō ancestors, that can be seen in the land forms within the Territory.¹⁴⁸

165. Some of the key sxwōxwiya:m include the Stl'áleqem of Sí:ilhqey, the two headed serpent that lives from Vancouver to Hope/Yale area, that created channels, and the tunnels created by Kwekwaytem, and the S'ó:lmexw.¹⁴⁹
166. Leah George Wilson, former chief of Tsleil-Waututh Nation described Shxwlá:m (spiritual mediator or healer):

The third story that Gabriel shared at that time was about *kwekwayten*. And he was a warrior that came out of *təmtəmíxwtən*, biggest place where the people here at Belcarra Regional Park currently. And that story explained how this boy began his journey to become that warrior and *Shxwlá:m* of our people. *Shxwlá:m* is -- he's a -- well, in English we say Indian doctor, but it doesn't really cover it, but Gabriel will explain more because he'll be referring to *kwekwayten* when we talk about the tunnels. And that story reminds us about the work that has to be put in to take care of the people and how important it is for the people to have somebody that -- like a *Shxwlá:m* that can help take care of them in a cultural, spiritual sort of way.

So *kwekwayten* was the one who slayed the two-headed serpent that was kind of around here that blocked access to the Indian River in Inlailawatash and actually he caused a drought and *kwekwayten* was the one who slew the dragon, demonstrating our responsibility, obligation to our people, our land, and our water. And in that story, Gabriel also shared the preparation for work and the kinds of -- how do you say -- the kinds of ceremony and ritual that he needed to undergo before he became the warrior that could do that work for the people.¹⁵⁰

167. Similarly, Naxaxalhts'i, Dr. Albert 'Sonny's McHalsie described s'ó:lmexw in his OTE for Shxw'ōwhámél First Nation:

Also, the waterways are home to what we call our s'ó:lmexw. S'ó:lmexw in our language is referred to as what is known as the -- well, quite often referred to as "water babies." They're actually little people that live under water. We have a very important ceremony that's very strong in our culture right now; it's a huge revival started back in around 1988. It's up to the point now where we're not worried about losing it. It's two main categories of our culture that have been

¹⁴⁸ ICA, Introduction, p. 14.

¹⁴⁹ NEB Hearing Transcript for Oral Traditional Evidence Hearing on October 16, 2014 [NEB Filing ID A4D3E6], Shxw'ōwhámél First Nation at para. 2348.

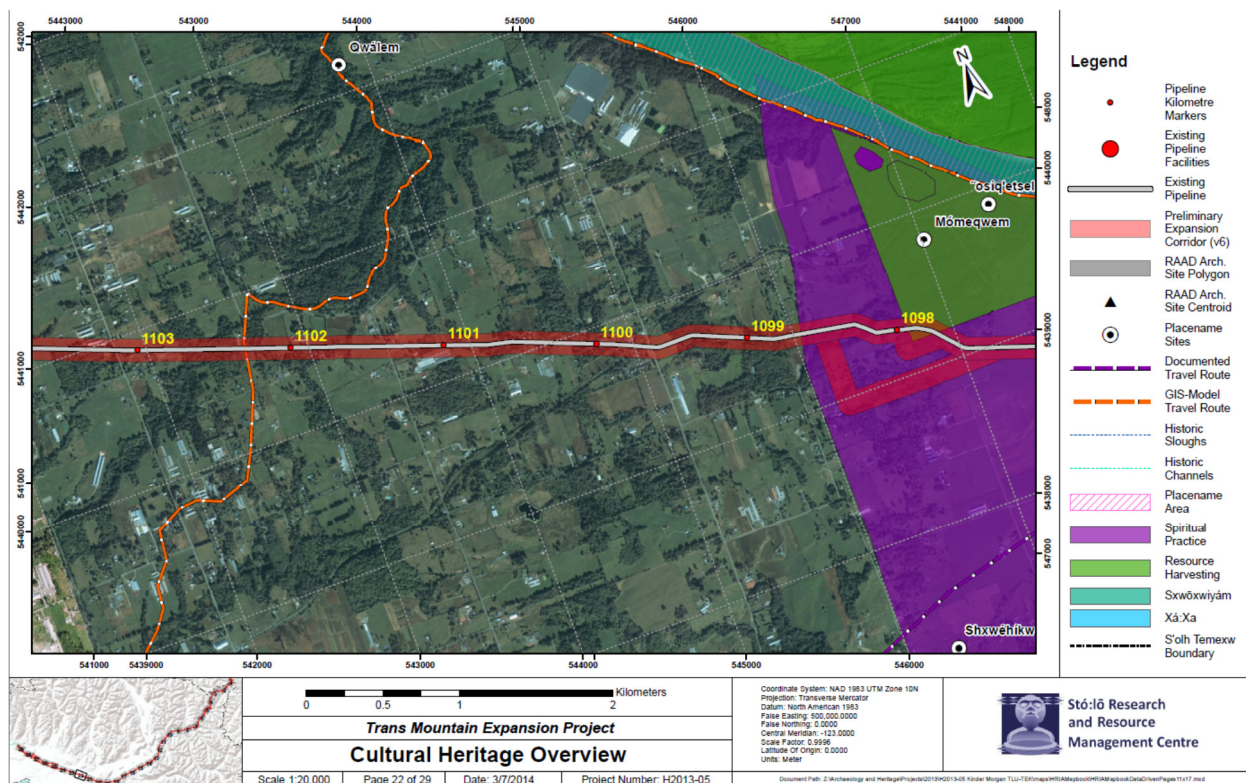
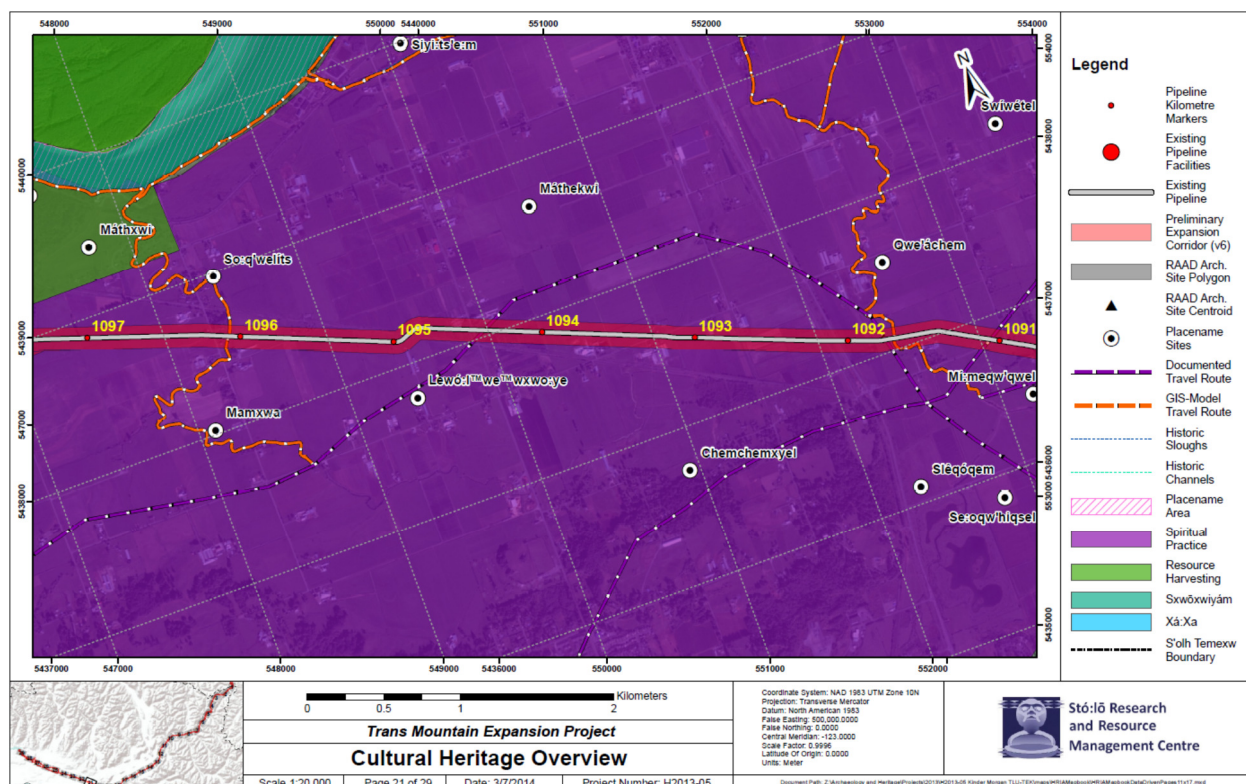
¹⁵⁰ NEB Hearing Transcript for Oral Traditional Evidence Hearing on November 26, 2018 [NEB Filing ID A96350-1], Tsleil-Waututh Nation, paras. 3552-53.

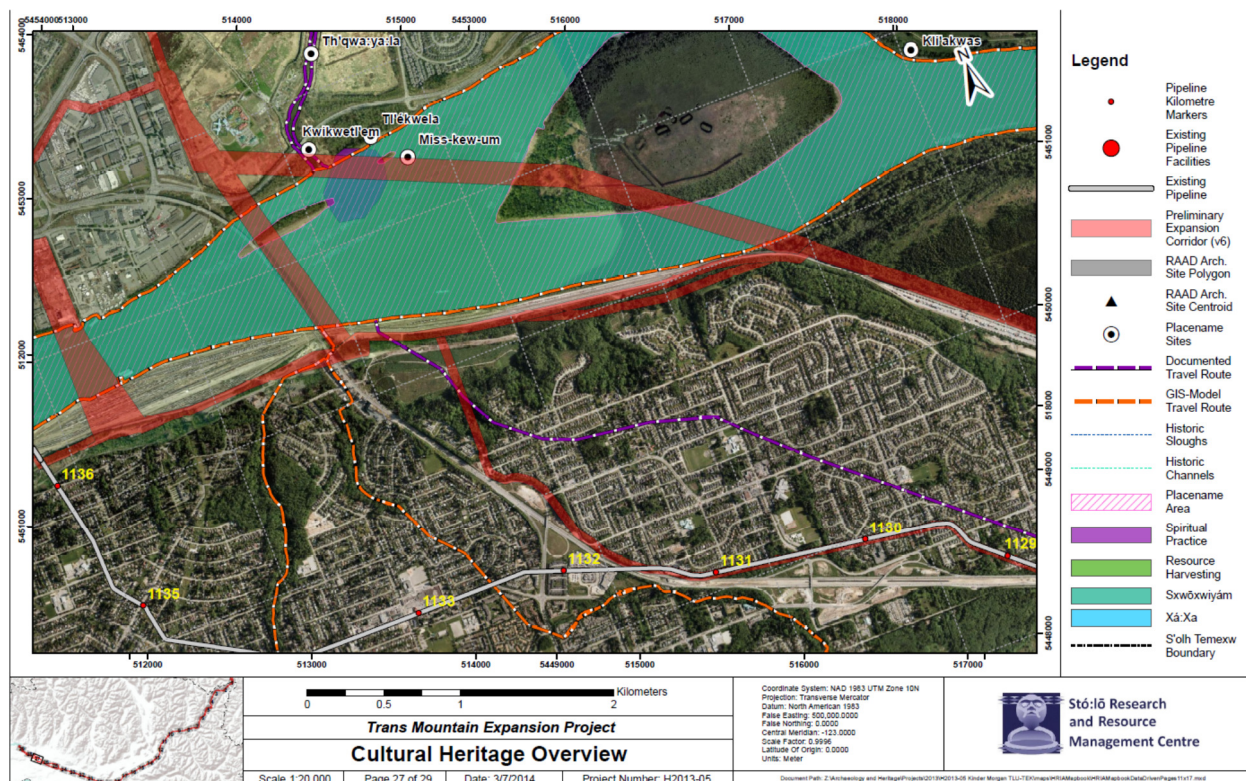
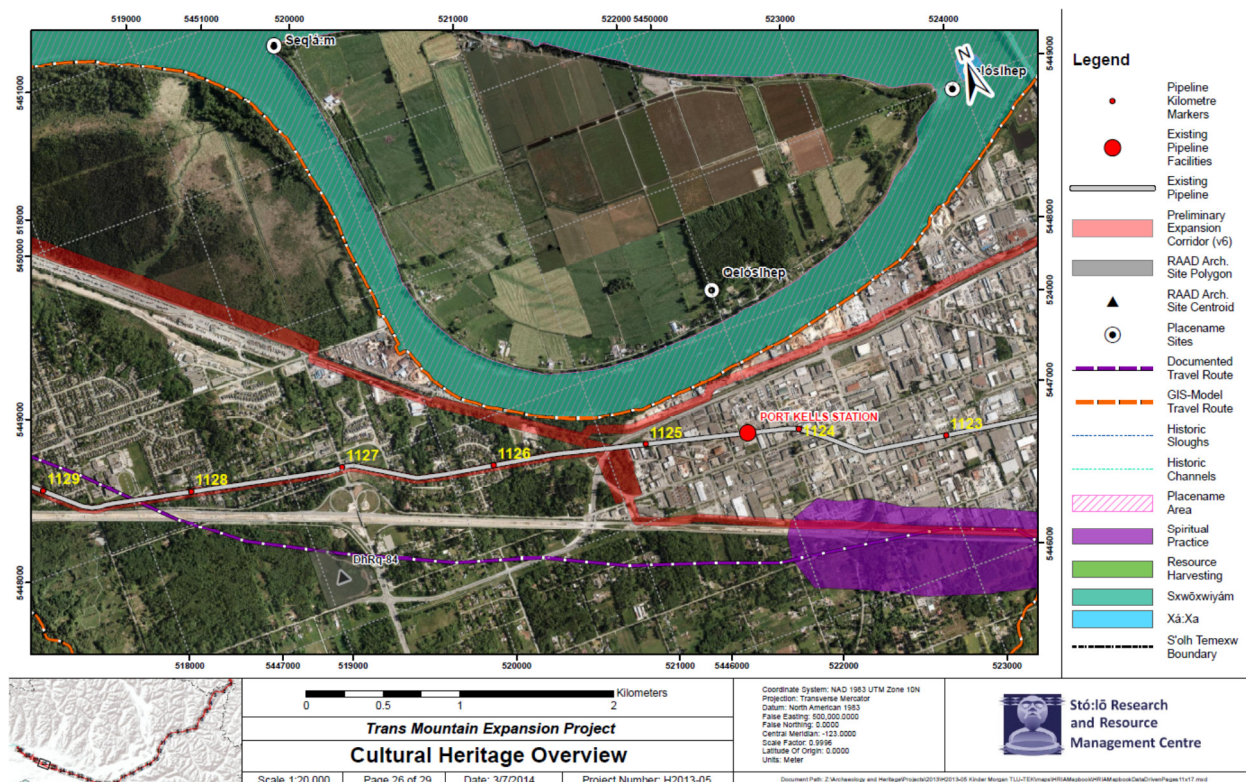
really protected and really hidden away, and that is the *sxwō:yxwey*, which is the mask dance, and then also the *smilha*, which is the winter dance. Both of those ceremonies are both practised by our relatives, our *siyá:ye*, down in this area, and also up in -- up in our area.¹⁵¹

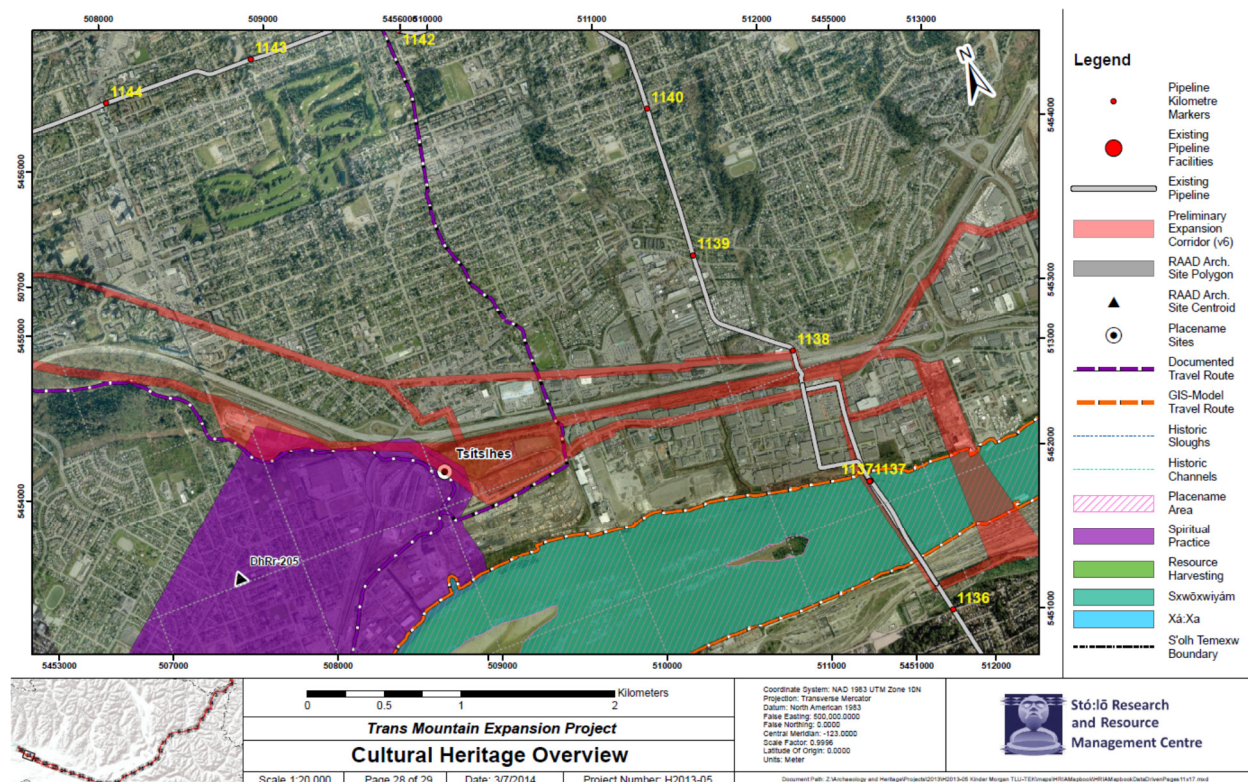
168. Stl'áleqem are a connection to the ancestors, to the land, to rootedness, and to place. The Stl'áleqem and the related ancestry provides a sense of pride and understanding. Impacts to Stl'áleqem have different effects on Stó:lō, all of which are negative. They are loss of connectivity to their *sxexó:mes*, their *Snoweyelh*, their *tomiyeqw*, their *sxwōxwiyá:m* and their *Shxwelí*.
169. Whether or not Westerners believe in the *sxwōxwiyá:m* of the Stó:lō, there is proof of existence of the interconnectedness of lakes and waterbodies through underground tunnels throughout the Fraser Valley, leading to and from the Salish Sea and the Fraser River. These underwater tunnels throughout the Fraser River increase the propensity and risk of impacts occurring throughout *S'ólh Téméxw* as a result of the Project and Project-related marine shipping.
170. The images of maps below, originally appearing in the Stó:lō Collective's Cultural Heritage Overview Assessment Map Book,¹⁵² provide a visual representation of Stó:lō interests along the proposed pipeline route.

¹⁵¹ NEB Hearing Transcript for Oral Traditional Evidence Hearing on December 4, 2018 [NEB Filing ID A96392], *Shxw'ōwhámél* First Nation at para. 4571.

¹⁵² Written Evidence of the Stó:lō Collective, Appendix 2 – Cultural Heritage Overview Assessment Map Book [NEB Filing ID A4L7A4].







(x) Stó:lō Governance

171. Stó:lō governance has always been linked to resource access and management at the individual, extended family, village and tribal levels. The ability to maintain strong inter-dependent relationships with *S'ólh Téméxw* via traditional governance, is extremely important to the Stó:lō identity and cultural health, and central to Stó:lō understandings of self-determination and nationhood.¹⁵³ Stó:lō responsibility to this relationship involves managing activities and development in *S'ólh Téméxw*.
172. Stó:lō leaders were meant to provide for the community, especially during hard times, and, as such, were highly knowledgeable in terms of both public and private knowledge; some with specific areas of knowledge within the culture. Resource ownership and access was directly linked to leadership and governance that was collectively linked to the individual and extended family.¹⁵⁴
173. Many types of activities and events, including *stl'e'áleq* (large scale gatherings among Northwest Coast peoples, commonly referred to as potlatches), were directly linked to governance structures. Namings, weddings, and funerals were all significant events

¹⁵³ ICA, Section 12, p. 10.

¹⁵⁴ *Ibid*, Section 12, p. 1.

involving the inheritance of rights associated with specific resource sites. Such gatherings were also associated with the resolution of disputes among family or between villages regarding such rights. These gatherings were key processes in building and maintaining social and political capital, and gaining access (customary rites) to specific sites. The Longhouse (the Bighouse or Smokehouse of today) played an important role in governance as it was a domestic centre and place where particular rites and ceremonies took place, especially those that were important to future *Siyá:m*, and established a place for relations of rights, roles and responsibilities among the populace.¹⁵⁵

174. Much of the resurgence of Stó:lō governance has taken place within the Bighouse, and the renewal of *Smílha* (winter dance ceremonies). Cultural practices associated with the Bighouse are increasing their profile through increased community participation. Many of these activities, previously practiced underground, are emerging to foster unification and connectivity among Stó:lō communities. During ICA information gathering sessions, it became clear that participation in traditional activities and political movements is increasing throughout *S'ólh Téméxw*.¹⁵⁶

¹⁵⁵ *Ibid*, Section 12, p. 2.

¹⁵⁶ *Ibid*, Section 12, p. 5.

(xi) **Project Impacts on Stó:lō Governance**

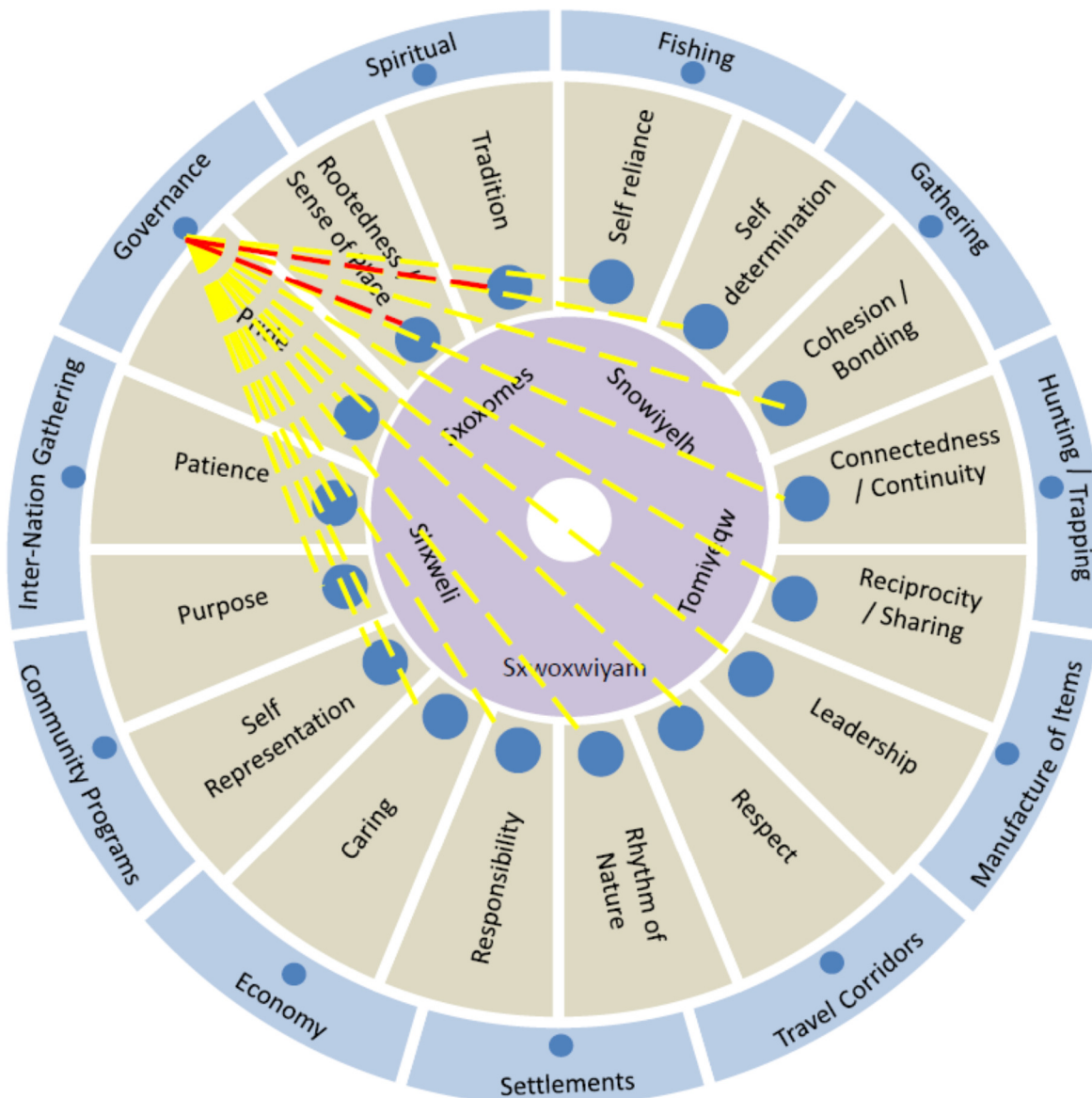


Figure 4 - Potential impacts of Project-Related Marine Shipping on Stó:lō Governance

175. Anything that upsets the balance and connectivity of Stó:lō and the Bighouse, has an impact on traditional and customary rites of governance within and outside of the Bighouse. This impact has a direct effect upon governance as a whole, due to the impact on naming ceremonies, roles, relations, and links to ancestors. Current management and stewardship done by Stó:lō leaders rely on aspects of protection, tomiyeqw, continuity, potlatch, reciprocity and naming. Family governance, including management and stewardship of family resources is protected and cared for by the

family. These governance systems have been a part of Stó:lō since time immemorial. While Chiefs and councils have been created under the *Indian Act*, a critical component of Stó:lō traditional governance relies on land use planning, stewardship, and self-determination under the key principles of Snoweyelh and tomiyeqw. Any impact affecting *S'ólh Téméxw* from Project-related marine shipping or contamination would reduce that capacity and directly impact the core principles of Snoweyelh and tomiyeqw. The impacts would continue until such time as total reparation and rehabilitation have been completed, if even possible.¹⁵⁷

176. Applying the methodology outlined in the ICA, Figure 4 above illustrates the potential impacts from Project-related marine shipping on Stó:lō governance.

(xii) Stó:lō Gathering Activities

177. Collecting plants and gathering medicines, supports a range of values from spiritual to material production closely linked to the social-spatial relations of the Stó:lō. Gathering requires spending time on the land as a factor of education and maintaining connection to land, air, water of *S'ólh Téméxw*, and gifts of the Creator.¹⁵⁸
178. Resource utilisation and collection sites for medicinal plants are important in ways that differentiate this form of gathering practice from other focuses of resource gathering, such as berry picking sites. Stó:lō gathered a wide range of plants for many purposes including food, social, ceremonial, economic, and medicinal uses. Gathering is a holistic and fundamental element of Stó:lō community relations, land use patterns, and resource use. Gathering is tied to tradition; connectivity of ancestors; cohesion among family; keen awareness of the rhythm of nature; responsibility for the plants and community health; and connection and caring among and between families, villages, and tribes. Gathering linked seasonality and broad-based use of the landscape, and connecting systems of governance associated with ancestral names; access rights and privileges; and identities. Gathering continues to be closely associated with a number of key cultural values.¹⁵⁹
179. It is estimated that over 75% of the Stó:lō population still continues to harvest traditional materials for food, social, and ceremonial purposes. This includes individuals gathering

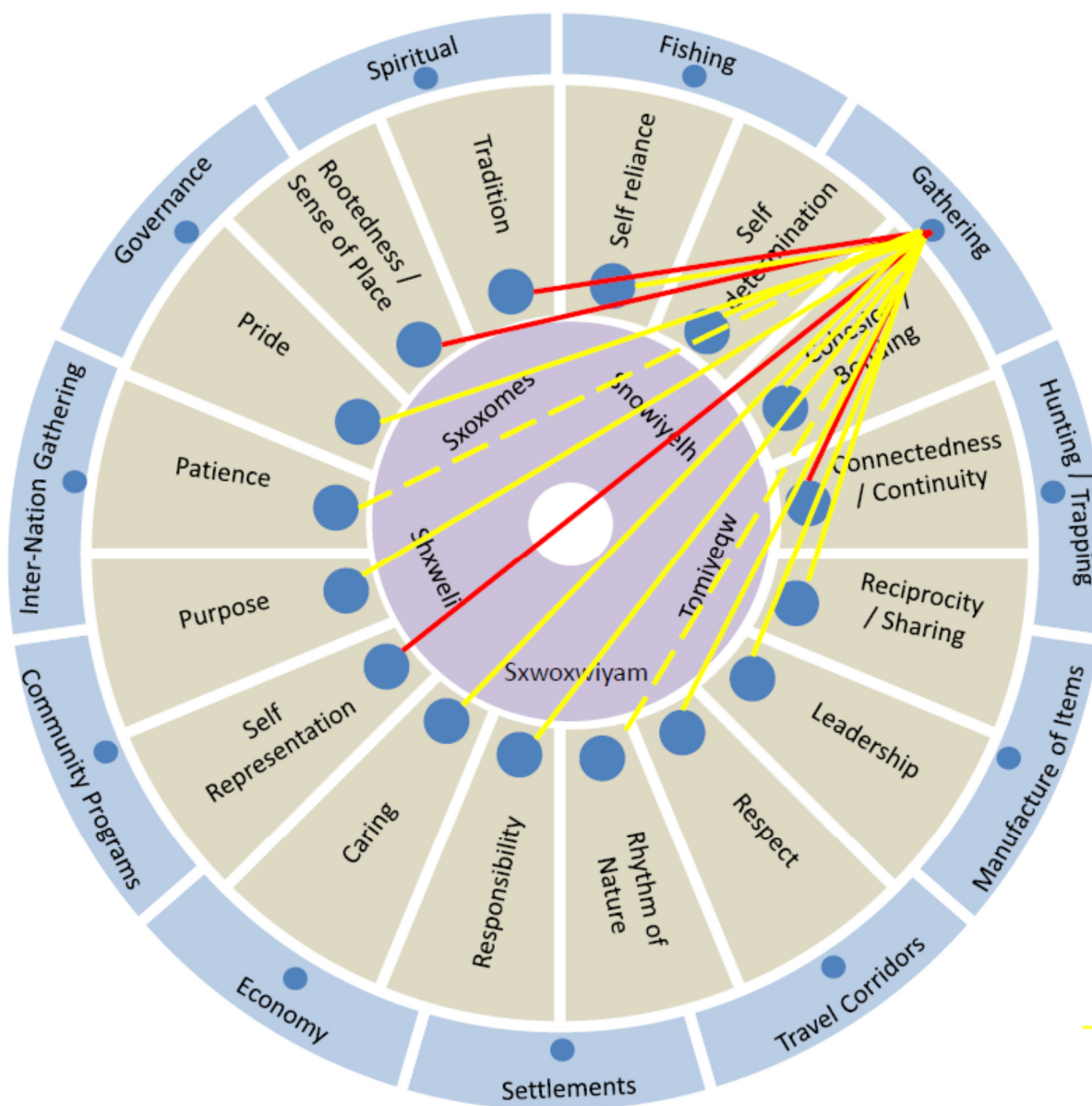
¹⁵⁷ ICA, Section 12, p. 4.

¹⁵⁸ ICA, Section 6, p. 1.

¹⁵⁹ *Ibid.*

food, medicines, or materials to manufacture cultural items. The Stó:lō people continue to target specific harvesting areas based on tradition, the spiritual potency, personal and spiritual preferences, and environmental quality of the site. Increasing development has limited access to some areas and changed the way individuals move across the landscape, however Stó:lō people continue to relate to the land and their history that is embedded in the landscape.¹⁶⁰

(xiii) **Project Impacts on Stó:lō Gathering Activities**



¹⁶⁰ ICA, Section 6, pp. 8-9.

Figure 5 - Potential impacts of Project-Related Marine Shipping on Stó:lō Gathering

180. Increased Project-related marine shipping will result in increased components of airborne contamination, particularly in the tops of watersheds and in the hydrologic cycle in relation to watersheds. Higher concentrations of pollution and contamination in the Fraser Valley, especially Chilliwack and Hope, will considerably impact flora throughout the Fraser Valley as a result of absorption of pollutants within the soils, flora stems and stamina, and due to cross contamination. This will have a corresponding impact on Stó:lō health.¹⁶¹
181. Applying the methodology outlined in the ICA, Figure 5 above illustrates the potential impacts from Project-related marine shipping on Stó:lō gathering.

(xiv) Stó:lō Economy

182. The Stó:lō economy was linked to social, political, spiritual and ceremonial activities, and both tangible and intangible cultural properties including fishing sites, resource patches and gathering areas, fish weirs, houses or house-planks, inherited names that carried particular privileges and rights, songs, designs, dances and histories/narratives. These cultural properties and activities formed the framework for the historical Stó:lō economy. Status, wealth and prestige were related to ownership of intangible names, songs, and private knowledge, as well as material possessions such as canoes, weapons, slaves, clothing/blankets, and tools.¹⁶²
183. *Stl'e'áleq* (potlatch) gatherings were a central feature of the Stó:lō interconnected political, spiritual, and material economy. The pre-contact Stó:lō economy was diverse and founded on wide-spread networks of interaction, trade, and exchange.¹⁶³
184. In the contemporary world, economic strife and disparity among Stó:lō citizens are commonplace – described as a diasporic relationship with Canada, within the Canadian economy.¹⁶⁴

¹⁶¹ ICA, Section 6, p.16.

¹⁶² ICA, Section 14, p. 1.

¹⁶³ *Ibid*, Section 14, p. 1.

¹⁶⁴ ICA, Section 14, pp.1-3.

(xv) **Project Impacts on Stó:lō Economy**

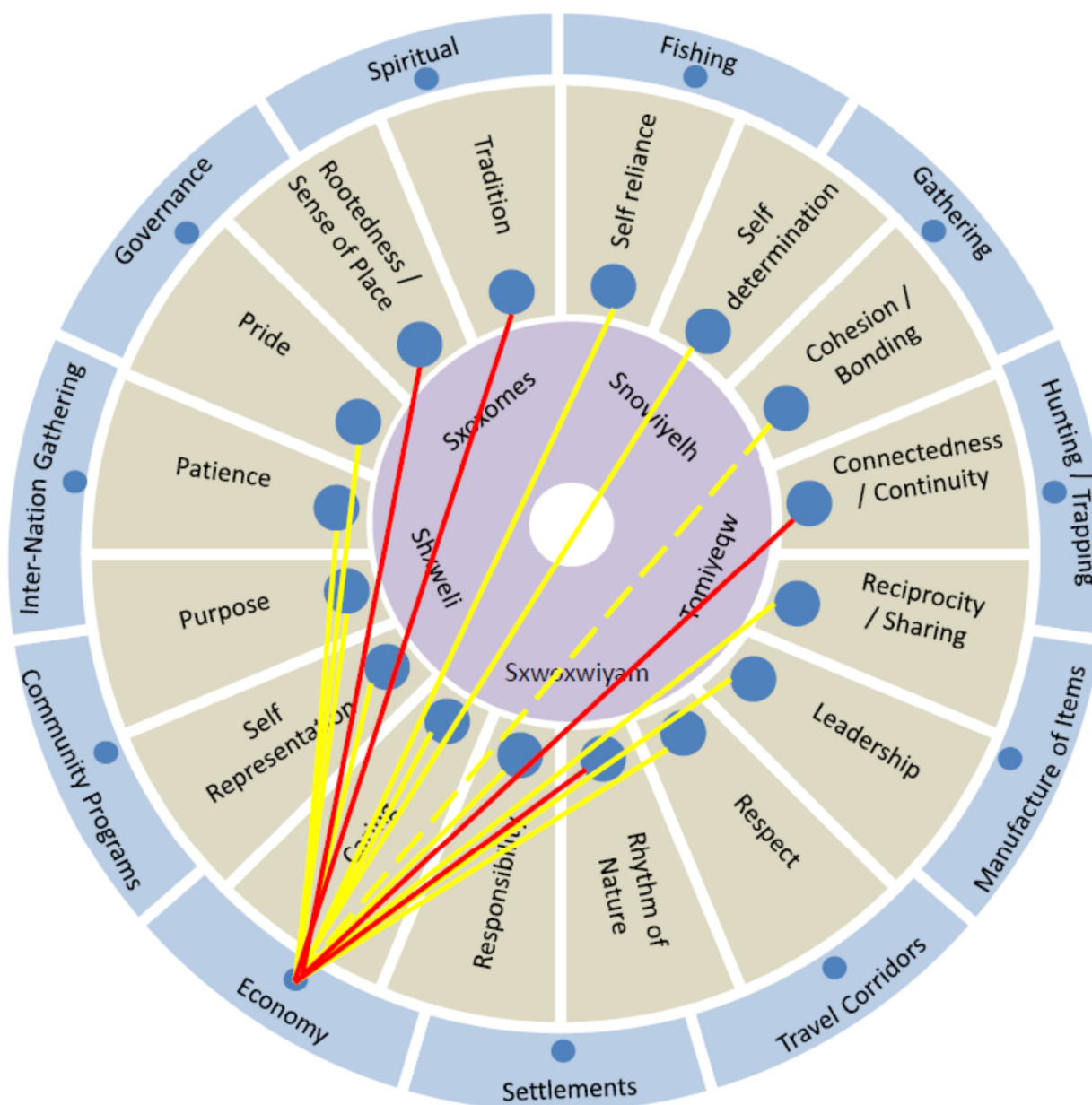


Figure 6 - Potential impacts of Project-Related Marine Shipping on Stó:lō Economy

185. There are three aspects of Stó:lō economy which could be impacted by Project-related marine shipping:
- (a) food, social and ceremonial fisheries;
 - (b) commercial fisheries; and

- (c) tourism based on the environment, which includes Eagle Festival Fishing, camping, hiking, and aspects of environmental tourism.

186. With the high probability of a spill and the resultant impacts on fish, fish habitat, marine/estuary/foreshore environment, and other sea-faring animals, the traditional economies of Stó:lō may greatly be impacted with ripple effects on contemporary economies. There is potential for a great impact on Stó:lō as fishers, and as community-based leaders that are tied to their land, water, and air through their sense of place, tradition, and connectedness with their community, ancestors, and families.
187. Applying the methodology outlined in the ICA, Figure 6 above illustrates the potential impacts from Project-related marine shipping on Stó:lō economy.

(xvi) Stó:lō Hunting and Trapping Activities

188. Hunting and trapping played a vital role in Stó:lō cultural as it related to food, social, ceremonial, and economic purposes. All men were expected to be able to hunt, with few being exceptional or *tewít* (professional hunters). Hunting was done throughout all seasons including winter, exploiting a wide range of resources and habitats between the lowlands and alpine landscape of *S'ólh Téméxw*. Hunting was carried out in a manner that was linked seasonally to the life cycles of the prey species and to the scheduling of other important activities including gathering and fishing. There was great pride, responsibility, and knowledge associated with being an exceptional hunter.¹⁶⁵
189. Many animals were hunted and trapped, and as such became a key to the socio-economics of trade relations between Indigenous trade partners (via potlatch for example) and in the emergent European fur trade and relations (along with fishing). Hunting, as with all aspects of Stó:lō land and resource use including fishing and gathering, was part of Indigenous systems of resource management.¹⁶⁶

(xvii) Project Impacts on Stó:lō Hunting and Trapping Activities

¹⁶⁵ ICA, Section 11, p. 1.

¹⁶⁶ *Ibid*, Section 11, p. 1.

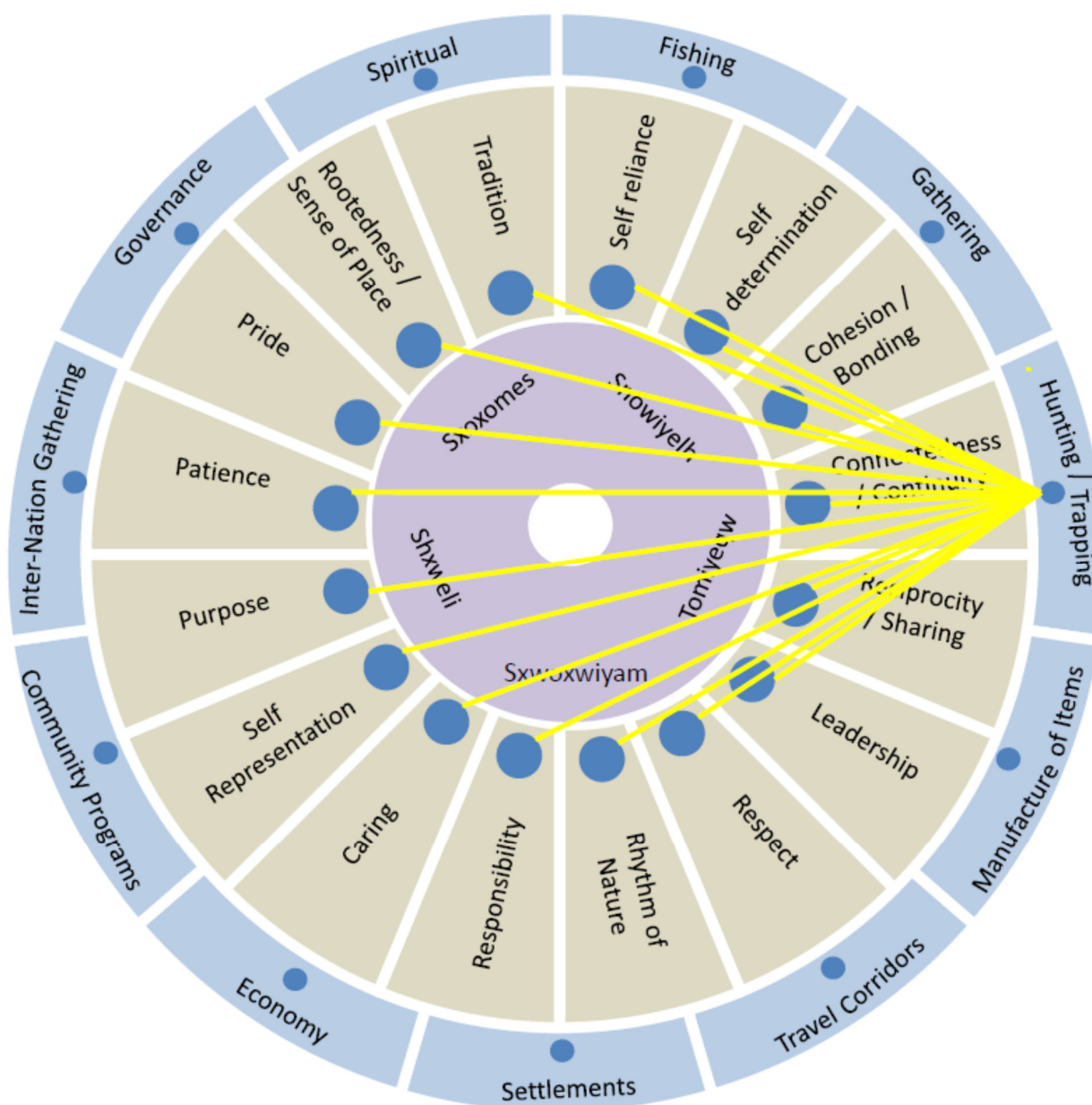


Figure 7 - Potential impacts of Project-Related Marine Shipping on Stó:lō Hunting and Trapping

190. The Stó:lō Collective is particularly concerned about the following hunting and trapping activities, which could be impacted by Project-related marine shipping as a result of absorption of contaminants by fauna through water and flora due to airborne contamination:

- (a) Trapping and hunting in wetlands and foreshore, specifically waterfowl and other birds, such as eagles, ducks, geese, and blue heron, all of which are culturally significant to the Stó:lō; and
 - (b) Impacts to regalia procured by hunting and trapping.
191. Hunting and trapping are directly connected to economy, governance and spirituality of the Stó:lō. Such places as Whale Rock where seals were hunted, Coqualeetza where fish were caught, and the connection to river otters, mice, beaver, and many other animals are part of the connectivity and continuity through *sxwōxwiyá:m*. Trapping, a source for food staples, trading and bartering, is a critical activity potentially impacted by any spill that may affect the marine environment, foreshore, estuaries, and intertidal confluences.
192. Applying the methodology outlined in the ICA, Figure 7 above illustrates the potential impacts from Project-related marine shipping on Stó:lō hunting and trapping.

V. INSUFFICIENT INFORMATION TO ASSESS MITIGATION

193. While the current evidentiary record clearly establishes that there will be significant adverse environment effects as a result of Project-related marine shipping, there has been insufficient study of the full scope of these, in particular as they relate to *S'ólh Téméxw* and the Fraser River. As a result, the Board does not have sufficient information to determine whether the mitigation measures proposed will adequately address the risks, and cannot make a recommendation that the Project be approved.
194. In its evidence on the Reconsideration Hearing, the Stó:lō Tribal Council tendered an expert report prepared by PGL Environmental Consultants (“**PGL**”) dated December 2018 entitled “Potential Effects of Trans Mountain Expansion Project-Related Vessel Traffic” (“**PGL Report**”).¹⁶⁷ After identifying several programs relied on by Canada which have been developed as part of the Ocean Protection Plan, the PGL Report concludes:

A meaningful determination of effects cannot be made until results from many of these programs are available. Until that point, potential adverse effects cannot be understood with precision and the efficacy of any of the proposed mitigations is unknown. Without these vital pieces of information, attempts to make a reliable statement about effects and their significance- that is, on with low uncertainty in which decision-makers can therefore have high confidence- are

¹⁶⁷ PGL Report, Appendix “A” to Opening Statement and Evidence of Stó:lō Tribal Council [NEB Filing ID A96442-1].

premature, reflective of poor EA practice, and if insufficiently cautious, may underestimate adverse effects.¹⁶⁸

195. The PGL Report further concluded, *inter alia*, that:

- (a) Where impact assessment is concerned, it is inappropriate to equate, as the Board had done in the 2016 Recommendation Report, conflicting data or uncertainty with absence of effect, “Rather, the absence of a substantial degree of certainty argues in favour of taking the precautionary approach with respect to conclusions and actions based on those conclusions”.¹⁶⁹ Work completed since the 2016 Recommendation Report was released “suggests that the potential effects of noise on fish and invertebrates are potentially wide-ranging and, in light of the already precarious position of a number of salmonoid stocks, potentially significant”.¹⁷⁰
- (b) In the 2016 Recommendation Report, the Board concluded that the understanding of the behaviour of dilbit when spilled into the marine environment is relatively poor. New expert reports submitted by TM Canada and Squamish/Tseil-Waututh Nations reach differing conclusions on the rate at which dilbit can be expected to sink- a major factor in determining the scope of potential effects and appropriate mitigation measures. The PGL Report states that, as a result of these differences in the expert evidence, “At minimum, the differences between the reports suggests that there remains no consensus regarding the behaviour of dilbit in the environment and that myriad gaps remain in our understanding of bitumen effects and how to manage them”.¹⁷¹
- (c) Further studies are necessary regarding the movement of entrained oils in order to understand whether a spill in the Salish Sea near the mouth of the Fraser River could be entrained in the salt wedge and carried upriver, the effects of this, and how far upriver these effects may occur “in order to better predict potential adverse effects and identify appropriate response times and techniques”.¹⁷²
- (d) Response planning in the Fraser River lags significantly and it is unclear whether required data and Geographic Response Strategies can be developed or tested

¹⁶⁸ *Ibid*, p. 23.

¹⁶⁹ *Ibid*, p. 25.

¹⁷⁰ *Ibid*, p. 25.

¹⁷¹ *Ibid*, p. 27.

¹⁷² *Ibid*, p. 28.

prior to the Project's proposed in-service date. According to PGL, "This information gap poses an uncertainty in the sufficiency of spill response to address effect on the Fraser River estuary, including salmon habitat, SRKW food, and cultural values".¹⁷³

- (e) Given the factors impacting the Fraser River, the probability based Trajectory Analysis Planner or similar modelling product should be applied to determine whether the two-hour response time established for the Fraser River is sufficient.¹⁷⁴

196. It is clear from the conclusions reached in the PGL Report that there is not a fulsome understanding of the potential adverse environmental effects of Project-related marine shipping on the Fraser River and *S'ólh Téméxw* at this time. However, it is equally clear from the Project impacts on the Stó:lō Collective outlined above that the risks to Stó:lō culture, values, and identity are great. Consequently, the Board cannot make a determination that mitigation measures proposed are adequate in light of the information gaps and the substantive risks. In the circumstances, the Board must recommend that the GIC not approve the Project.

VI. THE ENVIRONMENTAL ASSESSMENT UNDER CEAA, 2012

197. Pursuant to the OIC, the Board must consider whether, taking into account any mitigation measures, the Project, inclusive of Project-related marine shipping will cause significant adverse environmental effects. In order to make this determination, the Board must decide whether the Project's residual environmental effects (those environmental effects that, or are predicted to occur after mitigation measures are implemented) are: (i) adverse; (ii) significant; and (iii) likely.¹⁷⁵
198. Section 5 of CEAA 2012 describes the environmental effects that must be considered, while section 19 specifies the factors to be taken into account, including the environmental effects described in section 5 and the significance of these effects. This includes cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out,

¹⁷³ *Ibid*, p.29.

¹⁷⁴ *Ibid*, pp. 29-30.

¹⁷⁵ Canada. Canadian Environmental Agency, "Operational Policy Statement: Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under the Canadian Environmental Assessment Act, 2012", November 2015, Authorities at Tab 14, p. 3/7.

as well as environmental effects of accidents and malfunctions that may occur in relation to a designated project.¹⁷⁶

199. Pursuant to section 5(c)(i) of CEAA 2012, environmental effects to be taken into account in relation to a designated project are, with respect to Aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on:
 - (a) health and socio-economic conditions;
 - (b) physical and cultural heritage;
 - (c) the current use of lands and resources for traditional purposes; or
 - (d) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.
200. Given the Stó:lō Collective's cultural, spiritual, physical and psychological interconnection to *S'ólh Téméxw*, the adverse impacts from Project-related marine shipping would correlate to environmental effects on all of the areas identified in section 5(c)(i) of CEAA 2012, ultimately posing a significant threat to the cultural integrity of the Stó:lō.
201. While the Board must take into account mitigation measures in considering whether there will be significant adverse environmental effects, to date, neither Canada nor TM Canada have put forward sufficient measures to mitigate risks within *S'ólh Téméxw* and neither has agreed to implement the specific measures identified in the 89 Recommendations. Further, there has not been sufficient time or capacity to fully understand the environmental effects of Project-related marine shipping on *S'ólh Téméxw* and thus adequately identify the appropriate measures.

VII. THE TERMS AND CONDITIONS MUST BE REVISITED

202. On January 10, 2019, the Board issued Procedural Direction No. 4, which contained draft conditions ("**Conditions**") and recommendations ("**Recommendations**") for comment by all Parties. The Board indicated that the Conditions and Recommendations are intended to reduce or eliminate the effects of Project-related marine shipping in

¹⁷⁶ *Ibid*, p. 2/7.

accordance with the requirements of CEAA 2012 and the *Species at Risk Act*.¹⁷⁷ Parties were also informed that, in addition to providing comments on the Conditions and Recommendations, suggestions for additional conditions and recommendations for the Board's consideration were welcome.

A. Additional Terms and Conditions

203. It is the position of the Stó:lō Collective that the Board cannot recommend approval of the Project. However, irrespective of the recommendation, pursuant to section 52(b) of the *NEB Act*, all the terms and conditions that the Board considers necessary or desirable in the public interest to which the CPCN will be subject if the GIC were to direct the Board to issue the certificate are to be included in its report. Given Canada's complete failure to address accommodation measures during Phase III of consultation, the Stó:lō Collective submits that the Board should include in the terms and conditions the specific Project conditions previously requested by the Stó:lō Collective which have never been adequately considered or incorporated into Project planning.
204. Accordingly, at the outset, the Stó:lō Collective asks the Board to add the following conditions to the terms and conditions that must be attached to any Project approval. TM Canada must:
- (a) following good faith consultation with the Stó:lō Collective, adopt and implement the 89 Recommendations provided by the Stó:lō Collective in the ICA, and must file with the Board for Board approval, at least 180 days prior to commencing construction of the Project, a report on progress made on implementation of such conditions, which report must be approved by the Stó:lō Collective and which report must include a summary of the implementation activities undertaken, including: 1) the methods, dates and locations of implementation activities; 2) a summary of the comments and concerns raised or information provided by the Stó:lō Collective; 3) a summary of TM Canada's response to all of the comments and concerns raised or information provided; 4) a summary of any outstanding steps required to implement the 89 Recommendations; and 5) a description of the resources provided to the Stó:lō Collective that supported its participation in such implementation activities;

¹⁷⁷ NEB Procedural Direction No. 4 – Affidavits and written argument-in-chief, including comments on draft conditions and recommendations [NEB Filing ID A97236-1].

- (b) file with the Board for Board approval, at least 30 days prior to commencing construction of the Project, a report on consultation activities with the members of the Stó:lō Collective, which report must be approved by the Stó:lō Collective prior to its submission. The report must include, but will not be limited to:
 - (i) A summary of the consultation activities undertaken, including: 1) the methods, dates and locations of consultation activities; 2) a summary of the comments and concerns raised or information provided by the Stó:lō Collective; 3) a summary of TM Canada's response to all of the comments and concerns raised or information provided; 4) a summary of any outstanding concerns about the Project's potential effects raised by the members of the Stó:lō Collective, any steps that will be taken to address these outstanding concerns, or an explanation why no further steps are required; and 5) a description of the resources provided to the Stó:lō Collective that supported its participation in consultation activities; and
 - (ii) a summary of the assessment of the Project's potential effects on identified interests of the Stó:lō Collective, including: 1) a description of any such interests; 2) a description of the measures identified to reduce, eliminate or offset potential Project effects on such interests; and 3) a description of how any concerns raised or information provided by the Stó:lō Collective are addressed by, or incorporated into, the measures identified to reduce, eliminate or offset potential Project effects on such interests;
- (c) include the Stó:lō Collective in decision-making throughout the life of the Project and introduce mechanisms into the regulation of the Project to adequately take into account Stó:lō traditional knowledge. The Stó:lō Collective has specifically stressed the importance of consulting with traditional knowledge holders due to the nature of the Fraser River, and has also advised that it is critical that its peoples' traditional ecological and other knowledge is fully integrated into Project planning (ie. field surveys, mapping and development of protection plans);
- (d) ensure the Stó:lō Collective will be actively involved in the lifecycle of the Project including planning, survey work, monitoring, and reporting;

- (e) develop a Stó:lō Engagement Plan, and adequately resource Stó:lō Collective participation in planning, survey work, monitoring and reporting;
- (f) engage with the Stó:lō Collective when updating its construction alignment sheets and Environmental Protection Plans to reflect information provided in the ICA;
- (g) establish an Indigenous Oversight Committee with an ability to ensure that traditional ecological and other knowledge is fully integrated into Project planning and local benefits are maximized. Unlike the Indigenous Advisory and Monitoring Committee, such a Committee must have decision-maker powers and give the Stó:lō Collective the ability to monitor and enforce TM Canada's commitments; and
- (h) communicate with Coast Salish Nations annually to identify times of the year when those Nations plan to be in the Project-related marine shipping area for cultural purposes, and ensure that there is appropriate mitigation for conflict of use of the Salish Sea.

B. Comments on Draft Conditions and Recommendations

205. The Stó:lō Collective has reviewed the Conditions and provides the following comments in response:
- (a) regarding Condition 91, "Plan for marine spill prevention and response commitments", the Stó:lō Collective is not convinced that TM Canada can prevent a marine spill, except through ensuring that there are no "acceptable loss" scenarios. Accordingly, the Stó:lō Collective suggests that Condition 91 be renamed "Plan for marine spill mitigation and response commitments";
 - (b) regarding Condition 132, "Marine Mammal Protection Program", a specific emergency response plan for marine mammals is notably absent, and should be included; and
 - (c) regarding Condition 151, "Post-construction environmental monitoring reports", there is a need for post-spill recovery and environmental health monitoring.
206. The Stó:lō Collective has reviewed the Recommendations and provides the following comments in response:

- (a) Recommendation 1 states, *inter alia*, that the GIC should develop and implement a regional cumulative effects management plan that assesses the overall environmental state of, and cumulative effects on, the Salish Sea; however, this plan should be developed and implemented in conjunction with the Coast Salish Nations, through Coast Salish gatherings – not in Ottawa by the GIC alone. To develop and implement such a report requires understanding of the unique properties of the Salish Sea, which can only come through collaboration with Coast Salish peoples;
- (b) Recommendation 2 states, *inter alia*, that the GIC should report publicly, on an annual basis, on the oversight, progress and status of initiatives and measures to address cumulative effects on, and to support the health of, the Salish Sea. This reporting needs to be directed and delivered to Coast Salish Nations for input and truthing of the report before being released publicly to ensure that the report accurately portrays such efforts and status thereof;
- (c) Recommendation 3 states, *inter alia*, that the GIC should implement, with the support of industry, a marine bird monitoring program. This process should include an aspect of First Nation monitoring and involvement, and should provide funding opportunities for such involvement; and
- (d) Recommendation 7 states, *inter alia*, that the GIC should review and update the federal marine shipping oil spill response requirements. Again, this review and update should involve Coast Salish Nations who will be the first, and most, impacted by such a spill.

VIII. CONCLUSION

- 207. On the basis of the evidentiary record, the Board should make the following findings and recommendations:
 - (a) the Reconsideration Hearing is fatally flawed. Due largely to the GIC's Timeline, there is neither sufficient nor accurate evidence before the Board that would enable it to fulfil its statutory requirements with respect to determining the potential adverse effects of the Project on the rights, title and interests of the members of the Stó:lō Collective and other Indigenous intervenors, and, accordingly, the Board cannot make a positive recommendation to the GIC that the Project be approved;

- (b) the Reconsideration Hearing did not provide an opportunity for sufficient consultation by the Crown with Indigenous intervenors on the Project;
- (c) the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances;
- (d) a CPCN should not be issued for the Project; and
- (e) include in its report that any approval of the Project must include the conditions outlined above.

208. In making its decision, the Stó:lō Collective respectfully requests that the Board consider the efforts they and other Indigenous intervenors have made over the past several years (just in relation to this Project) to seek protection and recognition of what are their constitutionally protected rights. It has been long, frustrating, and in many respects a one-way street in which none of the Crown actors- Canada, the NEB or TM Canada- have fully engaged and responded in the manner required if the promised commitment to reconciliation is to be achieved. Despite these frustrations, the Stó:lō Collective has once again come forward to advocate for the protection of the rights and title of their members and *S'ólh Téméxw*:

And you see I talk about that place as a powerful place because the old stories of our people is we need to look after everything. Our people say, "*S'ólh temexw te ikw'elo*," this is our land. "*Xolhemet to mekw'stam it kwelat*," we have to look after everything that belongs to us.¹⁷⁸

All of which is respectfully submitted this 22nd day of January, 2019.



Joelle Walker
Counsel for Stó:lō Collective



Erin Reimer
Counsel for Stó:lō Collective



Dan Fogarty (Articled Student)

¹⁷⁸ OTE Hearing at para. 3400.

This is Exhibit TT referred to in the Affidavit
of Tanny Nguyen sworn before me at
Vancouver, BC, this 6th day of July, 2019.


A Commissioner for taking affidavits for British
Columbia

BOOK OF AUTHORITIES OF STÓ:LŦ COLLECTIVE

Hearing Order MH-052-2018

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Tab	Cases
1.	<i>Apsassin v. Canada</i> , [1988] 3 FC 20
2.	<i>Baker v. Canada (Minister of Citizenship and Immigration)</i> , [1999] 2 SCR 817, 1999 CanLII 699 (SCC)
3.	<i>Blueberry River Indian Band v. Canada</i> , [1995] 4 SCR 344, 1995 CanLII 50 (SCC)
4.	<i>Delgamuukw v. British Columbia</i> , [1997] 3 SCR 1010, 1997 CanLII 302 (SCC)
5.	<i>Haida Nation v. British Columbia (Minister of Forests)</i> , 2004 SCC 73 (CanLII)
6.	<i>Prophet River First Nation et al. v. Attorney General of Canada et al.</i> , 2015 FC 1030, aff'd 2017 FCA 15 (CanLII)
7.	<i>R. v. Gladstone</i> , [1996] 2 SCR 723, 1996 CanLII 160 (SCC)
8.	<i>R. v. Morris</i> , [2006] 2 SCR 915, 2006 SCC 59 (CanLII)
9.	<i>R. v. Nikal</i> , [1996] 1 SCR 1013, 1996 CanLII 245 (SCC)
10.	<i>R. v. Sparrow</i> , [1990] 1 SCR 1075, 1990 CanLII 104 (SCC)
11.	<i>R. v. Van der Peet</i> , [1996] 2 SCR 507, 1996 CanLII 216 (SCC)
12.	<i>Tsilhqot'in Nation v. British Columbia</i> , 2014 SCC 44 (CanLII)
13.	<i>William v. British Columbia</i> , 2012 BCCA 285 (CanLII)
	Legislative Policy
14.	Canada. Canadian Environmental Assessment Agency. Technical Guidance: Determining whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under the Canadian Environmental Assessment Act, 2012 (November 2015)

T-4178-78

T-4178-78

Joseph Apsassin, Chief of the Blueberry River Indian Band, and Jerry Attachie, Chief of Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band, the Blueberry River Indian Band and all present descendants of the Beaver Band of Indians (*Plaintiffs*)

v.

The Queen in right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act (*Defendant*)

INDEXED AS: APSASSIN v. CANADA (DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT)

Trial Division, Addy J.—Vancouver, January 12-15, 20-22, 26-30, February 2-6, 9-13, 16-19, 23-27, March 9-12, 23-27; Ottawa, November 4, 1987.

Native peoples — Lands — Title to former Indian reserve and mineral rights therein — Effect of surrender of mineral rights and validity of subsequent surrender of reserve — Whether full, free and informed consent given by Indians — Formalities — Nature of Indians' title to reserve land — Nature of fiduciary relationship between Crown and Indians, and of Crown's duty thereunder — Validity of transfer of reserve land by Department of Indian Affairs to The Director, The Veterans' Land Act — Inclusion of mineral rights in transfer — Breach of fiduciary duty by Department with respect to sufficiency of sale price — Director having neither duty nor unfettered power to transfer lands or mineral rights back to Indians — Under original treaty setting aside reserve, Indians not entitled, after surrender of reserve, to same number of acres of reserve land.

Constitutional law — Charter of Rights — Life, liberty and security — Charter unavailable to challenge B.C. Limitations Act s. 8 as not applying to interest in or damages pertaining to disposal of property (surrender and transfer of Indian reserve land) — Charter not retrospective — S. 7 referring to bodily wellbeing of person, not extending to protection of property — Limitation period applicable to all residents of province not offending principles of fundamental justice.

Constitutional law — Charter of Rights — Equality rights — B.C. Limitations Act s. 8 barring action challenging validity of surrender and transfer of Indian reserve land — S. 8 not contrary to Charter s. 15 as equality rights guarantee providing for similar treatment for persons similarly situated, not for identical treatment for all regardless of circumstances — S. 15

Joseph Apsassin, chef de la bande indienne de la rivière Blueberry, et Jerry Attachie, chef de la bande indienne de la rivière Doig, en leur nom et en celui de tous les autres membres de la bande indienne de la rivière Doig, de la bande indienne de la rivière Blueberry et de tous les descendants encore vivants de la bande indienne des Castors (*demandeurs*)

c.

Sa Majesté la Reine du chef du Canada, représentée par le ministère des Affaires indiennes et du Nord canadien et le Directeur des terres destinées aux anciens combattants (*défenderesse*)

RÉPERTORIÉ: APSASSIN c. CANADA (MINISTÈRE DES AFFAIRES INDIENNES ET DU NORD CANADIEN)

Division de première instance, juge Addy—Vancouver, 12 au 15, 20 au 22, 26 au 30 janvier, 2 au 6, 9 au 13, 16 au 19, 23 au 27 février, 9 au 12, 23 au 27 mars; Ottawa, 4 novembre 1987.

Peuples autochtones — Terres — Titre juridique sur une ancienne réserve indienne et les droits miniers y afférents — Conséquence de la cession des droits miniers et validité de la cession subséquente de la réserve — Les Indiens ont-ils donné un consentement libre et éclairé — Formalités — Nature du droit des Indiens sur les terres de la réserve — Nature des liens de fiduciaire entre la Couronne et les Indiens et des obligations de la Couronne à cet égard — Validité de la cession des terres de la réserve par le ministère des Affaires indiennes au Directeur des terres destinées aux anciens combattants — Inclusion des droits miniers dans le transfert — Violation des obligations fiduciaires par le Ministère à l'égard du prix de vente — Le Directeur n'a ni l'obligation ni le pouvoir de rétrocéder les terres ou les droits miniers aux Indiens — En vertu du traité original portant sur la mise de côté de la réserve, les Indiens n'ont pas droit, après la cession, au même nombre d'acres de terres de réserve.

Droit constitutionnel — Charte des droits — Vie, liberté et sécurité — La Charte ne peut être invoquée pour contester l'art. 8 de la Limitations Act de la C.-B. parce qu'elle ne s'applique pas aux droits ni aux dommages-intérêts relatifs à l'aliénation de biens (cession et transfert de terres de réserve indienne) — Non-rétroactivité de la Charte — L'art. 7 porte sur le bien-être physique de la personne et ne comprend pas la protection des biens — Un délai de prescription applicable à tous les résidents de la province ne contrevient pas aux principes de justice fondamentale.

Droit constitutionnel — Charte des droits — Droits à l'égalité — L'art. 8 de la Limitations Act de la C.-B. empêche la contestation de la validité de la cession et du transfert des terres des réserves indiennes — L'art. 8 ne contrevient pas à l'art. 15 de la Charte qui garantit à chacun un traitement semblable dans des circonstances semblables et non un traite-

not requiring identical laws in all provinces as not meant to destroy federalism.

Bill of Rights — Equality before the law — B.C. Limitations Act s. 8 not contrary to Bill of Rights s. 1(b) — No requirement under Bill of Rights for Parliament to enact uniform laws throughout country — Limitations differences from province to province not constituting discrimination.

Bill of Rights — Due process — Limitation provisions of general application, as in B.C. Limitations Act, not denial of due process — Ultimate limitation period not denying right to litigate nor right of access to court — Merely imposing time limitation for commencing action.

Practice — Limitation of actions — Pursuant to Federal Court Act s. 38, British Columbia law on prescriptions and limitations applicable — Action brought after expiration of ultimate limitation period of 30 years — Limitation provisions of Act prevailing over provisions in other Acts.

Practice — Evidence — Commission evidence — Videotaping — Recommendations as to how to film witnesses, how judge should view videotape, use of sound — Recommendation Court consider videotaping testimony at trial — Inadequacy of transcripts.

Practice — Evidence — Commission evidence — Interpreters — Interpreter should translate questions and answers word for word, not merely substance of conversation with witness — Commission hearings should be conducted in presence of legally qualified and experienced persons, such as judge or prothonotary, familiar with rules of evidence and courtroom procedure.

Indian Reserve No. 172 (I.R. 172), consisting of 18,168 acres, was set aside for the plaintiff Bands in 1916, pursuant to "Treaty 8", the validity of which is admitted. In 1940, the plaintiff Bands surrendered the mineral rights under I.R. 172, for leasing, to the Department of Indian Affairs (D.I.A.). The validity of this surrender is not disputed. In 1945, the whole reserve was surrendered to the D.I.A. In 1948, the D.I.A. transferred I.R. 172 to The Director, The Veterans' Land Act for the sum of \$70,000 and the Director subsequently disposed of parts of that land, including mineral rights, to individual veterans and others. In 1976, there was a major oil find on I.R. 172. This action centres around title to I.R. 172 and the mineral rights under that land.

The plaintiffs allege (1) that between 1916 and 1945, the defendant was guilty of several acts and omissions which constituted negligence and breaches of its fiduciary obligations towards them in allowing unauthorized land use and improper provincial regulation; (2) that the 1945 surrender was void or voidable; (3) that the defendant was guilty of fraud in securing

ment identique pour tous, quelles que soient les circonstances — L'art. 15 n'exige pas des lois identiques dans chaque province, car il ne doit pas avoir pour effet de détruire le fédéralisme.

a *Déclaration des droits — Égalité devant la loi — L'art. 8 de la Limitations Act de la C.-B. ne contrevient pas à l'art. 1b) de la Déclaration des droits — La Déclaration des droits n'oblige pas le Parlement à adopter des lois uniformes dans tout le pays — Les différences, d'une province à l'autre, quant aux délais de prescription ne constituent pas de la discrimination.*

b *Déclaration des droits — Application régulière de la loi — Les dispositions portant prescription qui sont d'application générale, comme dans la Limitations Act de la C.-B., ne constituent pas une violation de l'application régulière de la loi — Une disposition portant prescription finale ne prive pas du droit d'intenter un procès ni du droit d'accès aux tribunaux — Elle impose simplement un délai dans lequel l'action doit être intentée.*

d *Pratique — Prescription — En vertu de l'art. 38 de la Loi sur la Cour fédérale, les lois de la Colombie-Britannique en matière de prescription sont applicables — Action intentée après l'expiration de la prescription finale de 30 ans — Les dispositions de la loi portant prescription ont préséance sur les autres lois.*

e *Pratique — Preuve — Commission rogatoire — Enregistrement magnétoscopique — Recommandations sur la façon de filmer les témoins, de visionner les vidéocassettes, d'employer le son — Recommandation portant que la Cour étudie la possibilité d'enregistrer les témoignages aux audiences sur vidéocassette — Caractère inadéquat des notes de transcription.*

f *Pratique — Preuve — Commission rogatoire — Interpreters — L'interprète devrait traduire les questions et les réponses mot à mot et non seulement l'essentiel de la conversation tenue avec le témoin — Les audiences en commission rogatoire devraient être tenues en présence de juristes compétents et expérimentés, comme un juge ou un protonotaire, qui connaissent les règles de preuve et de procédure.*

g *La réserve indienne n° 172 (R.I. 172), comprenant 18 168 acres, a été mise de côté pour les bandes demandereses en 1916, en vertu du Traité n° 8 dont les parties reconnaissent la validité. En 1940, les bandes demandereses ont cédé les droits miniers afférents à la R.I. 172, aux fins de location, au ministère des Affaires indiennes (M.A.I.). La validité de cette cession n'est pas contestée. En 1945, toute la réserve a été cédée au M.A.I. En 1948, le M.A.I. a transféré la R.I. 172 au Directeur des terres destinées aux anciens combattants pour la somme de 70 000 \$ et le Directeur a par la suite aliéné des parties de ces terres, y compris les droits miniers y afférents, à des anciens combattants et à d'autres personnes. En 1976, on a trouvé une quantité considérable de pétrole sur la R.I. 172. L'action concerne principalement le titre juridique sur la R.I. 172 et les droits miniers afférents à ces terres.*

j *Les demandeurs allèguent que (1) entre 1916 et 1945, la défenderesse s'est rendue coupable de plusieurs actes et omissions équivalant à de la négligence et elle a violé ses obligations fiduciaires envers les demandeurs en permettant l'utilisation non autorisée de terres et la réglementation inadéquate par la province; (2) la cession effectuée en 1945 était nulle ou annula-*

the Bands' consent to the 1945 surrender; (4) that the defendant's acceptance of the 1945 surrender was void because it did not conform to section 51 of the *Indian Act*; (5) that the 1948 transfer to the Director did not conform to section 54 of the *Indian Act*; (6) that the 1948 transfer was void with respect to the mineral rights since they were never surrendered for sale and since the surrender did not conform to section 54 of the *Indian Act* and section 41 of the *Dominion Lands Act*; (7) that in transferring the land in 1948 to the Director, the defendant breached its fiduciary duties and acted fraudulently; (8) that since 1948, the defendant and the Director acted in breach of their fiduciary duty and fraudulently with respect to the mineral rights; (9) that all transfers of mineral rights to the Director since 1952 were void as they did not meet the requirements of the *Indian Act*.

The plaintiffs claimed a declaration that the 1945 surrender and the 1948 transfer were null and void regarding I.R. 172 as a whole or, at least, regarding the mineral rights. They also sought a declaration that they continue to be entitled, pursuant to Treaty 8, to the same number of acres of reserve land as was originally set aside for them.

The defendant pleaded that the action was statute-barred. The plaintiffs replied that limitations could not run against them in view of the defendant's continuing fraud and breaches of fiduciary duties. They also questioned the validity of sections 8 and 9 of the B.C. *Limitations Act* under the Charter and the Bill of Rights.

Held, the action is dismissed.

A—Videotaped commission evidence. The videotaped evidence of seven witnesses had to be reviewed for accuracy because it had not been obtained properly, the interpreters being advised in each case of the substance of the information counsel wished to obtain and reporting the net result of the conversation with the witness. The videotape should give a direct frontal close-up of the witness' face. It should include full sound recording. At trial, the monitor should be placed in front of the judge. Whenever possible, commission evidence should be taken before a legally qualified and experienced person. It might be worthwhile to consider whether the Rules of the Court should provide for the videotaping of oral testimony at certain trials, as an adjunct to the normal transcription services. Transcripts can be misleading and considerable technical advances had recently been made in videotaping and sound recording.

B—Nature of title, relationship and duty. It had to be stated, at the outset, that there is little doubt that, in the 1940's, the plaintiff Bands did not possess the required skills to engage in

ble; (3) la défenderesse s'est rendue coupable de fraude en obtenant le consentement des bandes indiennes à la cession effectuée en 1945; (4) l'acceptation par la défenderesse de la cession effectuée en 1945 était nulle parce qu'elle ne respectait pas l'article 51 de la *Loi sur les Indiens*; (5) le transfert effectué en 1948 au Directeur ne respectait pas l'article 54 de la *Loi sur les Indiens*; (6) le transfert de 1948 était nul en ce qui concerne les droits miniers parce que la bande indienne n'avait jamais cédé ces droits pour qu'ils soient vendus et que la cession ne respectait pas les exigences de l'article 54 de la *Loi sur les Indiens* et de l'article 41 de la *Loi des terres fédérales*; (7) en transférant ces terres en 1948 au Directeur, la défenderesse s'est rendue coupable de plusieurs violations à ses obligations fiduciaires et a en outre agi frauduleusement; (8) depuis 1948, la défenderesse et le Directeur ont tous les deux violé les obligations fiduciaires auxquelles ils étaient tenus et ont agi frauduleusement en ce qui concerne les droits miniers; et (9) tous les transferts de droits miniers au Directeur effectués depuis 1952 sont nuls parce qu'ils ne respectaient pas les exigences de la *Loi sur les Indiens*.

Les demandeurs sollicitent un jugement déclarant que la cession de 1945 et le transfert de 1948 sont nuls en ce qui concerne l'ensemble de la R.I. 172 ou, du moins, qu'ils sont nuls en ce qui a trait aux droits miniers. Ils demandent en outre un jugement déclarant qu'ils continuent à avoir droit, en vertu du Traité n° 8, à la même superficie de réserve que celle qui avait été mise de côté pour eux à l'origine.

La défenderesse a plaidé que l'action était prescrite. En réponse, les demandeurs ont fait valoir que la prescription ne pouvait courir contre eux à cause de la fraude continue de la défenderesse à leur égard et des violations de ses obligations fiduciaires. Ils ont également contesté la validité des articles 8 et 9 de la *Limitations Act* de la C.-B., en vertu de la Charte des droits et de la Déclaration des droits.

Jugement: l'action est rejetée.

A—Enregistrement magnétoscopique des dépositions faites devant une commission rogatoire. Les dépositions enregistrées par sept témoins ont dû être révisées pour en vérifier l'exactitude parce qu'elles n'avaient pas été obtenues de façon adéquate; dans chaque cas, les avocats indiquaient à l'interprète la nature des renseignements qu'ils souhaitaient obtenir du témoin et l'interprète rapportait en quelques mots ce qu'il considérait l'essentiel de sa conversation avec le témoin. La caméra devrait être installée de manière à prendre le visage du témoin en gros plan et de face. Elle devrait également enregistrer le son. À l'instruction, l'écran de télévision devrait être placé en face du juge. Lorsque c'est possible, le témoignage par commission rogatoire devrait être reçu par un juriste compétent et expérimenté. Il vaudrait peut-être la peine d'examiner la possibilité de prévoir dans les Règles de la Cour, à titre de complément au service ordinaire de transcription, l'enregistrement magnétoscopique de témoignages au cours de certains procès. Les transcriptions de témoignages sont parfois trompeuses et des progrès techniques considérables ont été réalisés récemment dans le domaine de l'enregistrement, image et son, sur ruban magnétoscopique.

B—Nature du titre, du rapport et de l'obligation. Il fallait établir, dès le début, qu'il était presque indubitable que, dans les années 1940, les bandes demanderesses n'avaient pas les

any financial planning or budgeting or to generally manage their affairs from a financial standpoint.

It is established that the Indians' interest in real property is not a legal property interest but merely a "personal and usufructuary interest." The Indians' interest is inalienable except upon surrender and places upon the Crown the equitable fiduciary obligation, enforceable at law, to deal with the land for the benefit of the Indians. This obligation is subject to principles very similar to those which govern the law of trust concerning, for example, the measure of damages for breach. There is no special fiduciary relationship or duty owed by the Crown with respect to reserve lands previous to surrender nor after the surrendered lands have been transferred. Except for certain restrictions in the *Indian Act*, Indians are not to be treated at law as if they were not *sui juris*. However, when advice is sought or proffered, there exists a duty on the Crown to take reasonable care. The onerousness of that duty will vary according to the degree of awareness or sophistication on the part of the Indians. And where there does exist a true fiduciary relationship, as in the case at bar following the 1945 surrender, the Crown must exercise the same high degree of prudence and care as in the case of a true trust.

The portion of the reasons dealing with evidence on the mineral rights has been summarized in an Editor's Note. Based on that evidence, there was no breach of the Crown's fiduciary duties towards the plaintiffs. The Crown's officers, servants or agents could not reasonably be expected to have anticipated, in 1948 or previously, that there would be any real value attached to potential mineral rights under I.R. 172 or that there would be any reasonably foreseeable advantage in retaining them.

C—Treaty 8. In 1950, after surrender and disposal of I.R. 172, which comprised 18,168 acres, the plaintiffs received three new reserves comprising 6,194 acres. The plaintiffs claim to be entitled, under the Treaty, to the difference, 11,974 acres. However, even the most liberal interpretation leads to the inevitable conclusion that once the Crown has laid aside as a reserve the required amount of land, the obligation of the Crown pursuant to the Treaty has been fulfilled insofar as reserve land is concerned. There is no subsisting right, after proper surrender and disposal of the reserve, to an area of land equal to the original acreage set aside pursuant to the Treaty.

D—1940 and 1945 surrenders. As to whether the 1945 surrender included the mineral rights which had been surrendered in 1940, the rule is that when, as here, there is no restriction or reservation expressed in the description of the property granted or ceded, all of the property mentioned, whether it be real or personal, and all interest in that property, whether it be legal, equitable or usufructuary, is presumed to be the subject-matter of the grant.

The 1940 surrender did not sever the mineral rights from the Indians' other interests in I.R. 172. The 1940 surrender was not a surrender of "a portion of" the reserve as defined in para-

compétences nécessaires pour s'occuper de planification financière ou de l'établissement d'un budget ni, en général, d'administrer financièrement leurs affaires.

Il est entendu que le droit des Indiens sur des biens immobiliers n'est pas un droit de propriété reconnu par la loi mais simplement un [TRADUCTION] «droit personnel, de la nature d'un usufruit». Le droit des Indiens est inaliénable, sauf dans le cas d'une cession et il impose par sa nature à la Couronne une obligation d'*equity*, exécutoire en justice, d'utiliser ces terres au profit des Indiens. Cette obligation est soumise à des principes très semblables à ceux qui régissent le droit des fiducies, en ce qui concerne notamment le montant des dommages-intérêts en cas de manquement. La Couronne n'est tenue par aucune obligation ou rapport fiduciaire spécial en ce qui concerne les terres des réserves avant qu'elles ne soient cédées et une fois que les terres cédées ont été transférées. Sauf certaines restrictions prévues dans la *Loi sur les Indiens*, les Indiens ne doivent pas être légalement traités comme s'ils étaient incapables d'exercer pleinement leurs droits. Toutefois, lorsque des conseils sont demandés ou qu'ils sont offerts, la Couronne est tenue de faire preuve d'une prudence raisonnable. Cette obligation dépendra du degré de connaissance ou de subtilité dont font preuve les Indiens. Et lorsqu'il existe un véritable rapport fiduciaire, comme c'est le cas en l'espèce par suite de la cession de 1945, la Couronne doit faire preuve du même degré de prudence et de diligence que lorsqu'il s'agit d'une véritable fiducie.

La partie des motifs portant sur la preuve afférente aux droits miniers a été résumée dans la note de l'arrêtiste. D'après cette preuve, la Couronne n'a pas manqué à ses obligations fiduciaires envers les demandeurs. On ne pouvait raisonnablement s'attendre à ce que les fonctionnaires, préposés ou mandataires de la Couronne prévoient, en 1948 ou avant, que les droits miniers éventuels afférents à la R.I. 172 auraient une valeur réelle ou qu'il y aurait un avantage raisonnablement prévisible à conserver ces droits.

C—Traité n° 8. En 1950, après la cession et l'aliénation de la R.I. 172 dont la superficie était de 18 168 acres, les demandeurs ont obtenu trois nouvelles réserves couvrant quelque 6 194 acres. Ils prétendent avoir droit, en vertu du Traité, à la différence, soit une superficie de 11 974 acres. Même la plus libérale des interprétations nous amène inévitablement à conclure que, une fois que la Couronne a mis de côté à titre de réserve l'étendue de terre requise, elle a rempli l'obligation que lui impose le Traité en ce qui concerne les terres de la réserve. Il ne subsiste aucun droit permettant à la bande indienne de recevoir, après la cession et l'aliénation de la réserve, d'autres terres dont la superficie égale celle de la réserve initialement mise à part conformément au Traité.

D—Cessions de 1940 et de 1945. Quant à savoir si la cession de 1945 comprenait les droits miniers cédés en 1940, il faut se souvenir, comme en l'espèce, que lorsque la description d'un bien cédé ne comporte aucune restriction ni réserve, l'ensemble du bien mentionné, qu'il s'agisse d'un bien réel ou personnel, et tous les droits afférents, qu'il s'agisse de droits légaux, en *equity* ou usufruitier, sont présumés faire partie de la cession.

La cession de 1940 n'a pas séparé les droits miniers des autres droits que les Indiens possédaient relativement à la R.I. 172. La cession de 1940 n'était pas celle d'une partie de

graph 2(e) of the *Indian Act* but only of a right in a part of the whole reserve. Mineral rights could not therefore be considered "Indian lands" which could not be surrendered, and the 1940 surrender, with its trust for lease, did not render the mineral rights incapable of any other type of alienation except by means of lease even if both parties agreed to it.

E—Breaches of duty between 1916 and 1945. With respect to the alleged acts of negligence and breaches of fiduciary duty between 1916 and 1945, there was no legal duty upon the Department to actively police the reserves nor to interfere with legitimate provincial legislation of general application merely because it happened to affect the Indians. Furthermore the claims were statute barred.

F—1945 Surrender. The decision to accept the surrender was an operational rather than a policy decision and, as such, it is reviewable.

Based on the available evidence, the members of the Band fully understood and freely consented to the surrender of I.R. 172 in September 1945. There was no evidence that the surrender meeting was not summoned in accordance with subsection 51(1) of the Act. And, applying subsection 31(1) of the *Interpretation Act*, the person who held the surrender meeting was duly authorized pursuant to subsection 51(1) of the Act.

Since subsection 51(3) of the Act was merely directory and not mandatory, non-compliance with the formalities provided for therein, had such non-compliance been proven, would not have rendered the surrender null and void.

G—1948 transfer to The Director, The Veterans' Land Act. The argument that since the 1948 transfer is silent as to minerals, it does not have the effect of transferring them cannot be sustained at law: unless an interest is specifically withheld, and absolute conveyance of land includes all interests except precious metals.

While there was no evidence of fraud at the time of the 1948 transfer, there was a breach of fiduciary duty in that the defendant has not discharged the onus of establishing that a full and fair price was obtained in 1948. That claim, however, was statute barred.

The Director, The Veterans' Land Act did not hold the lands in trust for the Indians. Nothing in the Act provides for such a trust. Nor were the mineral rights reserved from all sales as they had been previously by statute. Furthermore, the Act provides that the Director may hold and transfer property only for the purposes of the Act. There is no power, without consent of the veteran concerned, to reconvey lands or any mineral rights to the Crown for the benefit of Indians or to any other person.

H—Alleged breaches since 1948. While the defendant did not obtain mineral rights to the replacement reserves, there is no evidence that it undertook to do so, nor did it have a duty to do so. Nor was there any duty or promise to obtain the same

réserve telle que prévue à l'alinéa 2e) de la *Loi sur les Indiens*, mais plutôt d'un droit sur une partie de l'ensemble de la réserve. Les droits miniers ne pouvaient donc pas être considérés comme des «terres indiennes» qui ne pouvaient être cédées, et la cession de 1940, prévoyant une fiducie limitée à la location, ne s'opposait pas à ce que les droits miniers fassent l'objet de tout autre genre d'aliénation, sauf de location, même avec le consentement des deux parties.

E—Violations des obligations de fiduciaire entre 1916 et 1945. Quant aux actes de négligence et à la violation non frauduleuse des obligations de fiduciaire qui, selon les demandeurs, se seraient produits entre 1916 et 1945, il n'existe aucune obligation légale en vertu de laquelle le Ministère est tenu de surveiller activement les réserves indiennes ni d'intervenir pour annuler une loi provinciale légitime d'application générale, pour la simple raison qu'elle touche également les droits des Indiens. De plus, les réclamations sont prescrites.

F—La cession de 1945. La décision d'accepter la cession relève davantage du domaine de «l'exécution» que de celui de la «politique administrative» et, à ce titre, elle peut faire l'objet d'un contrôle.

D'après la preuve disponible, les membres de la bande ont donné librement leur consentement éclairé au projet de cession de la R.I. 172, en septembre 1945. Aucune preuve n'a été produite pour établir que l'assemblée n'a pas été convoquée conformément au paragraphe 51(1) de la Loi. Par application du paragraphe 31(1) de la *Loi d'interprétation*, l'assemblée a été tenue devant une personne dûment autorisée conformément au paragraphe 51(1) de la Loi.

Puisque les dispositions du paragraphe 51(3) de la Loi sont simplement supplétives et non impératives, l'inobservation des formalités prescrites, si la preuve en avait été faite, n'aurait pas invalidé la cession elle-même.

G—Transfert des terres au Directeur des terres destinées aux anciens combattants effectué en 1948. L'argument des demandeurs qui prétendent que, puisque le document ne mentionne pas les droits miniers, il n'a pas pour effet de les transférer, ne peut être soutenu en droit: à moins qu'un droit ne soit expressément retenu, une cession absolue des terres comprend tous les droits sauf ceux afférents aux métaux précieux.

Même s'il n'y a pas de preuve de fraude au moment de la cession de 1948, la Couronne a manqué à ses obligations de fiduciaire parce qu'elle ne s'est pas acquittée du fardeau d'établir qu'un prix pleinement équitable avait été obtenu en mars 1948. Toutefois, cette réclamation est prescrite.

Le Directeur des terres destinées aux anciens combattants ne détenait pas les terres en fiducie pour les Indiens. Aucune disposition de la Loi ne prévoit cette fiducie. Les minéraux n'étaient pas non plus réservés dans toutes les ventes, comme le prévoyaient les lois antérieures. De plus, la Loi prévoit que le Directeur peut détenir et transférer des biens aux seules fins de la Loi. Il ne peut absolument pas, sans le consentement de l'ancien combattant concerné, rétrocéder des terres ou des droits miniers à la Couronne, au profit d'Indiens, ou à tout autre personne.

H—Manquements imputés depuis 1948. Même si la défenderesse n'a pas obtenu les droits miniers sur les terres de remplacement, il n'est pas démontré qu'elle s'était engagée à le faire ni qu'elle en avait l'obligation. Il n'y avait pas non plus d'obliga-

acreage of land in the new reserves as was surrendered in I.R. 172.

I—Limitations. Pursuant to section 38 of the *Federal Court Act*, the *Limitations Act* of British Columbia applies in this case. The statement of claim in this case was issued in September 1978, five and one half months beyond the ultimate limitation period of thirty years from the time the cause of action arose—March 1948. No other legislation applies to override this limitations period.

The validity of section 8 of the *Limitations Act* cannot be challenged under section 7 of the Charter. The latter is not applicable as it relates to the protection of the person and to personal rights and freedoms and does not apply to interest in or damages pertaining to the disposal of property. Furthermore, the Charter, generally speaking, is not retrospective. And such a limitation period applicable to all residents of a province does not offend against the principles of fundamental justice.

The retrospective effect rule also applies to section 15 of the Charter. It does not provide for identical treatment for all regardless of circumstances. It is not discriminatory for the Crown to be subject to provincial limitation provisions like ordinary citizens. As far as civil law is concerned, section 15 does not require each province to enact the same laws, as this would be a denial of federalism and be destructive of the federal system itself.

Nor does section 8 of the *Limitations Act* violate paragraph 1(b) of the Bill of Rights. As in the case of the Charter, there is no requirement under the Bill of Rights for Parliament to enact uniform laws throughout the country. It has been recently decided that even where the matter falls within federal jurisdiction, where federal law is silent on the subject, the provincial law where the cause of action arose and is being litigated is to be exclusively applied in determining the rights of the litigants. And there is no more discrimination contrary to paragraph 1(b) than under sections 7 or 15 of the Charter.

Section 8 of the *Limitations Act* does not violate the due process provision in paragraph 1(a) of the Bill of Rights. An ultimate limitation period does not deny the plaintiffs the right to litigate nor the right of access to the court. It merely imposes a time limitation within which the action must be commenced. The claim for insufficiency of the sale price to the Director in 1948 is therefore statute barred and also extinguished pursuant to sections 8 and 9 of the B.C. *Limitations Act*.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

- Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 30.
- Canadian Bill of Rights*, R.S.C. 1970, Appendix III, ss. 1(a), (b), 2.
- Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act*, 1982, Schedule B, *Canada Act* 1982, 1982, c. 11 (U.K.), ss. 7, 8, 15.
- Constitution Act*, 1867, 30 & 31 Vict., c. 3 (U.K.) [R.S.C. 1970, Appendix II, No. 5] (as am. by *Canada*

tion ou de promesse d'obtenir des terres d'une même superficie que celle de la R.I. 172.

I—Prescription. En application de l'article 38 de la *Loi sur la Cour fédérale*, la loi applicable en l'espèce est la *Limitations Act* de la Colombie-Britannique. La déclaration a été déposée en septembre 1978, cinq mois et demi après l'expiration de la prescription de trente ans à compter de la date à laquelle la cause d'action a pris naissance, c'est-à-dire en mars 1948. Aucun autre texte législatif ne peut avoir priorité sur cette prescription.

La validité de l'article 8 de la *Limitations Act* ne peut être contestée en vertu de l'article 7 de la Charte. Cette dernière n'est pas applicable puisqu'elle concerne la protection de la personne et des droits et libertés personnels, et elle ne vise pas à garantir les droits ni les dommages-intérêts relatifs à l'aliénation des biens. De plus, la Charte, d'une manière générale, ne s'applique pas rétroactivement. Et une période de prescription de ce genre, applicable à tous les résidents de la province, ne contrevient pas aux principes de la justice fondamentale.

La règle de la non-rétroactivité s'applique également à l'article 15 de la Charte. Elle ne prévoit pas un traitement identique pour tous, quelles que soient les circonstances. Il n'est pas discriminatoire d'assujettir la Couronne aux dispositions portant prescription de la législation provinciale comme tout simple citoyen de la province. En ce qui concerne le droit civil, l'article 15 n'oblige pas chaque province à adopter les mêmes lois, ce qui équivaldrait à nier le fédéralisme et à détruire le système fédéral lui-même.

L'article 8 de la *Limitations Act* ne contrevient pas non plus à l'alinéa 1b) de la Déclaration des droits. À l'instar de la Charte, la Déclaration des droits n'oblige pas le Parlement à adopter des lois uniformes dans tout le pays. Dans un arrêt récent, il a été conclu que, même lorsque le litige est de compétence fédérale, le droit de la province dans laquelle le litige a pris naissance et est jugé doit s'appliquer de façon exclusive afin de déterminer les droits des plaideurs, si le droit fédéral ne prévoit rien à cet égard. Et il n'y a pas plus de discrimination à l'encontre de l'alinéa 1b) de la Déclaration des droits qu'en vertu des articles 7 ou 15 de la Charte.

L'article 8 de la *Limitations Act* n'est pas incompatible avec l'alinéa 1a) de la Déclaration des droits qui porte sur l'application régulière de la loi. Une prescription finale ne prive pas les demandeurs du droit d'intenter un procès ni du droit d'accès aux tribunaux. Elle impose simplement le délai dans lequel l'action doit être intentée. L'action intentée pour insuffisance du prix de vente demandé au Directeur, en 1948, est donc prescrite en vertu des articles 8 et 9 de la *Limitations Act* de la Colombie-Britannique.

LOIS ET RÈGLEMENTS

- Charte canadienne des droits et libertés*, qui constitue la Partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, chap. 11 (R.-U.), art. 7, 8, 15.
- Déclaration canadienne des droits*, S.R.C. 1970, Appendice III, art. 1a), b), 2.
- Laws Declaratory Act*, R.S.B.C. 1948, chap. 179, art. 2(11).

Act 1982, 1982, c. 11 (U.K.), Schedule to the *Constitution Act*, 1982, Item 1), s. 91(24).
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 38.
Federal Court Rules, C.R.C., c. 663, R. 494(1).
Indian Act, R.S.C. 1927, c. 98, ss. 2(e),(f), 4, 35, 36, 50 (as am. by S.C. 1938, c. 31, s. 1), 51, 54. **a**
Indian Act, R.S.C. 1952, c. 149, s. 18(1).
Interpretation Act, R.S.C. 1927, c. 1, s. 31(f).
Laws Declaratory Act, R.S.B.C. 1948, c. 179, s. 2 (11).
Limitations Act, S.B.C. 1975, c. 37.
Limitations Act, R.S.B.C. 1960, c. 370.
Limitation Act, R.S.B.C. 1979, c. 236, ss. 3(3), 6, 7, 8, 9, 14. **b**
Royal Proclamation, 1763, R.S.C. 1970, Appendix II, No. 1.
The Department of Mines and Resources Act, S.C. 1936, c. 33, s. 9(2).
The Dominion Lands Act, S.C. 1908, c. 20, s. 41. **c**
The Soldier Settlement Act, 1917, S.C. 1917, c. 21.
The Soldier Settlement Act, 1919, S.C. 1919, c. 71, s. 57.
The Veterans' Land Act, 1942, S.C. 1942-43, c. 33, ss. 3 (as am. by S.C. 1946, c. 70, s. 1), 5(3).
Trustee Act, R.S.B.C. 1948, c. 345, s. 86(1).
Trustee Act, R.S.B.C. 1960, c. 390, s. 93(1). **d**
Veterans' Land Act, R.S.C. 1970, c. V-4, s. 5(1),(3),(4).

Limitations Act, S.B.C. 1975, chap. 37.
Limitations Act, R.S.B.C. 1960, chap. 370.
Limitation Act, R.S.B.C. 1979, chap. 236, art. 3(3), 6, 7, 8, 9, 14.
Loi constitutionnelle de 1867, 30 & 31 Vict., chap. 3 (R.-U.) [S.R.C. 1970, Appendice II, n° 5] (mod. par la *Loi de 1982 sur le Canada*, 1982, chap. 11 (R.-U.), annexe de la *Loi constitutionnelle de 1982*, n° 1), art. 91(24).
Loi de 1942 sur les terres destinées aux anciens combattants, S.C. 1942-43, chap. 33, art. 3 (mod. par S.C. 1946, chap. 70, art. 1), 5(3).
Loi des Indiens, S.R.C. 1927, chap. 98, art. 2e),f), 4, 35, 36, 50 (mod. par S.C. 1938, chap. 31, art. 1), 51, 54.
Loi des terres fédérales, S.C. 1908, chap. 20, art. 41.
Loi d'Établissement de Soldats, 1917, S.C. 1917, chap. 21.
Loi d'établissement de soldats, 1919, S.C. 1919, chap. 71.
Loi d'interprétation, S.R.C. 1927, chap. 1, art. 31(f).
Loi du ministère des Mines et des ressources, S.C. 1936, chap. 33, art. 9(2).
Loi sur la Cour fédérale, S.R.C. 1970 (2^e Supp.), chap. 10, art. 38.
Loi sur la preuve au Canada, S.R.C. 1970, chap. E-10, art. 30.
Loi sur les Indiens, S.R.C. 1952, chap. 149, art. 18(1).
Loi sur les terres destinées aux anciens combattants, S.R.C. 1970, chap. V-4, art. 5(1),(3),(4).
Proclamation royale, 1763, S.R.C. 1970, Appendice II, n° 1. **e**
Règles de la Cour fédérale, C.R.C., chap. 663, Règle 494(1).
Trustee Act, R.S.B.C. 1948, chap. 345, art. 86(1).
Trustee Act, R.S.B.C. 1960, chap. 390, art. 93(1). **f**

CASES JUDICIALLY CONSIDERED

FOLLOWED:

Guerin et al. v. The Queen et al., [1984] 2 S.C.R. 335, reversing [1983] 2 F.C. 656; (1982), 143 D.L.R. (3d) 416 (C.A.). **g**

APPLIED:

Kruger v. The Queen, [1986] 1 F.C. 3 (abridged); (1985), 58 N.R. 241 (C.A.); *The Queen v. George*, [1966] S.C.R. 267; *Montreal Street Railway Company v. Normandin*, [1917] A. C. 170 (P.C.); *Melville (City of) v. Attorney General of Canada*, [1982] 2 F.C. 3 (T.D.); *Jasper Park Chamber of Commerce v. Governor General in Council*, [1983] 2 F.C. 98 (C.A.); *Attorney-General of British Columbia v. Attorney-General of Canada (1889)*, 14 App. Cas. 295 (P.C.); *Reference re Saskatchewan Natural Resources*, [1931] S.C.R. 263; *The Queen v. Richard L. Reese et al.*, [1956] Ex.C.R. 94; *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1 (C.A.); *Grabbe v. Grabbe*, [1987] 2 W.W.R. 642 (B.C.C.A.); *Davidson v. Davidson Estate*, [1987] 2 W.W.R. 657 (B.C.C.A.); *Smith, Kline & French Laboratories Limited v. Attorney General of Canada*, [1986] 1 F.C. 274 (T.D.); *R. v. Hamilton* (1986), 57 O.R. (2d) 412 (C.A.); *R. v. Burnshine*, [1975]

JURISPRUDENCE

DÉCISION SUIVIE:

Guerin et autres c. La Reine et autre, [1984] 2 R.C.S. 335, infirmant [1983] 2 C.F. 656; (1982), 143 D.L.R. (3d) 416 (C.A.).

DÉCISIONS APPLIQUÉES:

Kruger c. La Reine, [1986] 1 C.F. 3 (version abrégée); (1985), 58 N.R. 241 (C.A.); *The Queen v. George*, [1966] R.C.S. 267; *Montreal Street Railway Company v. Normandin*, [1917] A. C. 170 (C.P.); *Melville (City of) c. Procureur général du Canada*, [1982] 2 C.F. 3 (1^{re} inst.); *Chambre de commerce de Jasper Park c. Gouverneur général en conseil*, [1983] 2 C.F. 98 (C.A.); *Attorney-General of British Columbia v. Attorney-General of Canada (1889)*, 14 App. Cas. 295 (C.P.); *Reference re Saskatchewan Natural Resources*, [1931] R.C.S. 263; *The Queen v. Richard L. Reese*, [1956] R.C.É. 94; *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1 (C.A.); *Grabbe v. Grabbe*, [1987] 2 W.W.R. 642 (C.A.C.-B.); *Davidson v. Davidson Estate*, [1987] 2 W.W.R. 657 (C.A.C.-B.); *Smith, Kline & French Laboratories Limited c. Procureur général du Canada*, [1986] 1 C.F. 274 (1^{re} inst.); *R. v. Hamilton* (1986), 57 O.R. (2d) 412 (C.A.); *R. c.*

1 S.C.R. 693; (1974), 15 C.C.C. (2d) 505; *Algonquin Mercantile Corp. v. Dart Industries Canada Ltd.*, judgment dated June 17, 1987, Federal Court of Appeal, A-692-86.

DISTINGUISHED:

St. Ann's Fishing Club v. The King, [1950] S.C.R. 211; *Humphries v. Brogden* (1850), 12 Q. B. 739; *Algoma Ore Properties Ltd. v. Smith*, [1953] 3 D.L.R. 343 (Ont. C.A.); *Stoughton v. Leigh* (1808), 1 Taunt. 402; 127 E.R. 889 (H.C. Ch.); *Ex p. Jackson*, [1925] 1 D.L.R. 701 (Alta. S.C., App. Div.); *Berkheiser v. Berkheiser and Glaister*, [1957] S.C.R. 387; *Martyn v. Williams* (1857), 1 H. & N. 817; 156 E.R. 1430 (Exch.); *Earl of Lonsdale v. Lowther*, [1900] 2 Ch. 687; *Dorset Yacht Co. Ltd. v. Home Office*, [1970] A.C. 1004 (H.L.); *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Kamloops (City of) v. Nielsen et al.*, [1984] 2 S.C.R. 2; *Toews v. MacKenzie* (1980), 12 C.C.L.T. 263 (B.C.C.A.); *Brusewitz v. Brown*, [1923] N.Z. L.R. 1106 (S.C.); *Tufton v. Sporni*, [1952] 2 *The Times* L.R. 516 (E.C.A.); *Allcard v. Skinner* (1887), [1886-90] All E.R. Rep. 90 (E.C.A.); *Lloyds Bank Ltd v Bundy*, [1974] 3 All ER 757 (E.C.A.); *R. v. Antoine* (1983), 5 C.C.C. (3d) 97 (Ont. C.A.); *Re McDonald and The Queen* (1985), 51 O.R. (2d) 745 (C.A.); *R. v. Konechny* (1983), 10 C.C.C. (3d) 233 (B.C.C.A.); *Morgentaler v. The Queen*, [1976] S.C.R. 616; (1975), 20 C.C.C. (2d) 449; *Curr v. The Queen*, [1972] S.C.R. 889; *Piercey v. General Bakeries Ltd.*; *The Queen in right of Newfoundland et al.*, *Intervenors* (1986), 31 D.L.R. (4th) 373 (Nfld. S.C.).

CONSIDERED:

Xerox of Canada Ltd. et al. v. IBM Canada Ltd. (1977), 33 C.P.R. (2d) 24 (F.C.T.D.).

REFERRED TO:

St. Catherine's Milling and Lumber Company v. Reg. (1888), 14 App. Cas. 46 (P.C.); *Smith v. The Queen*, [1983] 1 S.C.R. 554.

AUTHORS CITED

Armour, Edward D. *The Law of Real Property*, 2nd ed. Toronto: Canada Law Book Company, 1916.

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Burnshine, [1975] 1 R.C.S. 693; (1974), 15 C.C.C. (2d) 505; *Algonquin Mercantile Corp. c. Dart Industries Canada Ltd.*, jugement en date du 17 juin 1987, Cour d'appel fédérale, A-692-86.

DISTINCTION FAITE AVEC:

St. Ann's Fishing Club v. The King, [1950] R.C.S. 211; *Humphries v. Brogden* (1850), 12 Q. B. 739; *Algoma Ore Properties Ltd. v. Smith*, [1953] 3 D.L.R. 343 (C.A. Ont.); *Stoughton v. Leigh* (1808), 1 Taunt. 402; 127 E.R. 889 (H.C. Ch.); *Ex p. Jackson*, [1925] 1 D.L.R. 701 (C.S. Alb., Div. d'appel); *Berkheiser v. Berkheiser and Glaister*, [1957] R.C.S. 387; *Martyn v. Williams* (1857), 1 H. & N. 817; 156 E.R. 1430 (Exch.); *Earl of Lonsdale v. Lowther*, [1900] 2 Ch. 687; *Dorset Yacht Co. Ltd. v. Home Office*, [1970] A.C. 1004 (H.L.); *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Kamloops (Ville de) c. Nielsen et autres*, [1984] 2 R.C.S. 2; *Toews v. MacKenzie* (1980), 12 C.C.L.T. 263 (C.A.C.-B.); *Brusewitz v. Brown*, [1923] N.Z. L.R. 1106 (S.C.); *Tufton v. Sporni*, [1952] 2 *The Times* L.R. 516 (E.C.A.); *Allcard v. Skinner* (1887), [1886-90] All E.R. Rep. 90 (E.C.A.); *Lloyds Bank Ltd v Bundy*, [1974] 3 All ER 757 (E.C.A.); *R. v. Antoine* (1983), 5 C.C.C. (3d) 97 (C.A. Ont.); *Re McDonald and The Queen* (1985), 51 O.R. (2d) 745 (C.A.); *R. v. Konechny* (1983), 10 C.C.C. (3d) 233 (C.A.C.-B.); *Morgentaler c. La Reine*, [1976] R.C.S. 616; (1975), 20 C.C.C. (2d) 449; *Curr c. La Reine*, [1972] R.C.S. 889; *Piercey v. General Bakeries Ltd.*; *The Queen in right of Newfoundland et al.*, *Intervenors* (1986), 31 D.L.R. (4th) 373 (C.S.T.-N.).

DÉCISION EXAMINÉE:

Xerox of Canada Ltd. et autre c. IBM Canada Ltd. (1977), 33 C.P.R. (2d) 24 (C.F. 1^{re} inst.).

DÉCISIONS CITÉES:

St. Catherine's Milling and Lumber Company v. Reg. (1888), 14 App. Cas. 46 (C.P.); *Smith c. La Reine*, [1983] 1 R.C.S. 554.

DOCTRINE

Armour, Edward D. *The Law of Real Property*, 2nd ed. Toronto: Canada Law Book Company, 1916.

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Le sous-procureur général du Canada pour la défenderesse.

EDITOR'S NOTE

The Executive Editor has decided that His Lordship's 121 page reasons for judgment herein should be reported as abridged. Some 31 pages have been deleted in the published report. Two portions of the reasons have been omitted. The first was a review of the testimony concerning the I.R. 172 mineral rights and the second, a review of the oral and documentary evidence on the question of free informed consent to the 1945 surrender. No editor's note has been prepared in respect of the last-mentioned issue in that Addy J. has provided a summary of his findings of fact in that regard.

The following are the reasons for judgment rendered in English by

ADDY J.:

THE PLAINTIFFS:

As the style of cause indicates, the two Indian Chief plaintiffs are suing in their personal capacity and on behalf of the members of their respective Bands. Their right to represent all members of the Bands, including former members who are still alive, is undisputed. There is also an allegation in the statement of claim, which allegation is admitted by the defendant, to the effect that the Chiefs represent all past and future members of their Bands. Although I entertain some very serious doubts as to the legal validity of any such claim, I refrain from making any finding on this issue, since it is not before me to be tried.

The members, whose ancestors for many centuries lived as hunters and gatherers in the territory north of Fort Saint John, British Columbia, for some years had formed the Beaver Band which in 1962 was re-named the Fort Saint John Band. It included people known as Dunne-za or Beavers who spoke the Dunne-za or Beaver language and members ethnically known as Crees who spoke the Cree language. They are at times collectively referred to as "Dunne-za/Crees". The Fort Saint John Band was divided into 2 bands in 1977: the Doig River Indian Band and the Blueberry River

NOTE DE L'ARRÊTISTE

a Le Directeur général a décidé de publier les motifs du jugement de 121 pages en version abrégée. Quelque 31 pages ont été retranchées dans la décision publiée. Deux parties des motifs ont été omises. Il s'agit de l'examen des témoignages relatifs aux droits miniers afférents à la R.I. 172 et de l'examen des preuves orales et écrites déposées sur la question du consentement libre et éclairé à la cession de 1945. L'arrê-
b tiste n'a pas rédigé de note sur cette dernière question puisque le juge Addy a soumis un sommaire de ses conclusions de fait à cet égard.
c

Ce qui suit est la version française des motifs du jugement rendus par

LE JUGE ADDY:

LES DEMANDEURS

e Comme l'indique l'intitulé de la cause, les deux chefs indiens demandeurs ont engagé la présente action en leur nom et au nom des membres de leur bande respective. Leur droit de représenter tous les membres de ces bandes ainsi que les anciens mem-
f bres qui sont encore vivants n'est pas contesté. La déclaration renferme également une allégation portant que lesdits chefs représentent tous les membres passés et futurs de leurs bandes, ce que reconnaît la défenderesse. Même si j'ai des doutes
g sérieux sur la validité juridique d'une telle prétention, je m'abstiens de statuer sur ce point, car on ne me l'a pas demandé.

h Les membres des bandes indiennes en cause, dont les ancêtres ont vécu, pendant plusieurs siècles, dans le territoire situé au nord de Fort Saint John (Colombie-Britannique) où ils chassaient et cueillaient des fruits sauvages, ont constitué pendant quelques années la bande des Castors qui, en
i 1962, a pris le nom de bande indienne de Fort Saint John. Cette dernière bande se composait de Dunne-za ou Castors qui parlaient la langue dun-
j ne-za ou castor et de membres faisant partie de l'ethnie crie et parlant la langue crie. On les appelle parfois collectivement les «Cri-Dunne-za». En 1977, la bande indienne de Fort Saint John a été divisée en deux pour former la bande indienne

Indian Band who are presently based in 2 separate reserves, north of Fort Saint John.

THE ISSUES

The action centers around title to a former Indian reserve, the Moberley reserve (subsequently known as Indian Reserve No. 172 or I.R. 172), and especially around the mineral rights under that land.

There are issues pertaining to or arising out of:

1. A treaty known as "Treaty 8" signed in 1900 with the Beaver Band;
2. The setting aside in 1916 of I.R. 172 which consisted of some 18,168 acres;
3. A surrender in 1940 to the Department of Indian Affairs (D.I.A.) by the Band of petroleum, natural gas and mining rights under I.R. 172 for the leasing of those rights;
4. The validity of and the extent or effect of a further surrender to the D.I.A. of I.R. 172 in 1945;
5. The transferring of I.R. 172 in 1948 by the D.I.A. to The Director, The Veterans' Land Act for the sum of \$70,000; and
6. The subsequent disposal of parts of that land including mineral rights by The Director, The Veterans' Land Act to individual veterans and others.

The validity of Treaty 8 and the surrender of 1940 is admitted but there is some dispute as to the interpretation of those documents as well as the legal effects flowing from them. There are many contentious matters pertaining to and arising out of I.R. 172. The claims and allegations of the plaintiffs may be briefly summarized as follows:

1. That between 1916 and 1945 the defendant was guilty of several acts and omissions which constituted negligence and breaches of its fiduciary obligations towards them, in allowing unauthorized use of lands in which the plaintiffs had an

de la rivière Doig et la bande indienne de la rivière Blueberry qui habitent actuellement dans deux réserves distinctes situées au nord de Fort Saint John.

^a LES POINTS LITIGIEUX

L'action concerne principalement le titre juridique sur une ancienne réserve indienne, la réserve de Moberley (appelée par la suite la réserve indienne n° 172 ou R.I. 172) et, en particulier, les droits miniers afférents à ces terres.

Les points litigieux concernent les éléments suivants ou en découlent:

- ^c 1. un traité appelé «Traité n° 8», conclu en 1900 avec la bande indienne des Castors;
2. la mise de côté en 1916 de la R.I. 172 dont la superficie était de 18 168 acres;
- ^d 3. la cession, en 1940, au ministère des Affaires indiennes (M.A.I.) par la bande indienne, de ses droits pétroliers, gaziers et miniers afférents à la R.I. 172 aux fins de leur location;
- ^e 4. la validité et la portée ou les conséquences d'une autre cession au M.A.I. effectuée en 1945 relativement à la R.I. 172;
- ^f 5. le transfert, en 1948, de la R.I. 172 par le M.A.I. au Directeur des terres destinées aux anciens combattants pour la somme de 70 000 \$;
- ^g 6. l'aliénation subséquente, par le Directeur des terres destinées aux anciens combattants, de parties de ces terres, y compris les droits miniers y afférents, à des anciens combattants et à d'autres personnes.

Les parties reconnaissent la validité du Traité n° 8 et la cession effectuée en 1940, mais elles ne s'entendent pas sur l'interprétation à donner à ces documents ainsi que sur les effets juridiques qui en découlent. Un bon nombre de points litigieux se rapportent à la R.I. 172 ou en découlent. Voici un bref résumé des revendications et des allégations des demandeurs:

1. Entre 1916 et 1945, la défenderesse s'est rendue coupable de plusieurs actes et omissions équivalant à de la négligence et elle a violé ses obligations fiduciaires envers les demandeurs en permettant l'utilisation non autorisée de terres sur lesquelles

interest and improper regulation of land use by the Province of British Columbia.

2. That the 1945 surrender of I.R. 172 was void or, in the alternative, voidable.

3. That by various acts and omissions, the defendant acted both in breach of a fiduciary relationship and also fraudulently in securing the consent of the Band to the 1945 surrender and in accepting the surrender.

4. That the defendant's acceptance of the 1945 surrender was void because it did not conform to section 51 of the *Indian Act* [R.S.C. 1927, c. 98].

5. That the defendant's transfer in 1948 to The Director, The Veterans' Land Act was void as it did not conform to section 54 of the *Indian Act*.

6. That, if the 1948 transfer was valid, it had no force and effect or was void regarding the mineral rights under I.R. 172, on the grounds that those rights were never surrendered by the Band for sale nor did the surrender meet the requirements of section 54 of the *Indian Act* and section 41 of *The Dominion Lands Act*, S.C. 1908, c. 20, section 1.

7. That in transferring the land in 1948 to The Director, The Veterans' Land Act the defendant was guilty of numerous breaches of its fiduciary duties towards the Band and, in addition, acted fraudulently.

8. That since 1948 the defendant and The Director, The Veterans' Land Act as such, acted both in breach of their fiduciary duties to the plaintiff and fraudulently in respect of the mineral rights under I.R. 172.

9. That all transfers of mineral rights to The Director, The Veterans' Land Act since 1952 were void as they did not meet the requirements of the *Indian Act* [R.S.C. 1952, c. 149].

The plaintiffs claim a declaration that both the 1945 surrender and the 1948 transfer to the Direc-

les demandeurs possédaient un droit et en autorisant la réglementation inadéquate par la province de la Colombie-Britannique de l'utilisation de ces terres.

2. La cession effectuée relativement à la R.I. 172 en 1945 était nulle ou annulable.

3. Par ses actes et omissions, la défenderesse a violé un rapport fiduciaire et elle s'est rendue coupable de fraude en obtenant le consentement de la bande indienne à la cession effectuée en 1945 et en acceptant celle-ci.

4. L'acceptation par la défenderesse de la cession effectuée en 1945 était nulle parce qu'elle ne respectait pas l'article 51 de la *Loi des Indiens* [S.R.C. 1927, chap. 98].

5. Le transfert effectué en 1948 par la défenderesse au Directeur des terres destinées aux anciens combattants était nul parce qu'il ne respectait pas l'article 54 de la *Loi des Indiens*.

6. Si le transfert de 1948 était valide, il n'avait aucun effet ou était nul en ce qui concerne les droits miniers afférents à la R.I. 172 pour le motif que la bande indienne n'avait jamais cédé ces droits pour qu'ils soient vendus et que la cession ne respectait pas les exigences de l'article 54 de la *Loi des Indiens* et de l'article 41 de la *Loi des terres fédérales*, S.C. 1908, chap. 20, article 1.

7. En transférant ces terres en 1948 au Directeur des terres destinées aux anciens combattants, la défenderesse s'est rendue coupable de plusieurs violations à ses obligations fiduciaires envers la bande indienne et elle a en outre agi frauduleusement.

8. Depuis 1948, la défenderesse et le Directeur des terres destinées aux anciens combattants ont tous les deux violé les obligations fiduciaires auxquelles ils étaient tenus à l'égard des demandeurs et ils ont agi frauduleusement en ce qui concerne les droits miniers afférents à la R.I. 172.

9. Tous les transferts de droits miniers au Directeur des terres destinées aux anciens combattants effectués depuis 1952 étaient nuls parce qu'ils ne respectaient pas les exigences de la *Loi sur les Indiens* [S.R.C. 1952, chap. 149].

Les demandeurs sollicitent un jugement déclarant que la cession de 1945 et le transfert de 1948

tor are null and void and of no force and effect regarding I.R. 172 as a whole or, alternatively, that they are of no force and effect regarding the I.R. 172 mineral rights, and, in addition, a declaration that the plaintiffs continue to be entitled, pursuant to Treaty 8, to 18,168 acres of reserve land. The plaintiffs also claim an accounting and damages under various heads.

The defendant denies all of the above claims and allegations of the plaintiffs and, in addition, pleads that the action is prescribed by various statutory limitation provisions to which I shall later refer.

With regard to limitations, counsel for the plaintiffs advanced the proposition that limitations could not even begin to run against their clients for many years following the surrender, as they had no knowledge that they could apply for any recourse before the courts because of their subordinate position with regard to the Department of Indian Affairs. It was also alleged by the plaintiffs that there had been, during the intervening years, a continuing fraud on the part of the defendant perpetuated on the plaintiffs as well as continuing breaches of the fiduciary duties owed to the plaintiffs. Because of the nature and possible effect of these allegations, counsel agreed that the question of when any limitations would begin to run could best be determined only after firm findings had been arrived at on these issues and would therefore have to be deferred until the end of the trial, after all relevant evidence had been adduced.

SEVERANCE OF LIABILITY AND DAMAGES

At the outset of trial, because of what appeared to be the very complex number of issues affecting liability and also because of the estimates by counsel as to how long these matters would take to resolve, I ordered that the issues of liability and the quantum of damages be severed, the latter to form the subject matter of a reference, subject to

au Directeur sont nuls en ce qui concerne l'ensemble de la R.I. 172 ou, à titre subsidiaire, qu'ils sont nuls en ce qui a trait aux droits miniers afférents à la R.I. 172; ils demandent en outre un jugement déclarant qu'ils continuent à avoir droit à des terres de réserve couvrant une superficie de 18 168 acres et ce, conformément au Traité n° 8. Les demandeurs cherchent également à obtenir une reddition de comptes et des dommages-intérêts sous divers postes.

La défenderesse nie toutes les allégations et revendications des demandeurs, et elle plaide en outre que l'action est prescrite en vertu de diverses dispositions législatives relatives à la prescription des actions, dispositions sur lesquelles je reviendrai plus loin.

Pour ce qui est de la prescription, les avocats des demandeurs ont fait valoir que la prescription n'a pas pu commencer à courir contre leurs clients pendant de nombreuses années après la cession parce que ces derniers ignoraient qu'ils possédaient un recours devant les tribunaux en raison de leur situation de dépendance vis-à-vis le ministère des Affaires indiennes. Les demandeurs ont également allégué que, pendant les années s'étant écoulées dans l'intervalle, la défenderesse et ses représentants ont continué leur fraude à leur égard et ont continué à violer les obligations fiduciaires auxquelles ils étaient tenus envers eux. En raison de la nature et des conséquences possibles de ces allégations, les avocats ont reconnu qu'il serait préférable de statuer sur la question du point de départ de la prescription une fois seulement que la Cour serait arrivée à des conclusions finales sur les points litigieux et, par conséquent, cette question ne devrait être examinée qu'à la fin de l'instruction, une fois tous les éléments de preuve soumis.

SÉPARATION DE LA QUESTION DE LA RESPONSABILITÉ DE CELLE DES DOMMAGES-INTÉRÊTS

En raison du nombre de points litigieux concernant la responsabilité et également des prévisions des avocats quant au temps qu'il faudrait pour régler cette question, j'ai ordonné dès le début de l'instruction que les questions de la responsabilité et du montant des dommages-intérêts soient séparées, cette dernière devant faire l'objet d'une référence, sous réserve des instructions qui pourraient être jugées souhaitables une fois que la Cour se

such directions as might be deemed advisable after the evidence as to liability had been determined.

LENGTH OF TRIAL

The trial, with 5 days being allocated for oral argument in addition to comprehensive written arguments, occupied 10 weeks of court time. The issues, although complex to some extent, were, in my view, unnecessarily further complicated by the adducing of a substantial amount of evidence with little or no relevancy or probative value. Both sides seemed to some extent committed to the very questionable practice of submitting evidence both oral and documentary when they did not appear to be convinced of its probative value at the time. The "short statement giving a concise outline of the facts" referred to in Rule 494(1) [*Federal Court Rules*, C.R.C., c. 663] involved some 186 numbered pages and took three and one half days to deliver; 150 documents, which eventually would become exhibits, were referred to therein. An opening statement should normally not take more than one half to one hour and, in complicated cases, 2 to 3 hours should suffice to inform the judge generally what the case involves since he must be assumed to be acquainted with the contents of the certified record. Some allegations which apparently could never be established in evidence were maintained until the very end of the trial.

The tendering of massive details on the assumption that this might help the court to more fully understand the background of the case, more often than not, serves to confuse the real issues and, far from facilitating the court's task, merely complicates it unnecessarily.

DOCUMENTARY EVIDENCE

Counsel for the parties had jointly caused to be prepared a series of books containing some 916 documents, the authenticity of which would not be contested. Most of the documents produced as exhibits at trial were contained in these books. A few additional exhibits were also produced but authenticity was never an issue.

sera prononcée sur les éléments de preuve relatifs à la responsabilité.

DURÉE DE L'INSTRUCTION

a L'instruction a duré dix semaines, cinq jours étant consacrés aux plaidoiries et à la présentation d'arguments écrits exhaustifs. La présentation d'éléments de preuve plus ou moins pertinents ou probants a inutilement compliqué, à mon avis, les points litigieux qui étaient malgré tout assez complexes. Les deux parties semblent avoir suivi la pratique discutable consistant à présenter des témoignages oraux et des preuves documentaires alors même qu'elles n'étaient apparemment pas convaincues de leur force probante. Le « bref exposé concis des faits » dont il est question à la Règle 494(1) [Règles de la Cour fédérale, C.R.C., chap. 663] comportait quelque 186 pages numérotées, et il a duré trois jours et demi; il y était question de 150 documents qui seraient finalement produits comme pièces. Une déclaration préliminaire ne devrait habituellement durer que de trente à soixante minutes et, dans les affaires compliquées, de deux à trois heures devraient suffire pour donner au juge un aperçu général de l'affaire, car il faut présumer que ce dernier est au courant du contenu du dossier certifié. Certaines allégations qui, apparemment, n'ont jamais pu être prouvées, ont été maintenues jusqu'à la toute fin de l'instruction.

g Plus souvent qu'autrement, la présentation d'une avalanche de détails sous prétexte que cela pourrait aider la cour à mieux comprendre les faits de l'affaire, contribue à créer de la confusion relativement aux véritables points litigieux et, au lieu de faciliter la tâche du juge, la complique inutilement.

h

PREUVE DOCUMENTAIRE

i Les avocats des parties ont conjointement fait préparer une série de recueils contenant quelque 916 documents dont l'authenticité ne serait pas contestée. La plupart des documents produits comme pièces à l'instruction figuraient dans ces recueils. Quelques autres pièces ont également été déposées, mais leur authenticité n'a jamais été en cause.

A serious misunderstanding arose however during the hearing regarding the purposes for which the documents might be used as exhibits.

In presenting the plaintiffs' case, their counsel tendered some 500 exhibits. Until the end of the seventh week of trial, the Court as well as counsel for the defendant, had been considering the evidence on the basis that all documents being tendered had been offered for all purposes including proof of the truth of the contents.

When the plaintiffs were about to close their case and the defendant had been requested, for the convenience of the Court, to furnish a list of the documents which they would eventually be submitting as exhibits, counsel for the plaintiffs then made it known that they would be objecting to their production as proof of the facts mentioned therein unless the provisions of section 30 of the *Canada Evidence Act* [R.S.C. 1970, c. E-10] were complied with. Counsel for the defendant, however, stated that there had been an agreement that any of the documents contained in the book of documents could be used as evidence of the facts stated therein subject, of course, to normal considerations of relevancy, weight, probative value, etc. It was at that time only, when the plaintiffs denied any such agreement that the Court and the defendant became aware of the fact that, with the exception of a couple of exhibits presented through witnesses, such as reports of the plaintiffs' experts, none of the exhibits in the plaintiffs' case had been tendered to establish the truth of their contents but that each and every one of them was tendered solely to establish either the state of mind of the writer or the course of conduct of the defendant or its agents. In order to make perfectly clear the limited purposes for which I will be considering the documents tendered in-chief on behalf of the plaintiffs, I quote from the transcript of the 28th of February 1987, as counsel for the plaintiffs were about to close their case (See Volume 30 of the transcript at pages 3951 and 3956):

Il y a eu toutefois un malentendu important au cours de l'audience relativement aux fins pour lesquelles les documents pourraient être utilisés comme pièces.

^a Les avocats des demandeurs ont présenté quelque 500 pièces au cours de leur argumentation. Jusqu'à la fin de la septième semaine de l'instruction, la Cour ainsi que les avocats de la défenderesse et de ses représentants ont examiné les éléments de preuve soumis en considérant que tous les documents produits pouvaient être utilisés à toutes fins utiles, y compris pour faire preuve de leur contenu.

^c Au moment où les demandeurs s'apprêtaient à terminer leur plaidoirie et où la Cour a demandé à la défenderesse, pour des raisons pratiques, de lui fournir une liste des documents qu'elle déposerait ^d finalement comme pièces, les avocats des demandeurs ont fait savoir qu'ils s'opposeraient à la production de ces documents à titre de preuve des faits qui y étaient mentionnés, à moins que les dispositions de l'article 30 de la *Loi sur la preuve au Canada* [S.R.C. 1970, chap. E-10] ne soient respectées. ^e Toutefois, les avocats de la défenderesse ont invoqué une entente selon laquelle n'importe quel des documents figurant dans les recueils de documents pourrait être employé pour prouver ^f les faits dont il y était question, sous réserve évidemment des considérations normales quant à leur pertinence, leur force et leur valeur probante, etc. Ce n'est qu'à ce moment précis, lorsque les demandeurs ont nié l'existence d'une telle entente, ^g que la Cour et la défenderesse ont compris que, à l'exception d'une ou deux pièces déposées par l'intermédiaire de témoins, par exemple les rapports des experts des demandeurs, aucune des pièces déposées en preuve par les demandeurs n'était ^h destinée à faire preuve de son contenu, mais que ces pièces avaient plutôt été produites pour établir soit l'état d'esprit de l'auteur des documents soit la ligne de conduite suivie par la défenderesse ou ses ⁱ mandataires. Afin d'indiquer clairement les fins limitées pour lesquelles je tiendrai compte des documents déposés en preuve principale par les demandeurs, voici un extrait tiré des notes sténographiques prises le 28 février 1987, au moment où ^j les avocats des demandeurs s'apprêtaient à terminer leur plaidoirie (voir le Volume 30 de la transcription des débats, aux pages 3951 et 3956):

MR. PAPE: I have no difficulty with answering your question, my Lord. The documents we've tendered are for the purposes I said.

THE COURT: Are what purpose?

MR. PAPE: Are for the purposes I said, that is to prove a course of conduct and to prove the state of mind of the person who wrote the document.

THE COURT: Only, solely?

MR. PAPE: That's correct, my Lord.

THE COURT: All right.

MR. PAPE: My Lord, as far as I know there is no document which we will ask you to take as evidence tending to prove the truth of its contents. Perhaps if I give a couple of examples of the kinds of documents—

THE COURT: Well as long as you make that statement you don't have to give examples.

MR. PAPE: Fine.

The announcement by the counsel for the plaintiffs regarding the purpose for which the documents had been tendered during the previous weeks was totally unexpected and could only be described as a bombshell, as it cast a completely different light on the case. The defendant requested and was immediately granted a lengthy adjournment to prepare to meet the requirements of section 30 of the *Canada Evidence Act* and to decide which documents including those already submitted by the plaintiffs would be required to be tendered by it as to proof of the truth of contents.

During the argument on that issue it turned out that the plaintiffs had indeed, during the second week of trial, furnished to the Court and the defendant a 62 page document enumerating some 446 documents which they intended to submit as exhibits and referring to specific portions of these documents on which they wished to rely. At page 3 and in other sections of that list when referring to some specific documents there was a statement to the effect that the plaintiffs would be relying on the documents for the purpose of establishing intention of the writer and the course of conduct. There was no statement that no such documents could be relied upon to establish the truth of contents. More importantly however that limitation directly contradicts in many ways how plaintiffs' counsel in their opening address stated that their case would be established. A written version

[TRADUCTION] M^e PAPE: Je peux facilement répondre à votre question, monsieur le juge. Les documents que nous avons déposés l'ont été aux fins que je vous ai mentionnées.

LA COUR: À quelles fins?

M^e PAPE: Aux fins que j'ai mentionnées, c'est-à-dire pour prouver la ligne de conduite adoptée ainsi que l'état d'esprit de la personne qui a rédigé le document.

LA COUR: Tout simplement?

M^e PAPE: C'est cela, monsieur le juge.

LA COUR: Très bien.

M^e PAPE: monsieur le juge, autant que je sache, il n'y a aucun document que nous vous demanderons de considérer comme un élément de preuve tendant à faire preuve de son contenu. Je pourrais peut-être vous donner un ou deux exemples du genre de documents...

LA COUR: Tant que c'est ce que vous déclarez, vous n'avez pas besoin de donner d'exemples.

M^e PAPE: Très bien.

La déclaration de l'avocat des demandeurs relativement aux fins pour lesquelles les documents avaient été déposés au cours des semaines précédentes était tout à fait inattendue, et tout ce qu'on peut dire est qu'elle a eu l'effet d'une bombe parce qu'elle jetait une lumière complètement différente sur l'affaire. La défenderesse et ses représentants ont demandé et obtenu immédiatement un long ajournement afin de prendre les mesures nécessaires pour se conformer aux exigences de l'article 30 de la *Loi sur la preuve au Canada* et pour déterminer quels documents, outre ceux déjà déposés par les demandeurs, ils devraient produire à titre de preuve de leur contenu.

Il est ressorti des débats sur cette question qu'en réalité, les demandeurs avaient fourni à la Cour ainsi qu'à la défenderesse et à ses représentants, pendant la deuxième semaine de l'instruction, un document de 62 pages où figurait une liste de quelque 446 documents qu'ils avaient l'intention de produire comme pièces et où ils indiquaient les parties particulières de ces documents qu'ils voulaient invoquer. À la page 3 ainsi que dans d'autres sections de la liste où ils invoquent des documents précis, les demandeurs ont déclaré qu'ils utiliseraient ces documents pour établir l'intention de leur auteur et la ligne de conduite adoptée. Ils n'ont nulle part ajouté que de tels documents ne pourraient être invoqués pour prouver leur contenu. Toutefois, ce qui est plus important, cette restriction contredit directement, à de nombreux égards, l'exposé introductif où les avocats des

of the opening address was furnished to the Court and to the defendant before trial began. A cursory reading of the first 140 pages of that document revealed that over 100 documents were alluded to therein in support of various factual allegations other than state of mind or course of conduct.

It is equally important to note that, even in the written version of their final argument, exhibits which counsel for the plaintiffs, on the 28th of February, insisted had been produced for those two limited purposes, were in fact being referred to as proof of the matters mentioned in them e.g.: at page 11 of the argument, the statement of the commissioners in exhibit 1 is argued as being evidence that the Indians had no developed institutions at the time; at page 27 of the argument, in order to prove that the potential of I.R. 172 was lost to the community, that lands to the North were cut off, that good lands for the re-establishment of veterans was at a premium, etc., Exhibits 289 and 301 were referred to. These are but a few examples, and I cite them and refer to Mr. Pape's assertions of the 28th of February, for the sole purpose of making it abundantly clear that none of the exhibits submitted by the plaintiffs in-chief will be considered by me for any purpose, other than to show the state of mind and intention of the originator of the document or a course of conduct of the defendant or its agents, unless the document has been duly confirmed by a witness as being his own document or as being true or unless there has been a formal agreement on the record between counsel as to the truth of contents. This ruling, of course, does not apply to exhibit 896 which was admitted in rebuttal as to truth of contents or to exhibits such as 713 which, although originally submitted by the plaintiffs, were subsequently admitted on motion by the defendant as to proof of contents, nor would it apply to any other of the defendant's exhibits admitted for that purpose.

demandeurs ont expliqué comment ils prouveraient leur cause. La version écrite de cet exposé a été fournie à la Cour ainsi qu'à la défenderesse et à ses représentants avant le début de l'instruction. Il ressort d'une lecture rapide des 140 premières pages de ce document que les demandeurs ont invoqué plus de cent documents au soutien des diverses allégations factuelles autres que celles portant sur l'état d'esprit ou la ligne de conduite adoptée.

Il est également important de souligner que, même dans le texte écrit de l'argumentation finale des demandeurs, les pièces au sujet desquelles les avocats de ces derniers ont insisté pour dire, le 28 février, qu'elles avaient été produites pour ces deux fins restreintes, ont en fait été invoquées comme faisant preuve de leur contenu; par exemple, il est allégué à la page 11 de l'argumentation que la déclaration des commissaires figurant dans la pièce 1 constitue une preuve que les Indiens ne possédaient à l'époque aucune institution importante; on a invoqué les pièces 289 et 301 à la page 27 de l'argumentation afin de prouver que le potentiel de la R.I. 172 avait échappé à la collectivité, que les terres situées au nord avaient été retranchées, que les bonnes terres avaient été accordées à titre de prime aux anciens combattants pour leur réinstallation, etc. Il ne s'agit là que de quelques exemples; je les cite et je mentionne les déclarations faites par M^e Pape le 28 février dans le seul but d'indiquer très clairement que je ne considérerai qu'aucune des pièces soumises en preuve principale par les demandeurs n'a d'autres fins que de montrer l'état d'esprit et l'intention de l'auteur du document ou la ligne de conduite suivie par la défenderesse ou ses mandataires, sauf si un témoin a dûment confirmé qu'il est l'auteur du document ou que celui-ci est authentique, ou si les avocats se sont formellement entendus dans le dossier sur l'authenticité du document. Cette décision ne s'applique évidemment pas à la pièce 896 qui a été admise pour réfuter l'authenticité de son contenu ni à des pièces comme la pièce 713 qui, bien qu'elles aient été produites à l'origine par les demandeurs, ont été par la suite acceptées sur requête de la défenderesse comme faisant preuve de leur contenu; elle ne s'appliquera pas non plus à d'autres pièces déposées par la défenderesse à cette fin.

In some instances, during final argument, for the apparent purpose of establishing not merely the state of mind of the writer but the state of certain conditions and situations, counsel for the plaintiffs referred to opinions expressed in documents which he had insisted were not admitted for the purpose of establishing the truth of contents. It is difficult to understand the logic of how opinions referred to in such documents could be relied upon as evidence when the factual assertions do not so qualify.

Regarding the exhibits of the defendant and the purpose for which they will be considered as evidence, they have been dealt with in an order which I rendered on the 20th of March 1987. To avoid further encumbering these excessively voluminous reasons for judgment, a copy of the aforesaid order is annexed hereto as Schedule "A" [reported at [1988] 3 F.C. 3].

VIDEOTAPED COMMISSION EVIDENCE

The evidence of 7 witnesses had been taken several years previously (i.e. between 1980 and 1982) pursuant to 3 orders of this Court, mainly because the witnesses were ill and getting very old at the time and it was therefore deemed preferable by both parties that their evidence be taken while they were still available and capable of testifying.

The videotaped evidence was taken before an official court reporter who acted as commissioner, the orders having stated that either a prothonotary of the court or an official court reporter could act as commissioner.

Five of the witnesses testified in their native language and an interpreter was used in each case. It is unfortunate that they not only appeared to lack any experience as legal interpreters but that they also were members of the plaintiff Indian Bands and therefore every bit as interested personally in the outcome of the trial as their elders being interrogated. It is even more unfortunate that the questioning of these witnesses was not properly conducted by counsel. In each case the examination had merely begun when, in lieu of addressing

Dans certains cas au cours de leur argumentation finale, les avocats des demandeurs ont invoqué les opinions exprimées dans des documents au sujet desquels ils avaient affirmé qu'ils n'avaient pas été admis pour faire preuve de leur contenu et ce, apparemment pour établir non seulement l'état d'esprit de l'auteur des documents mais aussi certaines conditions et situations existantes. Il est difficile de comprendre comment il serait logique de conclure que les opinions exprimées dans de tels documents pourraient être invoquées en preuve alors que les allégations factuelles ne peuvent l'être.

Pour ce qui est des pièces présentées par la défenderesse et des fins pour lesquelles elles seront considérées comme éléments de preuve, je me suis prononcé dans une ordonnance en date du 20 mars 1987. Afin de ne pas surcharger davantage les présents motifs de jugement qui sont déjà beaucoup trop longs, une copie de cette ordonnance est jointe à l'annexe A [publiée dans [1988] 3 C.F. 3].

ENREGISTREMENT MAGNÉTOSCOPIQUE DES DÉPOSITIONS FAITES DEVANT UNE COMMISSION ROGATOIRE

Les dépositions de sept témoins ont été prises plusieurs années plus tôt (c'est-à-dire entre 1980 et 1982), conformément à trois ordonnances de cette Cour, les deux parties ayant jugé préférable d'obtenir les dépositions de ces témoins, qui étaient malades et très âgés à l'époque, pendant qu'ils étaient encore vivants et capables de témoigner.

Les dépositions enregistrées sur ruban magnétoscopique ont été faites devant un sténographe judiciaire officiel qui a agi à titre de commissaire, les ordonnances ayant prévu qu'un protonotaire de la cour ou un sténographe judiciaire officiel pouvait agir en qualité de commissaire.

Cinq des témoins ont déposé dans leur langue maternelle, et on a eu recours aux services d'un interprète dans chaque cas. Il est regrettable de constater que, non seulement ces interprètes semblaient n'avoir aucune expérience comme interprète judiciaire, mais qu'ils étaient membres des bandes indiennes demandresses et étaient donc tout aussi intéressés par le résultat de l'affaire que leurs aînés interrogés. Il est encore plus dommage que l'interrogatoire de ces témoins n'ait pas été mené selon les règles par les avocats. Dans chaque

questions directly to the witness, they proceeded to address inquiries to the interpreter indicating to the latter the substance of the information they wished to obtain from the witness. The interpreter would then address the witness following which, on many occasions, lengthy exchanges between the two would occur. The interpreter would then turn to counsel conducting the examination and deliver in a very few words what he, in turn, considered to be the net result of each conversation. This method of proceeding is of course, totally improper and would never have occurred had the commission hearings been conducted in the presence of a judge or some other legally qualified person such as a prothonotary, possessing a proper knowledge of the rules of evidence and especially of court room procedure.

For the above reasons, after listening to and viewing some of the videotaped evidence, I became quite concerned as to possible inaccuracies in both the relaying of the inquiry by the interpreter to the witness and the interpretation of the substance of the replies into English. Upon inquiring from counsel for the parties whether, in the intervening years, anyone had taken the precaution of having the interpretations verified, I was quite surprised to hear that nothing had been done in this regard. I immediately demanded that the required steps be taken to ensure that, in the case of all videotaped commission evidence, where interpretation was involved, the English record represented at least the true substance of each reply.

The end result was that, following verification by other interpreters, counsel agreed that the interpretation of the commission evidence of one of the Indian witnesses was so inaccurate that it had to be discarded and they also requested that the record regarding another one of the witnesses be modified in certain places to reflect the true meaning of the replies of the witness.

There, of course, still remains the fact that the trier of facts is entitled to hear the *verbatim* interpretation of all words spoken by a witness and to judge their substance and effect for himself and

cas, l'interrogatoire avait à peine commencé qu'au lieu de poser directement leurs questions au témoin, les avocats indiquaient à l'interprète la nature des renseignements qu'ils souhaitaient obtenir du témoin. L'interprète s'adressait ensuite au témoin et, dans de nombreux cas, il s'ensuivait une longue conversation entre ceux-ci. S'adressant ensuite à l'avocat procédant à l'interrogatoire, l'interprète rapportait en quelques mots ce qu'il considérait l'essentiel de chaque conversation. Cette façon d'agir est évidemment tout à fait contraire aux règles normales; cela ne se serait pas produit si les audiences de la commission rogatoire avaient été tenues en présence d'un juge ou d'une autre personne légalement compétente, comme un prothonotaire, connaissant les règles de preuve et, en particulier, la procédure à suivre en salle d'audience.

Pour ces motifs et après avoir entendu et vu une partie des enregistrements magnétoscopiques des dépositions, je me suis inquiété de la possibilité que des erreurs se soient glissées dans la traduction des questions au témoin par l'interprète et dans la traduction en anglais de l'essentiel des réponses données. Après avoir demandé aux avocats si, dans les années qui se sont écoulées depuis, quelqu'un a pris la précaution de faire vérifier les traductions, j'ai été fort surpris d'apprendre qu'aucune mesure n'avait été prise à cet égard. J'ai immédiatement exigé que les démarches nécessaires soient faites pour vérifier que, dans chaque cas où il a été nécessaire de recourir aux services d'un interprète au cours de l'enregistrement magnétoscopique des dépositions faites devant une commission rogatoire, la traduction anglaise reflète au moins l'essentiel de chaque réponse.

En fin de compte, par suite des vérifications faites par d'autres interprètes, les avocats ont reconnu que la traduction de la déposition de l'un des témoins indiens était si inexacte qu'il a fallu la laisser de côté et ils ont également demandé que certains passages de la transcription de la déposition de l'un des autres témoins soient modifiés afin de rendre le sens véritable des réponses de ce témoin.

Évidemment, il n'en demeure pas moins que le juge des faits a le droit d'entendre la traduction textuelle des propos d'un témoin et d'évaluer leur contenu et leurs conséquences par lui-même et non

not have them judged by an interpreter. However, since both counsel finally agreed as to the substance and since at least one of the witnesses was now deceased and some others are now too old or senile to testify, I am accepting the recorded translations of the evidence of those witnesses as accurate for the purposes of the case at bar, subject to the modifications agreed upon by counsel.

The experience of listening to videotaped evidence in lieu of *viva voce* evidence at trial has led to several observations and conclusions which possibly might be of some assistance to parties applying for an order for commission evidence of that type and to judges considering under which conditions such applications should be granted.

In the first place, the camera, as was done in the case at bar, should be focused in such a way as to give a direct frontal close-up of the witness' face. For TV viewing at the trial it should be placed in front of the judge since he would normally, as I did, have before him a transcript of the evidence and thus would not be required to take notes. He is then, in my opinion, in an even better position to concentrate on, observe and therefore come to the required conclusions regarding the demeanour of the witness, all the voice inflections and generally the manner in which the questions are answered, than in the case of testimony received in a normal way from a witness testifying orally from the witness box. At trial a witness seldom faces the judge, as a person being interrogated naturally turns towards the questioner. However, it is much more tedious and trying to listen to videotaped evidence as it lacks the life and reality of oral evidence at trial and as the judge can exercise no control whatsoever over how it is adduced. Should improper, leading, hearsay or irrelevant questions be asked or answers given, he obviously is in no position to interrupt the flow of evidence and must, at a later date, decide what answers are to be disregarded. Should the record contain many such inadmissible answers from various witnesses in a lengthy case such as the present one, the task of dealing with them *ex post facto* can become unnecessarily tedious. For that reason, as well as for proper control of interpreted evidence as previ-

par l'intermédiaire d'un interprète. Toutefois, étant donné que les avocats des deux parties se sont finalement entendus sur l'essentiel et qu'au moins un des témoins est maintenant décédé et que quelques autres sont séniles ou trop âgés pour déposer, je considère que les traductions enregistrées des dépositions de ces témoins sont exactes aux fins de l'espèce, sous réserve des modifications convenues par les avocats.

L'audition de dépositions enregistrées sur ruban magnétoscopique au lieu de témoignages oraux à l'instruction m'a amené à formuler quelques observations et conclusions qui pourraient probablement être de quelque utilité aux parties demandant une ordonnance prévoyant la tenue d'une commission rogatoire de ce genre et aux juges se demandant à quelles conditions de telles demandes devraient être accueillies.

Je dois d'abord dire que la caméra, comme ce fut le cas en l'espèce, devrait être installée de manière à prendre le visage du témoin en gros plan et de face. À l'instruction, l'écran de télévision devrait être placé en face du juge puisque normalement, comme ce fut le cas pour moi, il devrait avoir sous la main la transcription de la déposition et il ne devrait donc pas avoir besoin de prendre des notes. À mon avis, il est alors en meilleure position pour concentrer toute son attention sur le témoin, l'observer et tirer les conclusions qui s'imposent en ce qui a trait à son comportement, aux inflexions de sa voix et, en général, à la manière dont il répond aux questions, que lorsque la déposition est reçue de la manière habituelle, donnée par une personne témoignant oralement à la barre des témoins. À l'instruction, un témoin fait rarement face au juge, une personne interrogée se tournant tout naturellement vers la personne qui lui pose les questions. Toutefois, il est beaucoup plus ennuyeux et pénible d'écouter l'enregistrement magnétoscopique d'un témoignage, car celui-ci n'est pas aussi vivant et réel qu'une déposition faite de vive voix à l'instruction et le juge n'a aucune influence sur la manière dont il est présenté. Dans les cas où des questions ou réponses irrégulières, suggestives, non pertinentes ou constituant du oui-dire sont posées ou données, il ne peut évidemment pas interrompre la déposition et il doit décider plus tard quelles réponses doivent être écartées. Lorsque le dossier renferme un bon nombre de ces réponses inadmis-

ously mentioned, it is my view that commission evidence be taken wherever possible before a legally qualified and experienced person who, in certain circumstances, might well be a judge.

In the case at bar, the taking of commission evidence was not controlled and counsel generally examined the witnesses as if they were conducting examinations for discovery of parties to the action. Finally, and perhaps most importantly, in the case of the witnesses who testified in the English language, it became abundantly clear that in many instances, the transcript, although faithfully reproducing the spoken words, often failed to convey to the reader the true meaning of and conclusions to be drawn from the witnesses' answers. One can well imagine the even greater discrepancies which occur when the text of the transcript is the product of an interpretation.

Although appellate tribunals have for many years quite properly adopted the principle that one must proceed very cautiously before relying on a transcript of testimony to vary or reverse a finding of fact resulting from oral evidence, the basic validity of that principle becomes crystal clear when one listens to and observes videotaped evidence with the written text in hand. It also brings to light the obvious advantage of having videotaped evidence at hand as part of the record where any question might arise on appeal as to the validity of a finding of fact in the context of certain answers of a witness. The spoken word and the visual impression are both preserved as part of the record to explain and at times to modify and even upset the conclusions that one might otherwise come to by a mere reading of the transcript. Having read the transcripts previously, I was quite surprised to note the degree to which some of my original impressions as to the effects of the evi-

sibles de la part de divers témoins, comme c'est le cas dans une longue affaire comme l'espèce, il peut devenir inutilement pénible de s'occuper de celles-ci après le fait. Pour cette raison et, comme je a l'ai déjà dit, afin également d'exercer un meilleur contrôle sur les dépositions traduites, j'estime que le témoignage par commission rogatoire devrait être reçu, lorsque c'est possible, par une personne légalement compétente et expérimentée qui, dans b certains cas, pourrait être un juge.

En l'espèce, la prise des dépositions par la commission rogatoire n'a nullement été contrôlée et les avocats ont en général interrogé les témoins c comme ils l'auraient fait au cours des interrogatoires préalables des parties à l'action. Enfin, et ce qui est peut-être plus important, il est manifeste qu'il est arrivé souvent dans le cas des témoins qui ont déposé en anglais que la transcription, même si d elle rapportait fidèlement les paroles échangées, ne transmettait pas au lecteur le sens véritable des réponses données par les témoins et les conclusions qu'il fallait en tirer. On peut facilement imaginer les contradictions encore plus graves qui se produisent lorsque le texte de la transcription est celui de e la traduction des propos du témoin.

Bien que, depuis de nombreuses années, les cours d'appel aient appliqué, à juste titre, le principe suivant lequel il faut faire preuve d'une extrême prudence avant d'invoquer la transcription d'un témoignage pour modifier ou infirmer une conclusion de fait découlant d'un témoignage oral, la validité fondamentale de ce principe devient g claire comme le jour lorsqu'on écoute et regarde l'enregistrement magnétoscopique d'un témoignage en ayant en main le texte de celui-ci. Cela montre bien également l'avantage évident d'avoir h au dossier l'enregistrement magnétoscopique d'un témoignage lorsqu'une question se pose en appel relativement à la validité d'une question de fait dans le contexte de certaines réponses du témoin. Les propos d'un témoin et l'impression visuelle qui s'en dégage sont conservés au dossier et permettent i d'expliquer et, parfois, de modifier et même d'infirmer les conclusions qu'aurait pu autrement susciter la simple lecture de la transcription. Après avoir lu la transcription des diverses dépositions, j j'ai été très surpris de constater dans quelle mesure certaines de mes impressions originales quant aux conséquences des témoignages se sont modifiées ou

dence were either modified or completely changed upon viewing the actual videotaped recordings.

As Collier J. stated in the case of *Xerox of Canada Ltd. et al. v. IBM Canada Ltd.* (1977), 33 C.P.R. (2d) 24 (F.C.T.D.), at page 42:

It is almost trite to observe that no matter how gifted the Court reporter in recording words he cannot (and is forbidden to do so) record the pauses in answers, the hesitancy of a witness, the silent resistance to yielding the obvious, the demeanour and manner in exchanges with counsel, the tone of voice and the nuances of expression, facial and otherwise. Some of the illustrations (earlier set out) for my critical assessment may, possibly, seem unexceptional. But the print does not record the atmosphere of the arena at the particular moment.

In conclusion, it seems very obvious that all commission evidence should normally be videotaped with full sound recording. Furthermore, having regard to the considerable technical advances recently made in this field and to the fact that both sound and video-recording are now combined in one small portable camera, it might be worthwhile that, as an adjunct to the normal transcription services, some consideration be given to provision being made in the Rules of the Court for videotaping oral testimony of certain trials. The true weight, probative value and effect of the testimony would then be preserved with all the important inflections, pauses, hesitations and attitudes of the witnesses none of which are apparent in the arid transcripts, which in fact are at times so misleading.

TOPOGRAPHY

In order to better understand the evidence, the location in relation to I.R. 172 of certain places most frequently referred to, are described in Schedule "B" attached to these reasons.*

THE DUNNE-ZA CREE SOCIETY

An appreciation of the culture of the Dunne-za Cree, their way of life and degree of sophistication, as well as how the society was organized and functioned, is of some importance in determining many of the issues raised, such as how the surren-

ont complètement changé après avoir vu les enregistrements magnétoscopiques.

Comme l'a déclaré le juge Collier à la page 42 de l'affaire *Xerox of Canada Ltd. et autre c. IBM Canada Ltd.* (1977), 33 C.P.R. (2d) 24 (C.F. 1^{re} inst.):

Il est presque banal de dire que nonobstant la compétence du sténographe judiciaire, il ne peut enregistrer (et il lui est interdit de le faire) les pauses dans les réponses, les hésitations d'un témoin, les résistances silencieuses à admettre ce qui est évident, la façon d'agir et la manière de répondre à l'avocat, le ton de la voix et les nuances des expressions, faciale et autres. Quelques-uns des exemples (précités) qui ont servi de base à mon évaluation sévère peuvent sembler formels. Mais la transcription ne fait pas état de l'atmosphère qui régnait à la cour à ce moment particulier.

En conclusion, il semble évident que tous les témoignages pris par une commission rogatoire devraient être enregistrés, images et son, sur ruban magnétoscopique. Qui plus est, étant donné les progrès techniques considérables réalisés récemment dans ce domaine et vu qu'une petite caméra portative permet maintenant d'enregistrer à la fois les images et le son, il vaudrait peut-être la peine d'examiner la possibilité de prévoir dans les règles de la Cour, à titre de complément aux services ordinaires de transcription, l'enregistrement magnétoscopique de témoignages faits de vive voix au cours de certains procès. Il serait alors possible de préserver la véritable force ou valeur probante d'un témoignage ainsi que les inflexions significatives de la voix des témoins, leurs pauses, leurs hésitations et leurs attitudes, éléments qui ne ressortent pas des seules transcriptions des témoignages qui, en fait, sont parfois si trompeuses.

TOPOGRAPHIE

Afin de mieux comprendre les témoignages, l'emplacement par rapport à la R.I. 172 de certains des lieux les plus fréquemment mentionnés est décrit à l'annexe B jointe aux présents motifs*.

LA SOCIÉTÉ CRI-DUNNE-ZA

Il est important d'examiner la culture des Cri-Dunne-za, leur mode de vie et leur niveau de développement ainsi que l'organisation et le fonctionnement de leur société pour trancher un bon nombre des points litigieux soulevés, notamment

* Editor's Note: The Schedules have been omitted.

* Note de l'arrêstiste: Les annexes n'ont pas été reproduits.

der meeting of 1945 was in fact conducted, how it should have been conducted, whether the Crown owed any special duty to or stood in any special fiduciary relationship to the Dunne-za Cree, the extent of their comprehension and whether or not they consented to the surrender with sufficient knowledge of the basic relevant facts.

A considerable amount of testimony was heard on their way of life, culture and other related matters from the Indian witnesses themselves and other witnesses called both by plaintiffs and the defendant including an expert anthropologist called by the plaintiffs. It is not my intention to comment extensively on these matters, but to merely touch on some of the highlights. The evidence of the anthropologist will be dealt with more fully at a later stage.

The Dunne-za Cree who, for some centuries, had been living in northeastern B.C. and were originally engaged exclusively in hunting, fishing and the gathering of berries, had also, for many years previous to the 1940s, added trapping as an integral part of their livelihood. Although they remained hunters and gatherers, trapping in fact had become the principal means of obtaining money or credit and therefore goods, clothing, amenities and supplies from the white man.

From 1930, the Provincial government of British Columbia required that all trappers, including Indians, confine their trapping activities to registered trap lines. By 1945, the Department of Indian Affairs had managed to obtain from B.C. the registration of several trap lines all situated together in a large area to the north and northeast of I.R. 172, for the exclusive use of the Dunne-za Cree. One further line was obtained in 1949. The various hunting, fishing, trapping and berry picking areas of the two Bands are indicated on maps filed at trial as Exhibits 919 to 928 inclusively. Although these maps show the areas exploited during 1978 and 1979, they appear, generally speaking, to represent approximately the same areas as those used in the 1940s. Although they hunted all year round, their trapping activities took place in the fall and winter and also extended

comment s'est effectivement déroulée l'assemblée de la cession de 1945 et quel aurait dû en être le déroulement, l'existence pour la Couronne d'une obligation spéciale ou d'un rapport fiduciaire spécial entre elle et les Cri-Dunne-za, la portée de cette obligation ou de ce rapport et la question de savoir si les Indiens ont consenti à la cession en toute connaissance des faits pertinents.

Les témoins indiens ainsi que d'autres témoins cités par les demandeurs et la défenderesse, notamment un anthropologue cité par les demandeurs, ont abondamment parlé du mode de vie des Indiens, de leur culture ainsi que d'autres questions connexes. Je n'ai pas l'intention de m'étendre longuement sur ces questions, mais d'effleurer simplement certains des points les plus importants et j'examinerai la déposition de l'anthropologue plus loin.

Les Cri-Dunne-za qui, pendant quelques siècles, ont habité au nord-est de la Colombie-Britannique et dont les principales activités étaient à l'origine la chasse, la pêche et la cueillette des fruits sauvages, ont également ajouté le piégeage à leurs moyens de subsistance, de nombreuses années avant les années 1940. Même s'ils ont continué à chasser et à cueillir des fruits sauvages, le piégeage est effectivement devenu pour eux le principal moyen de se procurer de l'argent ou d'obtenir du crédit et, par conséquent, d'acheter à l'homme blanc des marchandises, des vêtements, des objets de luxe et des provisions.

À compter de 1930, le gouvernement provincial de la Colombie-Britannique a exigé que tous les trappeurs, y compris les Indiens, limitent leur piégeage aux sentiers de piégeage enregistrés. En 1945, le ministère des Affaires indiennes avait réussi à obtenir du gouvernement de la Colombie-Britannique, pour une vaste région située au nord-nord-est de la R.I. 172, l'enregistrement de plusieurs sentiers de piégeage réservés à l'usage exclusif des Cri-Dunne-za. Un autre sentier a été obtenu en 1949. Les diverses régions où les deux Bandes se livraient à la chasse, à la pêche, au piégeage et à la cueillette des fruits sauvages sont indiquées sur des cartes qui ont été déposées à l'instruction comme pièces 919 à 928 inclusivement. Bien que ces cartes indiquent les régions exploitées en 1978 et en 1979, il semble en général que ces régions soient approximativement les

until the middle of May for beaver furs. They trapped beaver, muskrat, lynx, fisher, squirrel and other fur bearing animals and hunted such animals as bear, moose, deer, rabbit and porcupine as well as grouse and other game birds. They would generally eat the flesh of all animals trapped and hunted except lynx, marten and fisher.

They would all meet every summer for a few weeks in a summer gathering place where they would rest, visit, exchange information, play games, engage in various activities and generally enjoy and benefit from various social exchanges.

Their life was essentially a nomadic one. They hunted and trapped in small hunting groups of between 3 and 10 male members. The women also took part in the hunting and trapping activities. Each group recognized one Indian, generally the eldest or, at times, the most skilful hunter, as the leader. There were 7 such groups. They would follow their trap lines during the trapping season. During the remainder of the year, they would spend some time at their summer gathering place but most of the time gathering berries and looking for game in their various hunting areas. Some winter cabins were built along the various trap lines. In the summer they originally used tepees and, later on, tents.

In addition to the group leaders, there was in the 1940s a Chief of the Band, Chief Succona and also a Headman or Sub-Chief, one Joe Apsassin. Until approximately 1954, the Chiefs were appointed for life. Since then, they are elected pursuant to procedures laid down by the Department of Indian Affairs. I find that, even when the Chiefs were appointed for life, they could nevertheless be removed if they were deemed to no longer be wise or good as Chiefs and another Chief could be chosen. The witness John Davis at first denied this but then subsequently admitted it upon being faced, on cross-examination, with his previous testimony given on commission.

mêmes que celles utilisées pendant les années 1940. Ces Indiens chassaient pendant toute l'année; toutefois, ils trappaient pendant l'automne et l'hiver et jusqu'à la mi-mai pour attraper des castors. Ils attrapaient au piège des castors, des rats musqués, des lynx, des pékans, des écureuils et d'autres animaux à fourrure et ils chassaient l'ours, l'orignal, le chevreuil, le lièvre et le porc-épic ainsi que la perdrix et d'autres gibiers. En général, il mangeaient les animaux qu'ils avaient chassés ou pris au piège, à l'exception des lynx, des marteaux et des pékans.

Ils se rencontraient chaque été pendant quelques semaines dans un lieu de rassemblement estival où ils se reposaient, se rendaient visite, échangeaient des connaissances, s'amusaient, participaient à diverses activités et, en général, profitaient de divers échanges sociaux.

Ils vivaient essentiellement comme des nomades. Ils chassaient et trappaient par petits groupes de trois à dix hommes. Les femmes participaient aussi à la chasse et au piégeage. Chaque groupe choisissait un chef, en général le membre le plus âgé ou, parfois, le chasseur le plus habile. Il existait sept groupes de ce genre. Ils suivaient leurs sentiers de piégeage pendant la saison du trappage. Le reste de l'année, ils passaient quelque temps dans leur lieu de rassemblement estival, mais la plupart du temps ils cueillaient des fruits sauvages et cherchaient du gibier dans leurs diverses régions de chasse. Ils construisaient quelques habitations d'hiver le long des sentiers de piégeage. Pendant l'été, ils utilisaient à l'origine des tipis et plus tard, des tentes.

En plus des chefs de groupes, il y avait aussi dans les années 1940 un chef de bande, le chef Succona, ainsi qu'un sous-chef, un certain Joe Apsassin. Jusqu'en 1954 environ, les chefs étaient nommés à vie. Depuis, ils sont élus conformément aux procédures établies par le ministère des Affaires indiennes. Je constate que, même lorsqu'ils étaient nommés à vie, les chefs pouvaient néanmoins être destitués si on jugeait qu'ils ne remplissaient plus leurs tâches de chef avec sagesse ou efficacité et alors, un autre chef pouvait être choisi. Le témoin John Davis a tout d'abord nié ce fait, mais il l'a ensuite admis lorsqu'au moment du contre-interrogatoire, on lui a rappelé sa déposition antérieure devant une commission rogatoire.

In the 1940s the Dunne-za Cree mixed very little with white society although white settlers were gradually moving north and their contacts with white trappers and with some of the farmers settling in the general area were becoming somewhat more frequent. They maintained contact with the Department of Indian Affairs through the Indian Agent whose office was situated in Fort Saint John. The Indian Agent would, throughout the year, visit the Indians from time to time and would also see them when they came to Fort Saint John to trade their furs and would also meet with them at treaty time wherever treaty money was to be paid.

There seems to be little doubt that, in the 1940s, the Dunne-za Cree did not possess the required skills to engage in any financial planning or budgeting or to generally manage their affairs from a financial standpoint. They had no true organized system of government or real law makers. They also lacked to a great extent the ability to plan or manage, with any degree of success, activities or undertakings other than fishing, hunting and trapping. It seems that many of their decisions even regarding these activities, could better be described as spontaneous or instinctive rather than deliberately planned. The witness Johnson-Watson testified that, even during the years 1975 and 1978 when he was district manager for the Fort Saint John district office, he found that the Dunne-za Cree were greatly limited in the ability to manage the financial aspect of their affairs, that they were not successful farmers and that they still relied to a large extent on advice and guidance from the Department's staff. Most of the other bands were considerably more advanced in these areas. The society was individualistic, having to rely on one another and the members were not inclined to be competitive.

NATURE OF TITLE, RELATIONSHIP AND DUTY

The leading case pertaining to the nature of the interest of status Indians in lands and of the relationship existing between them and the Crown is, without a doubt, the case of *Guerin et al. v. The Queen et al.*, [1984] 2 S.C.R. 335.

Dans les années 1940, les Cri-Dunne-za se mêlaient très peu à la société blanche même si des colons blancs se déplaçaient graduellement vers le nord et que leurs contacts avec des trappeurs blancs et quelques fermiers blancs s'installant dans la région devenaient un peu plus fréquents. Ils maintenaient le contact avec le ministère des Affaires indiennes par l'intermédiaire de l'agent des Indiens dont le bureau était situé à Fort Saint John. Pendant l'année, l'agent des Indiens leur rendait visite à l'occasion et il les rencontrait lorsqu'ils venaient à Fort Saint John pour vendre leurs fourrures et au moment de la conclusion de traités, chaque fois que des sommes étaient payables en vertu d'un traité.

Il semble presque indubitable que, dans les années 1940, les Cri-Dunne-za n'avaient pas les compétences nécessaires pour s'occuper de planification financière ou de l'établissement d'un budget ni, en général, d'administrer financièrement leurs affaires. Aucune véritable structure gouvernementale n'était en place et personne n'était chargé de légiférer. Ils n'avaient pas non plus la capacité d'organiser ou de diriger, avec plus ou moins de succès, des activités ou entreprises autres que la pêche, la chasse et le piégeage. Il semble qu'on pourrait qualifier d'instinctives ou de spontanées plutôt que de volontairement planifiées un bon nombre de leurs décisions relatives à ces activités. Le témoin Johnson-Watson a déclaré dans sa déposition que, même pendant les années 1975 à 1978 lorsqu'il était directeur régional du bureau régional de Fort Saint John, il a constaté que les Cri-Dunne-za étaient fort peu compétents pour administrer leurs affaires financières, qu'ils n'étaient pas de bons fermiers et qu'ils dépendaient encore dans une large mesure des conseils et avis du personnel du Ministère. La plupart des autres bandes indiennes étaient sensiblement plus avancées dans ces domaines. Leur société était individualiste, chaque membre ayant à compter l'un sur l'autre et ayant peu l'esprit de compétition.

NATURE DU TITRE, DU RAPPORT ET DE L'OBLIGATION

L'arrêt faisant autorité relativement à la nature du droit des Indiens inscrits sur des terres et au rapport existant entre ceux-ci et la Couronne est sans contredit *Guerin et autres c. La Reine et autre*, [1984] 2 R.C.S. 335.

All of the judges recognized and reaffirmed that the Indians' interest in real property was not a legal property interest but merely a "personal and usufructuary interest", as laid down by the Privy Council in the case of *St. Catherine's Milling and Lumber Company v. Reg.* (1888), 14 App. Cas. 46, and recently approved by the Supreme Court in *Smith v. The Queen*, [1983] 1 S.C.R. 554.

In her reasons, concurred in by Ritchie and McIntyre JJ., Wilson J. stated that, although subsection 18(1) of the *Indian Act* [R.S.C. 1952, c. 149] did not *per se* create a fiduciary obligation on the part of the Crown, it did recognize the existence of such a relationship which has its roots in aboriginal title and also did acknowledge the historic reality that Indians have a beneficial interest in reserves and that the Crown has a responsibility to protect it. The Crown does not, previous to surrender, hold the land in trust. However, upon surrender the fiduciary relationship which previously existed at large is crystalized into an express trust.

The Chief Justice [then Puisne Judge], whose reasons were concurred in by three of the Judges namely, Beetz, Chouinard and Lamer JJ., took a somewhat different view of the relationship.

The nature of the Indians' interest is that it is inalienable except upon surrender and places upon the Crown the equitable obligation, enforceable at law, to deal with the land for the benefit of the Indians. They agreed with Le Dain J., who had delivered the judgment in that case on behalf of the Federal Court of Appeal [[1983] 2 F.C. 656; (1982), 143 D.L.R. (3d) 416], that the Crown does not hold land in trust for the Indians after surrender. They did not agree that, at the time of surrender, the Crown's obligation crystallized into a trust either express or implied. They felt that upon unconditional surrender, the Indians' right in the land disappears. No property interest is transferred which could constitute the *res* of the trust nor is there a constructive trust created by the surrender. The Crown must however hold the surrendered land for the use and benefit of the surrendering band and that obligation is [at page 387] "subject to principles very similar to those which govern the law of trusts concerning for example,

Tous les juges ont reconnu et reconfirmé dans cet arrêt que le droit des Indiens sur des biens immobiliers n'était pas un droit de propriété reconnu par la loi, mais simplement un [TRADUCTION] «droit personnel, de la nature d'un usufruit», comme l'a statué le Conseil Privé dans l'affaire *St. Catherine's Milling and Lumber Company v. Reg.* (1888), 14 App. Cas. 46, à laquelle a souscrit récemment la Cour suprême dans l'arrêt *Smith c. La Reine*, [1983] 1 R.C.S. 554.

Dans ses motifs auxquels ont souscrit les juges Ritchie et McIntyre, le juge Wilson a déclaré que même si le paragraphe 18(1) de la *Loi sur les Indiens* [S.R.C. 1952, chap. 149] n'imposait pas en soi à la Couronne une obligation de fiduciaire, il reconnaissait l'existence d'une telle obligation ayant sa source dans le titre aborigène et il reconnaissait également la réalité historique que les Indiens ont un droit de bénéficiaire sur les réserves et qu'il incombe à la Couronne de protéger ce droit. La Couronne ne détient pas les terres en fiducie, avant la cession. Toutefois, au moment de la cession, le rapport fiduciaire général qui existait préalablement se cristallise en fiducie explicite.

Le juge en chef [alors juge puîné], dont les motifs ont reçu l'appui des juges Beetz, Chouinard et Lamer, a adopté un point de vue un peu différent en ce qui concerne ce rapport.

Le droit des Indiens sur les terres est inaliénable, sauf dans le cas d'une cession, et il impose par sa nature à la Couronne une obligation d'*equity*, exécutoire en justice, d'utiliser ces terres au profit des Indiens. Tout comme le juge Le Dain, qui avait prononcé le jugement de la Cour d'appel fédérale [(1982), 143 D.L.R. (3d) 416] dans cette affaire, ces juges estimaient que la Couronne ne possède pas les terres en fiducie pour les Indiens après la cession. Ils n'étaient toutefois pas d'accord pour dire qu'au moment de la cession, l'obligation de la Couronne se cristallisait d'une manière ou d'une autre en fiducie explicite ou implicite. Ils étaient d'avis que, par suite d'une cession inconditionnelle, il y a disparition du droit des Indiens sur le bien-fonds. Aucun droit de propriété pouvant constituer l'objet de la fiducie n'est transféré et la cession n'engendre pas non plus de fiducie par interprétation. Toutefois, la Couronne doit détenir les terres à l'usage et au profit de la bande qui les a cédées et cette obligation est [à la page 387]

the measure of damages for breach". They also stated that, although the relationship does bear some similarity to an agency, it does not constitute an agency at law, as the Crown's authority to act is not based on contract and the band is not a party to the ultimate disposal of the land, which would be the case if there were an agency relationship.

After analyzing the effect of the *Royal Proclamation, 1763* [R.S.C. 1970, Appendix II, No. 1], the reasons of the Chief Justice contained the following statement at page 383:

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians. . . ."

It appears clear however that the special fiduciary relationship arises upon surrender. The Chief Justice states at page 382:

... it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of the Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading. [Emphasis added.]

Estey J., for his part, chose to dispose of the case strictly on the basis of an agency relationship, without considering the problem of whether there existed any trust, fiduciary relationship or pre-surrender duty.

I feel that the views expressed by the Chief Justice and the three Justices who concurred, are binding upon me and also appear to be the most plausible. This approach has since been followed by Urie J. in the appeal of *Kruger v. The Queen*, reported in [1986] 1 F.C. 3 (abridged); (1985), 58

«soumise à des principes très semblables à ceux qui régissent le droit des fiducies, en ce qui concerne notamment le montant des dommages-intérêts en cas de manquement». Les juges ont également ajouté que, même si le rapport fiduciaire présente une certaine analogie avec le mandat, il n'y a pas mandat suivant la loi, car le pouvoir d'agir de la Couronne n'a aucun fondement contractuel et la bande indienne n'est pas partie à la vente finalement conclue, comme ce serait le cas s'il y avait mandat.

Après avoir analysé les conséquences de la *Proclamation royale, 1763* [S.R.C. 1970, Appendice II, n° 1], le juge en chef déclare à la page 383 de ses motifs de jugement:

Cette exigence d'une cession vise manifestement à interposer Sa Majesté entre les Indiens et tout acheteur ou locataire éventuel de leurs terres, de manière à empêcher que les Indiens se fassent exploiter. Cet objet ressort nettement de la Proclamation royale elle-même qui porte, au début de la disposition qui fait de Sa Majesté un intermédiaire, «qu'il s'est commis des fraudes et des abus dans les achats de terres des sauvages au préjudice de Nos intérêts et au grand mécontentement de ces derniers . . . »

Cependant, il semble évident que le rapport fiduciaire spécial naît lorsqu'il y a cession. Le juge en chef dit à la page 382:

... mais il est également vrai, comme nous allons le constater plus loin, que ce droit, lorsqu'il est cédé, a pour effet d'imposer à Sa Majesté l'obligation de fiduciaire particulière d'utiliser les terres au profit des Indiens qui les ont cédées. Ces deux aspects du titre indien vont de pair, car, en stipulant que le droit des Indiens ne peut être aliéné qu'à elle-même, Sa Majesté voulait au départ être mieux en mesure de représenter les Indiens dans les négociations avec des tiers. Le droit des Indiens se distingue donc surtout par son inaliénabilité générale et par le fait que Sa Majesté est tenue d'administrer les terres pour le compte des Indiens lorsqu'il y a eu cession de ce droit. Toute description du titre indien qui va plus loin que ces deux éléments est superflue et risque d'induire en erreur. [C'est moi qui souligne.]

Pour sa part, le juge Estey a choisi de trancher l'action en fonction uniquement du rapport mandant-mandataire, sans se demander s'il existait une fiducie, un rapport fiduciaire ou une obligation antérieure à la cession.

J'estime être lié par les opinions exprimées par le juge en chef et les trois juges qui y ont souscrit, opinions qui me paraissent également être les plus plausibles. Ce point de vue a depuis été suivi par le juge Urie dans l'appel interjeté dans l'affaire *Kruger c. La Reine*, [1986] 1 C.F. 3 (version

N.R. 241 (C.A.), at pages 47-48 F.C.; 257 N.R., paras. 52 and 53. With the exception of any special obligations which might be created by treaty, there is no special fiduciary relationship or duty owed by the Crown with regard to reserve lands previous to surrender nor, *a fortiori*, is there any remaining after the surrendered lands have been transferred and disposed of subsequently. The duty from that moment attaches to the proceeds of disposition. There might indeed exist a moral, social or political obligation to take special care of the Indians and to protect them (especially those bands who are not advanced educationally, socially or politically) from the selfishness, cupidity, cunning, stratagems and trickery of the white man. That type of political obligation, unenforceable at law, which the Federal Court of Appeal in the *Guerin* case (*supra*) felt should apply to the Crown following surrender (which concept was, of course, rejected by the Supreme Court), would be applicable previous to surrender. This legal issue is of some importance in the present case since counsel for the plaintiffs argued that, previous to the surrender and also following final disposition of the lands the Crown was in breach of certain alleged fiduciary duties such as the duty to take action to prevent some white farmers from grazing cattle on certain parts of the reserve.

Although, as previously stated, three justices of the Supreme Court (Ritchie, McIntyre and Wilson JJ.) held that there existed, previous to surrender, a fiduciary duty regarding the lands, neither they nor anyone else at any time suggested that there might continue to subsist some general continuing legally recognized fiduciary duty regarding the lands, once they have been disposed of.

The *Indian Act* does impose certain restrictions on the actions and on the rights of status Indians. Except insofar as those specific restrictions might prevent them from acting freely, the Indians are not to be treated at law somehow as if they were not *sui juris* such as infants or persons incapable of managing their own affairs, which would cause

abrégée); (1985), 58 N.R. 241 (C.A.), pages 47 et 48 C.F.; paragraphes 52 et 53, page 257 N.R. À l'exception des obligations spéciales que peuvent créer les traités, la Couronne n'est tenue par aucune obligation ou rapport fiduciaire spécial en ce qui concerne les terres des réserves avant qu'elles ne soient cédées et, *a fortiori*, elle ne l'est pas non plus une fois que les terres cédées ont été transférées et subséquemment vendues. L'obligation naissant à ce moment concerne les produits de la vente. Il est possible qu'il existe effectivement une obligation morale, sociale ou politique de prendre particulièrement soin des Indiens et de les protéger (en particulier, les bandes indiennes qui ne sont pas avancées aux points de vue social et politique ni en ce qui concerne l'éducation) contre l'égoïsme, la cupidité, les ruses, les stratagèmes et les supercheries de l'homme blanc. Ce genre d'obligation politique, non exécutoire en justice, qui, selon la Cour d'appel fédérale, s'appliquait à la Couronne dans l'arrêt *Guerin* (précité) par suite de la cession (principe qui a évidemment été rejeté par la Cour suprême), serait applicable avant que la cession soit effectuée. Cette question juridique revêt une certaine importance en l'espèce, les avocats des demandeurs ayant allégué qu'avant la cession et par suite de la vente finalement conclue relativement aux terres cédées, la Couronne a violé certaines des obligations fiduciaires auxquelles elle aurait été tenue, par exemple l'obligation de prendre des mesures pour empêcher certains fermiers blancs de faire paître leurs troupeaux dans certaines parties de la réserve.

Même si, je le répète, trois juges de la Cour suprême (les juges Ritchie, McIntyre et Wilson) ont statué qu'il existait une obligation fiduciaire à l'égard des terres avant qu'elles ne soient cédées, ni ces juges ni personne d'autre n'a laissé entendre qu'il serait possible qu'une obligation fiduciaire générale reconnue par la loi continue à exister en ce qui concerne les terres une fois qu'elles ont été vendues ou autrement aliénées.

La *Loi sur les Indiens* apporte certaines restrictions aux actes et aux droits des Indiens inscrits. Sauf dans la mesure où ces restrictions particulières pourraient les empêcher d'agir librement, les Indiens ne doivent pas être légalement traités comme s'ils étaient incapables d'exercer pleinement leurs droits, comme le sont les mineurs ou les

some legally enforceable fiduciary duty to arise on the part of the Crown to protect them or to take action on their behalf. They are fully entitled to avail themselves of federal and provincial laws and of our judicial system as a whole to enforce their rights, as they are indeed doing in the case at bar.

Finally, the provisions of our Constitution are of no assistance to the plaintiffs on this issue. The *Indian Act* was passed pursuant to the exclusive jurisdiction to do so granted to the Parliament of Canada by subsection 91(24) of the *Constitution Act 1867*, [30 & 31 Vict., c. 3 (U.K.) [R.S.C. 1970, Appendix II, No. 5] (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.) Schedule to the *Constitution Act, 1982*, Item 1)]. This does not carry with it the legal obligation to legislate or to carry out programs for the benefit of Indians any more than the existence of various disadvantaged groups in society creates a general legally enforceable duty on the part of governments to care for those groups although there is of course a moral and political duty to do so in a democratic society where the welfare of the individual is regarded as paramount.

I must hasten to state however, that, wherever advice is sought or whenever it is proffered, regardless of whether or not it is sought or whether action is taken, there exists a duty on the Crown to take reasonable care in offering the advice to or in taking any action on behalf of the Indians. Whether or not reasonable care and prudence has been exercised will of course depend on all of the circumstances of the case at that time and, among those circumstances, one must of course include as most important any lack of awareness, knowledge, comprehension, sophistication, ingenuity or resourcefulness on the part of the Indians of which the Crown might reasonably be expected to be aware. Since this situation exists in the case at bar, the duty on the Crown is an onerous one, a breach of which will bring into play the appropriate legal and equitable remedies.

Where there does exist a true fiduciary relationship such as in the case at bar, following the 1945 surrender, the same high degree of prudence and

personnes incapables de s'occuper de leurs affaires, ce qui créerait pour la Couronne une obligation fiduciaire, exécutoire en justice, de les protéger ou d'intenter des actions en leur nom. Ils sont pleinement habilités à recourir aux lois fédérales et provinciales ainsi qu'à notre système judiciaire pour faire valoir leurs droits, comme ils le font d'ailleurs en l'espèce.

Enfin, les dispositions de la Constitution ne sont d'aucune utilité pour les demandeurs sur ce point. La *Loi sur les Indiens* a été adoptée en vertu du pouvoir exclusif conféré au Parlement du Canada par le paragraphe 91(24) de la *Loi constitutionnelle de 1867* [30 & 31 Vict., chap. 3 (R.-U.) [S.C.R. 1970, Appendice II, n° 5] (mod. par la *Loi de 1982 sur le Canada*, 1982, chap. 11 (R.-U.), annexe de la *Loi constitutionnelle de 1982*, n° 1)]. Cette disposition ne comporte pas plus l'obligation légale de légiférer ou de mettre en œuvre des programmes pour le bénéfice des Indiens que l'existence de divers groupes défavorisés dans la société crée pour les gouvernements une obligation générale, exécutoire en justice, de prendre soin de ces groupes, même s'il existe évidemment une obligation morale et politique de le faire dans une société démocratique où le bien-être de l'individu est jugé primordial.

Toutefois, je m'empresse d'ajouter que chaque fois que des conseils sont demandés ou qu'ils sont offerts, qu'ils aient été sollicités ou non, ou lorsqu'une action est intentée, la Couronne est tenue de faire preuve d'une prudence raisonnable en offrant ces conseils aux Indiens ou en intentant une action en leur nom. La question de savoir si la Couronne a fait preuve de prudence ou de diligence raisonnable dépendra évidemment de toutes les circonstances de l'affaire; parmi ces circonstances, il faut bien sûr inclure l'inconscience, l'ignorance, le manque de compréhension, de subtilité, d'ingéniosité ou de ressources de la part des Indiens, dont on peut raisonnablement s'attendre que la Couronne soit au courant. Étant donné qu'il s'agit d'une telle situation en l'espèce, la Couronne est tenue d'une lourde obligation dont la violation permettra l'utilisation des recours en *equity* et de ceux prévus dans la loi.

Lorsqu'il existe un véritable rapport fiduciaire, comme c'est le cas en l'espèce par suite de la cession de 1945, il faut faire preuve du même

care must be exercised in dealing with the subject-matter to which the fiduciary duty relates, as in the case of a true trust (refer *Guerin et al. v. The Queen et al.*, *supra*, at page 376). The test to be applied is an objective one: good faith and a clear conscience will not suffice. It is also similar to a trust in another respect: where a trustee is in any way interested in the subject-matter of the trust, there rests upon him a special onus of establishing that all of the rights and interests both present and future of the beneficiary are protected and are given full and absolute priority and that the subject-matter is dealt with for the latter's benefit and to the exclusion of the trustee's interest to the extent that there might be a conflict. A similar onus rests on the Crown in the case at bar regarding the equitable obligation which it owed the plaintiffs.

EDITOR'S NOTE

With the exception of a one-year exploration permit granted in 1940, no oil, gas or other mineral leases in respect of I.R. 172 were sought or granted until several years after the transfer to The Director, The Veterans' Land Act in 1948. By that year, no oil or gas field had been discovered closer than 340 miles away (Leduc) except for a small gas field at Pouce Coupé some 50 miles distant on the Alberta-B.C. border. As late as 1981 there was no oil field in the Pouce Coupé area. No actual exploration for gas or oil was done on I.R. 172 prior to 1976. Nor did I.R. 172 lie within any of the 14 large areas of land in north-eastern British Columbia targeted for oil exploration in 1950 by a consortium of major oil companies.

It was in 1976 that there was a major oil find, in an unusual trap between rock layers, on I.R. 172. The opinion of the plaintiffs' expert, that "by the 1940s it would have been obvious even to a casual observer that the Peace River area of B.C. had attracted serious commercial interest for oil and gas", could not be accepted as the evidence did not support that conclusion. The opinion of the defendant's geologist was to be preferred. The excitement over the discovery at Leduc in 1947 was restricted to the areas around Edmon-

degré de prudence et de diligence pour traiter de l'objet de l'obligation fiduciaire que lorsqu'il s'agit d'une véritable fiducie (voir l'arrêt *Guerin et autres c. La Reine et autre*, précité, page 376). Le critère applicable est un critère objectif: la bonne foi et une conscience tranquille ne suffiront pas. Il existe une autre similitude avec une fiducie: lorsqu'un fiduciaire possède un droit quelconque relativement à l'objet d'une fiducie, il lui incombe de prouver que tous les droits présents et futurs du bénéficiaire sont protégés et qu'il leur accorde priorité absolue, et qu'il s'occupe de l'objet de la fiducie pour l'avantage du bénéficiaire et à l'exclusion de son propre droit dans la mesure où il peut y avoir un conflit entre ceux-ci. En l'espèce, une obligation semblable incombe à la Couronne en ce qui concerne l'obligation d'*equity* à laquelle elle est tenue à l'égard des demandeurs.

NOTE DE L'ARRÉTISTE

À l'exception d'un permis d'exploration d'un an accordé en 1940, aucun bail n'a été consenti ni demandé relativement à l'exploitation pétrolière, gazière ou minière de la R.I. 172 si ce n'est plusieurs années après le transfert au Directeur des terres destinées aux anciens combattants, en 1948. À cette époque, aucun champ pétrolier ou minier n'avait été découvert à moins de 340 milles (Leduc), sauf un petit champ gazier à Pouce Coupé, à quelque 50 milles de là, sur la frontière Alberta-Colombie-Britannique. Jusqu'en 1981, aucun gisement pétrolier n'a été relevé dans la région Pouce Coupé. Aucune exploration n'a été effectuée en vue de trouver du gaz ou du pétrole dans la R.I. 172 avant 1976. La R.I. 172 n'était pas non plus comprise dans les quatorze grandes régions situées au nord-est de la Colombie-Britannique et choisies comme lieux d'exploration pétrolière en 1950 par un consortium pétrolier.

Ce n'est qu'en 1976 que s'est produite la principale découverte de pétrole dans la R.I. 172, dans une poche anormale entre les couches de roche. L'opinion de l'expert des demandeurs, selon laquelle [TRADUCTION] «dans les années 1940, il aurait été évident, même pour un simple observateur, que la région de la Peace River en Colombie-Britannique avait suscité un intérêt commercial important en ce qui concerne le pétrole et le gaz», n'a pu être retenue parce que la preuve ne permettait tout simplement pas d'en

ton and Calgary and had little if any effect in British Columbia. In that year the question was not considered as being whether there was oil on I.R. 172 but whether there were any economic oil or gas accumulations anywhere in northeastern B.C. The opinion of the defendant's expert was not destroyed by the evidence that, in 1950, Sun Oil Company had acquired exploration rights in respect of I.R. 172. That company had risked a limited amount of money but nothing resulted therefrom for many years. There was evidence that the oil discovery, made a quarter century after 1947, was accidental and that the accumulation was so unique that it could not have been anticipated in 1948. Until that discovery, the mineral rights under I.R. 172 would have carried a modest value. That opinion was supported by the fact that mineral rights were apparently not considered worthy of mention in the sale to the Director and in the land sales to veterans.

I find that, taking into account the fiduciary relationship then existing between Her Majesty the Queen and the plaintiffs, none of her officers, servants or agents, exercising due care, consideration and attention in the discharge of those fiduciary duties, could reasonably be expected to have anticipated at any time during 1948 or previously that there would be any real value attached to potential mineral rights under I.R. 172 or that there would be any reasonably foreseeable advantage in retaining them.

TREATY 8

The plaintiffs formally adhered to Treaty 8 in May 1900 (Exhibit 1 at trial). In 1916, pursuant to that Treaty, they obtained I.R. 172 which comprised 18,168 acres. The three new reserves which they eventually received in 1950 after surrender and disposal of I.R. 172, comprised some 6,194 acres. They claim to be entitled to the difference, that is 11,974 acres, of new reserves as a loss of the benefits of Treaty 8 because they allege that,

arriver à cette conclusion. L'opinion du géologue de la défenderesse devait être retenue. L'intérêt qu'a suscité la découverte du champ Leduc en 1947 n'a touché que les régions situées près d'Edmonton et de Calgary et n'a eu peu ou pas d'effet en Colombie-Britannique. Cette année-là, la question n'était pas de savoir s'il y avait du pétrole dans la R.I. 172, mais plutôt s'il était possible de trouver des gisements rentables de pétrole ou de gaz naturel, où que ce soit dans la région nord-est de la Colombie-Britannique. L'opinion de l'expert de la défenderesse n'a pas été détruite par la preuve que, en 1950, Sun Oil Company avait acquis des droits d'exploration relativement à la R.I. 172. Cette société avait risqué une somme limitée mais n'en a rien tiré pendant de nombreuses années. Il a été démontré que la découverte de pétrole, un quart de siècle après 1947, était l'effet du hasard et que le gisement était exceptionnel, aussi ne pouvait-il en aucune façon avoir été prévu en 1948. Jusqu'à cette découverte, les droits miniers afférents à la R.I. 172 avaient une valeur minime. D'ailleurs, le fait que les droits miniers n'aient jamais été mentionnés dans la vente au Directeur ou dans les ventes aux anciens combattants vient confirmer cette opinion.

J'estime que, si on tient compte du rapport fiduciaire liant alors Sa Majesté la Reine aux demandeurs, on ne pouvait raisonnablement s'attendre à ce qu'aucun des fonctionnaires, préposés ou mandataires de cette dernière, exerçant toute la prudence et l'attention voulues dans l'exécution de ses obligations fiduciaires, ait pu prévoir à quelque moment que ce soit, en 1948 ou avant, que les droits miniers éventuels afférents à la R.I. 172 auraient une valeur réelle ou qu'il y aurait un avantage raisonnablement prévisible à conserver ces droits.

TRAITÉ N° 8

Les demandeurs ont officiellement adhéré au Traité n° 8 en mai 1900 (pièce 1 déposée à l'instruction). Conformément à ce traité, ils ont obtenu en 1916 la R.I. 172 dont la superficie était de 18 168 acres. Les trois nouvelles réserves qu'ils ont finalement obtenues en 1950 après la cession et la vente de la R.I. 172 couvraient quelque 6 194 acres. Les demandeurs prétendent avoir droit à la différence comme nouvelles réserves, soit une

pursuant to its terms, the Crown was obliged to secure for them in perpetuity a fair portion of the ceded treaty territory.

There is no dispute over the fact that when the plaintiffs received the 18,168 acres, they received their full reserve land entitlement under the Treaty. The three paragraphs dealing with reserve land rights are to be found at the bottom of page 12 and top of page 13 of the Treaty. They read as follows:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a promise as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

In *The Queen v. George*, [1966] S.C.R. 267, at page 279, we find the following statement of the law regarding an 1827 treaty:

We should, I think endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of

superficie de 11 974 acres, pour compenser la perte des avantages qui leur étaient garantis par le Traité n° 8 parce qu'ils allèguent que, selon le libellé du Traité, la Couronne était obligée de mettre à part pour eux, à perpétuité, une juste partie du territoire cédé par traité.

Les parties ne contestent pas que, lorsque les demandeurs ont reçu les 18 168 acres de terre, ils ont obtenu un droit absolu sur les terres de la réserve conformément au Traité. Les trois paragraphes du Traité traitant des droits afférents aux terres de la réserve se trouvent à la page 15; en voici le texte:

Et Sa Majesté la Reine par les présentes convient et s'oblige de mettre à part des réserves pour les bandes qui en désireront, pourvu que ces réserves n'excèdent pas en tout un mille carré pour chaque famille de cinq personnes pour tel nombre de familles qui désireront habiter sur des réserves, ou dans la même proportion pour des familles plus ou moins nombreuses ou petites; et pour les familles ou les sauvages [sic] particuliers qui préféreront vivre séparément des réserves des bandes, Sa Majesté s'engage de fournir une terre en particulier de 160 acres à chaque sauvage [sic], la terre devant être cédée avec une restriction quant à l'inaliénation sans le consentement du Gouverneur général du Canada en conseil, le choix de ces réserves et terres en particulier devant se faire de la manière suivante, savoir: le Surintendant général des Affaires des Sauvages [sic] devra députer et envoyer une personne compétente pour déterminer et assigner ces réserves et terres après s'être consulté avec les sauvages [sic] intéressés quant à la localité que l'on pourra trouver convenable et disponible pour le choix.

Pourvu, néanmoins, que Sa Majesté se réserve le droit de régler avec tous les colons établis dans les limites de toute terre réservée pour une bande de la manière qu'elle trouvera convenable, et aussi que lesdites réserves de terre ou tout droit sur ces terres pourront être vendus et adjugés par le gouvernement de Sa Majesté pour le bénéfice et avantage des dits sauvages [sic] qui y auront droit, après qu'on aura au préalable obtenu leur consentement.

Il est de plus convenu entre Sa Majesté et ses dits sujets sauvages que telles parties des réserves et des terres ci-dessus indiquées qui pourront de temps à autre être requises pour des travaux publics, des édifices, des chemins de fer, ou des routes de quelque nature que ce soit, pourront être prises dans ce but par le gouvernement de Sa Majesté du Dominion du Canada, et il sera accordé une indemnité convenable en compensation des améliorations qui y auront été faites, et un équivalent en terre, en argent ou autre considération pour l'étendue de la réserve ainsi appropriée.

On trouve à la page 279 de l'arrêt *The Queen v. George*, [1966] R.C.S. 267, l'exposé suivant du droit en ce qui concerne le traité de 1827:

[TRADUCTION] J'estime que nous devrions essayer d'interpréter le traité de 1827 et les lois du Parlement qui ont une incidence sur la question dont nous avons été saisis de manière que l'honneur de la Souveraine soit préservé et qu'on ne puisse

having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.

This same principle would certainly apply to Treaty 8.

Even the most liberal interpretation, in accordance with the above mentioned principle in *The Queen v. George* of the above quoted treaty clauses, leads one to the inevitable conclusion that, once the Crown had laid aside as a reserve the required amount of land, the obligation of the Crown pursuant to the Treaty had been fulfilled insofar as reserve land is concerned. In other words, the second and third paragraphs are inconsistent with any perpetual obligation to continue providing reserve bases from time to time to the extent of that acreage, after a reserve has been legally and properly surrendered by the Band and subsequently disposed of and the proceeds of disposition have been set aside to the credit of or paid to the Band. There is no subsisting right on the part of the Band under the Treaty itself to receive, over and above the proceeds of disposition, additional reserve land up to the amount of acreage initially set aside pursuant to the Crown's treaty obligations.

Counsel for the plaintiffs relied on certain statements of the report of the Commissioners for Treaty 8, dated 22nd September 1899. The report is annexed to the Treaty as part of Exhibit 1 at trial.

The Commissioners were responsible to negotiate and obtain the adhesion of various Indian bands who were within the territory to be covered by the Treaty. It was argued by counsel that representations made by the Commissioners, as evidenced by the report, created the obligation to continue to supply reserve land to the extent mentioned in the Treaty, notwithstanding the fact that the land might have at one time been properly disposed of with the full consent of the Indians.

Because of the special relationship existing between the Crown and the Indians, the illiteracy of the latter and their dependency on the advice of

reprocher au Parlement d'avoir retiré aux Indiens par un acte unilatéral et sans leur accorder de contrepartie les droits qui leur sont solennellement garantis par le traité ainsi qu'à leurs descendants.

Ce même principe s'appliquerait très certainement au Traité n° 8.

Même la plus libérale des interprétations, faite conformément au principe dégagé dans l'arrêt *The Queen v. George* relativement aux clauses précitées du Traité, nous amène inévitablement à conclure que, une fois que la Couronne a mis de côté à titre de réserve l'étendue de terre requise, elle a rempli l'obligation que lui impose le Traité en ce qui concerne les terres de la réserve. En d'autres termes, les deuxième et troisième paragraphes sont incompatibles avec l'existence d'une obligation perpétuelle de continuer à fournir des terres jusqu'à concurrence de la superficie prévue, une fois que la bande indienne a légalement cédé une réserve et que celle-ci a, par la suite, été vendue et que les produits de sa vente ont été portés au crédit de la bande ou lui ont été versés. En vertu du Traité, il ne subsiste aucun droit permettant à la bande indienne de recevoir, en plus des produits de la vente, d'autres terres dont la superficie égale celle de la réserve initialement mise à part conformément aux obligations imposées à la Couronne par le Traité.

Les avocats des demandeurs ont invoqué certaines des déclarations figurant dans le rapport des commissaires sur le Traité n° 8, en date du 22 septembre 1899. Ce rapport est annexé au Traité comme élément de la pièce 1 déposée à l'instruction.

Les commissaires étaient chargés de négocier avec diverses bandes indiennes se trouvant dans le territoire qui devait être visé par le Traité et d'obtenir leur adhésion. Les avocats ont allégué que les déclarations des commissaires, comme en fait foi le rapport, ont créé l'obligation de continuer à fournir des terres jusqu'à concurrence de la superficie mentionnée dans le Traité, malgré le fait que ces terres puissent avoir été cédées à un moment ou un autre, selon les règles et avec le consentement des Indiens.

Étant donné le rapport spécial existant entre la Couronne et les Indiens, l'analphabétisme de ces derniers et leur dépendance à l'égard des manda-

agents of the Crown, if there was in fact a special representation made to the Indians to that effect previous to signature, any such representation would be fully binding at law on the Crown, notwithstanding the fact that it might not have been incorporated in the formal terms of the Treaty.

The plaintiffs rely specifically on the underlined sentence of the following paragraph contained in the report of the Commissioners:

The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing. [Emphasis added.]

I simply cannot read into that statement the meaning which the plaintiffs urge that I attribute to it: the undertaking is to provide reserve lands when required by the Indians up to the amount stipulated. Once that land has been provided it will be theirs in perpetuity and they cannot then be deprived of it without their consent. That is the effect and substance of the statement. There is no mention whatsoever that, if a reserve is subsequently disposed of with the properly obtained consent of the Indians, new reserves will be furnished. There might well exist in certain circumstances a political or moral obligation to do so, but not a legal one pursuant to Treaty 8. The provisions of fresh reserve lands might also be one of the conditions imposed by the Indians or suggested and agreed upon by the Crown at the time of the surrender of a reserve but this would be the subject-matter of a new agreement and has nothing to do with Treaty 8 nor is it dealt with either directly or indirectly in the Treaty or by the Commissioners in their report.

taires de la Couronne, si une déclaration spéciale en ce sens avait effectivement été faite aux Indiens avant la signature du Traité, elle lierait légalement la Couronne, même s'il était possible qu'elle n'ait pas été incorporée dans le libellé formel du Traité.

Les demandeurs invoquent expressément la phrase soulignée dans le paragraphe suivant figurant dans le rapport des commissaires:

On donna aux sauvages le choix de prendre des réserves ou des terres en particulier. Comme l'étendue du pays couverte par le traité rendait impossible de définir des réserves ou des propriétés, et comme les sauvages n'étaient pas prêts à faire un choix, nous nous contentâmes d'entreprendre de mettre à part à l'avenir les réserves et les propriétés, et les sauvages furent satisfaits de la promesse que cela se ferait lorsqu'ils le demanderaient. Il n'y a aucune nécessité immédiate de faire un tracé général des réserves ou de faire une répartition des terres. Il sera bien assez tôt de le faire lorsque l'avancement de la colonisation rendra nécessaire l'arpentage des terres. De fait les sauvages s'opposaient en général à être placés sur les réserves. Il eût été impossible de faire un traité si nous ne leur avions pas assuré que nous n'avions aucune intention de les confiner dans des réserves. Nous avons dû leur expliquer que la disposition relative aux réserves et à la répartition des terres était faite pour les protéger et pour leur assurer à perpétuité une portion raisonnable de la terre cédée, dans le cas où la colonisation avancerait. [C'est moi qui souligne.]

Je ne peux tout simplement pas attribuer à cette déclaration le sens que les demandeurs me pressent de lui donner, soit que l'engagement consiste à fournir des terres de réserve lorsque les Indiens le demandent jusqu'à concurrence de la superficie prévue. Une fois que ces terres leur ont été fournies, elles leur appartiennent à perpétuité et elles ne peuvent leur être retirées sans leur consentement. Tels sont l'effet et l'essence de la déclaration. Il n'est nulle part mentionné que, si une réserve est par la suite aliénée avec le consentement des Indiens obtenu suivant les règles, de nouvelles réserves seront fournies. Une obligation politique ou morale de le faire pourrait exister dans certains cas, mais le Traité n° 8 ne crée pas une telle obligation légale. Il se pourrait également que l'octroi de nouvelles terres de réserve constitue l'une des conditions imposées par les Indiens ou proposées et acceptées par la Couronne au moment de la cession d'une réserve, mais cela ferait l'objet d'un nouvel accord et n'a rien à voir avec le Traité n° 8; il n'en est pas non plus question directement ou indirectement dans le Traité ni dans le rapport des commissaires.

1940 SURRENDER

On the 9th of July, 1940 the plaintiffs surrendered to the Crown their mineral rights in I.R. 172 "in trust to lease the same to such person or persons and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people". That surrender document was executed by Succona and Joseph Apsassin, the same Chief and Headman who subsequently signed the 1945 surrender. The 1940 surrender was also signed by 3 councillors or "principal men".

Section 51 of the Act prescribes the requirements for a valid release or surrender of "Indian lands". The first part of that section reads as follows:

51. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

As previously stated, neither the validity of that surrender nor, presumably, the Indians' informed consent to it were, unlike the subsequent surrender of 1945, disputed. The latter was for sale or lease and the issue between the parties regarding the 1940 surrender of the mineral rights for lease was whether it resulted in the mineral rights not being included in the 1945 surrender or not being capable of being included in it.

It is of some importance to remember that the title of the reserve lands remained in the Crown at all times. What might be termed the granting clause in the 1940 surrender effectively released to the King whatever usufructuary interests the plaintiffs had in "the petroleum and natural gas and the mining rights in connection therewith" pertaining to I.R. 172. The 1945 surrender, on the other hand, refers to the reserve itself and not to any particular limited right in the reserve and purports to release to His Majesty for ever the entire reserve. This, of course, can only mean whatever usufructuary interest or rights the Indi-

LA CESSION DE 1940

Le 9 juillet 1940, les demandeurs ont cédé à la Couronne leurs droits miniers afférents à la R.I. 172 [TRADUCTION] «en fiducie aux fins de leur cession à bail à une ou plusieurs personnes et selon les conditions que le gouvernement du Canada peut juger les plus appropriées pour assurer notre bien-être et celui de notre peuple». L'acte de cession a été signé par Succona et Joseph Apsassin, les mêmes chef et sous-chef qui ont signé par la suite la cession de 1945. La cession de 1940 a également été signée par trois conseillers ou [TRADUCTION] «membres principaux».

L'article 51 de la Loi prévoit les exigences relatives à la validité d'une cession ou d'une rétrocession de «terres indiennes». Voici le libellé de la première partie de cet article:

51. Sauf dispositions contraires de la présente Partie, nulle cession ou rétrocession d'une réserve ou d'une partie de réserve à l'usage d'une bande, ou d'un Indien en particulier, n'est valide ni obligatoire, à moins que la cession ou rétrocession ne soit ratifiée par la majorité des hommes de la bande qui ont vingt et un ans révolus, et ce à une assemblée ou à un conseil de la bande convoqué pour en délibérer conformément aux usages de la bande, et tenu en présence du surintendant général, ou d'un fonctionnaire régulièrement autorisé par le gouverneur en son conseil ou par le surintendant général à y assister.

Je le répète, ni la validité de cette cession ni non plus le consentement éclairé des Indiens à celle-ci n'ont été contestés contrairement à ce qui fut le cas pour la cession subséquente de 1945. Cette dernière visait la vente ou la location et le point litigieux entre les parties en ce qui concerne la cession des droits miniers en 1940 aux fins de leur location consistait à savoir si, par conséquent, les droits miniers n'étaient pas inclus dans la cession de 1945 ou ne pouvaient y être inclus.

Il est important de se rappeler que le titre sur les terres de la réserve appartenait en tout temps à la Couronne. Par ce qu'on pourrait appeler la clause de concession dans l'acte de cession de 1940, tous les droits usufruitiers que les demandeurs possédaient relativement [TRADUCTION] «au pétrole et au gaz naturel ainsi qu'aux droits miniers connexes» en ce qui concerne la R.I. 172 ont été effectivement cédés au Roi. Par contre, il est question dans la cession de 1945 de la réserve elle-même et non d'un droit restreint afférent à celle-ci, et, par cette cession, l'ensemble de la réserve est cédé pour toujours à Sa Majesté. Évidemment,

ans might have in the entire reserve. There is no restriction in the granting clause; the habendum clause mentions that it is "in trust to sell or lease ... and moneys received shall be placed to our credit in the usual way." When there is no restriction or reservation expressed in the description of the property granted or ceded all of the property mentioned, whether it be real or personal and all of the interest in that property whether it be legal, equitable or usufructuary, is presumed to be the subject-matter of the grant. This is not only a rule of common law but one of common sense.

Assuming for the moment that full, free and informed consent was given by the plaintiffs to the 1945 surrender, one would normally conclude on the mere reading of those two documents and failing evidence to the contrary, that it was intended by both parties on executing the 1945 surrender, that all of the property rights of the plaintiffs, including any property or other rights in minerals which they might possibly have were being surrendered for the purposes mentioned in that document, that is, for sale or lease by the Crown for the benefit of the Indians. I find that, in interpreting the document pursuant to the principle mentioned in *The Queen v. George* (*supra*), the wording imposes, upon sale or absolute disposal of the reserve, the obligation on the part of the Crown to set aside for the plaintiffs not only whatever consideration might be attributable to the usufructuary interests ceded, but also whatever part of the total consideration might arguably be attributable to the remainder of the absolute title. In any event, the absolute title, when subject to the burden of a perpetual unlimited usufructuary interest affecting the whole of the land involved, would have no real value.

Counsel for the plaintiffs argued however that, whatever meaning one might attempt to attribute to the 1945 surrender document, their clients' interests in the petroleum and natural gas rights were no longer capable at law of being surrendered by that document because they were no longer encompassed within the reserve: upon surrender in 1940 and acceptance of the surrender by Order-in-

cela ne peut que viser les droits usufruitiers ou autres droits que les Indiens peuvent posséder sur l'ensemble de la réserve. Il n'y a aucune restriction dans la clause de concession; la clause de l'*habendum* prévoit qu'il y a cession [TRADUCTION] «en fiducie aux fins de vendre ou de louer ... et que les sommes reçues seront portées à notre crédit de la manière habituelle.» Lorsque la description d'un bien cédé ne comporte aucune restriction ni réserve, l'ensemble du bien mentionné, qu'il s'agisse d'un bien réel ou personnel, et tous les droits afférents, qu'il s'agisse de droits légaux, en *equity* ou usufruitiers, sont présumés faire partie de la cession. Il ne s'agit pas seulement d'une règle de *common law*, mais de bon sens.

Si on présume pour l'instant que les demandeurs ont librement consenti, en toute connaissance de cause, à la cession effectuée en 1945, on pourrait normalement conclure à la simple lecture des deux documents, et en l'absence de preuve contraire, que les deux parties voulaient, en signant la cession de 1945, que tous les droits de propriété des demandeurs, y compris les droits de propriété ou autres droits qu'ils pouvaient posséder sur les minéraux de la réserve, soient cédés aux fins mentionnées dans cet acte, c'est-à-dire leur vente ou leur location par la Couronne pour le profit des Indiens. J'estime que cet acte, lorsqu'on l'interprète en fonction du principe dégagé dans l'arrêt *The Queen v. George* (précité), impose à la Couronne, au moment de la vente ou de l'aliénation absolue de la réserve, l'obligation de mettre à part pour les demandeurs non seulement toute contrepartie qui pourrait être attribuable aux droits usufruitiers cédés, mais aussi toute partie de la contrepartie totale qui pourrait être accordée pour le reste du titre de propriété absolu. De toute manière, un titre de propriété absolu n'a aucune valeur réelle lorsqu'il est assorti d'un droit usufruitier illimité et perpétuel, afférent à l'ensemble des terres en cause.

Toutefois, les avocats des demandeurs ont allégué que, quel que soit le sens que l'on puisse essayer d'attribuer à l'acte de cession de 1945, les droits de leurs clients sur le pétrole et le gaz naturel ne pouvaient désormais plus être légalement cédés par cet acte parce qu'ils ne faisaient plus partie de la réserve: par suite de la cession de 1940 qui a été acceptée par décret du conseil, ils

Council they became "Indian lands" and were unavailable for re-surrender in 1945. The mineral rights were, by the 1940 surrender, severed from the Indians' other interest in I.R. 172.

The 1940 instrument of surrender was, pursuant to the requirements of subsection 51(4) of the *Indian Act* duly accepted by the Governor in Council in November 1941 by Q.C. 8939 (Exhibit 214 at trial).

The argument rests mainly on the definitions of "Indian lands" and "reserve" as they are found in the 1927 Act. Paragraph 2(e) of that act defines "Indian lands" as:

2. ...

(e) any reserve or portion of a reserve which has been surrendered to the Crown;

"Reserve" is defined in paragraph 2(j) as follows:

2. ...

(j) "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein;

Based on these definitions, counsel for the plaintiffs argued that, once the 1940 surrender was taken, the petroleum and gas became "Indian lands" and therefore no longer a reserve or a portion of a reserve and subject only to disposal as petroleum and natural gas rights on reserves pursuant to the 1930 Regulations, paragraph 1(a) of which provided that they could be leased at a rental of 50¢ per acre for the first year and then at \$1 an acre for each subsequent year, if they had been released to His Majesty in trust in accordance with section 50 of the *Indian Act*. They relied mainly on the case of *St. Ann's Fishing Club v. The King*, [1950] S.C.R. 211, at page 215, where Taschereau J. stated:

These lands in question were formerly part of a "Reserve" for the use or benefit of the Chippewa and Pottawatomie Indians of Walpole Island, and there is no doubt that they could not be originally leased in May, 1881, to the predecessors

sont devenus «terres indiennes» et ils ne pouvaient être rétrocédés en 1945. Par suite de la cession de 1940, les droits miniers ont été séparés des autres droits que les Indiens possédaient relativement à la R.I. 172.

L'acte de cession de 1940 a été dûment accepté par le gouverneur en conseil en novembre 1941, par le Q.C. 8939 (pièce 214 produite à l'instruction) et ce, conformément aux exigences du paragraphe 51(4) de la *Loi des Indiens*.

L'argumentation repose essentiellement sur les définitions de «terres indiennes», «terres des Indiens» et de «réserve» figurant dans la Loi de 1927. L'alinéa 2l) de cette Loi définit «terres indiennes» et «terres des Indiens» comme suit:

2. ...

l) «terres indiennes», «terres des Indiens» signifie toute réserve ou partie de réserve qui a été cédée à la Couronne;

Le mot «réserve» est défini comme suit à l'alinéa 2h):

2. ...

h) «réserve» signifie toute étendue de terre mise à part, par traité ou autrement, pour l'usage ou le profit d'une bande particulière d'Indiens ou concédée à cette bande, et dont le titre légal est attribué à la Couronne, et qui fait encore partie de la réserve et n'a pas été rétrocédée à la Couronne, et comprend les arbres, le bois, la terre, la pierre, les minéraux, les métaux et autres choses de valeur qui se trouvent à la surface ou à l'intérieur du sol;

Se fondant sur ces définitions, les avocats des demandeurs ont allégué que, une fois la cession effectuée en 1940, le pétrole et le gaz naturel sont devenus des «terres indiennes» et ne constituaient donc plus une réserve ou une partie de réserve; ils ne pouvaient donc être aliénés qu'à titre de droits pétroliers et gaziers afférents aux réserves, conformément aux Règlements de 1930 dont l'alinéa 1a) prévoyait qu'ils pouvaient être loués 0,50 \$ l'acre pour la première année et ensuite, 1 \$ l'acre pour chaque année subséquente, s'ils avaient été cédés en fiducie à Sa Majesté conformément à l'article 50 de la *Loi des Indiens*. Les avocats ont invoqué principalement l'arrêt *St. Ann's Fishing Club v. The King*, [1950] R.C.S. 211, où le juge Taschereau a déclaré à la page 215:

[TRADUCTION] Les terres en cause faisaient anciennement partie d'une «Réserve» pour l'usage ou le profit des Chippewa et des Pottawatomie de Walpole Island, et il ne fait aucun doute qu'elles ne pouvaient à l'origine être louées en mai 1881 aux

of the appellant, unless they had been *surrendered* to the Crown. The effect of a surrender is to make a reserve or part of a reserve, "Indian Lands", defined in section 2 of the *Indian Act*, para. (k) ((i.e. 2(e) of the 1927 Act)) as "any reserve or portion of a reserve which has been surrendered to the Crown". [Emphasis and text in double parentheses added.]

They also relied on the following statement by Kerwin J. at pages 212 and 213 of the same case:

During the argument a question was asked as to whether a contention could be advanced that the surrender "to the end that said described territory may be leased to the applicants for the purpose of shooting and fishing for such term and on such conditions as the Superintendent of Indian Affairs may consider best for our advantage", was really a surrender upon condition, and that if the condition were not fulfilled the land would revert. It was suggested in answer thereto that this would not assist the appellant and this was made quite clear by Mr. Jacket when he pointed to ss. 2(i) and (k) ((i.e. 2(j) & (e) of 1927 Act)), 19, 48 and 49 of the *Indian Act*, c. 81, R.S.C. 1906. If by some means the lands again became part of the reserve, then s. 49 ((i.e. see 51 of 1927 Act)) would apply and, except as in Part I otherwise provided, no release or surrender of a reserve or a portion thereof shall be valid or binding unless the release or surrender complies with the specified conditions. [Emphasis and text in double parentheses added.]

The *St. Ann's Fishing Club* case can clearly be distinguished from the present one as it involved the surrender of an entire island being a portion of a reserve while the gas and oil rights are merely an interest in the whole of the reserve. The 1940 surrender was not a surrender of "a portion of" the reserve as defined in paragraph 2(e) and as considered in the *St. Ann's Fishing Club* case but only of a right in a part of the whole reserve. Furthermore, in the Act, a reserve is contemplated as being an extent or stretch of territory which is defined therein as a "tract or tracts of land set apart ... and includes ... the trees, wood ... minerals, metals and other valuables". That simply means that the land of the reserve includes these objects and does not mean that a right or interest such as a leasehold interest in any of these objects constitutes a reserve. The inclusion of those objects in the term "reserve" might have been deemed preferable as the Indians do not have a title to the reserve but merely an usufructuary interest in it and there does not exist in such a case a common law rule which, as in the case of an absolute title, provides that all of these objects are necessarily

prédécesseurs de l'appellant, à moins qu'elles n'aient été *cédées* à la Couronne. Une cession a pour effet de faire d'une réserve ou d'une partie de réserve des «terres indiennes», expression définie à l'alinéa 2k) de la *Loi des Indiens* ((c'est-à-dire à l'alinéa 2l) de la Loi de 1927)) comme «toute réserve ou partie de réserve qui a été cédée à la Couronne». [C'est moi qui souligne et qui ajoute le texte entre doubles parenthèses.]

Ils ont également invoqué la déclaration suivante du juge Kerwin aux pages 212 et 213 du même arrêt:

[TRADUCTION] Au cours des débats, on a demandé si on pouvait prétendre que la cession «ayant pour but de permettre que le territoire décrit puisse être loué aux requérants aux fins d'y chasser et d'y pêcher pour la durée et aux conditions que le surintendant des Affaires indiennes peut juger dans notre intérêt», constituait effectivement une cession conditionnelle et si, dans l'éventualité où cette condition ne serait pas remplie, les terres seraient rendues. On a laissé entendre qu'une réponse à cette question ne serait d'aucune utilité à l'appellant, ce qu'a indiqué très clairement M. Jackett lorsqu'il a invoqué les alinéas 2i) et k) ((c'est-à-dire les alinéas 2h) et l) de la Loi de 1927)) et les articles 19, 48 et 49 de la *Loi sur les sauvages*, chap. 81, S.R.C. 1906. Si d'une manière ou d'une autre les terres redevenaient une partie de la réserve, l'article 49 ((c'est-à-dire l'article 51 de la Loi de 1927)) s'appliquerait et, sous réserve de ce que prévoit la Partie I, aucune concession ou cession d'une réserve ou d'une partie de réserve ne sera valide ou ne liera les parties que si ladite concession ou cession respecte les conditions prévues. [C'est moi qui souligne et qui ajoute le texte entre doubles parenthèses.]

On peut clairement établir une distinction entre l'arrêt *St. Ann's Fishing Club* et l'espèce, car il s'agissait de la cession d'une île entière constituant une partie de la réserve alors que les droits pétroliers et gaziers ne constituent qu'un simple droit sur l'ensemble de la réserve. La cession de 1940 n'était pas celle d'une partie de réserve telle que prévue à l'alinéa 2l) et comme cela a été le cas dans l'arrêt *St. Ann's Fishing Club*; il s'agissait plutôt de la cession d'un droit sur une partie de l'ensemble de la réserve. En outre, la Loi prévoit qu'une réserve est une étendue de territoire qu'elle définit comme suit: «étendue de terre mise à part ... et comprend les arbres, le bois ... les minéraux, les métaux et autres choses de valeur». Cela signifie simplement que les terres de la réserve comprennent ces objets et non qu'un droit tel qu'une tenure à bail sur l'un quelconque de ces objets constitue une réserve. Il se peut que l'inclusion de ces objets dans le mot «réserve» ait été jugée préférable parce que les Indiens ne possèdent pas un titre de propriété sur la réserve mais plutôt un droit usufruitier et qu'il n'existe pas, dans un tel cas, une règle de *common law* prévoyant,

included in a fee simple unless specifically excepted.

Finally, there is nothing in the *Indian Act* prohibiting the Band from changing its mind and giving approval and consent to another arrangement with the Crown. Counsel for the plaintiffs were in fact arguing that, because of the trust for lease imposed on the Crown by the 1940 surrender, that surrender rendered the interests of the Indians in mineral rights incapable of any other type of alienation except by means of lease even if both the Crown and the Indians subsequently agreed to a sale or to a further type of alienation as part of the whole reserve. This would lead to the absurd conclusion that these oil and gas rights would be forever incapable of sale although the remaining rights in the reserve could be surrendered for that purpose. In order to arrive at any such extraordinary conclusion, there would have to be a clear and unequivocal provision in the *Indian Act* to that effect. No such restraint on alienation exists therein. Legislative enactments do at times lead to absurdities, but, before accepting them, the Courts must, at the very least, insist that in such cases the intention of the legislators be not only clearly and unequivocally expressed but that the text be completely incapable of supporting any other interpretation.

Counsel for the plaintiffs, in their argument regarding severance of oil and gas rights from the remaining rights in the reserve and the consequences of such severance, referred to several cases as well as to *Armour on Real Property*, 2nd Ed., 1916. The cases referred to were *Humphries v. Brogden* (1850), 12 Q. B. 739; *Algoma Ore Properties Ltd. v. Smith*, [1953] 3 D.L.R. 343 (Ont. C.A.); *Stoughton v. Leigh*, (1808), 1 Taunt. 402; 127 E.R. 889 (H.C. Ch.); *Ex p. Jackson*, [1925] 1 D.L.R. 701 (Alta. S.C., App. D.), at page 702; *Berkheiser v. Berkheiser and Glaister*, [1957] S.C.R. 387; *Martyn v. Williams* (1857), 1 H. & N. 817; 156 E.R. 1430 (Exch.), and *Earl of Lonsdale v. Lowther*, [1900] 2 Ch. 687. That jurisprudence does not affect the fundamental issue of whether the rights surrendered for lease in

comme c'est le cas pour un titre de propriété absolu, que tous ces objets font nécessairement partie d'un fief simple à moins d'en être expressément exclus.

^a Enfin, rien dans la *Loi sur les Indiens* n'interdit à la bande indienne de changer d'avis et d'approuver et de conclure un autre arrangement avec la Couronne. Les avocats des demandeurs ont, en fait, allégué qu'en raison de la fiducie obligeant la location, fiducie qui a été imposée à la Couronne par la cession de 1940, les droits miniers des Indiens ne pouvaient désormais plus, par suite de cette cession, être autrement aliénés que par bail, même si la Couronne et les Indiens devaient subseq-
^b uemment consentir à leur vente ou à leur aliénation à titre de partie de la réserve. Cela nous amènerait à conclure illogiquement que ces droits pétroliers et gaziers ne pourraient plus jamais être
^c vendus alors que les autres droits afférents à la réserve pourraient être cédés à cette fin. Pour pouvoir arriver à une conclusion aussi extraordinaire, il faudrait qu'il existe une disposition claire et sans équivoque à cet effet dans la *Loi sur les Indiens*. Celle-ci ne contient aucune disposition
^d limitant de cette manière le droit d'aliénation. Les dispositions législatives entraînent parfois des absurdités, mais avant d'accepter celles-ci, les tribunaux doivent tout au moins exiger que, dans de
^e tels cas, l'intention du législateur soit exprimée clairement et sans équivoque et que le libellé utilisé ne puisse absolument pas donner lieu à une autre interprétation.

^g Dans leur argumentation concernant la séparation des droits pétroliers et gaziers des autres droits afférents à la réserve et les conséquences d'une telle séparation, les avocats des demandeurs ont invoqué l'ouvrage *Armour on Real Property*, 2^e éd., 1916, ainsi que les affaires *Humphries v. Brogden* (1850), 12 Q. B. 739; *Algoma Ore Properties Ltd. v. Smith*, [1953] 3 D.L.R. 343 (C.A. Ont.); *Stoughton v. Leigh* (1808), 1 Taunt. 402; 127 E.R. 889 (H.C. Ch.); *Ex p. Jackson*, [1925] 1 D.L.R. 701 (C.S. Alb., Div. d'appel), à la page 702; *Berkheiser v. Berkheiser and Glaister*, [1957] R.C.S. 387; *Martyn v. Williams* (1857), 1 H. & N. 817; 156 E.R. 1430 (Exch.); et *Earl of Lonsdale v. Lowther*, [1900] 2 Ch. 687. Cette jurisprudence n'a aucune incidence sur la question fondamentale de savoir si les droits cédés aux fins de

1940 were legally capable of forming part of the 1945 surrender and of being eventually sold free of any trust for lease in favour of the plaintiffs originally created by the 1940 surrender.

I therefore find that the oil and petroleum rights surrendered for the purpose of leasing in 1940 were still at law capable of being surrendered with the remainder of the reserve in 1945 for either leasing or sale or both.

BREACHES OF DUTY BETWEEN 1916 AND 1945

The acts of negligence and of non-fraudulent breach of fiduciary duty alleged by the plaintiffs to have occurred between 1916 and 1945, in allowing unauthorized use of the lands in which the plaintiffs had an interest and also in allowing the Province of British Columbia to improperly regulate the use of certain lands are without foundation at law. There is no legal duty statutory, fiduciary or otherwise, cast upon the Department of Indian Affairs to actively police the Indian reserves nor is there any legal duty on the part of the defendant to interfere with or to use its constitutional power to override legitimate provincial legislation of general application merely because it also happens to affect the Indians.

By reason of their very nature, the incidents complained of must necessarily have been known to the plaintiffs at the time they occurred. There is no evidence that any complaint was ever made to Superintendent General or to the departmental officials regarding these alleged trespassers which might bring into play any duty on the part of the Department to prosecute trespassers as mentioned in sections 35 and 36 of the *Indian Act* of 1927.

For the reasons which I will be dealing with subsequently these claims are also statute barred by the mere fact that they are all alleged to have occurred during a period well over 30 years previous to the institution of the action and no fraud on the part of the defendant pertaining thereto has even been alluded to.

leur location en 1940 pouvaient légalement faire partie de la cession de 1945 et être finalement vendus libres de toute fiducie obligeant leur location en faveur des demandeurs, fiducie originellement créée par la cession de 1940.

Par conséquent, j'estime que les droits pétroliers et gaziers cédés aux fins de leur location en 1940 pouvaient encore être légalement cédés avec le reste de la réserve en 1945 soit aux fins de leur location ou de leur vente, soit à ces deux fins.

VIOLATIONS DE L'OBLIGATION ENTRE 1916 ET 1945

Il n'existe aucun fondement juridique aux actes de négligence et à la violation non frauduleuse de l'obligation fiduciaire qui, selon les demandeurs, se seraient produits entre 1916 et 1945 et qui consistaient à avoir permis l'utilisation non autorisée de terres sur lesquelles les demandeurs possédaient un droit et à avoir autorisé la province de la Colombie-Britannique à réglementer inadéquatement l'utilisation de certaines terres. Il n'existe aucune obligation légale, fiduciaire ou autre, en vertu de laquelle le ministère des Affaires indiennes est tenu de réglementer activement les réserves indiennes; la défenderesse n'est pas non plus légalement tenue d'intervenir ou d'utiliser son pouvoir constitutionnel pour annuler une loi provinciale légitime d'application générale, pour la simple raison qu'elle touche également les droits des Indiens.

En raison de la nature même des incidents reprochés, les demandeurs devaient en être au courant au moment où ils se sont produits. Rien dans la preuve n'indique qu'une plainte a été portée auprès du surintendant général ou des fonctionnaires du Ministère en ce qui concerne ces prétendus intrus, ce qui ferait entrer en jeu l'obligation du Ministère de poursuivre les intrus comme le prévoyaient les articles 35 et 36 de la *Loi des Indiens* de 1927.

Pour les motifs que j'examinerai plus loin, ces réclamations sont également prescrites parce que les incidents se seraient produits il y a déjà plus de trente ans avant l'introduction de la présente action et qu'on n'a même pas allégué qu'il y avait eu fraude de la part de la défenderesse à cet égard.

1945 SURRENDERa) Statute Law applicable:

In order to be valid, the 1945 surrender must, among other things, have been carried out in accordance with the provisions of the *Indian Act* applicable at that time, namely sections 4, 50 [as am. by S.C. 1938, c. 31, s. 1] and 51. They read as follows:

4. The Minister of the Interior, or the head of any other department appointed for that purpose by the Governor in Council, shall be the Superintendent General of Indian Affairs, and shall, as such, have the control and management of the lands and property of the Indians in Canada.

50. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this part; but the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.

2. The Governor in Council may make regulations enabling the Superintendent General in respect of any Indian reserve, to issue leases upon such terms as may be considered proper in the interest of the Indians and of any other lessee or licensee of surface rights,

(a) upon surrender in accordance with this part, of any land deemed to contain salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals and to grant in respect of such land the right to prospect for, mine, recover and take away any or all such mineral, and

(b) without surrender, to any person authorized to mine any of the minerals in this section mentioned, of surface rights over such area of any land within a reserve containing any such minerals as may be necessary for the mining thereof.

(As amended by S.C. 1938, c. 31, s. 1.)

51. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.

3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on

LA CESSION DE 1945a) Loi applicable

Pour être valide, la cession de 1945 doit notamment avoir été exécutée conformément aux dispositions de la *Loi des Indiens* en vigueur à cette époque, savoir les articles 4, 50 [mod. par S.C. 1938, chap. 31, art. 1] et 51. Ils sont rédigés en ces termes:

4. Le ministre de l'Intérieur, ou le chef de tout autre ministère désigné à cet effet par le gouverneur en son conseil, est le surintendant général des affaires indiennes, et, à ce titre, gère et administre les terres et propriétés indiennes en Canada.

50. Sauf dispositions contraires de la présente Partie, nulle réserve ou portion de réserve ne peut être vendue, aliénée ni affermée, avant d'avoir été cédée ou rétrocédée à la Couronne pour les objets de la présente Partie; mais le surintendant général peut donner à bail, au profit de quelque Indien, sur sa demande, la terre à laquelle celui-ci a droit, sans cession ni abandon, et il peut, sans qu'il y ait eu abandon, disposer de la manière la plus avantageuse possible pour les Indiens des graminées sauvages et du bois mort sur pied ou du chablis.

2. Le gouverneur en conseil peut établir des règlements permettant au surintendant général, à l'égard d'une réserve indienne, de donner à bail, aux conditions jugées pertinentes dans l'intérêt des Indiens et de tout autre locataire ou titulaire de droits de surface,

a) sur abandon conformément à la présente Partie, tout terrain censé contenir du sel, du pétrole, du gaz naturel, du charbon, de l'or, de l'argent, du cuivre, du fer ou d'autres minéraux, et de conférer, à l'égard de ce terrain, le droit de prospecter ou de faire des travaux miniers pour obtenir l'un quelconque de ces minéraux, ou le droit de le récupérer ou emporter, et

b) sans abandon, à toute personne autorisée à extraire l'un des minéraux mentionnés au présent article, des droits de surface sur telle étendue de terrain, à l'intérieur d'une réserve contenant lesdits minéraux, qui peut être nécessaire à leur extraction.

(Mod. par S.C. 1938, chap. 31, art. 1.)

51. Sauf dispositions contraires de la présente Partie, nulle cession ou rétrocession d'une réserve ou d'une partie de réserve à l'usage d'une bande, ou d'un Indien en particulier, n'est valide ni obligatoire, à moins que la cession ou rétrocession ne soit ratifiée par la majorité des hommes de la bande qui ont vingt et un ans révolus, et ce à une assemblée ou à un conseil de la bande convoqué pour en délibérer conformément aux usages de la bande, et tenu en présence du surintendant général, ou d'un fonctionnaire régulièrement autorisé par le gouverneur en son conseil ou par le surintendant général à y assister.

2. Nul Indien ne peut voter ni assister à ce conseil, à moins de résider habituellement dans ou près de la réserve en question, ou d'y avoir un intérêt.

3. Le fait que la cession ou rétrocession a été consentie par la bande, à ce conseil ou à cette assemblée, doit être attesté sous

oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal. R.S., c. 81, s. 49; 1918, c. 26, s. 2.

b) Status of decision to surrender

In dealing with the decision of the Department in 1945 to sell I.R. 172, counsel for the defendant argued that the question of whether a particular surrender should be taken and accepted was a policy function of the Department as opposed to an operational function and was therefore not reviewable by the Courts. He relied on a statement by Lord Diplock in *Dorset Yacht Co. Ltd. v. Home Office*, [1970] A.C. 1004 (H.L.), at page 1067, wherein he is quoted as stating:

It is, I apprehend, for practical reasons of this kind that over the past century the public law concept of *ultra vires* has replaced the civil law concept of negligence as the test of the legality, and consequently of the actionability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament as to the means by which they are to achieve a particular public purpose. According to this concept Parliament has entrusted to the department or authority charged with the administration of the statute the exclusive right to determine the particular means within the limits laid down by the statute by which its purpose can best be fulfilled.

That statement of the law was reaffirmed and followed subsequently by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), at page 754:

Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this "discretion" meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion." It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose upon it a common law duty of care.

serment par le surintendant général ou par le fonctionnaire qu'il a autorisé à assister à ce conseil ou à cette assemblée, et par l'un des chefs ou des anciens qui y a assisté et y a droit de vote, devant toute personne autorisée à faire prêter serment et ayant juridiction dans l'endroit où le serment est prêté.

a

4. Après que ce consentement a été ainsi attesté, comme susdit, la cession ou rétrocession est soumise au gouverneur en son conseil, pour qu'il l'accepte ou la refuse. S.R., c. 81, art. 49; 1918, c. 26, art. 2.

b

b) Nature de la décision de procéder à la cession

Au sujet de la décision prise par le Ministère de vendre la R.I. 172 en 1945, l'avocat de la défenderesse a soutenu que la question de savoir s'il faut accepter une cession donnée relevait de la politique administrative du Ministère plutôt que du domaine de l'exécution. Par conséquent, elle ne pouvait faire l'objet d'un contrôle judiciaire. Il s'est appuyé sur une déclaration faite par lord Diplock dans l'arrêt *Dorset Yacht Co. Ltd. v. Home Office*, [1970] A.C. 1004 (H.L.), à la page 1067:

[TRADUCTION] C'est, je crois, pour des raisons d'ordre pratique de ce genre qu'au cours du dernier siècle le concept de l'*ultra vires* du droit public a remplacé la notion de négligence du droit civil à titre de critère pour juger de la légalité (et donc de la possibilité de poursuivre) des actes ou omissions des ministères ou des organismes publics dans l'exercice du pouvoir discrétionnaire dont ils sont investis par le Parlement en ce qui concerne les moyens de réaliser un objectif public déterminé. Selon ce concept, le Parlement a accordé au Ministère ou à l'organisme chargé de l'administration de la loi le droit exclusif de choisir, dans le cadre fixé par le texte législatif, les moyens qui lui permettront le mieux de s'acquitter de sa mission.

Cet énoncé du droit a été confirmé à nouveau et appliqué par la suite par la Chambre des lords dans l'arrêt *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), à la page 754:

[TRADUCTION] Les lois ayant trait aux autorités ou organismes publics comportent, pour la plupart sinon toutes, une large mesure de politique administrative. Les cours appellent cela «pouvoir discrétionnaire» pour signifier que la décision appartient à ces autorités ou organismes, et non pas aux tribunaux judiciaires. Plusieurs lois prescrivent aussi ou du moins présupposent l'exécution pratique des décisions de politique: une façon utile de décrire ce phénomène consiste à dire qu'en plus du domaine de la politique administrative ou du pouvoir discrétionnaire, il existe un domaine d'exécution. Bien que la distinction entre ce qui relève de la politique et ce qui relève de l'exécution soit utile et nous éclaire, il s'agit probablement d'une distinction de degré; un bon nombre de pouvoirs et d'obligations «d'exécution» comportent certains éléments de «discretion». On peut affirmer sans contredit que plus un pouvoir ou une obligation relève du domaine de l'exécution, plus il est facile de lui superposer une obligation de diligence qui relève de la *common law*.

The principle was also approved by the Supreme Court of Canada in *Kamloops (City of) v. Nielsen et al.*, [1984] 2 S.C.R. 2, and by the British Columbia Court of Appeal in *Toews v. MacKenzie* (1980), 12 C.C.L.T. 263 (B.C.C.A.).

I do not accept the argument that, in the circumstances of this case, the decision to accept the surrender cannot be reviewed or that an action in damages could not be founded on its improper exercise. The decision is more properly characterized as being in the "operational" rather than in the "policy" field. Although it is a provision in a statute which confers powers on the Department, the scale and the extent to which the power can be exercised is left to the Department. The discretion is not absolute but must be accompanied by a properly obtained consent on the part of the Indians and the Department in effect can only recommend: the approval depends ultimately on acceptance by the Governor General in Council. Finally, in the case at bar, the consent of the Indians depended to some extent at least on the advice and guidance which they sought and received from the Department and the decision to accept the surrender cannot logically be considered separately from that advice given by the same authorities. Finally, the plaintiffs are, in essence, not complaining of the policy, but rather of the manner in which it was actually implemented. That is reviewable and, if improper, can form the basis of an action for damages.

c) Surrender documents

One of the main issues to be tried was whether the members of the Band fully understood and freely consented to the surrender of I.R. 172 on the 22nd of September, 1945. A closely related issue was whether an individual vote was taken at the meeting.

The indenture of surrender (Exhibit 295) and the reporting letter by Mr. Grew (Exhibit 294) dated September 24, 1945 are, of course, important exhibits to be considered on these issues.

The surrender document, witnessed by Mr. Grew and Mr. Galibois, was executed on behalf of

Le principe a également été approuvé par la Cour suprême du Canada dans l'arrêt *Kamloops (Ville de) c. Nielsen et autres*, [1984] 2 R.C.S. 2, et par la Cour d'appel de la Colombie-Britannique dans l'arrêt *Toews v. MacKenzie* (1980), 12 C.C.L.T. 263 (C.A.C.-B.).

Je ne puis admettre l'argument voulant que, dans les circonstances de l'espèce, la décision d'accepter la cession ne puisse faire l'objet d'un contrôle ni qu'une action en dommages-intérêts ne puisse être fondée sur son exercice irrégulier. La décision relève davantage du domaine de «l'exécution» que de celui de la «politique administrative». Bien que les pouvoirs du Ministère lui aient été conférés par une loi, l'étendue de leur exercice est laissé à la discrétion de celui-ci. Ce pouvoir discrétionnaire n'est cependant pas absolu, car le consentement des Indiens doit avoir été obtenu de façon régulière, et, en réalité, le Ministère ne peut que recommander l'acceptation du projet de cession, celui-ci devant être soumis en définitive à l'approbation du gouverneur en conseil. En l'espèce, les conseils prodigués par le Ministère à la demande des Indiens ont déterminé ceux-ci, dans une certaine mesure du moins, à donner leur consentement. La décision d'accepter la cession ne peut logiquement être dissociée des opinions émises par les autorités qui cherchaient à obtenir le consentement. Pour l'essentiel enfin, les demandeurs ne se plaignent pas de la politique mais plutôt de sa mise en œuvre qui, elle, peut faire l'objet d'un contrôle et pourrait servir de fondement à une action en dommages-intérêts si elle s'avérait contraire aux règles.

c) Documents relatifs à la cession

L'un des principaux points en litige est la question de savoir si les membres de la bande ont parfaitement compris la portée de leur décision et s'ils ont consenti librement à la cession de la R.I. 172 le 22 septembre 1945. Étroitement liée à la première, une deuxième question concerne la tenue d'un vote individuel à l'assemblée.

L'acte de cession (pièce 295) et le compte rendu de M. Grew (pièce 294) en date du 24 septembre 1945 sont, bien sûr, des pièces importantes dont il faut tenir compte à ce sujet.

L'acte de cession, attesté par MM. Grew et Galibois, a été signé au nom de la bande par le

the Band by Chief Succona and four other members of the Band, one of whom was the Headman Joseph Apsassin and two of the remaining three were leaders of their respective groups. Attached to the actual surrender document is what counsel described as an improperly executed affidavit taken by Mr. Grew and also by Chief Succona and Headman Joseph Apsassin, before one J. S. Young described therein as "a Justice of the Peace in and for British Columbia". Since the validity of this document has been strongly objected to by counsel for the plaintiffs, it is set out hereunder textually:

DOMINION OF CANADA
Province of British Columbia
County of Cariboo

To Wit:

Personally appeared before me

J. L. Grew
of the city of Ottawa
in the Province of Ontario

and Chief Succona and Headman Jos Apsassin Chiefs of the
St. John Beaver Band of Indians

And the said J. L. Grew

for himself saith:—

That the annexed release or surrender was assented to by a majority of the male members of the said band of Indians of the full age of twenty-one years entitled to vote, all of whom were present at the meeting or council.

That such assent was given at the meeting or council of the said Band summoned for that purpose and according to its rules or the rules of the Department.

That the terms of the said surrender were interpreted to the Indians by an interpreter qualified to interpret from the English language to the language of the Indians.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Deputy Superintendent General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the band or interested in the land mentioned in the said release or surrender.

And the said Chief Succona and Headman Joseph Apsassin

say:—

That the annexed release or surrender was assented to by them and a majority of the male members of the said band of Indians of the full age of Twenty-one years.

That such assent was given at a meeting or council of the said band of Indians summoned for that purpose as hereinbefore stated, and held in the presence of the said

J. L. Grew

chef Succona et quatre autres membres de la bande, dont le sous-chef Joseph Apsassin. Deux des trois autres signataires étaient chefs de leur groupe respectif. Un affidavit à l'égard duquel l'avocat prétend que les formalités prescrites n'ont pas été accomplies est joint à l'acte de cession proprement dit. L'affidavit a été souscrit par M. Grew, le chef Succona et le sous-chef Joseph Apsassin devant J. S. Young en sa qualité de [TRADUCTION] «juge de paix pour la Colombie-Britannique». Comme la validité de ce document a été vivement contestée par l'avocat des demandeurs, le texte intégral de l'affidavit est reproduit ci-dessous:

^c [TRADUCTION] DOMINION DU CANADA
Province de la Colombie-Britannique
Comté de Cariboo

Ont personnellement comparu devant moi

^d J. L. Grew
de la ville d'Ottawa
dans la province de l'Ontario

le chef Succona et le sous-chef Jos Apsassin, chefs de la bande indienne de St John Beaver.

^e Ledit J. L. Grew a déclaré ce qui suit:

L'acte de cession ou de rétrocession ci-joint a été sanctionné par la majorité des membres de sexe masculin de ladite bande indienne, ayant atteint l'âge de vingt et un ans et ayant le droit de vote, qui tous ont assisté à l'assemblée ou conseil.

^f Ce consentement a été donné à l'assemblée ou conseil de ladite bande convoqué à cette fin conformément à son règlement ou à celui du Ministère.

^g Les termes dudit acte de cession ont été traduits pour les Indiens par un interprète qualifié pour traduire de l'anglais vers la langue des Indiens.

J'ai assisté à cette assemblée ou conseil et j'ai entendu les Indiens donner leur consentement.

J'ai été dûment autorisé à assister à ce conseil ou assemblée par l'assistant-surintendant général des Affaires indiennes.

^h Aucun Indien n'appartenant pas à la bande ou n'ayant aucun intérêt sur les terres mentionnées dans ledit acte de cession ou de rétrocession n'a assisté à l'assemblée ou conseil ni n'y a voté.

Ledit chef Succona et le sous-chef Joseph Apsassin ont déclaré ce qui suit:

ⁱ L'acte de cession ou de rétrocession ci-joint a été sanctionné par la majorité des membres de sexe masculin de ladite bande indienne ayant atteint l'âge de vingt et un ans et nous.

^j Ce consentement a été donné à une assemblée ou conseil de ladite bande indienne convoqué à cette fin, comme il a été déclaré ci-dessus, et tenu en présence dudit

J. L. Grew.

That no Indian was present or voted at such council or meeting who was not a habitual resident on the reserve of the said band of Indians and interested in the land mentioned in the said release or surrender.

That the terms of the said surrender were interpreted to the Indians by an interpreter qualified to interpret from the English language to the language of the Indians.

That they are Chief and Headman of the said band of Indians and entitled to vote at the said meeting or council.

Sworn before me by the deponents
at the P.O. of Rose Prairie
In the County of Cariboo
This 22 day of September
A.D. 1945

J. E. Young
A Justice of the Peace
in and for British Columbia

Also annexed to the surrender document is what is described as a complete list of voters dated September 22, 1945. It lists 27 members as having been present and having voted in favour of the surrender, 4 as having been absent and none as being against the surrender. The list was certified as correct by J. L. Grew.

In his reporting letter (Exhibit 294) addressed to Mr. Hoey, the Director of the Indian Affairs Branch, Mr. Grew stated that he was enclosing the signed surrender papers together with the voters list and also informed Mr. Hoey that, on Saturday, September 21, the Fort Saint John Band of Indians unanimously agreed to the surrender for sale of their reserve.

The documents to which I have referred constitute at least *prima facie* evidence to the effect that the Band had freely consented to the surrender of I.R. 172 for the purpose of sale and, in the absence of convincing evidence to the contrary, the plaintiffs would fail on this issue.

Regarding the actual subject-matter of the surrender and the conditions attached to it, I have already discussed to some extent the granting and habendum clauses of the document when dealing with the 1940 surrender (refer page 53 *supra*). To summarize: the document purports to grant all of the interest of the Band in I.R. 172 subject only to the fiduciary obligation of the Crown to sell or lease to such persons and upon such conditions as the Crown may deem conducive to the welfare of the Band, with the proceeds to be placed "to our

Aucun Indien n'étant pas résident habituel de la réserve de ladite bande indienne et n'ayant aucun intérêt sur les terres mentionnées dans ledit acte de cession ou de rétrocession n'a assisté à l'assemblée ou conseil ni n'y a voté.

Les termes dudit acte de cession ont été traduits pour les Indiens par un interprète qualifié pour traduire de l'anglais vers la langue des Indiens.

Nous sommes le chef et le sous-chef de ladite bande indienne et nous avons le droit de voter à ladite assemblée ou conseil.

Fait sous serment devant moi par les déposants
au B.P. de Rose Prairie
dans le comté de Cariboo
Ce 22^e jour du mois de septembre de l'an de
grâce 1945

J. E. Young
Juge de paix
pour la Colombie-Britannique

Un document décrit comme étant une liste complète des votants en date du 22 septembre 1945 est également annexé à l'acte de cession. Selon ce document, 27 membres de la bande étaient présents et ont voté en faveur de la cession, quatre membres étaient absents et personne ne s'est opposé à la cession. La liste a été certifiée exacte par J. L. Grew.

Dans son compte rendu (pièce 294) adressé à M. Hoey, directeur de la Direction des Affaires indiennes, M. Grew a indiqué qu'il faisait parvenir les papiers de la cession signés ainsi que la liste des votants. Il informait également M. Hoey du fait que, le samedi 21 septembre, la bande indienne de Fort Saint John avait unanimement accepté la cession de la réserve en vue de sa vente.

Les documents auxquels je fais référence constituent au moins une preuve *prima facie* du fait que la bande a librement consenti à la cession de la R.I. 172 en vue de sa vente et, en l'absence d'une preuve contraire convaincante, les demandeurs n'auraient pas gain de cause sur ce point.

Quant à l'objet véritable de la cession et à ses modalités, j'ai déjà traité, dans une certaine mesure, des clauses de concession et de l'*habendum* lorsque j'ai abordé la cession de 1940 (voir la page 53 ci-dessus). Rappelons brièvement que le document vise à céder tous les droits détenus par la bande sur la R.I. 172, sous réserve seulement de l'obligation de fiduciaire de la Couronne de vendre ou de louer les terres aux personnes et aux conditions qu'elle juge de nature à favoriser le bien-être de la bande, le produit devant être porté «à notre

credit in the usual way". It is obvious that, although the surrender is drawn as if the fee simple were being granted, it could not operate as such since the title of the lands was in the Crown before the surrender. The legal effect could only be to grant or surrender whatever rights the plaintiffs had in I.R. 172.

d) Informed consent:

The plaintiffs argued that the majority of the Band did not consent and that, in any event, if consent was given it was not an informed consent: the matter having been put to the Indians too suddenly, they did not have time to consider the matter and really know what the implications of the surrender were. It is further alleged that not only was there a failure to disclose important matters but improper advice was actually given and it was given because the Crown actually had an interest in obtaining the surrender and that that interest was the governing reason for the action. In support of the above arguments and what might be described as the superior position of the Crown in relation to the Indians, the plaintiffs relied greatly on the doctrine of undue influence as defined in such cases as *Brusewitz v. Brown*, [1923] N.Z. L.R. 1106 (S.C.); *Tufton v. Sporni*, [1952] 2 *The Times* L.R. 516 (E.C.A.); *Allcard v. Skinner* (1887), [1886-90] All E.R. Rep. 90 (E.C.A.); *Lloyds Bank Ltd v Bundy*, [1974] 3 All ER 757 (E.C.A.) and other cases. In the *Brusewitz* case (*supra*) we find the following statement at page 1109:

Where there is not merely an absence or inadequacy of consideration for the transfer of property, but there also exists between the grantor and the grantee some special relation of confidence, control, domination, influence, or other form of superiority, such as to render reasonable a presumption that the transaction was procured by the grantee through some unconscientious use of his power over the grantor, the law will make that presumption, and will place on the grantee the burden of supporting the transaction by which he so benefits, and of rebutting the presumption of its invalidity.

In the *Lloyds Bank* case (*supra*) Sir Eric Sachs states at page 768 of the report:

crédit de la manière habituelle». Bien que l'acte de cession soit formulé comme si la propriété absolue était cédée, il est évident que cette cession ne pouvait s'opérer puisque la Couronne possédait le titre de propriété sur les terres avant la cession. Seuls les droits que les demandeurs détenaient sur la R.I. 172 pouvaient être légalement cédés.

b d) Consentement éclairé

Les demandeurs prétendent que la majorité des membres de la bande n'a pas donné son consentement et que, de toute façon, s'il y a eu consentement, celui-ci n'était pas un consentement éclairé: la question aurait été posée aux Indiens de façon trop soudaine, ils n'auraient pas eu le temps de peser le pour et le contre et de véritablement prendre connaissance des incidences de la cession. De plus, les demandeurs soutiennent que non seulement des faits importants ont été passés sous silence, mais que des conseils intéressés ont été donnés aux Indiens parce qu'il était réellement dans l'intérêt de la Couronne d'obtenir la cession et qu'il fallait y voir la raison primordiale des mesures prises. Pour étayer cette argumentation et ce qu'on pourrait appeler la position supérieure de la Couronne par rapport aux Indiens, les demandeurs se sont fortement appuyés sur la doctrine de l'abus d'influence telle qu'elle est définie notamment dans les décisions *Brusewitz v. Brown*, [1923] N.Z. L.R. 1106 (S.C.); *Tufton v. Sporni*, [1952] 2 *The Times* L.R. 516 (E.C.A.); *Allcard v. Skinner* (1887), [1886-1890] All E.R. Rep. 90 (E.C.A.); *Lloyds Bank Ltd v Bundy*, [1974] 3 All ER 757 (E.C.A.) et dans d'autres jugements. Voici un extrait de l'affaire *Brusewitz*, précitée, à la page 1109:

[TRANSDUCTION] Lorsqu'il n'y a pas simplement absence ou insuffisance de la contrepartie pour la cession des biens mais que le concédant et le concessionnaire sont également liés par quelque rapport spécial de confiance, de subordination, de domination, de pouvoir ou tout autre rapport de supériorité qui rend raisonnable l'hypothèse selon laquelle la transaction a été obtenue par le concessionnaire grâce à l'exercice peu scrupuleux de son pouvoir sur le concédant, la loi établit une présomption et fait peser sur le concessionnaire le fardeau d'étayer la transaction dont il profite et de réfuter la présomption voulant que la transaction ne soit pas valide.

Dans l'affaire *Lloyds Bank*, précitée, sir Eric Sachs déclare à la page 768 du recueil de jurisprudence:

As regards the second class of undue influence, however, that word in the context means no more than that once the existence of a special relationship has been established, then any possible use of the relevant influence is, irrespective of the intentions of the persons possessing it, regarded in relation to the transaction under consideration as an abuse—unless and until the duty of fiduciary care has been shown to be fulfilled or the transaction is shown to be truly for the benefit of the person influenced. This approach is a matter of public policy.

I fully accept as authoritative the statements of law expressed in those cases when considered in the light of the factual situations to which they relate. Based on those principles, counsel for the plaintiffs however, in their oral argument, went on to state that, in view of the relationship existing between the parties, it was now incumbent upon the defendant to prove positively that some 16 matters enumerated at pages 29, 30 and 31 of their written argument (which I have not reproduced here) had been explained to the Band before informed consent could be found to have existed and that, failing the discharge of this burden, the plaintiffs would succeed. In the first place, I totally reject the argument that all these matters had to be explained. Many of them are redundant or irrelevant, others would obviously be known to the Indians, and others would be required only if they were not only dependant persons but actually *non compos mentis*, in which case no consent could validly be obtained. In the second place, it would be manifestly ludicrous to require now, 40 years after the event, when all of the persons who might have given the advice are either deceased or too senile to testify, that the defendant establish positively that advice was given on all these matters. It would have to have been communicated orally in any event as none of the Indians could read or write. Finally, even where there exists a special relationship between the parties, when an agreement in writing is being challenged and especially an indenture under seal such as the present one, it seems that there would have to be something more than a bare allegation of improper conduct before there is any duty on the person in the dominant position to adduce evidence to establish that the special duty was properly fulfilled.

[TRADUCTION] En ce qui concerne la deuxième catégorie d'abus d'influence cependant, ce mot pris dans le contexte signifie simplement que lorsque l'existence d'un rapport spécial est établie, tout exercice de l'influence en question est considéré comme un abus relativement à la transaction à l'étude, peu importe les intentions des personnes détenant ce pouvoir, jusqu'à ce qu'il soit démontré que les obligations du fiduciaire ont été remplies ou que la transaction profite véritablement à la personne sur laquelle s'est exercée l'influence. Cette solution est d'intérêt public.

b

J'accepte pleinement l'autorité des énoncés de droit exprimés dans ces affaires dans la perspective des situations de fait auxquelles ils se rapportent. Invoquant ces principes, les avocats des demandeurs ont cependant soutenu, dans leur plaidoirie, qu'en raison du rapport qui unissait les parties, il incombait maintenant à la défenderesse d'établir par une preuve positive que les seize points énumérés aux pages 29, 30 et 31 de son argumentation écrite (que je n'ai pas reproduite ici) ont été expliqués aux membres de la bande avant qu'on puisse conclure à l'existence d'un consentement éclairé, faute de quoi les demandeurs auraient gain de cause. En premier lieu, je rejette absolument l'argument voulant que tous ces points doivent avoir été expliqués aux Indiens. Bon nombre sont redondants ou ne sont pas pertinents. D'autres auraient évidemment été connus des Indiens. Enfin, l'explication de certains autres points n'aurait été requise que s'il s'agissait non pas seulement de personnes à charge mais de véritables aliénés, auquel cas aucun consentement valable n'aurait pu être obtenu. En second lieu, il serait manifestement ridicule d'exiger maintenant, quarante ans plus tard, alors que toutes les personnes qui auraient pu donner des conseils sont soit décédées, soit trop séniles pour témoigner, que la défenderesse démontre par une preuve positive que des avis ont été émis sur tous ces points. De toute façon, il aurait fallu que les renseignements soient communiqués oralement aux Indiens, car ceux-ci ne pouvaient ni lire ni écrire. Enfin, même s'il existe un rapport spécial entre les parties, lorsqu'un accord écrit est contesté, en particulier un acte scellé comme en l'espèce, il semble qu'il faut plus qu'une simple allégation de conduite irrégulière pour que la personne placée en situation dominante soit tenue de produire des preuves pour démontrer que les obligations spéciales ont été régulièrement remplies.

In the case at bar, there was, however, at the outset, sufficient evidence adduced by the plaintiffs to put in issue from a factual standpoint the question of whether informed consent was in fact given. This casts upon the defendant the burden of establishing on a balance of probabilities that there was no failure in the performance of any of the duties entailed by the existence of the special relationship. The duties to which that burden will extend will depend, among other things, on the nature of the relationship on the subject-matter in issue, and on the capability of the subordinate party to fully understand and consent to the issue.

* * * *

Review of evidence on consent to the 1945 surrender deleted. See findings of fact infra.

* * * *

To summarize, with regard to the question of informed consent to the 1945 surrender, I make the following findings of fact:

1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
2. That they had discussed the matter previously on at least three formal meetings where representatives of the Department were present;
3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;
4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
5. That neither Mr. Grew, Mr. Galibois nor Mr. Peterson appeared to have attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter appears to have been dealt with most conscientiously by the departmental representatives concerned;

En l'espèce toutefois, dès le départ, les demandeurs ont présenté des preuves suffisantes pour mettre en doute l'existence du consentement éclairé. Il incombe donc à la défenderesse de prouver, selon la prépondérance des probabilités, qu'elle n'a pas manqué aux obligations découlant du rapport spécial. L'étendue des obligations visées par ce fardeau dépend, entre autres choses, de la nature du rapport, de l'objet du litige et de l'aptitude de la partie subordonnée à comprendre pleinement de quoi il s'agit et à donner son consentement.

* * * *

La revue de la preuve relative au consentement de la cession de 1945 a été omise. Voir les conclusions de fait ci-dessous.

* * * *

Bref, en ce qui concerne le consentement éclairé, j'émetts les conclusions de fait suivantes:

1. Les demandeurs savaient depuis longtemps qu'une cession absolue de la R.I. 172 était envisagée;
2. Ils en avaient discuté auparavant au moins à trois reprises à l'occasion d'assemblées officielles tenues en présence de représentants du Ministère;
3. Contrairement à ce que prétendent les demandeurs, il serait absurde de conclure que les Indiens n'auraient pas débattu la question entre eux à de nombreuses occasions et de façon informelle au sein des groupes familiaux et des groupes de chasse;
4. À l'assemblée de la cession elle-même, la question avait fait l'objet d'un débat complet. Les Indiens en avaient discuté entre eux et avec les représentants du Ministère avant la signature de l'acte de cession;
5. M. Grew, M. Galibois ni M. Peterson n'ont semblé avoir essayé d'influencer les demandeurs soit avant, soit pendant l'assemblée de la cession. Au contraire, la question semble avoir été résolue de façon très consciencieuse par les représentants du Ministère concernés;

6. That Mr. Grew fully explained to the Indians the consequences of a surrender;

7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased from the proceeds;

8. That the said alternate sites had already been chosen by them, after mature consideration.

I therefore conclude that not only the majority of but all of the male members of the Band present at the surrender meeting gave their free and informed consent to the surrender and that each, in turn, orally signified his consent in accordance with the voters list attached to the surrender document. There is also evidence which I accept to the effect that the voters list included all of the Indians of the Fort Saint John Band who were entitled to vote and no others.

e) Other objections to 1945 surrender:

Several further arguments regarding the validity of the surrender were raised by counsel for the plaintiffs. They all relate to section 51 of the *Indian Act*, R.S.C. 1927, c. 98, in force at the time. I am reproducing again for the sake of convenience the relevant portions of section 51:

51. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

6. M. Grew avait expliqué aux Indiens toutes les conséquences d'une cession;

7. Même s'ils n'ont pas saisi exactement la nature du droit, en *common law*, qu'ils cédaient, ils en étaient probablement incapables, ils ont bel et bien compris, dans les faits, que par la cession ils renonçaient pour toujours à tous leurs droits sur la R.I. 172 en échange de l'argent qui serait versé à leur crédit après la vente de la réserve, et d'autres terrains situés près de leurs sentiers de piégeage qui seraient achetés avec le produit de la vente;

8. Lesdits terrains avaient déjà été choisis par les Indiens, après mûre réflexion.

J'en conclus que tous les membres de sexe masculin de la bande qui assistaient à l'assemblée de cession, et non pas seulement la majorité d'entre eux, ont donné librement leur consentement éclairé au projet de cession. À tour de rôle, ils ont exprimé oralement leur accord suivant la liste des votants jointe à l'acte de cession. Des éléments de preuve, que j'accepte, montrent que seul figurait sur la liste des votants le nom des Indiens de la bande de Fort Saint John qui avaient le droit de voter.

e) Autres objections à la cession de 1945

Plusieurs autres arguments relatifs à la validité de la cession ont été présentés par les avocats des demandeurs. Ils se rapportent tous à l'article 51 de la *Loi des Indiens*, S.R.C. 1927, chap. 98, en vigueur à l'époque. Pour plus de commodité, je reproduis à nouveau les dispositions pertinentes de l'article 51:

51. Sauf dispositions contraires de la présente Partie, nulle cession ou rétrocession d'une réserve ou d'une partie de réserve à l'usage d'une bande, ou d'un Indien en particulier, n'est valide ni obligatoire, à moins que la cession ou rétrocession ne soit ratifiée par la majorité des hommes de la bande qui ont vingt et un ans révolus, et ce à une assemblée ou à un conseil de la bande convoqué pour en délibérer conformément aux usages de la bande, et tenu en présence du surintendant général, ou d'un fonctionnaire régulièrement autorisé par le gouverneur en son conseil ou par le surintendant général à y assister.

3. Le fait que la cession ou rétrocession a été consentie par la bande, à ce conseil ou à cette assemblée, doit être attesté sous serment par le surintendant général ou par le fonctionnaire qu'il a autorisé à assister à ce conseil ou à cette assemblée, et par l'un des chefs ou des anciens qui y a assisté et y a droit de vote, devant toute personne autorisée à faire prêter serment et ayant juridiction dans l'endroit où le serment est prêté.

4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal. R.S., c. 81, s. 49; 1918, c. 26, s. 2.

The objections raised were the following:

1. The meeting was not summoned in accordance with subsection 51(1) of the Act.
2. The meeting was not held before a duly authorized officer in accordance with that section.
3. The required certificate under subsection 51(3) was not obtained and furnished.

With regard to the first objection, there is no evidence whatsoever that the Fort Saint John Band had any rules regarding the summoning of its meetings or councils. The Indians were informed in plenty of time of the meeting. Witnesses of the plaintiffs also admit that they were convened to the meeting although some claim that they were unaware of the purpose. There were four members of the Band absent but there is no evidence that they were not aware of the meeting or that they ever complained of insufficient notice. In any event the onus on this issue is clearly on the plaintiffs and it has not been met.

On the question of whether Mr. Grew was duly authorized pursuant to subsection 51(1) to hold a surrender meeting it is of some importance that he was directed to do so by Mr. Hoey who at the time was the Director of Indian Affairs Branch of the Department and possessed all the powers of the Deputy Minister pursuant to subsection 9(2) of *The Department of Mines and Resources Act* [S.C. 1936, c. 33] which read as follows:

9. ...

(2) The chief officer in charge of the branch of the Department in which is included Indian Affairs may, under the Deputy Minister, perform and exercise all the duties, powers and functions with respect to Indian Affairs which are or may be vested in the Deputy Superintendent General of Indian Affairs by any Act of the Parliament of Canada or by any order or regulation made under the authority thereof.

Paragraph 31(1) of the *Interpretation Act* [R.S.C. 1927, c.1] in effect in 1927 provides that a

4. Après que ce consentement a été ainsi attesté, comme susdit, la cession ou rétrocession est soumise au gouverneur en son conseil, pour qu'il l'accepte ou la refuse. S.R., c. 81, art. 49; 1918, c. 26, art. 2.

a Les objections soulevées sont les suivantes:

1. L'assemblée n'a pas été convoquée conformément au paragraphe 51(1) de la Loi.
2. L'assemblée n'a pas été tenue devant un fonctionnaire régulièrement autorisé conformément à cet article.
3. L'attestation requise en application du paragraphe 51(3) n'a pas été obtenue ni fournie.

c Quant à la première objection, aucune preuve n'a été produite pour établir que la bande de Fort Saint John avait adopté un règlement concernant la convocation de ses réunions ou conseils. Les d Indiens ont été informés de l'assemblée bien assez tôt. Les témoins des demandeurs ont également reconnu qu'ils avaient été invités à l'assemblée bien que certains prétendent ne pas avoir été mis au courant de l'objet de la réunion. Quatre des e membres de la bande étaient absents, mais on n'a pas prouvé qu'ils ne savaient pas qu'une assemblée serait tenue ni qu'ils se soient jamais plaints de l'insuffisance du préavis. De toute façon, le fardeau de la preuve sur ce point pèse clairement sur f les demandeurs qui n'ont pas réussi à s'en acquitter.

En ce qui concerne la question de savoir si M. Grew a été régulièrement autorisé à tenir l'assemblée de la cession en application du paragraphe 51(1), il est assez important de constater que ses instructions lui venaient de M. Hoey qui à l'époque était à la tête de la Direction des affaires indiennes du Ministère et était investi de tous les pouvoirs du sous-ministre en vertu du paragraphe 9(2) de la *Loi du ministère des Mines et des ressources* [S.C. 1936, chap. 33] qui est formulé comme suit:

9. ...

i (2) Le fonctionnaire en chef de la division du ministère dans laquelle sont comprises les affaires indiennes peut, sous l'autorité du sous-ministre, accomplir et exercer les devoirs, pouvoirs et fonctions concernant les affaires indiennes qui sont ou peuvent être attribuées au surintendant général adjoint des affaires indiennes pour toute loi du Parlement du Canada ou par tout règlement ou ordonnance établi sous son empire.

j L'alinéa 31(1) de la *Loi d'interprétation* [S.R.C. 1927, chap. 1] en vigueur en 1927 prévoit que le

Deputy Minister may exercise a Minister's power in administering the Department. That provision reads as follows:

31. ...

(1) words directing or empowering a minister of the Crown to do any act or thing, or otherwise applying to him by his name of office, include a minister acting for, or, if the office is vacant, in the place of such minister, under the authority of an order in council, and also his successors in such office, and his or their lawful deputy;

There is nothing in section 51 of the *Indian Act* to indicate that the Parliament intended that the Superintendent General rather than his Deputy was to personally authorize any individual to attend the surrender meeting. Paragraph 31(1) of the *Interpretation Act* would therefore apply. Finally, there is nothing to say that the Superintendent General could not authorize the person orally or instruct Mr. Hoey to direct Mr. Grew to attend the meeting. There is no evidence that this was not in fact what happened. The onus of establishing that Mr. Grew was not authorized rests with the plaintiffs and that onus is not discharged by simply establishing that Mr. Grew was directed by Mr. Hoey to attend the meeting and to take the surrender since, as previously stated, this might well have been done with the full authority, approval and direction of the Superintendent General.

On the question of whether non compliance with all of the provisions of subsection 51(3) of the Act would invalidate the surrender, a legal issue arises as to whether those provisions are mandatory or merely directory. In the latter case non-compliance would not render void the surrender itself nor its subsequent acceptance by the Governor in Council.

In considering this issue the actual wording of the other provisions of section 51 are of some importance. Subsection (1) provides that "no surrender ... shall be valid or binding unless assented to". This is clearly a substantial or mandatory provision. Subsection (2) defines who is entitled to vote at a meeting and subsection (4) provides that the Governor in Council may either accept or refuse the surrender. These provisions are also clearly substantial or mandatory. Subsection (3), however, provides the means by which the fact

sous-ministre peut exercer les pouvoirs du ministre pour gérer le Ministère. Cette disposition est formulée comme suit:

31. ...

(1) Les mots par lesquels ordre ou pouvoir est donné à un ministre de la Couronne de faire un acte ou une chose, ou qui de toute autre manière lui sont applicables à raison de son titre officiel, impliquent tout ministre agissant pour lui, ou, s'il y a vacance, tenant sa place par intérim en vertu d'un arrêté en conseil, et impliquent aussi ses successeurs dans sa charge et son substitut ou leur substitut légalement nommé;

Aucune disposition de l'article 51 de la *Loi des Indiens* n'indique que le Parlement voulait que le surintendant général, plutôt que son substitut, autorise personnellement un individu à assister à l'assemblée de la cession. L'alinéa 31(1) de la *Loi d'interprétation* s'applique donc. Enfin, rien ne dit que le surintendant général ne pouvait autoriser oralement la personne ni donner des instructions à M. Hoey pour qu'il ordonne à M. Grew d'assister à l'assemblée. Aucune preuve ne montre que dans les faits il n'en a pas été ainsi. Il incombe aux demandeurs de prouver que M. Grew n'a pas été autorisé, et ils ne peuvent s'acquitter de ce fardeau en démontrant simplement que M. Hoey a donné pour instructions à M. Grew d'assister à l'assemblée et de recevoir la cession puisque, répétons-le, ces directives peuvent fort bien avoir été données avec l'autorisation du surintendant général et sur son ordre.

Lorsqu'il s'agit de savoir si le fait de ne pas observer toutes les dispositions du paragraphe 51(3) de la Loi pourrait rendre nulle la cession, une question de droit se pose: ces dispositions sont-elles impératives ou simplement supplétives? Dans ce dernier cas, l'inobservation n'invaliderait pas la cession elle-même ni son acceptation subséquente par le gouverneur en conseil.

Pour trancher cette question, il faut consulter le libellé même des autres dispositions de l'article 51, qui est assez important. Le paragraphe (1) dispose que «nulle cession ... n'est valide ni obligatoire, à moins que la cession ... ne soit ratifiée». Il s'agit clairement d'une disposition impérative ou substantielle. Le paragraphe (2) détermine qui a le droit de voter à l'assemblée, et le paragraphe (4) porte que le gouverneur en conseil peut soit accepter, soit refuser la cession. Ces dispositions sont également clairement impératives ou substantielles.

that the surrender has been properly taken and executed is to be evidenced or established.

The leading decision in this area of the law is the Privy Council case of *Montreal Street Railway Company v. Normandin*, [1917] A. C. 170. This case involved a claim that a jury verdict should be set aside due to the failure of the sheriff to update voters' lists to empanel juries. In it the Privy Council laid down the general principles to guide courts on this issue. At pages 174 and 175 they stated as follows:

The statutes contain no enactment as to what is to be the consequence of non-observance of these provisions. It is contended for the appellants that the consequence is that the trial was *coram non iudice* and must be treated as a nullity.

It is necessary to consider the principles which have been adopted in construing statutes of this character, and the authorities so far as there are any on the particular question arising there. The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th ed. p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

The *Montreal Street Railway* case was followed in this Court in *Melville (City of) v. Attorney General of Canada*, [1982] 2 F.C. 3 (T.D.), by Mr. Justice Collier, whose decision was upheld by the Federal Court of Appeal in the parallel case of *Jasper Park Chamber of Commerce v. Governor General in Council*, [1983] 2 F.C. 98.

The *City of Melville* case involved the allegation that the failure to register an Order in Council within the prescribed time limits, relating to the discontinuance of rail service, was fatal. Mr. Justice Collier dealt with this claim at page 14 of the report, applying the principles set out in the *Montreal Street Railway* case. The Federal Court

les. Cependant, le paragraphe (3) prévoit les moyens par lesquels sera prouvé le fait que la cession a été reçue de façon régulière et que toutes les formalités requises ont été remplies.

^a La décision qui fait autorité dans ce domaine du droit est l'affaire *Montreal Street Railway Company v. Normandin*, [1917] A. C. 170, entendue par le Conseil privé. Dans cette cause, on prétendait que le verdict du jury devait être rejeté parce ^b que le shérif n'avait pas mis à jour la liste des votants pour former le jury. Le Conseil privé a énoncé les principes généraux qui guident les tribunaux sur cette question. Voici un extrait de ^c l'avis du Conseil privé (aux pages 174 et 175):

[TRADUCTION] Les lois sont silencieuses sur les conséquences de l'inobservance de ces dispositions. On soutient au nom des appelantes que cela a pour conséquence que l'instruction fut *coram non iudice* et qu'elle doit être considérée comme une nullité.

^d Il est nécessaire d'examiner les principes adoptés pour l'interprétation des lois de ce genre et la jurisprudence, dans la mesure où il y en a, sur le point particulier soulevé ici. On s'est souvent demandé si les dispositions d'une loi étaient supplétives ou impératives dans ce pays; on a répondu qu'aucune règle ^e générale ne pouvait être énoncée et qu'il fallait considérer chaque cas d'espèce que visait la loi. On trouvera la jurisprudence sur le sujet rassemblée dans *Maxwell on Statutes*, 5^e éd., aux p. 596 et suivantes. Lorsque les dispositions d'une loi concernent l'exercice d'une fonction publique et que juger nuls et non avenus des actes exécutés en ignorance de cette obligation causerait des inconvénients généralisés sérieux, ou encore ^f une injustice à des individus n'ayant aucun contrôle sur les responsables de cette fonction, tout en ne favorisant pas l'objet principal recherché par le législateur, il a été d'usage de statuer que ces dispositions n'étaient que supplétives et que cette ignorance, quoique condamnable, n'invaliderait pas ces actes.

^g L'arrêt *Montreal Street Railway* a été suivi par la Cour dans l'affaire *Melville (City of) c. Procureur général du Canada*, [1982] 2 C.F. 3 (1^{re} inst.). Cette dernière décision rendue par le juge ^h Collier a été confirmée par la Cour d'appel fédérale dans l'affaire *Chambre de commerce de Jasper Park c. Gouverneur général en conseil*, [1983] 2 C.F. 98, qui portait sur une action parallèle.

ⁱ Dans la décision *City of Melville*, les demandeurs soutenaient que le défaut d'enregistrer dans les délais prescrits un décret concernant la suppression du service ferroviaire le rendait invalide. ^j Le juge Collier a battu en brèche cet argument à la page 14, en appliquant les principes énoncés dans l'affaire *Montreal Street Railway*. La Cour

upheld his finding at pages 118 and 119 of the *Jasper Park* case (*supra*).

As stated in the *Montreal Street Railway* case, the object of the statute must be considered. It seems clear that section 51 has been enacted to ensure that the assent of the majority of adult members of the Band has been properly obtained before a surrender can be accepted by the Governor in Council and become valid and effective. The object of that section is to provide the means by which the general restrictions imposed on the surrender sale or alienation of Indian reserve lands by section 50 of the Act can be overcome. In other words, the sale or lease of Indian reserve lands must be made pursuant to the wishes of the Indian Band and must, of course, also be approved by the Governor in Council. The last requirement would presumably involve the Governor in Council being satisfied that the surrender has been properly approved, that it is for the general welfare of the Indians and that they are not being unfairly deprived of their lands.

Examination of the object of the statute reveals that a decision which would render the surrender null and void solely because of non-compliance with the formalities of subsection 51(3) would certainly not promote the main object of the legislation where all substantial requirements have been fulfilled; it might well cause serious inconveniences or injustice to persons having no control over those entrusted with the duty of furnishing evidence of compliance in proper form. In the subsection, unlike subsection (1), where it is provided that unless it is complied with no surrender shall be valid or binding, there is no provision for any consequences of non-observance. I therefore conclude that the provisions of subsection 51(3) are merely directory and not mandatory.

It is also of some importance that the subsection does not state specifically that an affidavit must be submitted attesting to those facts but merely provides that:

51. ...

3. The fact that such release or surrender has been assented to by the band ... shall be certified on oath ... before any

fédérale a confirmé ses conclusions aux pages 118 et 119 de la décision *Jasper Park*, précitée.

Comme il a été précisé dans l'arrêt *Montreal Street Railway*, il faut tenir compte de l'objet de la Loi. Il semble clair que l'article 51 a été édicté pour garantir l'obtention régulière de l'assentiment de la majorité des membres adultes de la bande avant que la cession ne puisse être acceptée par le gouverneur en conseil et ne prenne effet. Cette disposition vise à fournir des moyens de surmonter les restrictions générales apportées par l'article 50 de la Loi à la cession, la vente ou l'aliénation des terres d'une réserve indienne. En d'autres termes, la vente ou la location des terres d'une réserve indienne doit être conclue conformément aux vœux de la bande, en plus d'être bien sûr approuvée par le gouverneur en conseil. Cette dernière exigence suppose vraisemblablement que le gouverneur en conseil est convaincu que la cession a été approuvée de façon régulière, qu'elle a pour objectif le bien-être général des Indiens et que ceux-ci ne sont pas injustement privés de leurs terres.

L'examen de l'objet de la Loi montre qu'une décision invalidant la cession pour la seule raison que les formalités prescrites par le paragraphe 51(3) n'ont pas été respectées ne favoriserait certainement pas la réalisation du principal objectif de la législation lorsque toutes les exigences essentielles ont été remplies. Il se pourrait fort bien que des personnes n'ayant aucune autorité sur ceux qui sont chargés de prouver l'observation des formalités prescrites subissent de ce fait de graves inconvénients ou fassent l'objet d'une injustice. Contrairement au paragraphe (1) qui porte qu'en cas d'inobservation de ces dispositions, la cession n'est ni valide ni obligatoire, le paragraphe 51(3) n'envisage pas les conséquences du non-respect de ses exigences. Je conclus donc que les dispositions du paragraphe 51(3) sont simplement supplétives, et non impératives.

Il est également assez révélateur que le paragraphe ne dispose pas expressément qu'un affidavit doit être soumis pour attester ces faits mais qu'il porte simplement ce qui suit:

51. ...

3. Le fait que la cession ou rétrocession a été consentie par la bande ... doit être attestée sous serment ... devant toute

person having authority to take affidavits and having jurisdiction

This was in fact done and J. E. Young, whose signature is admitted and whose authority as a justice of the peace in and for the Province of British Columbia is uncontested and which I must accept (in the absence of any evidence to the contrary) has stated that the deponents were sworn before him and that they testified as mentioned in the document. The failure to actually require the deponents to sign or affix their mark to the document can well be understood when one considers the lack of legal training or knowledge of some persons who are granted commissions as justices of the peace in remote areas of Canada.

Finally, the Department, in addition to this document, had before it for submission to the Governor General in Council if required, the surrender document itself, the attached voters list and Mr. Grew's letters of the August 8, 1945 (Exhibit 283) and September 24, 1945 (Exhibit 294). There was therefore ample evidence that the substantial requirements of section 51 had been complied with. In addition, I have found as a fact that the surrender was fully assented to.

To summarize, I find that subsection 51(3) was in fact sufficiently complied with and, if not, the plaintiffs' objection on this ground must nevertheless fail as subsection (3) is merely directory and not mandatory.

1948 TRANSFER TO THE DIRECTOR, THE VETERANS' LAND ACT

a) Effect of the transfer

Section 54 of the *Indian Act*, 1927 provides that all reserve lands "shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part." The special provisions in the Act which apply to the facts of this case are sections 50 and 51. I have already dealt with them as well as the terms of the surrender. The Department obviously had the right to alienate the lands by absolute sale. There were no special directions given by the Governor in Council and the letters patent (Exhib-

personne autorisée à faire prêter serment et ayant juridiction . . .

C'est ce qui a été fait. J. E. Young, dont la signature est admise et dont la compétence à titre de juge de paix pour la province de la Colombie-Britannique n'est pas contestée et que je dois accepter (en l'absence de toute preuve contraire) a déclaré que les déposants avaient prêté serment devant lui et qu'ils avaient rendu témoignage tel qu'il est mentionné dans le document. Le fait de ne pas avoir exigé des déposants qu'ils signent le document ou qu'ils y apposent leur marque se comprend bien si l'on tient compte de l'absence de formation ou de connaissance juridique de certaines personnes nommées juges de paix dans les régions éloignées du Canada.

Enfin outre ce document, le Ministère avait en main l'acte de cession lui-même, la liste des votants y annexée et les lettres de M. Grew datées du 8 août 1945 (pièce 283) et du 24 septembre 1945 (pièce 294) qu'il pouvait, au besoin, soumettre au gouverneur général en conseil. Il y avait donc de nombreuses preuves de l'observation des exigences essentielles de l'article 51. De plus, j'en viens à la conclusion que la cession a été pleinement sanctionnée.

Pour résumer, l'objection soulevée par les demandeurs doit échouer, si ce n'est parce que je conclus que les formalités du paragraphe 51(3) ont été suffisamment respectées, du moins parce que cette disposition est simplement supplétive, et non impérative.

TRANSFERT DES TERRES AU DIRECTEUR DES TERRES DESTINÉES AUX ANCIENS COMBATTANTS EFFECTUÉ EN 1948

a) Effet du transfert

L'article 54 de la *Loi des Indiens* de 1927 porte que toutes les terres qui sont des réserves «sont administrées, affermées et vendues selon que le gouverneur en son conseil le prescrit, sauf les conditions de la rétrocession et les dispositions de la présente Partie.» Les dispositions spéciales de la Loi applicables aux faits en l'espèce sont les articles 50 et 51. J'ai déjà traité de ces dispositions de même que des conditions de la cession. À l'évidence, le Ministère avait le droit d'aliéner les terres par vente définitive. Le gouverneur en con-

it 506) transferring the lands from the Department of Indian Affairs to the Director contain no reservation whatsoever except for the public road allowance reserved through the parcel. The grant is to the Director, his heirs and successors forever and is absolute in every way.

The plaintiffs claim that, since the document is silent as to minerals, it does not have the effect of transferring them. This argument cannot be sustained at law: unless an interest is specifically withheld, an absolute conveyance of land includes all interests except precious metals (*Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 App. Cas. 295 (P.C.), at pages 302, 303 and 306).

b) Whether the Department of Indian Affairs had the duty to retain the minerals

The plaintiffs also claim that the Department of Indian Affairs had a fiduciary duty to retain the minerals for the plaintiff Band in March 1948 when the letters patent were granted to the Director. They argue that the Department should have noticed the error subsequently and should have required that the letters patent be corrected.

I have already made several findings affecting this issue in dealing with the value and foreseeability of potential mineral rights under I.R. 172 (refer pages 48-49 *supra*) and, in the concluding paragraph, I held that the defendant had sufficiently established that, in 1948, no fiduciary could reasonably have anticipated or foreseen that there would be any value to those rights.

The evidence indicated that no importance was attached to minerals either at the time of the transfer to the Director nor until many, if not all of the veterans, had at least taken possession pursuant to their respective agreements to purchase and, as a result, no mention whatsoever was made of mineral rights in those documents. A duty on the Department of Indian Affairs to retain the minerals has not been established.

seil n'avait émis aucune directive spéciale, et les lettres patentes (pièce 506) transférant les terres du ministère des Affaires indiennes au Directeur ne comportaient aucune réserve, sinon pour l'emprise d'un chemin public sur la parcelle de terre. La cession, absolue en tous points, est consentie au Directeur, à ses héritiers et successeurs, définitivement.

Les demandeurs prétendent que, puisque le document ne mentionne pas les droits miniers, il n'a pas pour effet de les transférer. Cet argument ne peut être soutenu en droit. À moins qu'un droit ne soit expressément retenu, une cession absolue des terres comprend tous les droits sauf ceux afférents aux métaux précieux (*Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 App. Cas. 295 (P.C.), aux pages 302, 303 et 306).

b) Le ministère des Affaires indiennes avait-il l'obligation de conserver les droits miniers?

Les demandeurs prétendent également que le ministère des Affaires indiennes était tenu, en vertu de ses obligations de fiduciaire, de retenir les droits miniers pour la bande demanderesse en mars 1948 lorsque les lettres patentes ont été accordées au Directeur. Ils soutiennent que le Ministère aurait dû voir l'erreur par la suite et qu'il aurait dû exiger que les lettres patentes soient corrigées.

J'ai déjà tiré plusieurs conclusions sur cette question en traitant de la valeur et de la prévisibilité d'éventuels droits miniers afférents à la R.I. 172 (voir les pages 48 et 49 ci-dessus). Dans le dernier paragraphe, j'ai décidé que la défenderesse avait suffisamment démontré qu'en 1948, aucun fiduciaire n'aurait raisonnablement pu prévoir que ces droits auraient quelque valeur.

D'après la preuve, on n'a attaché aucune importance aux minéraux au moment du transfert consenti au Directeur ni avant que bon nombre d'anciens combattants, sinon la totalité d'entre eux, ne prennent au moins possession des terres aux termes de leur promesse de vente respective et, par conséquent, aucune mention des droits miniers n'est faite dans ces documents. Il n'a pas été établi que le ministère des Affaires indiennes avait l'obligation de retenir les droits miniers.

c) Breach of duty of defendant upon transfer to the Director

The plaintiffs also argue that, at the time of the transfer to the Director in 1948, the defendant acted fraudulently and also in breach of the fiduciary duties which it owed the Band at the time. With regard to the allegations of fraud, I find that they have failed completely to establish that the defendant had, in any way, through its agents or servants, been guilty of fraud towards them at any times relevant to this action. The allegations of breaches of fiduciary duty at the time of the transfer to the Director, however, have much greater substance. Mr. Justice Dickson (as he then was) stated in the *Guerin* case (*supra*) that upon unconditional surrender, the Indians' right in the land disappeared but that there subsisted however an obligation of the Crown to the Indians which was trust-like in that "the Crown must hold the surrendered land for the use and benefit of the surrendering Band". (Refer *Guerin* case (*supra*) at page 387.) Regardless of whether the opinion of the majority expressed by Chief Justice Dickson in the *Guerin* case, that no true trust whether constructive or otherwise is created, or whether one adopts the view of Wilson J. concurred in by Ritchie and McIntyre JJ. to the effect that an express trust is created, the duty cast upon the defendant as represented by the Department of Indian Affairs, which arises upon surrender of the land by the Indians, is equally as onerous, since the obligation is at least "trust-like".

It appears that, as in the case of *Kruger v. The Queen*, [1986] 1 F.C. 3 (C.A.), there existed in the case at bar a conflict of interest between the Department of Indian Affairs and The Director, The Veterans' Land Act: the former was seeking the best price available for the land and was interested in obtaining it immediately in order to purchase substitute reserves closer to the trap lines (See Exhibit 428). The latter, on the other hand, wanted to secure good agricultural land at the lowest possible price in order to allow the veterans to obtain a greater benefit from the purchase.

c) Manquement à l'obligation de la défenderesse au moment du transfert consenti au Directeur

a Les demandeurs prétendent aussi qu'au moment du transfert consenti au Directeur en 1948, la défenderesse a agi de façon frauduleuse et qu'elle ne s'est pas acquittée des obligations de fiduciaire qu'elle avait envers les Indiens à cette époque. En ce qui a trait aux allégations de fraude, je conclus qu'ils n'ont pas réussi à prouver que la défenderesse avait, de quelque façon que ce soit, par l'entremise de ses mandataires ou préposés, commis une fraude à leur égard pendant la période visée par la présente action. Toutefois, les allégations de manquement à l'obligation de fiduciaire à l'époque du transfert consenti au Directeur, elles, ont beaucoup plus de poids. Le juge Dickson (alors juge puîné) a déclaré dans l'arrêt *Guerin*, précité, que si la cession inconditionnelle entraînait la disparition du droit des Indiens sur le bien-fonds, la Couronne n'en demeurerait pas moins tenue de s'acquitter à l'égard des Indiens d'une obligation semblable à une fiducie, car «... Sa Majesté doit détenir les terres à l'usage et au profit de la bande qui les a cédées» (voir l'arrêt *Guerin*, précité, à la page 387). Qu'on se range à l'opinion de la majorité exprimée par le juge en chef Dickson dans l'affaire *Guerin* et selon laquelle la cession ne crée pas de fiducie au sens strict, soit une fiducie par interprétation ou autre, ou que l'on adopte le point de vue du juge Wilson auquel ont souscrit les juges Ritchie et McIntyre et voulant que la cession engendre une fiducie explicite, l'obligation pesant sur la défenderesse, représentée par le ministère des Affaires indiennes, par suite de la cession des terres par les Indiens est tout aussi lourde, étant au moins semblable à une fiducie.

h En l'espèce, comme dans la décision *Kruger c. La Reine*, [1986] 1 C.F. 3 (C.A.), il semble y avoir un conflit d'intérêt entre le Directeur des terres destinées aux anciens combattants et le Ministère des Affaires indiennes. Celui-ci cherchait à obtenir le meilleur prix possible pour les terres et à l'obtenir immédiatement en vue d'acheter des terres pour remplacer les réserves, qui soient situées plus près des sentiers de piégeage (voir pièce 428), celui-là désirait acheter de bonnes terres agricoles au plus bas prix possible afin que l'achat soit plus profitable pour les anciens combattants.

The statement of Heald J. at page 17 of the above cited report of the *Kruger* case is particularly relevant here:

Bearing in mind that it is the Crown which owes the fiduciary duty to the Indians, the facts of this case clearly raise the issue of conflict of interest, in my view. It seems evident that two Departments of the Government of Canada were in conflict concerning the manner in which the Indian occupants of Parcel A should be dealt with. The evidence seems to unquestionably establish that the officials of the Indian Affairs Branch were diligent in their efforts to represent the best interests of the Indian occupants. On the other hand, the Department of Transport was anxious to acquire the additional lands in the interests of air transport. This situation resulted in competing considerations. Accordingly, the federal Crown was in a conflict of interest in respect of its fiduciary relationship with the Indians. The law is clear that "one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside" and that "Equity fashioned the rule that no man may allow his duty to conflict with his interest". On this basis, the federal Crown cannot default on its fiduciary obligation to the Indians through a plea of competing considerations by different departments of Government.

There is also the argument that there might well be an element of self-dealing involved. As stated in the case of *Reference re Saskatchewan Natural Resources*, [1931] S.C.R. 263, at page 275:

There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.

There is, of course, a rather important distinction to be drawn between the last mentioned case and the case at bar. We are not dealing with a question of the land being administered for the Crown by one Minister or another on behalf of their respective departments but of the transfer from a department of government, namely the Department of Indian Affairs, to a corporation sole, namely The Director, The Veterans' Land Act, created by Parliament for the express purpose of acquiring, administering and disposing of lands for the exclusive benefit of veterans in accordance with the specific provisions of the Act and independently of the control normally exercised by a Minister over his department. Be that as it may, I find that, in the case at bar, there rested an onerous fiduciary duty upon the Department of

La déclaration faite par le juge Heald dans l'affaire *Kruger*, précitée, à la page 17, est particulièrement pertinente:

À mon avis, étant donné que la Couronne a une obligation de fiduciaire envers les Indiens, la question du conflit d'intérêts se pose clairement dans ce cas-ci. De toute évidence, deux Ministères du gouvernement canadien ne s'entendaient pas sur la façon de traiter les occupants indiens du lot A. La preuve semble incontestablement montrer que les fonctionnaires de la direction des Affaires indiennes ont fait preuve de diligence lorsqu'il s'est agi de défendre au mieux les intérêts des occupants indiens. D'autre part, le ministère des Transports était anxieux d'acquérir les nouvelles terres dans l'intérêt des transports aériens. Cette situation a entraîné l'existence de considérations incompatibles les unes avec les autres. Par conséquent, en sa qualité de fiduciaire des Indiens, la Couronne fédérale faisait face à un conflit d'intérêts. En droit, il est clair que [TRADUCTION] «une personne qui se charge d'une tâche pour le compte d'une autre doit agir exclusivement au bénéfice de cette dernière, sans tenir compte de ses propres intérêts» et que [TRADUCTION] «Selon la règle établie en *equity*, personne ne peut laisser son devoir entrer en conflit avec son intérêt». Ceci étant, on ne saurait reprocher à la Couronne fédérale d'avoir manqué à son obligation de fiduciaire envers les Indiens en invoquant l'existence de considérations incompatibles entre les différents ministères du gouvernement.

On a également prétendu qu'il pourrait fort bien y avoir un élément de transaction intéressée en l'espèce. Comme il a été précisé dans l'arrêt *Reference re Saskatchewan Natural Resources*, [1931] R.C.S. 263, à la page 275:

[TRADUCTION] Il n'y a qu'une seule Couronne, et les terres qui lui appartiennent lui sont dévolues et le demeurent, en dépit du fait que leur administration et leur utilisation par le bénéficiaire, approuvée par les autorités compétentes, peuvent être régies selon l'avis des divers ministres chargés du service approprié.

Bien entendu, il convient d'établir une distinction importante entre la dernière affaire mentionnée et le cas qui nous occupe. Il ne s'agit pas ici de l'administration d'un bien-fonds pour la Couronne par un ministre ou un autre au nom de leur ministère respectif mais plutôt de son transfert d'un ministère du gouvernement, savoir le ministère des Affaires indiennes, au Directeur des terres destinées aux anciens combattants, corporation constituée d'une seule personne physique, qui a été créée par le Parlement en vue précisément d'acquérir, d'administrer et de transporter des terres au profit exclusif des anciens combattants conformément aux dispositions spécifiques de la Loi et indépendamment de l'autorité normalement exercée par un ministre sur son ministère. Quoi qu'il en soit, je conclus qu'en l'espèce, il incombait au

Indian Affairs to ensure that all reasonable efforts were made to obtain the best price possible for the land at the time of sale.

Where such a fiduciary duty exists there also rests upon the person by whom the duty is owed, an onus of proving that it has been discharged.

The evidence establishes that an appraiser engaged by the Department of Indian Affairs appraised the value of the land at \$93,160 (Exhibit 414). After lengthy negotiations between that department and The Director, The Veterans' Land Act, who would not purchase at that price, the land was finally sold to him for the sum of \$70,000 on March 30, 1978 (Exhibit 506). In addition, the cost of survey was borne by the Department of Indian Affairs.

There is a lack of evidence adduced by the defendant to justify the discrepancy between the appraised price and the actual sale price. Although I am not making any finding as to the actual value, since the question of damages is not before me and also because Exhibit 414 is not in evidence for the purpose of establishing the truth of the assertion that the land was in fact worth \$93,160, the evidence does establish that the defendant was fully aware of a discrepancy between the appraised price of its own appraiser and the sale price. The sufficiency of the sale price is therefore a real issue and not merely a speculative or a theoretical one. The defendant had a duty to convince the Court that it could not reasonably have been expected to obtain a better price. There was no evidence as to what other offers were sought and what efforts were made to obtain a better price elsewhere. Since the onus of establishing that a full and fair price was in fact obtained in March 1948 has not been discharged by the defendant, I find that the latter was guilty of a breach of its fiduciary duty towards the plaintiffs in that regard. Unless the claim is statute barred, the amount of damages sustained by the plaintiffs due to the possible insufficiency of the sale price would thus remain to be determined at a later hearing or upon a reference for assessment of damages. However, as previously stated, the evidence does not establish the

ministère des Affaires indiennes de s'acquitter d'une lourde obligation de fiduciaire et de s'assurer que tous les efforts raisonnables avaient été faits pour obtenir le meilleur prix possible pour les terres au moment de la vente.

L'existence d'une telle obligation fait également peser sur la personne qui doit s'en acquitter le fardeau de prouver qu'elle a accompli sa mission.

La preuve établit qu'un évaluateur dont les services avaient été retenus par le ministère des Affaires indiennes avait fixé la valeur des terres à 93 160 \$ (pièce 414). À l'issue de longues négociations entre le Ministère et le Directeur des terres destinées aux anciens combattants, qui ne voulait pas acheter les terres à ce prix, celles-ci lui avaient finalement été vendues pour la somme de 70 000 \$ le 30 mars 1978 (pièce 506). En outre, les frais d'arpentage avaient été supportés par le ministère des Affaires indiennes.

La défenderesse n'a produit aucune preuve pour justifier l'écart entre le prix fixé par l'évaluateur et le prix de vente réel. Bien que je ne tire aucune conclusion relativement à la valeur réelle, puisque je n'ai pas à me prononcer sur les dommages-intérêts et que la pièce 414 n'a pas été produite aux fins d'établir la véracité de l'affirmation voulant que les terres valaient en réalité 93 160 \$, la preuve montre tout à fait que la défenderesse savait très bien qu'il y avait un écart entre le prix fixé par son propre évaluateur et le prix de vente. La suffisance du prix de vente pose par conséquent un véritable problème, il ne s'agit pas d'une question théorique. Il incombait à la défenderesse de convaincre la Cour qu'elle ne pouvait raisonnablement s'attendre à obtenir un meilleur prix. Aucune preuve n'a été présentée pour établir que d'autres offres avaient été recherchées ni pour montrer que des efforts avaient été faits pour obtenir un meilleur prix ailleurs. Comme la défenderesse ne s'est pas acquittée du fardeau d'établir qu'un prix équitable avait en réalité été obtenu en mars 1948, je conclus qu'elle a manqué sur ce point à ses obligations de fiduciaire à l'égard des demandeurs. À moins que la demande ne soit prescrite, le montant des dommages subis par les demandeurs en raison de l'insuffisance possible du prix de vente devra donc être déterminé au cours d'une audience ultérieure ou d'une référence pour évaluer les domma-

probability of fraud, of fraudulent intent or of willful concealment.

d) Whether The Director, The Veterans' Land Act held in trust for Indians ^a

The plaintiffs argued that, following the transfer to The Director, The Veterans' Land Act, in 1948, the latter continued to hold the mineral rights in trust for the plaintiffs and should have transferred them back when some interest in obtaining exploration permits subsequently arose.

Regarding title to minerals, the present case is clearly distinguishable from the matters which arose under and were dealt with under the former *The Soldier Settlement Act, 1917* [S.C. 1917, c. 21] later replaced by *The Soldier Settlement Act, 1919* [S.C. 1919, c. 71] which were enacted for the resettlement of veterans of the first Great War. Section 57 of the 1919 Act specifically provided that "mines and minerals shall be and shall be deemed to have been reserved" from all sales made by the Board. Therefore, one could not obtain from the Board any title or claim to mines or minerals regardless of whether or not they were reserved or regardless of any statement in the document of conveyance. When Parliament in 1942 enacted *The Veterans' Land Act, 1942*, [S.C. 1942-43, c. 33] for the benefit of the veterans of the 1939-45 War it chose to omit any such reservations or limitations. The general law must therefore be applied.

In addition, however, there would have been a serious legal impediment to any conveyance by the Director to the Department of Indian Affairs or to any person other than a veteran. *The Veterans' Land Act, 1942* (R.S.C. 1970, c. V-4) provides that the Director is a corporation sole with perpetual succession, having power to hold and transfer property which he is "by this Act authorized to acquire, hold, convey, transfer, agree to convey or agree to transfer, but for such purposes only" [underlining added] (subsection 5(1)), and that "All property acquired for any of the purposes of

ges-intérêts. Cependant, comme il a déjà été dit, la preuve n'établit pas la probabilité d'une fraude, d'une intention frauduleuse ni d'une dissimulation volontaire.

d) Le Directeur des terres destinées aux anciens combattants détenait-il les droits miniers en fiducie pour les Indiens?

Les demandeurs soutiennent qu'à la suite du transfert consenti au Directeur des terres destinées aux anciens combattants en 1948, celui-ci a continué à détenir les droits miniers en fiducie pour les demandeurs. Ils prétendent qu'il aurait dû les rétrocéder lorsque l'obtention de permis d'exploration a commencé à susciter de l'intérêt.

En ce qui concerne le titre sur les minéraux, on peut établir une distinction nette entre le cas qui nous occupe et les litiges résolus sous le régime de l'ancienne *Loi d'Établissement de Soldats, 1917*, [S.C. 1917, chap. 21] remplacée par la suite par la *Loi d'établissement de soldats, 1919*, [S.C. 1919, chap. 71] qui avaient été adoptées en vue de l'établissement des anciens combattants de la Première Guerre mondiale. L'article 57 de la Loi de 1919 dispose expressément que «toutes les mines et tous les minéraux doivent être, et sont censés avoir été réservés» dans toutes les ventes conclues par la Commission. Par conséquent, la Commission ne pouvait accorder de titre ni de droit de réclamation sur les mines ou les minéraux, peu importe qu'ils aient été réservés ou non et en dépit des stipulations de l'acte de cession. Lorsque le Parlement a adopté en 1942 la *Loi de 1942 sur les terres destinées aux anciens combattants* [S.C. 1942-43, chap. 33] dans l'intérêt des anciens combattants de la guerre de 1939-1945, il a choisi d'omettre ces réserves ou limitations. Les règles générales du droit doivent donc être appliquées.

Au surplus, un grave obstacle juridique aurait empêché la cession par le Directeur au ministère des Affaires indiennes ou à toute autre personne qui n'était pas un ancien combattant. La *Loi de 1942 sur les terres destinées aux anciens combattants* (S.R.C. 1970, chap. V-4) dispose que le Directeur est une corporation constituée d'une seule personne physique jouissant d'une succession perpétuelle et habilité à détenir et à transférer les biens «que la présente loi l'autorise à acquérir, détenir, transporter, transférer ou convenir de transporter ou de transférer, mais pour ces fins

this Act shall vest in the Director as such corporation sole" (subsection 5(4), formerly subsection 5(3)). The Director obtains land by grant in fee simple from the Crown as in the case of any other person or corporation. In order for the Crown to obtain title to those lands, they must be reconveyed by the Director. The powers of disposition of land of the Director and the purposes for which land is to be acquired by him are strictly defined in considerable detail in the Act. There are provisions for reconveyance of the land to the Crown where it is required for a public purpose or for conveyance to any person with the consent of the interested veteran or for the sale of land which eventually might not be required for the purposes of the Director. There is no power however, without consent of the veteran concerned, to reconvey lands or any mineral rights to the Crown for the benefit of Indians or to any other person for that matter.

Section 3 of the Act as amended in 1946 [S.C. 1946, c. 70, s. 1] renders the Director responsible to the Minister of Veterans Affairs and subject to the latter's direction. It is obvious, however, that the Director must comply strictly with the provisions of the *Veterans' Land Act* and that the Minister cannot instruct him to exercise powers as Director which are not contained in the *Veterans' Land Act* nor to act in any way contrary to the statute.

If any authority were needed to support the proposition that the Director's powers and authority are strictly limited to those conferred upon him by the *Veterans' Land Act*, the case of *The Queen v. Richard L. Reese et al.*, [1956] Ex.C.R. 94, could be cited as relevant and authoritative. In that case, a promise made to convey mineral rights under the *Soldier Settlement Act* was declared to be unenforceable against the Crown even though the undertaking was given to a soldier. Since the Director (formerly "the Board" under the *Soldier Settlement Act*) can only bind the Crown for the purposes mentioned in the Act, the latter cannot be vicariously liable for the Director's failure to

seulement» [c'est moi qui souligne] (paragraphe 5(1)) et «Tous les biens acquis pour l'un des objets de la présente loi sont dévolus au Directeur en sa qualité de corporation constituée d'une seule personne physique» (paragraphe 5(4), ancien paragraphe 5(3)). Le Directeur obtient les terres en vertu d'une cession de la propriété absolue consentie par la Couronne comme toute autre personne ou société. Pour que la Couronne puisse obtenir le titre sur ces terres, celles-ci doivent être rétrocédées au Directeur. Les pouvoirs relatifs à l'aliénation des terres accordés au Directeur et les raisons pour lesquelles il doit acquérir des terres sont strictement définies par le menu détail dans la Loi. Des dispositions prévoient la rétrocession des terres à la Couronne lorsque celles-ci sont requises pour cause d'utilité publique, la rétrocession à toute personne avec le consentement de l'ancien combattant intéressé et la vente éventuelle des terres dont le Directeur n'aura pas besoin. La Loi ne prévoit toutefois aucun pouvoir de rétrocéder des terres ou tout droit minier à la Couronne au profit des Indiens ou de toute autre personne d'ailleurs, sans le consentement de l'ancien combattant concerné.

Selon l'article 3 de la Loi, modifiée en 1946 [S.C. 1946, chap. 70, art. 1], le Directeur relève du ministre des Affaires des anciens combattants de qui il reçoit des directives. Cependant, il est évident que le Directeur doit se conformer strictement aux dispositions de la *Loi sur les terres destinées aux anciens combattants* et que le ministre ne peut lui ordonner d'exercer des pouvoirs qui ne sont pas prévus par la *Loi sur les terres destinées aux anciens combattants* ni de contrevenir de quelque façon à la Loi.

S'il était nécessaire d'étayer la proposition selon laquelle les pouvoirs du Directeur sont strictement limités à ceux qui lui sont conférés par la *Loi sur les terres destinées aux anciens combattants*, on pourrait citer l'affaire *The Queen v. Richard L. Reese*, [1956] R.C.É. 94, qui fait autorité. Dans cette affaire, une promesse de céder des droits miniers faite sous le régime de la *Loi d'établissement de soldats* a été déclarée inexécutable à l'encontre de la Couronne même si l'engagement avait été passé avec un soldat. Puisque le Directeur (anciennement «la Commission» en vertu de la *Loi d'établissement de soldats*) ne peut lier la Couronne que pour les fins mentionnées dans la Loi, la

either administer or reconvey the land for the benefit of the Indians, nor can the Crown order him to do so without an amendment to the *Veterans' Land Act*.

Finally, once the letters patent had been issued, the full purchase price had been paid by the Director to the Department of Indian Affairs and the latter had set aside the funds as required by the Act for the benefit of the Indians, the lands of I.R. 172 no longer formed the object of the trust, if it was a trust, or, alternatively, no longer constituted the object to which the special fiduciary duty of the defendant related. From that moment on, namely from March 30, 1948, the proceeds of the sale in lieu of the land were to be administered by the defendant for the benefit of the plaintiffs.

For the above reasons the plaintiffs' argument on the issue of the Director's duty to reconvey mineral rights to or on behalf of the Indians cannot succeed.

e) Non-compliance with *The Dominion Lands Act*, 1908

There is no merit to the argument founded on paragraph 78 of the statement of claim that the 1948 transfer of mineral rights in I.R. 172 would be void as regards those rights because of non-compliance with the requirements of section 41 of *The Dominion Lands Act*, 1908, c. 20. This section refers exclusively to terms of payment of the purchase price of school lands. No part of I.R. 172 was ever designated as school lands pursuant to the Act nor is there any evidence that any part was used for such purpose.

ALLEGED BREACHES SINCE 1948

Numerous breaches of trust and of duty towards the Indians are alleged to have occurred since 1948. Unlike the issue of sufficiency of the sale price of I.R. 172, the onus of proof of these allegations rests upon the plaintiffs.

It has not been established as alleged in paragraph 35 of the statement of claim that the defendant undertook to obtain replacement

Couronne ne peut être tenue responsable du fait que le Directeur n'a pas géré ni rétrocédé les terres au profit des Indiens, et la Couronne ne peut lui ordonner de le faire si la *Loi sur les terres destinées aux anciens combattants* n'est pas modifiée.

Enfin, après que les lettres patentes eurent été délivrées, que la totalité du prix d'achat eut été versé par le Directeur au ministère des Affaires indiennes et que celui-ci eut réservé le produit au profit des Indiens comme le prescrit la Loi, les terres de la R.I. 172 n'étaient plus détenues en fiducie, si fiducie il y avait, ou subsidiairement, elles ne faisaient plus l'objet de l'obligation de fiduciaire spéciale qui pesait sur la défenderesse. À compter de cette date, savoir le 30 mars 1948, le produit de la vente, et non plus les terres, devait être géré par la défenderesse au profit des Indiens.

Pour les motifs précités, l'argument des demandeurs relativement à l'obligation du Directeur de rétrocéder les droits miniers aux Indiens ou en leur nom ne peut être retenu.

e) Inobservation des dispositions de la *Loi des terres fédérales de 1908*

L'argument invoqué au paragraphe 78 de la déclaration voulant que le transfert des droits miniers sur la R.I. 172 effectué en 1948 soit invalide en raison de l'inobservation des dispositions de l'article 41 de la *Loi des terres fédérales* de 1908, chap. 20, n'est pas fondé. Cet article se rapporte exclusivement aux modalités de versement du prix d'achat des terres réservés pour les écoles. Aucune partie de la R.I. 172 n'a jamais été désignée à ce titre en application de la Loi et aucune preuve n'a été produite pour établir qu'une partie des terres de la réserve était utilisée à cette fin.

MANQUEMENTS IMPUTÉS DEPUIS 1948

De nombreux manquements à l'obligation et aux devoirs de fiduciaire envers les Indiens seraient survenus depuis 1948. Il incombe aux demandeurs de prouver ces affirmations, contrairement à la suffisance du prix de vente de la R.I. 172 que la défenderesse devait établir.

Il n'a pas été établi comme les demandeurs le soutiennent au paragraphe 35 de la déclaration, que la défenderesse a cherché à obtenir des terres

reserves which would be situated beyond the area of future agricultural settlements.

With regard to the alleged delay in actually acquiring legal title until 1950 to the reserves from the Province of British Columbia, since I.R. 172 was actually sold in 1948 and some time was required to complete surveys I do not feel that the delay was excessive. More importantly, however, there can be no damage since the evidence indicates that the plaintiffs apparently continued to enjoy the benefit and use of those reserves between 1945 and 1950. The evidence establishes also that they had in the past been making very limited use of reserve lands.

The plaintiffs also complained that they did not obtain mineral rights to the replacement reserves. Treaty lands normally carried mineral rights, since those rights had been held by the Crown in right of Canada in the first place. This did not apply to the replacement reserves after the mineral rights had been transferred to the Province. Unlike I.R. 172, the replacement reserves were merely reserves obtained for the benefit of the plaintiffs under the provisions of the *Indian Act* and in pursuance of the conditions of the 1945 surrender of I.R. 172, and were not treaty reserves. It turned out that the Department could not, in view of the general policy of the Provincial Government regarding reservation of all mineral rights, obtain title to those rights for the benefit of the Indians. The Department was apparently not aware of this policy nor of the reservation of rights until some time later when, in error, some of its officials indicated a readiness to grant an exploration licence on the replacement reserves to an oil company. Furthermore, although the defendant, had it obtained mineral rights in the replacement reserves, would undoubtedly have considered them as forming an integral part of the reserve, there is a lack of evidence that the defendant, as a condition of the 1945 surrender, undertook in any way to obtain mineral rights in the replacement reserves. There is also evidence which might tend to indicate the contrary. Before being chosen, the areas were considered by both parties merely from the standpoint of their suitability for habitation, their proximity to the hunting, fishing and trap-

de remplacement situées plus loin que les terrains destinés à accueillir de futurs établissements agricoles.

a En ce qui concerne le retard imputé à la défenderesse, qui n'a obtenu qu'en 1950 de la province de la Colombie-Britannique le titre de propriété en *common law* sur les réserves, j'estime que ce délai n'était pas excessif compte tenu du fait que la R.I. 172 avait été vendue en 1948 et qu'il avait fallu un certain temps pour compléter l'arpentage. Fait plus important encore, il ne saurait y avoir préjudice puisque la preuve montre que les demandeurs ont continué apparemment d'utiliser ces réserves de 1945 à 1950. Il est également établi que par le passé ils avaient très peu utilisé les terres de réserve.

d Les demandeurs soutiennent aussi qu'ils n'ont pas obtenu les droits miniers sur les terres de remplacement. Les droits miniers étaient d'ordinaire attachés aux terres conférées par traité puisqu'ils étaient détenus par la Couronne du chef du Canada. Il n'en va pas de même des terres de remplacement après que les droits miniers eurent été transférés à la province. Contrairement à la R.I. 172, les terres achetées pour remplacer les réserves étaient simplement des réserves acquises au profit des demandeurs en application des dispositions de la *Loi des Indiens* et conformément aux conditions de la cession de 1945 de la R.I. 172, et elles ne constituaient donc pas des réserves conférées par traité. Le Ministère ne pouvait pas, en raison de la politique adoptée par le gouvernement provincial relativement à la retenue de tous les droits miniers, obtenir le titre sur ces droits au profit des Indiens. Le Ministère n'a apparemment été informé de cette politique que plus tard lorsque, par erreur, certains de ses fonctionnaires s'étaient montrés disposés à accorder un permis d'exploration visant les terres de remplacement à une société pétrolière. En outre, bien que la défenderesse eût sans doute considéré les droits miniers sur les terres de remplacement comme une partie intégrante de la réserve, si elle les avait obtenus, il n'est pas démontré qu'elle s'était engagée de quelque façon, aux termes de l'acte de cession de 1945, à obtenir des droits miniers sur les terres de remplacement. Des éléments de preuve tendent également à indiquer le contraire. Avant d'arrêter leur choix, les deux parties avaient exploré la région à

ping grounds of the Indians, their distance from white settlements in the vicinity and the possible future development of the lands for agricultural or cattle farming by the Indians. There is no evidence of any thought whatsoever having been given to mineral rights under the new reserves.

Although there were rumours at some time during 1950 that the British Columbia Government was contemplating a change of policy regarding the granting of lands for the purpose of establishing Indian reserves, it was only in January 1951 that the Canadian Government was advised that the Provincial Government had, in November 1950, formally decided that, altogether apart from the reservation of mineral rights, no more lands would henceforth be transferred in fee to the Department of Indian Affairs to be used for Indian reserves unless an equivalent amount of land was obtained in exchange. As a result of that decision many, if not all, proposed land purchases by the defendant for the benefit of other Indian bands in the Province had to be abandoned (refer Exhibit 688). No promise of the defendant was established to the effect that the same acreage of land would be obtained in the new reserves as was surrendered in I.R. 172 nor does there seem to be any evidence that the plaintiffs at that time expected the defendant to do so. There was a considerable amount of correspondence pertaining to the proposed replacement and to the reserves themselves when they were obtained and in none of this correspondence or the memoranda of the various officials does there appear to be any question of equivalent acreage.

Sales under the agreements which the Director had entered into with the veterans gave each veteran purchaser a right to immediate possession of the lands upon the signing of the agreement and payment of the deposit and also the right, upon payment in full of the purchase price, to a deed and fee simple free of all encumbrances. Paragraph 14 of the agreement reads as follows:

14. It is agreed that upon punctual payment by the Veteran of all moneys hereby by him agreed to be paid and subject to

la recherche de terrains sur lesquels on pourrait construire des habitations et situés à proximité des territoires de chasse et de pêche ainsi que des sentiers de piégeage. Ils ont également tenu compte de la distance qui les séparait des établissements des blancs dans la région et de l'éventuelle mise en valeur des terres par les Indiens, par l'agriculture ou l'élevage. Il n'a pas été démontré que l'on s'était le moins préocculté des droits miniers sur les nouvelles réserves.

Bien que le bruit ait couru en 1950 que le gouvernement de la Colombie-Britannique envisageait de modifier la politique relative à l'octroi des terres pour l'établissement des réserves indiennes, ce n'est qu'en janvier 1951 que le gouvernement fédéral était informé du fait que le gouvernement provincial avait en novembre 1950 décidé officiellement que, mise à part la retenue des droits miniers, aucun droit de propriété sur des terres ne serait plus désormais transféré au ministère des Affaires indiennes en vue de former des réserves à moins que des terres d'une même superficie ne soient obtenues en échange. Par suite de cette décision, bon nombre, sinon la totalité, des projets d'achat de terrains de la défenderesse au profit d'autres bandes indiennes de la province ont dû être abandonnés (voir pièce 688). Il n'a pas été établi que la défenderesse avait promis que des terres d'une même superficie que celles de la R.I. 172 seraient obtenues ni, semble-t-il, que les demandeurs à cette époque s'attendaient à ce que la défenderesse le fasse. Une correspondance volumineuse a été produite relativement aux terres de remplacement proposées et aux réserves elles-mêmes à l'époque où elles ont été achetées. Cependant, il ne semble pas être question d'obtenir des terres d'une superficie équivalente dans aucune des lettres ni aucun des mémoires rédigés par les divers fonctionnaires.

En vertu des ententes conclues par le Directeur avec les anciens combattants, chaque acheteur avait droit à la possession immédiate des terres dès la signature de l'entente et le versement du dépôt. Au paiement de l'intégralité du prix d'achat, l'ancien combattant recevait un acte scellé, et la propriété absolue du terrain, libre de toute charge, lui était transmise. Le paragraphe 14 de l'entente est formulé comme suit:

[TRADUCTION] 14. Les parties conviennent qu'au paiement ponctuel par l'ancien combattant des montants qu'il accepte

performance of all and singular the aforesaid provisions, conditions and agreements, and upon the surrender of this contract, he shall be entitled to a conveyance of the said land in fee simple free from all encumbrances other than such as may have resulted through the act and neglect of the Veteran, but subject to all reservations, limitations, provisos and conditions contained or expressed in the title held by the Director. (Refer Exhibit 986 D)

There were no reservations, limitations, provisions or conditions contained or expressed in the title held by the Director. Paragraph 14 above is a complete answer to the argument of plaintiffs' counsel to the effect that, until the deeds in fee simple were actually delivered to the veterans, the Director could have somehow repossessed the lands for the benefit of the Indians. Sales by agreements for sale to veterans were made as follows: 1948: 19; 1949: 13; 1950: 2; 1951: 1; 1956: 1. Thus, by the end of 1950 all but two of the lots were in the possession of veterans who had a contractual right to an absolute title in fee simple.

Four of the lots which were in surplus to the Director's requirements were disposed of by the Director in 1952 by public auction in accordance with the terms of the statute.

In any event, all of the above allegations regarding subsequent dealings with the land by the Director are of no real help to the plaintiffs. As I have already held, from March 30, 1948 the plaintiffs were no longer entitled to any part of I.R. 172 and the Director, who then held the lands in fee simple, could not in the circumstances and because of the provisions of the *Veterans' Land Act*, be considered a fiduciary or a trustee, constructive or otherwise, for the benefit of the Indians.

The plaintiffs have failed to establish any practical requirement for further reserves, even up to the time of trial. The question of trap lines has already been dealt with. The Department, many years ago, secured numerous registered trap lines for their exclusive use and there is a lack of evidence as to the requirement for any additional lines or for large hunting and fishing areas reserved for their exclusive use as now claimed by the plaintiffs.

par les présentes de payer, sous réserve de l'exécution de toutes les dispositions, conditions et ententes susmentionnées, et à la délivrance du présent contrat, il aura droit au transport de la propriété absolue desdites terres, libres de toutes charges autres que celles pouvant résulter des actes et de la négligence de l'ancien combattant mais sous réserve des restrictions et conditions stipulées dans le titre détenu par le directeur. (Voir pièce 986 D)

Aucune restriction ni condition n'est énoncée dans le titre détenu par le Directeur. Le paragraphe 14 ci-dessus détruit de manière absolue l'argument des avocats des demandeurs voulant que jusqu'à ce que l'acte scellé reconnaissant le transport de la propriété absolue soit délivré à l'ancien combattant, le Directeur pouvait d'une façon ou d'une autre reprendre possession des terres au profit des Indiens. Aux termes des promesses de vente passées avec les anciens combattants, les ventes suivantes ont été conclues: 1948: 19, 1949: 13, 1950: 2, 1951: 1 et 1956: 1. Donc à la fin de 1950, les anciens combattants qui étaient en droit, aux termes d'un contrat, d'obtenir un titre absolu de propriété étaient entrés en possession de tous les lots, à l'exception de deux.

En 1952, le Directeur avait vendu aux enchères quatre lots dont il n'avait pas besoin, conformément aux dispositions de la Loi.

De toute manière, toutes les affirmations susmentionnées relatives à la gestion subséquente des terres par le Directeur ne sont d'aucune utilité aux demandeurs. Comme il a déjà été décidé, dès le 30 mars 1948, les demandeurs n'avaient plus droit à aucune partie de la R.I. 172, et le Directeur qui détenait alors les terres en propriété absolue ne pouvait, dans les circonstances et en raison des dispositions de la *Loi sur les terres destinées aux anciens combattants*, être considéré comme un fiduciaire, sous le régime d'une fiducie par interprétation ou autrement créée au profit des Indiens.

Les demandeurs n'ont pas démontré la nécessité pratique de former d'autres réserves, même au moment de l'instruction. La question des sentiers de piégeage a déjà été résolue. Il y a bien des années, le Ministère avait obtenu de nombreux sentiers de piégeage enregistrés à l'usage exclusif des Indiens, et il n'a pas été démontré qu'il était nécessaire d'obtenir des sentiers de piégeage additionnels ou de vastes territoires de chasse et de pêche réservés à leur usage exclusif, comme le demandent maintenant les demandeurs.

The evidence contained in the Band council resolutions which were filed together with annual budgets deposited in evidence, points to the fact that the funds received from the sale were duly retained for the benefit of the plaintiffs and that all accrued interest thereon was duly credited to their account. Payments from this account plus additional monies from the general appropriations of the Department of Indian Affairs were, from time to time throughout the years, spent for their benefit. There is no evidence whatsoever that any of such monies were misappropriated as claimed. On the contrary, the evidence indicates that all disbursements from those monies and accrued interest were made for the benefit of the plaintiffs, who also received additional monies to which they were not contractually entitled, for their various undertakings, projects, social and collective requirements, etc.

To summarize with regard to alleged breaches since 1948, I find that the onus of proof resting upon the plaintiffs has not been satisfied but that, on the contrary, whatever credible and admissible evidence which does exist regarding these issues would tend to lead one to conclusions contrary to those which they seek.

LIMITATIONS

a) Application

Pursuant to section 38 of the *Federal Court Act* [R.S.C. 1970 (2nd Supp.), c. 10] the law to be applied regarding prescriptions and limitations in this action is clearly that of British Columbia (*Kruger v. The Queen*, [1986] 1 F.C. 3; (1985), 58 N.R. 241 (C.A.)).

Because counsel were unaware of what my ultimate findings might be regarding various claims and allegations of fraud and of continuing breaches of fiduciary responsibilities, considerable argument was addressed to the Court and numerous authorities were quoted and statutory provisions referred to on the question of limitations, in order to cover all possibilities. Since I have found that there was but a non-fraudulent breach of fiduciary duty which related to the sufficiency of the amount received by the Department of Indian Affairs on March 30, 1948 and have found no continuing negligence, breaches of trust or other

Les résolutions des conseils de bande qui ont été versées au dossier avec les budgets annuels font ressortir le fait que le produit de la vente avait été dûment conservé au profit des demandeurs et que tous les intérêts courus avaient été dûment versés au crédit de leur compte. Des sommes tirées de ce compte et des montants additionnels provenant des crédits affectés au ministère des Affaires indiennes ont été dépensées au fil des années à leur profit. Aucune preuve n'a été produite pour démontrer que ces sommes avaient été détournées, comme le prétendent les demandeurs. Au contraire, la preuve indique que tous les versements provenant de ces sommes et les intérêts courus ont été payés à l'avantage des demandeurs qui ont également reçu des montants supplémentaires auxquels ils n'avaient pas droit par contrat pour leurs divers entreprises, projets et besoins sociaux et collectifs, etc.

En résumé, en ce qui concerne les manquements imputés depuis 1948, je conclus que les demandeurs ne se sont pas acquittés du fardeau de la preuve qui pesait sur eux. Du reste, les quelques preuves crédibles et admissibles qui ont été produites relativement à ces questions tendent à appuyer des conclusions contraires à celles que les demandeurs recherchent.

PRESCRIPTION

a) Application

En application de l'article 38 de la *Loi sur la Cour fédérale* [S.R.C. 1970 (2^e Supp.), chap. 10], il est évident qu'en l'espèce, la loi applicable en matière de prescription est celle de la Colombie-Britannique (*Kruger c. La Reine*, [1986] 1 C.F. 3; (1985), 58 N.R. 241 (C.A.)).

Ne sachant pas quelles conclusions définitives je tirerais au sujet des diverses réclamations et allégations de fraude et de manquement continu aux obligations de fiduciaire, les avocats ont cité une jurisprudence volumineuse, et ils ont fait référence à des dispositions législatives dans une longue argumentation sur la prescription afin de prévoir toutes les possibilités. Comme j'ai conclu qu'il y avait eu simplement un manquement non frauduleux à l'obligation de fiduciaire en ce qui concerne le montant reçu par le ministère des Affaires indiennes le 30 mars 1948 et qu'à mon avis, il n'y avait eu ni négligence continue, ni violation de

breaches of duty, whether fiduciary or statutory, the issues regarding limitations are considerably simplified.

The cause of action must therefore be held to have arisen on the 30th of March 1948. The statement of claim was issued on September 19, 1978, i.e. five and one half months beyond thirty years from the time the cause of action arose.

b) Sections 8 and 9 of the B.C. *Limitations Act*

British Columbia is apparently the only province in Canada with a statute providing for what is termed an ultimate limitation period. The new *Limitation Act* was enacted in 1975 [*Limitations Act*, S.B.C. 1975, c. 37] and may be found in the 1979 Revised Statutes, R.S.B.C. 1979, c. 236. The relevant portions of section 8 of that Act read as follows:

8. (1) Subject to section 3 (3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6, 7 or 12, no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose, . . .

(2) Subject to subsection (1), the effect of sections 6 and 7 is cumulative.

Subsection 3(3) refers to special classes of action, none of which are applicable to the findings in the case at bar. Section 6 mentioned in subsection (2) above provides for the postponement of the running of time in certain specific instances and section 7 deals with persons under disability. Section 12 is not applicable. It seems clear that, on reading section 8, although the effects of sections 6 and 7 are cumulative, those sections are not to be taken into account in calculating the 30 year period mentioned in subsection (1). Thus, neither disability nor knowledge come into play with respect to the 30 year ultimate limitation.

The Court of Appeal of B.C. dealt with the effect of section 8 in the case *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1. In that case Esson J.A., with whom Cheffins J.A. concurred, stated at page 27:

fiducie ni autre manquement à des obligations fiduciaires ou prévues par la loi, les questions relatives à la prescription sont considérablement simplifiées.

^a Il convient donc de décider que la cause d'action a pris naissance le 30 mars 1948. La déclaration a été déposée le 19 septembre 1978, c'est-à-dire cinq mois et demi après l'expiration d'un délai de trente ans à compter de la date à laquelle la cause d'action a pris naissance.

b) Les articles 8 et 9 de la *Limitations Act* de la C.-B.

^c Apparemment, la Colombie-Britannique est la seule province canadienne qui ait adopté une loi prévoyant ce qu'on appelle une prescription finale. La nouvelle *Limitation Act*, R.S.B.C. 1979, chap. 236, a été édictée en 1975 [*Limitations Act*, S.B.C. 1975, chap. 37]. Les passages pertinents de l'article 8 de la Loi sont formulés comme suit:

[TRADUCTION] 8. (1) Sous réserve du paragraphe 3(3), mais nonobstant la confirmation faite en application de l'article 5 ou l'interruption ou la suspension du délai en vertu des articles 6 et 7 ou de l'article 12, aucune action à laquelle s'applique la présente loi ne doit être intentée après l'expiration d'un délai de trente ans à compter de la date à laquelle le droit de le faire a pris naissance, . . .

^f (2) Sous réserve du paragraphe (1), l'effet des articles 6 et 7 est cumulatif.

^g Le paragraphe 3(3) concerne des catégories spéciales d'action dont aucune n'est applicable aux conclusions tirées en l'espèce. L'article 6 mentionné au paragraphe (2) ci-dessus prévoit également l'interruption de la prescription dans certains cas précis, et l'article 7 vise les personnes incapables. L'article 12 ne s'applique pas ici. À la lecture de l'article 8, il ne fait pas de doute que même si l'effet des articles 6 et 7 est cumulatif, ces dispositions ne doivent pas être prises en considération dans le calcul du délai de trente ans mentionné au paragraphe (1). Par conséquent, ni l'incapacité ni la connaissance n'entrent en jeu dans la prescription finale de trente ans.

^j La Cour d'appel de la Colombie-Britannique a examiné l'effet de l'article 8 dans la décision *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1. Dans cette affaire, le juge d'appel Esson, dont le juge d'appel Cheffins a partagé l'avis, a déclaré à la page 27 ce qui suit:

A significant part of the "balance" created by ss. 6, 7 and 8 is that the 30-year ultimate limitation is long enough so that no action by an infant can be barred before he comes of age and other actions falling within ss. 6 and 7 cannot be ultimately barred for more than a generation.

Craig J.A., who dissented on another point, was of the same view regarding section 8 (refer pages 11 and 12 of the above-mentioned report).

Subsection 9(1) is also of some importance since it provides that on expiration of a limitation period in an action to recover a debt, damages or for an accounting, etc., not only is the right to sue prescribed but the cause of action itself is extinguished. This is clearly a provision of substantive law of general application throughout the Province. The statute also provides (section 14) that no cause of action that was statute barred on July 1, 1975, is revived and also that the statute applies to prescribe an action that arose before that date, by July 1, 1977, at the latest, if the limitation period under the 1975 Act would expire by that date and is shorter than the former limitation.

The 30 year period, after the right to sue for whatever damages might have resulted from the insufficiency of the sale price, expired on March 30, 1978. Since the statement of claim was only filed on September 19, 1978, unless some other legislation either statutory or constitutional could lead to a different conclusion, the right of action would have already been prescribed under section 8 of the Act and, by virtue of section 9, the cause of action itself would also have been extinguished.

c) Other Legislation

Insofar as other legislation is concerned, subsection 2(11) of the former *Laws Declaratory Act*, R.S.B.C. 1948, c. 179, declared that, except as provided in the *Trustee Act*, [R.S.B.C. 1948, c. 345], no claim of a *cestui que trust* against his trustee, held upon an express trust, could be barred by any statute of limitations. On the other hand, subsection 93(1) of the *Trustee Act* in 1948 [s. 86(1)] which may be found in R.S.B.C. 1960, c. 390, provided that, unless the claim was founded upon a fraud to which the trustee was a party or

[TRADUCTION] L'un des éléments importants de «l'équilibre» créé par les articles 6, 7 et 8 est que la prescription finale de trente ans est assez longue pour qu'aucune action intentée par un enfant en bas âge ne puisse être jugée irrecevable avant qu'il n'ait atteint sa majorité. Les autres actions visées par les articles 6 et 7 ne peuvent être prescrites définitivement pendant plus d'une génération.

Le juge d'appel Craig, dissident sur un autre point, a souscrit à cette opinion en ce qui concerne l'article 8 (voir les pages 11 et 12 du recueil de jurisprudence précité).

Le paragraphe 9(1) a également une certaine importance, car il dispose qu'à l'expiration du délai de prescription fixé pour une action intentée en vue de recouvrer une dette, des dommages-intérêts ou pour obtenir une reddition de compte, etc., non seulement le droit de poursuivre est-il prescrit mais la cause d'action elle-même est éteinte. Il s'agit clairement ici d'une règle de fond applicable dans toute la province. La Loi précise aussi (article 14) qu'aucune cause d'action prescrite le 1^{er} juillet 1975 ne renaît; elle dispose également que la prescription atteint l'action ayant pris naissance avant cette date, au plus tard le 1^{er} juillet 1977, si le délai de prescription prévu par la loi de 1975 est expiré à cette date et s'il est plus court que l'ancien délai de prescription.

Le 30 mars 1978, trente ans s'étaient écoulés depuis que le droit de poursuivre pour tout dommage subi par suite de l'insuffisance du prix d'achat avait pris naissance. Comme la déclaration n'a été déposée que le 19 septembre 1978, à moins que quelque autre texte législatif ou constitutionnel ne permette de tirer une conclusion différente, le droit de poursuivre était déjà prescrit en vertu de l'article 8 de la Loi et, en application de l'article 9, la cause d'action elle-même était déjà éteinte.

h) c) Autres textes législatifs

En ce qui concerne les autres textes législatifs pertinents, le paragraphe 2(11) de l'ancienne *Laws Declaratory Act*, R.S.B.C. 1948, chap. 179, disposait que, sous réserve des dispositions de la *Trustee Act* [R.S.B.C. 1948, chap. 345], aucune réclamation présentée par le *cestui que trust* contre son fiduciaire, sous le régime d'une fiducie explicite, ne pouvait être déclarée irrecevable en vertu d'un texte législatif. En revanche, le paragraphe 93(1) de la *Trustee Act* de 1948 [86(1)] que l'on trouve dans R.S.B.C. 1960, chap. 390, disposait que, sauf

was for the recovery of trust property, the trustee would enjoy all the rights and privileges of the limitation statutes of the Province. Even if it could have been argued that, contrary to the majority finding of the Supreme Court of Canada in the *Guerin* case (*supra*), the surrender created an express trust, the claim could not be considered as one of recovery of trust property and, more importantly, limitations provisions of these two statutes were repealed by the 1975 Act, which now deals in some considerable detail with trust property and breaches of trust. Finally, the wording of the sections of the 1975 Act, to which I have referred, make it quite clear that the provisions of section 8 would prevail.

d) Charter of Rights

The plaintiffs sought to challenge the validity of section 8 also under the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.)] and paragraphs 1(a) and 1(b) of the *Canadian Bill of Rights* [R.S.C. 1970, Appendix III]. In arguing that section 8 of the *B.C. Limitations Act* infringed the Charter, and more particularly section 7 which protects the right not to be deprived of one's life, liberty and security of the person, against the principles of fundamental justice, counsel for the plaintiffs referred to recent decisions such as *R. v. Antoine* (1983), 5 C.C.C. (3d) 97 (Ont. C.A.); *Re McDonald and The Queen* (1985), 51 O.R. (2d) 745 (C.A.); *R. v. Konechny* (1983), 10 C.C.C. (3d) 233 (B.C.C.A.) and several other such cases. I find however that these cases are not applicable and that none of the plaintiffs' Charter arguments can be sustained for two very simple reasons, the first one being that the Charter relates to the protection of the person and to personal rights and freedoms and does not apply to interest in or damages pertaining to the disposal of property. The second one is that the Charter, generally speaking, is not retrospective. It was held, in cases such as the ones cited above, to be applicable where there has been a continuing injustice following the date of promulgation of the Charter such as cases where

si la demande était fondée sur une fraude à laquelle avait participé le fiduciaire ou si elle visait le recouvrement de biens détenus en fiducie, le fiduciaire pouvait invoquer les lois prévoyant des délais de prescription dans la province. Même si on avait pu soutenir que, contrairement à l'opinion majoritaire exprimée par la Cour suprême du Canada dans l'arrêt *Guerin*, précité, la cession créait une fiducie explicite, la réclamation ne pourrait être considérée comme une action en recouvrement de biens détenus en fiducie, et fait plus important encore, les dispositions relatives à la prescription de ces deux lois ont été abrogées par la Loi de 1975 dont les dispositions visent maintenant de façon détaillée les biens détenus en fiducie et les violations de fiducie. Enfin, la formulation des articles de la Loi de 1975, auxquels j'ai fait référence, fait ressortir clairement que les dispositions de l'article 8 l'emportent.

d) La Charte des droits

Les demandeurs contestent la validité de l'article 8 en invoquant la *Charte canadienne des droits et libertés* [qui constitue la Partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, chap. 11 (R.-U.)] ainsi que les alinéas 1a) et 1b) de la *Déclaration canadienne des droits* [S.R.C. 1970, Appendice III]. Pour étayer ces prétentions voulant que l'article 8 de la *Limitations Act* de la Colombie-Britannique déroge à la Charte, et plus particulièrement à l'article 7 qui garantit le droit à la vie, à la liberté et à la sécurité de la personne, auquel il ne peut être porté atteinte qu'en conformité avec les principes de la justice fondamentale, les avocats des demandeurs ont cité des décisions récentes telles *R. v. Antoine* (1983), 5 C.C.C. (3d) 97 (C.A. Ont.); *Re McDonald and The Queen* (1985), 51 O.R. (2d) 745 (C.A.); *R. v. Konechny* (1983), 10 C.C.C. (3d) 233 (C.A.C.-B.) et plusieurs autres affaires similaires. Toutefois, j'estime que ces décisions ne sont pas applicables et qu'aucun des arguments fondés sur la Charte et mis de l'avant par les demandeurs ne peut être retenu pour deux raisons très simples. D'une part, la Charte concerne la protection de la personne et des droits et libertés personnels, et elle ne vise pas à garantir les droits ni les dommages-intérêts relatifs à l'aliénation des biens. D'autre part, la Charte, d'une manière générale, ne s'applique pas rétroactive-

incarceration of a person continued beyond that date, where the law pursuant to which he was incarcerated at the time now infringes the Charter. This has been characterized as a prospective application of the Charter as opposed to a retrospective one. There is no question of prospective application here as the source of the complaint arose in 1948 and does not constitute a cause of action continuing beyond that time.

Two recent decisions of the B.C. Court of Appeal, namely *Grabbe v. Grabbe* and *Davidson v. Davidson Estate*, both reported in [1987] 2 W.W.R., at pages 642 and 657 respectively have held that section 15 of the Charter does not operate retrospectively.

I also subscribe to the argument that the equality rights provided for in subsection 15(1) of the Charter merely guarantee that persons similarly situated should receive similar treatment. They do not provide for identical treatment for all regardless of circumstances (*Smith, Kline & French Laboratories Limited v. Attorney General of Canada*, [1986] 1 F.C. 274 (T.D.)).

In the recent case of *R. v. Hamilton* (1986), 57 O.R. (2d) 412, which was referred to at trial, the Court of Appeal of Ontario found that section 15 of the Charter had been infringed because the equal application of criminal law, which is exclusively within federal jurisdiction, once enacted, cannot depend on the acquiescence of Provincial Attorneys General. That same case, however, recognizes the validity of the principle insofar as civil law is concerned in any event that section 15 of the Charter does not require each Province to enact the same laws within its own jurisdiction, as this would constitute a denial of federalism and would be destructive of the federal system itself. The Supreme Court of Canada in *R. v. Burnshine*, [1975] 1 S.C.R. 693; (1974), 15 C.C.C. (2d) 505, although dealing with the Bill of Rights and not

ment. Dans des affaires semblables à celles qui ont été citées, ce texte législatif a été jugé applicable dans les cas d'injustice se poursuivant après la date de la promulgation de la Charte, par exemple, dans les cas où une personne était maintenue en détention après cette date lorsque la loi en vertu de laquelle elle avait été incarcérée à l'époque était jugée maintenant incompatible avec les dispositions de la Charte. Il s'agit d'une application prospective de la Charte par opposition à une application rétroactive. Il n'est pas question d'une application prospective en l'espèce, car les faits à l'origine de la réclamation sont survenus en 1948, et ne sauraient donner naissance à un droit d'action après cette date.

Dans deux jugements rendus récemment, *Grabbe v. Grabbe* et *Davidson v. Davidson Estate*, [1987] 2 W.W.R. aux pages 642 et 657 respectivement, la Cour d'appel de la Colombie-Britannique a décidé que l'article 15 de la Charte n'avait pas un effet rétroactif.

Je souscris également à la thèse selon laquelle les droits à l'égalité prévus par le paragraphe 15(1) de la Charte garantissent simplement un traitement similaire aux personnes placées dans des situations similaires. Ces droits ne prévoient pas un traitement identique pour tous, quelles que soient les circonstances (*Smith, Kline & French Laboratories Limited c. Procureur général du Canada*, [1986] 1 C.F. 274 (1^{re} inst.)).

Dans un jugement rendu récemment, *R. v. Hamilton* (1986) 57 O.R. (2d) 412, qui a été cité à l'instruction, la Cour d'appel de l'Ontario a jugé qu'il avait été porté atteinte à l'article 15 de la Charte parce que l'application uniforme des règles du droit pénal adoptées par le gouvernement fédéral, qui a compétence exclusive dans ce domaine fédéral, ne saurait être subordonnée au consentement des procureurs généraux des provinces. Cette même décision reconnaît toutefois la validité du principe en ce qui concerne le droit civil en tout cas. L'article 15 de la Charte n'oblige pas chaque province à adopter les mêmes lois dans les domaines qui relèvent de sa compétence, ce qui équivaldrait à nier le fédéralisme et à détruire le système fédéral lui-même. Dans l'arrêt *R. c. Burnshine*, [1975] 1 R.C.S. 693; (1974), 15 C.C.C. (2d) 505, la Cour suprême du Canada a tiré la même conclusion relativement à la nature du fédéralisme

with the Charter, came to the same conclusion regarding the nature of federalism.

Where, in situations such as the present one, to the extent that federal legislation is silent on the matter, the liability of the Crown as well as the quantum and nature of damages which would be recoverable are to be determined by provincial law, it cannot logically be argued that it is discriminatory in a pejorative sense for the Crown to be subject to and to also enjoy the benefit provincial limitation provisions to the same extent as ordinary citizens of the province.

Insofar as section 7 of the Charter is concerned it has also been held in several cases, including *Smith, Kline & French (supra)* that life, liberty and security of the person mentioned therein refers to the bodily wellbeing of a person: it does not extend to the protection of property. Furthermore, a 30 year ultimate limitation period applicable to all residents of a province does not offend against the principles of fundamental justice.

e) Bill of Rights

The plaintiffs also submit that section 8 of the new *Limitation Act* violates paragraph 1(b) of the *Canadian Bill of Rights* and is, to the extent of that inconsistency, of no force or effect. The text of that legislation on which they rely is as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(b) the right of the individual to equality before the law and the protection of the law;

As in the case of the Charter, there is no requirement under the Bill of Rights for Parliament to enact uniform laws throughout the country. The plaintiffs are subject to section 8 of the *Limitation Act* in the same manner as are all other British Columbia litigants. In its as yet unreported decision in the case of *Algonquin Mercantile Corp. v. Dart Industries Canada Ltd.*, judgment dated June 17, 1987, Federal Court file A-692-86, our

bien que cette affaire porte sur l'application de la *Déclaration canadienne des droits* et non sur celle de la Charte.

Lorsque, dans des situations comme l'espèce et dans la mesure où la législation fédérale est silencieuse sur la question, la responsabilité de la Couronne de même que le montant et la nature des dommages-intérêts recouvrables doivent être déterminés par la loi provinciale, on ne peut soutenir logiquement qu'il est discriminatoire, dans le sens péjoratif du terme, d'assujettir la Couronne aux dispositions portant prescription de la législation provinciale tout en lui permettant d'en invoquer le bénéfice comme tout simple citoyen de la province.

En ce qui concerne l'article 17 de la Charte, il a également été décidé dans plusieurs affaires, y compris le jugement *Smith, Kline & French*, précité, que le droit à la vie, à la liberté et à la sécurité de la personne susmentionné se rapporte au bien-être physique de la personne: le texte législatif n'étend pas la protection aux biens. En outre, une période de prescription finale de trente ans applicable à tous les résidents de la province ne contrevient pas aux principes de la justice fondamentale.

e) La Déclaration des droits

Les demandeurs prétendent également que l'article 8 de la nouvelle *Limitation Act* est incompatible avec l'alinéa 1b) de la *Déclaration canadienne des droits* et qu'il n'a, dans cette mesure, aucune force. Voici le texte de la disposition législative qu'ils invoquent:

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:

b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

À l'instar de la Charte, la Déclaration des droits n'oblige pas le Parlement à adopter des lois uniformes dans tout le pays. Les demandeurs sont visés par l'article 8 de la *Limitation Act* de la même façon que tous les autres plaideurs, en Colombie-Britannique. Dans une décision qui n'est pas encore publiée, l'affaire *Algonquin Mercantile Corp. c. Dart Industries Canada Ltd.*, en date du 17 juin 1987, n° de greffe: A-692-86, la Cour

Court of Appeal approved and applied the principle that even where the matter falls within federal jurisdiction, the provincial law where the cause arose and is being litigated, is to be exclusively applied in determining the rights of the litigants, where federal law is silent on the subject. The decision dealt with rates of interest to be applied and recognizes that the mere fact that the result would have been different had the law of some other province been applicable, is not to be taken into account.

Section 38 of the *Federal Court Act* meets the test that those who are similarly situated should receive similar treatment. The mere fact that litigants in other Provinces are not subject to an ultimate 30 year limitation does not constitute discrimination against paragraph 1(b) of the *Bill of Rights* any more than it does under sections 7 or 15 of the Charter. Although the Bill of Rights has been in effect for over 27 years, counsel for the plaintiffs were unable to cite one authoritative case capable of supporting this territorial argument for civil cases.

The plaintiffs also argued that paragraph 1(a) of the Bill of Rights which protects their right to "life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law" would render inoperative section 8 of the (B.C.) *Limitation Act* by reason of the overriding provisions of section 2 of the Bill of Rights.

In support of this proposition, counsel for the plaintiffs referred to a statement of Laskin C.J., speaking for the minority in the case of *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at page 633; (1975), 20 C.C.C. (2d) 449, at page 462, and to another statement of Ritchie J. in *Curr v. The Queen*, [1972] S.C.R. 889. Neither of these statements support the proposition advanced by the plaintiffs.

Reliance by the courts on limitation provisions of general application does not constitute a denial of due process nor does the legislation itself constitute such a denial. An ultimate limitation period

d'appel fédérale a approuvé et appliqué le principe selon lequel, même lorsque le litige est de compétence fédérale, le droit de la province dans laquelle le litige a pris naissance et est jugé doit s'appliquer de façon exclusive afin de déterminer les droits des plaideurs, si le droit fédéral ne prévoit rien à cet égard. Cette affaire portait sur les taux d'intérêt qui doivent s'appliquer, et le juge a reconnu qu'il ne faut pas tenir compte du simple fait que l'issue aurait été différente si la loi d'une autre province s'était appliquée.

L'article 38 de la *Loi sur la Cour fédérale* satisfait au critère selon lequel il faut garantir un traitement similaire aux personnes placées dans des situations similaires. Le simple fait que les plaideurs d'autres provinces ne sont pas assujettis à une prescription finale de trente ans ne constitue pas de la discrimination, à l'encontre de l'alinéa 1b) de la *Déclaration des droits*, pas plus que c'en est une en vertu des articles 7 ou 15 de la Charte. Bien que la Déclaration des droits soit en vigueur depuis plus de vingt-sept ans, les avocats des demandeurs n'ont pu citer une affaire ayant fait jurisprudence leur permettant d'étayer cet argument de nature territoriale en matière civile.

Les demandeurs ont également soutenu que l'alinéa 1a) de la Déclaration des droits, qui protège leur droit «à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi», rendrait inapplicable l'article 8 de la *Limitation Act* de la C.-B. du fait des dispositions dérogatoires de l'article 2 de la Déclaration des droits.

À l'appui de cette proposition, les avocats des demandeurs se sont reportés à une déclaration du juge en chef Laskin, lorsqu'il s'est exprimé au nom de la minorité dans l'arrêt *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, à la page 633; (1975), 20 C.C.C. (2d) 449, à la page 462, et à une déclaration du juge Ritchie dans l'arrêt *Curr c. La Reine*, [1972] R.C.S. 889. Ni l'une ni l'autre de ces déclarations n'appuie la proposition avancée par les demandeurs.

Le fait que les tribunaux invoquent les dispositions d'application générale portant prescription ne constitue pas un déni de l'application régulière de la loi, et les lois elles-mêmes ne constituent pas non

does not deny the plaintiffs the right to litigate nor the right of access to the court. It merely imposes a time limitation within which the action must be commenced. Thus it does not, as argued by the plaintiffs, fall within the situation which was before the Supreme Court of Newfoundland in *Piercey v. General Bakeries Ltd.; The Queen in right of Newfoundland et al., Intervenors* (1986), 31 D.L.R. (4th) 373.

f) Conclusion re: limitations

I conclude that the claim for insufficiency of the sale price to the Director in 1948 is statute barred and also extinguished pursuant to sections 8 and 9 of the 1975 B.C. *Limitation Act*, R.S.B.C. 1979, c. 236.

LACHES AND OTHER LIMITATION PROVISIONS

Counsel for the defendant raised the defence of laches and also relied upon other sections of the B.C. *Limitation Act* and also the former Act to be found in R.S.B.C. 1960, c. 370. Considerable argument was advanced and numerous authorities referred to by both counsel on these subjects.

In view of my finding regarding the 30 year ultimate limitation provisions, no useful purpose would be served in referring to these arguments nor to my findings of fact pertaining to them. I will however add that, after taking into account the saving provisions of sections 6 and 7 and the transitional provision of section 14 of the 1975 Act, I would have concluded that the action was in any event, also barred by reason of the former *Limitations Act* and also by reason of section 3(4) of the new Act.

FINDING

For the above reasons, judgment will issue dismissing the action. Costs will follow the event.

plus un tel déni. Une prescription finale ne prive pas les demandeurs du droit d'intenter un procès ni du droit d'accès devant les tribunaux. Elle impose simplement le délai dans lequel l'action doit être intentée. Ainsi, ce cas n'est pas, comme le prétendent les demandeurs, visé par la situation dont était saisie la Cour suprême de Terre-Neuve dans l'affaire *Piercey v. General Bakeries Ltd.; The Queen in right of Newfoundland et al., Intervenors*, (1986), 31 D.L.R. (4th) 373.

f) Conclusion relative à la prescription

Je conclus que l'action intentée pour insuffisance du prix de vente demandé au Directeur, en 1948, est prescrite en vertu des articles 8 et 9 de la *Limitation Act* de la C.-B. de 1975, R.S.B.C. 1979, chap. 236.

MANQUE DE DILIGENCE ET AUTRES DISPOSITIONS PORTANT PRESCRIPTION

Les avocats de la défenderesse ont invoqué en défense le manque de diligence et se sont également appuyés sur d'autres articles de la *Limitation Act* de la C.-B. ainsi que de l'ancienne Loi (R.S.B.C. 1960, chap. 370). Les avocats des deux parties ont avancé un grand nombre d'arguments et présenté une abondante jurisprudence à cet égard.

Compte tenu de ma conclusion relative aux dispositions portant prescription finale de trente ans, il serait inutile de me reporter à ces arguments ou à mes conclusions de fait connexes. Toutefois, j'ajouterais qu'après avoir tenu compte des dispositions d'exception des articles 6 et 7 ainsi que de la disposition transitoire de l'article 14 de la loi de 1975, j'aurais conclu que l'action était, quoi qu'il en soit, également prescrite du fait de l'ancienne *Limitations Act* ainsi que du paragraphe 3(4) de la nouvelle Loi.

CONCLUSION

Pour les motifs qui précèdent, la présente action est rejetée. Les frais suivront la cause.

Mavis Baker *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees, and the Charter Committee on Poverty Issues *Interveners*

INDEXED AS: BAKER v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

File No.: 25823.

1998: November 4; 1999: July 9.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Humanitarian and compassionate considerations — Children's interests — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Application denied without hearing or formal reasons — Whether procedural fairness violated — Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) — Immigration Regulations, 1978, SOR/93-44, s. 2.1 — Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.

Administrative law — Procedural fairness — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Whether participatory rights accorded consistent with duty of procedural fairness — Whether failure to provide reasons violated principles of procedural fairness — Whether reasonable apprehension of bias.

Mavis Baker *Appelante*

c.

Le ministre de la Citoyenneté et de l'Immigration *Intimé*

et

Le Conseil canadien des églises, la Canadian Foundation for Children, Youth and the Law, la Défense des enfants-International-Canada, le Conseil canadien pour les réfugiés et le Comité de la Charte et des questions de pauvreté *Intervenants*

RÉPERTORIÉ: BAKER c. CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION)

N° du greffe: 25823.

1998: 4 novembre; 1999: 9 juillet.

Présents: Les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Raisons d'ordre humanitaire — Intérêts des enfants — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Demande rejetée sans audience ni motifs écrits — Y a-t-il eu violation de l'équité procédurale? — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 82.1(1), 114(2) — Règlement sur l'immigration de 1978, DORS/93-44, art. 2.1 — Convention relative aux droits de l'enfant, R.T. Can. 1992 n° 3, art. 3, 9, 12.

Droit administratif — Équité procédurale — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Les droits de participation accordés étaient-ils compatibles avec l'obligation d'équité procédurale? — Le défaut d'exposer les motifs de décision a-t-il enfreint les principes d'équité procédurale? — Y a-t-il une crainte raisonnable de partialité?

Courts — Appellate review — Judge on judicial review certifying question for consideration of Court of Appeal — Legal effect of certified question — Immigration Act, R.S.C., 1985, c. I-2, s. 83(1).

Immigration — Humanitarian and compassionate considerations — Standard of review of humanitarian and compassionate decision — Best interests of claimant's children — Approach to be taken in reviewing humanitarian and compassionate decision where children affected.

Administrative law — Review of discretion — Approach to review of discretionary decision making.

The appellant, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption, based on humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. This application was supported by letters indicating concern about the availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children. A senior immigration officer replied by letter stating that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. This letter contained no reasons for the decision. Counsel for the appellant, however, requested and was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. The Federal Court — Trial Division, dismissed an application for judicial review but certified the following question pursuant to s. 83(1) of the Act: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?" The Court of Appeal limited its consideration to the question and found that the best interests of the children did not need to be given primacy in assessing such an application. The order that the appellant be removed from Canada, which was made after the immigration officer's decision, was stayed pending the result of this appeal.

Tribunaux — Contrôle en appel — Certification, par le juge siégeant en contrôle judiciaire, d'une question à soumettre à la Cour d'appel — Effet juridique d'une question certifiée — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 83(1).

Immigration — Raisons d'ordre humanitaire — Norme de contrôle d'une décision fondée sur des raisons d'ordre humanitaire — Intérêt supérieur des enfants de la demanderesse — Approche du contrôle d'une décision fondée sur des raisons d'ordre humanitaire touchant des enfants.

Droit administratif — Contrôle du pouvoir discrétionnaire — Approche du contrôle de décisions discrétionnaires.

Une mesure d'expulsion a été prise contre l'appelante, mère d'enfants à charge nés au Canada. Elle a alors demandé d'être dispensée de faire sa demande de résidence permanente de l'extérieur du Canada, pour des raisons d'ordre humanitaire, conformément au par. 114(2) de la *Loi sur l'immigration*. Sa demande était appuyée de lettres exprimant des inquiétudes quant à la possibilité d'obtenir un traitement médical dans son pays d'origine et quant à l'effet de son départ éventuel sur ses enfants nés au Canada. Un agent d'immigration supérieur a répondu par lettre qu'il n'y avait pas suffisamment de raisons humanitaires pour justifier de traiter sa demande au Canada. Cette lettre ne donnait pas les motifs de la décision. L'avocat de l'appelante a cependant demandé et reçu les notes de l'agent investigateur, que l'agent supérieur d'immigration avait utilisées pour rendre sa décision. La Section de première instance de la Cour fédérale a rejeté une demande de contrôle judiciaire mais a certifié la question suivante en application du par. 83(1) de la Loi: «Vu que la Loi sur l'immigration n'incorpore pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention internationale relative aux droits de l'enfant, les autorités d'immigration fédérales doivent-elles considérer l'intérêt supérieur de l'enfant né au Canada comme une considération primordiale dans l'examen du cas d'un requérant sous le régime du par. 114(2) de la *Loi sur l'immigration*?» La Cour d'appel a limité son examen à cette question et a conclu qu'il n'était pas nécessaire d'accorder la primauté à l'intérêt supérieur des enfants dans l'appréciation d'une telle demande. Un sursis à la mesure d'expulsion de l'appelante prononcée après la décision de l'agent d'immigration, a été ordonné jusqu'à l'issue du présent pourvoi.

Held: The appeal should be allowed.

Per L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.: Section 83(1) of the *Immigration Act* does not require the Court of Appeal to address only the certified question. Once a question has been certified, the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction.

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

A duty of procedural fairness applies to humanitarian and compassionate decisions. In this case, there was no legitimate expectation affecting the content of the duty of procedural fairness. Taking into account the other factors, although some suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model. The duty of fairness owed in these circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered. Nevertheless, taking all the factors into account, the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient.

It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are

Arrêt: Le pourvoi est accueilli.

Les juges L'Heureux-Dubé, Gonthier, McLachlin, Bastarache et Binnie: Le paragraphe 83(1) de la *Loi sur l'immigration* n'exige pas que la Cour d'appel traite seulement la question certifiée. Lorsqu'une question a été certifiée, la Cour d'appel peut examiner tous les aspects de l'appel qui relèvent de sa compétence.

L'obligation d'équité procédurale est souple et variable et repose sur une appréciation du contexte de la loi et des droits visés. Les droits de participation qui en font partie visent à garantir que les décisions administratives sont prises au moyen d'une procédure équitable et ouverte, adaptée au type de décision et à son contexte légal, institutionnel et social, comprenant la possibilité donnée aux personnes visées de présenter leur point de vue et des éléments de preuve qui seront dûment pris en considération par le décideur. Plusieurs facteurs sont pertinents pour déterminer le contenu de l'obligation d'équité procédurale: (1) la nature de la décision recherchée et le processus suivi pour y parvenir; (2) la nature du régime législatif et les termes de la loi régissant l'organisme; (3) l'importance de la décision pour les personnes visées; (4) les attentes légitimes de la personne qui conteste la décision; (5) les choix de procédure que l'organisme fait lui-même. Cette liste de facteurs n'est pas exhaustive.

L'obligation d'équité procédurale s'applique aux décisions d'ordre humanitaire. En l'espèce, il n'y avait pas d'attente légitime ayant une incidence sur la nature de l'obligation d'équité procédurale. Compte tenu des autres facteurs, bien que certains indiquent des exigences plus strictes en vertu de l'obligation d'équité, d'autres indiquent des exigences moins strictes et plus éloignées du modèle judiciaire. L'obligation d'équité dans ces circonstances est plus que minimale, et le demandeur et les personnes dont les intérêts sont profondément touchés par la décision doivent avoir une possibilité valable de présenter les divers types de preuves qui se rapportent à leur affaire et de les voir évalués de façon complète et équitable. Néanmoins, compte tenu de tous ces facteurs, le fait qu'il n'y ait pas eu d'audience ni d'avis d'audience ne constituait pas un manquement à l'obligation d'équité procédurale. La possibilité de produire une documentation écrite complète était suffisante.

Il est maintenant approprié de reconnaître que, dans certaines circonstances, notamment lorsque la décision revêt une grande importance pour l'individu, ou lorsqu'il existe un droit d'appel prévu par la loi, l'obligation d'équité procédurale requerra une explication écrite de

required here given the profound importance of this decision to those affected. This requirement was fulfilled by the provision of the junior immigration officer's notes, which are to be taken to be the reasons for decision. Accepting such documentation as sufficient reasons upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that, in the administrative context, this transparency may take place in various ways.

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. This duty applies to all immigration officers who play a role in the making of decisions. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference. Statements in the immigration officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him, but on the fact that the appellant was a single mother with several children and had been diagnosed with a psychiatric illness. Here, a reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with the impartiality appropriate to a decision made by an immigration officer. The notes therefore give rise to a reasonable apprehension of bias.

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. Review of the substantive aspects of discretionary decisions is best approached within the pragmatic and functional framework defined by this Court's decisions, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. Though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

la décision. Des motifs écrits sont nécessaires en l'espèce, étant donné l'importance cruciale de la décision pour les personnes visées. Cette obligation a été remplie par la production des notes de l'agent subalterne, qui doivent être considérées comme les motifs de la décision. L'admission de ces documents comme motifs de la décision confirme le principe selon lequel les individus ont droit à une procédure équitable et à la transparence de la prise de décision, mais reconnaît aussi qu'en matière administrative, cette transparence peut être atteinte de différentes façons.

L'équité procédurale exige également que les décisions soient rendues par un décideur impartial, sans crainte raisonnable de partialité. Cette obligation s'applique à tous les agents d'immigration qui jouent un rôle significatif dans la prise de décision. Parce qu'elles visent nécessairement des personnes de provenances diverses, issues de cultures, de races et de continents différents, les décisions en matière d'immigration exigent de ceux qui les rendent sensibilité et compréhension. Elles exigent la reconnaissance de la diversité, la compréhension des autres et l'ouverture d'esprit à la différence. Les déclarations contenues dans les notes de l'agent d'immigration donnent l'impression qu'il peut avoir tiré des conclusions en se fondant non pas sur la preuve dont il disposait, mais sur le fait que l'appelante était une mère célibataire ayant plusieurs enfants, et était atteinte de troubles psychiatriques. En l'espèce, un membre raisonnable et bien informé de la communauté conclurait que l'agent n'a pas traité cette affaire avec l'impartialité requise dans une décision rendue par un agent d'immigration. Les notes donnent donc lieu à une crainte raisonnable de partialité.

La notion de pouvoir discrétionnaire s'applique dans les cas où le droit ne dicte pas une décision précise, ou quand le décideur se trouve devant un choix d'options à l'intérieur de limites imposées par la loi. Le droit administratif a traditionnellement abordé le contrôle judiciaire des décisions discrétionnaires séparément de décisions sur l'interprétation de règles de droit. Le contrôle des éléments de fond d'une décision discrétionnaire est mieux envisagé selon la démarche pragmatique et fonctionnelle définie par la jurisprudence de notre Cour, compte tenu particulièrement de la difficulté de faire des classifications rigides entre les décisions discrétionnaires et les décisions non discrétionnaires. Même si en général il sera accordé un grand respect aux décisions discrétionnaires, il faut que le pouvoir discrétionnaire soit exercé conformément aux limites imposées dans la loi, aux principes de la primauté du droit, aux principes du droit administratif, aux valeurs fondamentales de la société canadienne, et aux principes de la *Charte*.

In applying the applicable factors to determining the standard of review, considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division, and the individual rather than polycentric nature of the decision also suggest that the standard should not be as deferential as “patent unreasonableness”. The appropriate standard of review is, therefore, reasonableness *simpliciter*.

The wording of the legislation shows Parliament’s intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children since children’s rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of these values may be found in the purposes of the Act, in international instruments, and in the Minister’s guidelines for making humanitarian and compassionate decisions. Because the reasons for this decision did not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of the appellant’s children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to the appellant’s country of origin might cause her.

Per Cory and Iacobucci JJ.: The reasons and disposition of L’Heureux-Dubé J. were agreed with apart from the effect of international law on the exercise of ministerial discretion under s. 114(2) of the *Immigration Act*. The certified question must be answered in the negative. The principle that an international convention ratified by the executive is of no force or effect within the Canadian legal system until incorporated into domestic law does not survive intact the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation.

Dans l’application des facteurs pertinents à la détermination de la norme de contrôle appropriée, on devrait faire preuve d’une retenue considérable envers les décisions d’agents d’immigration exerçant les pouvoirs conférés par la loi, compte tenu de la nature factuelle de l’analyse, de son rôle d’exception au sein du régime législatif et de la large discrétion accordée par le libellé de la loi. Toutefois, l’absence de clause privative, la possibilité expressément prévue d’un contrôle judiciaire par la Cour fédérale — Section de première instance, ainsi que la nature individuelle plutôt que polycentrique de la décision, tendent aussi à indiquer que la norme applicable ne devrait pas en être une d’aussi grande retenue que celle du caractère «manifestement déraisonnable». La norme de contrôle appropriée est celle de la décision raisonnable *simpliciter*.

Le libellé de la législation révèle l’intention du Parlement de faire en sorte que la décision soit fondée sur des raisons d’ordre humanitaire. L’exercice raisonnable du pouvoir conféré par l’article exige que soit prêtée une attention minutieuse aux intérêts et aux besoins des enfants puisque les droits des enfants, et la considération de leurs intérêts, sont des valeurs humanitaires centrales dans la société canadienne. Une indication de ces valeurs se trouve dans les objectifs de la Loi, dans les instruments internationaux, et dans les lignes directrices régissant les décisions d’ordre humanitaire publiées par le ministre. Étant donné que les motifs de la décision n’indiquent pas qu’elle a été rendue d’une manière réceptive, attentive ou sensible à l’intérêt des enfants de l’appelante, ni que leur intérêt a été considéré comme un facteur décisionnel important, elle constituait un exercice déraisonnable du pouvoir conféré par la loi. En outre, les motifs de la décision n’accordent pas suffisamment d’importance ou de poids aux difficultés qu’un retour de l’appelante dans son pays d’origine pouvait lui susciter.

Les juges Cory et Iacobucci: Les motifs du juge L’Heureux-Dubé et le dispositif qu’elle propose sont acceptés sauf pour ce qui concerne la question de l’effet du droit international sur l’exercice du pouvoir discrétionnaire conféré au ministre par le par. 114(2) de la *Loi sur l’immigration*. La question certifiée devrait recevoir une réponse négative. Le principe qu’une convention internationale ratifiée par le pouvoir exécutif n’a aucun effet en droit canadien tant qu’elle n’est pas incorporée dans le droit interne ne peut pas survivre intact après l’adoption d’un principe de droit qui autorise le recours dans le processus d’interprétation des lois, aux dispositions d’une convention qui n’a pas été intégrée dans la législation.

Cases Cited

By L'Heureux-Dubé J.

Applied: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **disapproved:** *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4; *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238; **not followed:** *Tylo v. Minister of Employment and Immigration* (1995), 90 F.T.R. 157; *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170; *Chan v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 62; *Marques v. Canada (Minister of Citizenship and Immigration)* (No. 1) (1995), 116 F.T.R. 241; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656; *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646; **referred to:** *Ramoutar v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 370; *Minister of Employment and Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 81; *Said v. Canada (Minister of Employment and Immigration)* (1992), 6 Admin. L.R. (2d) 23; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57; *Mercier-Néron v. Canada (Minister of National Health and Welfare)*, (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310; *R. v. Secretary of*

Jurisprudence

Citée par le juge L'Heureux-Dubé

Arrêts appliqués: *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; **arrêts critiqués:** *Liyanagamage c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1994), 176 N.R. 4; *Shah c. Ministre de l'Emploi et de l'Immigration* (1994), 170 N.R. 238; **arrêts non suivis:** *Tylo c. Ministre de l'Emploi et de l'Immigration* (1995), 90 F.T.R. 157; *Gheorlan c. Canada (Secrétaire d'État)* (1995), 26 Imm. L.R. (2d) 170; *Chan c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1994), 87 F.T.R. 62; *Marques c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (n° 1) (1995), 116 F.T.R. 241; *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *Supermarchés Jean Labrecque Inc. c. Flamand*, [1987] 2 R.C.S. 219; *Public Service Board of New South Wales c. Osmond* (1986), 159 C.L.R. 656; *Williams c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1997] 2 C.F. 646; **arrêts mentionnés:** *Ramoutar c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] 3 C.F. 370; *Ministre de l'Emploi et de l'Immigration c. Jiminez-Perez*, [1984] 2 R.C.S. 565; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Sobrie c. Canada (Ministre de l'Emploi et de l'Immigration)* (1987), 3 Imm. L.R. (2d) 81; *Said c. Canada (Ministre de l'Emploi et de l'Immigration)* (1992), 6 Admin. L.R. (2d) 23; *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Russell c. Duke of Norfolk*, [1949] 1 All E.R. 109; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879; *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105; *R. c. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525; *Qi c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1995), 33 Imm. L.R. (2d) 57; *Mercier-Néron c. Canada (Ministre de la Santé nationale et du Bien-être social)* (1995), 98 F.T.R. 36; *Bendahmane c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1989] 3 C.F. 16; *Canada (Procureur général) c. Comité du tribunal des droits de la personne (Canada)* (1994), 76 F.T.R. 1; *IWA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282; *Renvoi relatif à la rémunération des juges de la Cour*

State for the Home Department, ex parte Doody, [1994] 1 A.C. 531; *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120; *Orlowski v. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541; *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 55 N.S.R. (2d) 71; *Taabea v. Refugee Status Advisory Committee*, [1980] 2 F.C. 316; *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 179 N.B.R. (2d) 43; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Gladue*, [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Francis v. The Queen*, [1956] S.C.R. 618; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Young v. Young*, [1993] 4 S.C.R. 3.

By Iacobucci J.

Applied: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; **referred to:** *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms.
Convention on the Rights of the Child, Can. T.S. 1992 No. 3, preamble, Arts. 3(1), (2), 9, 12.
Declaration of the Rights of the Child (1959), preamble.
Immigration Act, R.S.C., 1985, c. I-2, ss. 3(c), 9(1), 82.1(1) [rep. & sub. 1992, c. 49, s. 73], 83(1) [*idem*], 114(2) [*ibid.*, s. 102].

provinciale de l'Île-du-Prince-Édouard, [1997] 3 R.C.S. 3; *R. c. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310; *R. c. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531; *Norton Tool Co. c. Tewson*, [1973] 1 W.L.R. 45; *Alexander Machinery (Dudley) Ltd. c. Crabtree*, [1974] I.C.R. 120; *Orlowski c. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541; *R.D.R. Construction Ltd. c. Rent Review Commission* (1982), 55 N.S.R. (2d) 71; *Taabea c. Comité consultatif sur le statut de réfugié*, [1980] 2 C.F. 316; *Boyle c. Commission de la santé, de la sécurité et de l'indemnisation des accidents au travail (N.-B.)* (1996), 179 R.N.-B. (2^e) 43; *R. c. S. (R.D.)*, [1997] 3 R.C.S. 484; *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623; *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048; *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Maple Lodge Farms Ltd. c. Gouvernement du Canada*, [1982] 2 R.C.S. 2; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231; *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corporation*, [1948] 1 K.B. 223; *Roncarelli c. Duplessis*, [1959] R.C.S. 121; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *R. c. Gladue*, [1999] 1 R.C.S. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Francis c. The Queen*, [1956] R.C.S. 618; *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141; *Tavita c. Minister of Immigration*, [1994] 2 N.Z.L.R. 257; *Vishaka c. Rajasthan*, [1997] 3 L.R.C. 361; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *Young c. Young*, [1993] 4 R.C.S. 3.

Citée par le juge Iacobucci

Arrêt appliqué: *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141; **arrêt mentionné:** *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038.

Lois et règlements cités

Charte canadienne des droits et libertés.
Convention relative aux droits de l'enfant, R.T. Can. 1992 n° 3, préambule, art. 3(1), (2), 9, 12.
Déclaration des droits de l'enfant (1959), préambule.
Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 3c), 9(1), 82.1(1) [abr. & rempl. 1992, ch. 49, art. 73], 83(1) [*idem*], 114(2) [*ibid.*, art. 102].

Immigration Regulations, 1978, SOR/78-172, s. 2.1 [ad. SOR/93-44, s. 2].

Authors Cited

- Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf).
- Canada. Employment and Immigration Canada. *Immigration Manual: Examination and Enforcement*. Ottawa: Employment and Immigration Canada, 1983 (loose-leaf updated 1991, release 2).
- Davis, Kenneth Culp. *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press, 1969.
- de Smith, Stanley A. *Judicial Review of Administrative Action*, 5th ed. By Lord Woolf and Jeffrey Jowell. London: Sweet & Maxwell, 1995.
- Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart Publishing, 1997, 279.
- Macdonald, Roderick A., and David Lametti. "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123.
- Morris, Michael H. "Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate" (1997), 11 *C.J.A.L.P.* 155.
- Mullan, David J. *Administrative Law*, 3rd ed. Scarborough, Ont.: Carswell, 1996.
- Shapiro, Debra. "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282.
- Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

APPEAL from a judgment of the Federal Court of Appeal, [1997] 2 F.C. 127, 207 N.R. 57, 142 D.L.R. (4th) 554, [1996] F.C.J. No. 1726 (QL), dismissing an appeal from a judgment of Simpson J. (1995), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150, [1995] F.C.J. No. 1441 (QL), dismissing an application for judicial review. Appeal allowed.

Roger Rowe and Rocco Galati, for the appellant.

Urszula Kaczmarczyk and Cheryl D. Mitchell, for the respondent.

Sheena Scott and Sharryn Aiken, for the interveners the Canadian Foundation for Children,

Règlement sur l'immigration de 1978, DORS/78-172, art. 2.1 [aj. DORS/93-44, art. 2].

Doctrine citée

- Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf).
- Canada. Emploi et Immigration Canada. *Guide de l'immigration: examen et application de la loi*. Ottawa: Emploi et Immigration Canada, 1983 (feuilles mobiles mises à jour 1991, envoi n° 2).
- Davis, Kenneth Culp. *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press, 1969.
- de Smith, Stanley A. *Judicial Review of Administrative Action*, 5th ed. By Lord Woolf and Jeffrey Jowell. London: Sweet & Maxwell, 1995.
- Dyzenhaus, David. «The Politics of Deference: Judicial Review and Democracy», in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart Publishing, 1997, 279.
- Macdonald, Roderick A., and David Lametti. «Reasons for Decision in Administrative Law» (1990), 3 *C.J.A.L.P.* 123.
- Morris, Michael H. «Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate» (1997), 11 *C.J.A.L.P.* 155.
- Mullan, David J. *Administrative Law*, 3rd ed. Scarborough, Ont.: Carswell, 1996.
- Shapiro, Debra. «Legitimate Expectation and its Application to Canadian Immigration Law» (1992), 8 *J.L. & Social Pol'y* 282.
- Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1997] 2 C.F. 127, 207 N.R. 57, 142 D.L.R. (4th) 554, [1996] A.C.F. n° 1726 (QL), qui a rejeté un appel d'un jugement du juge Simpson (1995), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150, [1995] A.C.F. n° 1441 (QL), qui avait rejeté une demande de contrôle judiciaire. Pourvoi accueilli.

Roger Rowe et Rocco Galati, pour l'appelante.

Urszula Kaczmarczyk et Cheryl D. Mitchell, pour l'intimé.

Sheena Scott et Sharryn Aiken, pour les intervenants la Canadian Foundation for Children, Youth

Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees.

John Terry and Craig Scott, for the intervener the Charter Committee on Poverty Issues.

Barbara Jackman and Marie Chen, for the intervener the Canadian Council of Churches.

The judgment of L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ. was delivered by

L'HEUREUX-DUBÉ J. — Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

I. Factual Background

Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms. Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their

and the Law, la Défense des enfants-International-Canada et le Conseil canadien pour les réfugiés.

John Terry et Craig Scott, pour l'intervenant le Comité de la Charte et des questions de pauvreté.

Barbara Jackman et Marie Chen, pour l'intervenant le Conseil canadien des églises.

Version française du jugement des juges L'Heureux-Dubé, Gonthier, McLachlin, Bastarache et Binnie rendu par

LE JUGE L'HEUREUX-DUBÉ — Le règlement passé en vertu du par. 114(2) de la *Loi sur l'immigration*, L.R.C. (1985), ch. I-2, autorise le ministre intimé à faciliter l'admission au Canada d'une personne quand il est convaincu, pour des raisons d'ordre humanitaire, que l'admission devrait être facilitée ou qu'une dispense d'application des règlements passés aux termes de la Loi devrait être accordée. Le présent pourvoi porte essentiellement sur la démarche à suivre lorsqu'un tribunal procède au contrôle judiciaire de ces décisions, à la fois sur le fond et sur le plan de la procédure. Ce pourvoi soulève également des questions relatives à la crainte raisonnable de partialité, à la rédaction de motifs écrits dans le cadre de l'obligation d'agir équitablement et au rôle de l'intérêt des enfants dans le contrôle judiciaire de décisions rendues conformément au par. 114(2).

I. Les faits

Mavis Baker, citoyenne de la Jamaïque, est entrée au Canada à titre de visiteur en août 1981 et y vit depuis. Elle n'a jamais obtenu le statut de résidente permanente, mais a subvenu illégalement à ses besoins en travaillant pendant 11 ans comme travailleur domestique. Elle a eu quatre enfants (qui sont tous citoyens canadiens) au Canada: Paul Brown, né en 1985, les jumeaux Patricia et Peter Robinson, nés en 1989, et Desmond Robinson, né en 1992. Après la naissance de Desmond, M^{me} Baker a souffert d'une psychose post-partum et on a diagnostiqué qu'elle était atteinte d'une schizophrénie paranoïde. À cette époque, elle a présenté une demande d'assistance sociale. Quand

natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

on a découvert qu'elle était atteinte de troubles mentaux, deux de ses enfants ont été confiés aux soins de leur père naturel et les deux autres ont été placés en foyer d'accueil. Son état s'étant amélioré, elle a de nouveau la garde des deux enfants placés en foyer d'accueil.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application, and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that, although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

En décembre 1992, une ordonnance d'expulsion a été prise contre l'appelante, lorsqu'on a découvert qu'elle avait travaillé illégalement au Canada et avait séjourné au-delà de son visa de visiteur. En 1993, M^{me} Baker a demandé d'être dispensée de faire sa demande de résidence permanente de l'extérieur du Canada, pour des raisons d'ordre humanitaire, conformément au par. 114(2) de la *Loi sur l'immigration*. Elle a obtenu l'aide d'un avocat pour remplir cette demande, et a notamment ajouté, comme documents additionnels, des observations de son avocat, une lettre de son médecin et une lettre d'un travailleur social de la Société d'aide à l'enfance. Les documents présentés indiquaient que, même si elle éprouvait toujours des problèmes psychiatriques, elle faisait des progrès, mais qu'elle pourrait retomber malade si elle était forcée de retourner en Jamaïque, parce qu'elle ne pourrait peut-être pas y bénéficier d'un traitement. Madame Baker a aussi clairement indiqué qu'elle était la seule à pouvoir prendre soin de deux de ses enfants nés au Canada et que ses deux autres enfants avaient besoin de son soutien affectif et étaient régulièrement en contact avec elle. Les documents mentionnaient également qu'elle subirait aussi des difficultés d'ordre émotionnel si elle était séparée d'eux.

4 The response to this request was contained in a letter dated April 18, 1994 and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

En réponse à cette demande, une lettre datée du 18 avril 1994 et signée par l'agent d'immigration M. Caden a informé M^{me} Baker de la décision qu'il n'y avait pas suffisamment de raisons humanitaires pour justifier de traiter au Canada sa demande de résidence permanente, sans toutefois donner les motifs de la décision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary

À la demande de l'avocat de l'appelante, les notes de l'agent d'immigration G. Lorenz, que l'agent Caden a utilisées pour rendre sa décision, ont été remises à l'appelante. Après un résumé de

of the history of the case, Lorenz's notes read as follows:

PC is unemployed — on Welfare. No income shown — no assets. Has four Cdn.-born children — four other children in Jamaica — HAS A TOTAL OF EIGHT CHILDREN

Says only two children are in her "direct custody". (No info on who has ghe [*sic*] other two). There is nothing for her in Jamaica — hasn't been there in a long time — no longer close to her children there — no jobs there — she has no skills other than as a domestic — children would suffer — can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 — is now an outpatient and is improving. If sent back will have a relapse.

Letter from Children's Aid — they say PC has been diagnosed as a paranoid schizophrenic. — children would suffer if returned — Letter of Aug. '93 from psychiatrist from Ont. Govm't. Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well — deportation would be an extremely stressful experience.

Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.

This case is a catastrophe [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there

l'historique de l'affaire, les notes de M. Lorenz se lisent:

[TRADUCTION] PC est sans emploi — reçoit l'assistance sociale. Aucun revenu connu — pas de biens. A quatre enfants nés au Canada, quatre autres en Jamaïque — HUIT ENFANTS AU TOTAL

Dit que seulement deux enfants sont sous sa garde directe. (Aucun renseignement sur la garde des deux autres). Il n'y a rien qui l'attend en Jamaïque — n'y est pas allée depuis longtemps — n'est plus proche de ses enfants qui s'y trouvent — pas d'emplois — n'a pas d'autre métier que celui de domestique — les enfants souffriraient — elle ne peut pas les emmener avec elle et elle n'a personne ici à qui les confier. Dit qu'elle souffre de troubles mentaux depuis 1981 — elle est actuellement une patiente en consultation externe et son état s'améliore. Si elle est renvoyée là-bas, elle fera une rechute.

Lettre de la Société d'aide à l'enfance — dit que PC souffre d'une schizophrénie paranoïde — les enfants souffriraient, si elle était renvoyée. Lettre d'août 1993 d'un psychiatre du gouvernement de l'Ontario — dit que PC a une psychose post-partum et a eu une brève période de psychose en Jamaïque quand elle avait 25 ans. Elle est maintenant patiente en consultation externe et se porte relativement bien — l'expulsion serait une expérience extrêmement stressante.

L'avocat dit que PC est une mère célibataire et qu'elle est la seule à pouvoir prendre soin de deux de ses enfants nés au Canada. L'état mental de PC se détériorerait si elle devait être déportée etc.

Cette affaire est une catastrophe. C'est aussi une condamnation de notre système: la cliente est arrivée comme visiteur en août 1981, une ordonnance d'expulsion n'a été prise qu'en décembre 1992 et en AVRIL 1994 ELLE EST TOUJOURS ICI!

PC est atteinte de schizophrénie paranoïde et reçoit l'assistance sociale. Elle n'a pas d'autres qualifications que de domestique. Elle a QUATRE ENFANTS EN JAMAÏQUE ET QUATRE AUTRES NÉS ICI. Elle sera, bien entendu, un fardeau excessif pour nos systèmes d'aide sociale (probablement) pour le reste de sa vie. Il n'existe pas d'autres facteurs d'ordre humanitaire que ses QUATRE ENFANTS NÉS AU CANADA. Devons-nous lui permettre de rester pour ça? Je suis d'avis que le Canada ne peut plus se permettre cette sorte de générosité. Toutefois, compte tenu des circonstances, il est possible qu'il y ait une mauvaise presse.

is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

There is also a potential for violence — see charge of “assault with a weapon” [Capitalization in original.]

⁶ Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation has been stayed pending the result of this appeal.

II. Relevant Statutory Provisions and Provisions of International Treaties

⁷ *Immigration Act*, R.S.C., 1985, c. I-2

82.1 (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division.

83. (1) A judgment of the Federal Court — Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

114. . . .

(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Immigration Regulations, 1978, SOR/78-172, as amended by SOR/93-44

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to

Je recommande le rejet, mais vous désirerez peut-être obtenir l'approbation de quelqu'un au centre régional.

Violence possible — voir l'accusation d'agression armée. [Majuscules dans l'original.]

À la suite du rejet de sa demande, M^{me} Baker a reçu signification, le 27 mai 1994, de l'ordre de se présenter à l'aéroport Pearson le 17 juin pour son renvoi du Canada. Un sursis d'expulsion a été ordonné jusqu'à l'issue du présent pourvoi.

II. Les dispositions législatives et des traités internationaux

Loi sur l'immigration, L.R.C. (1985), ch. I-2

82.1 (1) La présentation d'une demande de contrôle judiciaire aux termes de la *Loi sur la Cour fédérale* ne peut, pour ce qui est des décisions ou ordonnances rendues, des mesures prises ou de toute question soulevée dans le cadre de la présente loi ou de ses textes d'application — règlements ou règles — se faire qu'avec l'autorisation d'un juge de la Section de première instance de la Cour fédérale.

83. (1) Le jugement de la Section de première instance de la Cour fédérale rendu sur une demande de contrôle judiciaire relative à une décision ou ordonnance rendue, une mesure prise ou toute question soulevée dans le cadre de la présente loi ou de ses textes d'application — règlements ou règles — ne peut être porté en appel devant la Cour d'appel fédérale que si la Section de première instance certifie dans son jugement que l'affaire soulève une question grave de portée générale et énonce celle-ci.

114. . . .

(2) Le gouverneur en conseil peut, par règlement, autoriser le ministre à accorder, pour des raisons d'ordre humanitaire, une dispense d'application d'un règlement pris aux termes du paragraphe (1) ou à faciliter l'admission de toute autre manière.

Règlement sur l'immigration de 1978, DORS/78-172, modifié par DORS/93-44

2.1 Le ministre est autorisé à accorder, pour des raisons d'ordre humanitaire, une dispense d'application d'un règlement pris aux termes du paragraphe 114(1) de

Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family

la Loi ou à faciliter l'admission au Canada de toute autre manière.

Convention relative aux droits de l'enfant, R.T. Can. 1992 n° 3

Article 3

1. Dans toutes les décisions qui concernent les enfants, qu'elles soient le fait des institutions publiques ou privées de protection sociale, des tribunaux, des autorités administratives ou des organes législatifs, l'intérêt supérieur de l'enfant doit être une considération primordiale.

2. Les États parties s'engagent à assurer à l'enfant la protection et les soins nécessaires à son bien-être, compte tenu des droits et des devoirs de ses parents, de ses tuteurs ou des autres personnes légalement responsables de lui, et ils prennent à cette fin toutes les mesures législatives et administratives appropriées.

Article 9

1. Les États parties veillent à ce que l'enfant ne soit pas séparé de ses parents contre leur gré, à moins que les autorités compétentes ne décident, sous réserve de révision judiciaire et conformément aux lois et procédures applicables, que cette séparation est nécessaire dans l'intérêt supérieur de l'enfant. Une décision en ce sens peut être nécessaire dans certains cas particuliers, par exemple lorsque les parents maltraitent ou négligent l'enfant, ou lorsqu'ils vivent séparément et qu'une décision doit être prise au sujet du lieu de résidence de l'enfant.

2. Dans tous les cas prévus au paragraphe 1 du présent article, toutes les parties intéressées doivent avoir la possibilité de participer aux délibérations et de faire connaître leurs vues.

3. Les États parties respectent le droit de l'enfant séparé de ses deux parents ou de l'un d'eux d'entretenir régulièrement des relations personnelles et des contacts directs avec ses deux parents, sauf si cela est contraire à l'intérêt supérieur de l'enfant.

4. Lorsque la séparation résulte de mesures prises par un État partie, telles que la détention, l'emprisonnement, l'exil, l'expulsion ou la mort (y compris la mort, quelle qu'en soit la cause, survenue en cours de détention) des deux parents ou de l'un d'eux, ou de l'enfant, l'État partie donne sur demande aux parents, à l'enfant ou, s'il y a lieu, à un autre membre de la famille les renseignements

with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

III. Judgments

A. *Federal Court — Trial Division* (1995), 101 F.T.R. 110

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Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this situation, and was not part of domestic law. She also held that the evidence

essentiels sur le lieu où se trouvent le membre ou les membres de la famille, à moins que la divulgation de ces renseignements ne soit préjudiciable au bien-être de l'enfant. Les États parties veillent en outre à ce que la présentation d'une telle demande n'entraîne pas en elle-même de conséquences fâcheuses pour la personne ou les personnes intéressées.

Article 12

1. Les États parties garantissent à l'enfant qui est capable de discernement le droit d'exprimer librement son opinion sur toute question l'intéressant, les opinions de l'enfant étant dûment prises en considération eu égard à son âge et à son degré de maturité.

2. À cette fin, on donnera notamment à l'enfant la possibilité d'être entendu dans toute procédure judiciaire ou administrative l'intéressant, soit directement, soit par l'intermédiaire d'un représentant ou d'un organisme approprié, de façon compatible avec les règles de procédure de la législation nationale.

III. Les jugements

A. *Cour fédérale — Section de première instance* (1995), 101 F.T.R. 110

Le juge Simpson a prononcé à l'audience les motifs rejetant la demande de contrôle judiciaire de l'appelante. Elle a statué que, puisque l'agent Caden n'avait pas motivé sa décision, qu'aucun affidavit n'avait été fourni, et qu'aucun motif n'était requis, elle présumerait, en l'absence de preuve contraire, qu'il avait agi de bonne foi et avait rendu la décision en se fondant sur des principes appropriés. Elle a rejeté l'argument de l'appelante selon lequel l'affirmation dans les notes de l'agent Lorenz que M^{me} Baker serait un fardeau pour le système d'aide sociale n'était pas étayée par la preuve, concluant qu'il était raisonnable de conclure au vu des rapports fournis que M^{me} Baker ne pourrait pas reprendre le travail. Elle a conclu que le langage de l'agent Lorenz ne donnait pas lieu à une crainte raisonnable de partialité, et a également conclu que les opinions exprimées dans ses notes étaient sans importance parce qu'elles n'étaient pas celles du décideur, l'agent Caden. Elle a rejeté l'argument de l'appelante selon lequel la *Convention relative aux droits de l'enfant* commandait que l'intérêt de l'appelante prime dans les décisions fondées sur le par. 114(2), concluant que

showed the children were a significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

Simpson J. certified the following as a "serious question of general importance" under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?"

B. Federal Court of Appeal, [1997] 2 F.C. 127

The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He

la Convention ne s'appliquait pas à cette situation, et ne faisait pas partie du droit interne. Elle a également conclu que la preuve démontrait que les enfants avaient constitué un facteur important dans le processus décisionnel et a rejeté l'argument de l'appelante selon lequel la Convention donnait lieu à une attente légitime que l'intérêt des enfants serait une considération primordiale dans la décision.

Le juge Simpson a certifié la question suivante comme «question grave de portée générale» en vertu du par. 83(1) de la *Loi sur l'immigration*: «Vu que la Loi sur l'immigration n'incorpore pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention internationale relative aux droits de l'enfant, les autorités d'immigration fédérales doivent-elles considérer l'intérêt supérieur de l'enfant né au Canada comme une considération primordiale dans l'examen du cas d'un requérant sous le régime du par. 114(2) de la *Loi sur l'immigration*?»

B. Cour d'appel fédérale, [1997] 2 C.F. 127

Les motifs de la Cour d'appel sont exposés par le juge Strayer. Il déclare que, conformément au par. 83(1) de la *Loi sur l'immigration*, l'appel est limité à la question certifiée par le juge Simpson. Il rejette également la contestation par l'appelante de la constitutionnalité du par. 83(1). Le juge Strayer note qu'un traité ne peut pas avoir d'effet juridique au Canada s'il n'a pas été mis en vigueur par une loi adoptée à cet effet, et que la Convention n'avait pas été adoptée par une loi fédérale ou provinciale. Il conclut que, bien que la loi doive, dans la mesure du possible, être interprétée de façon à ne pas entraîner de conflit avec les obligations internationales du Canada, dire que le par. 114(2) exige que le pouvoir discrétionnaire conféré s'exerce conformément à la Convention enfreindrait la séparation des pouvoirs entre l'exécutif et le législatif. Il conclut qu'un tel principe pourrait également toucher des droits et obligations relevant de la compétence des législatures provinciales. Le juge Strayer rejette également l'argument selon lequel quelque article de la Convention peut s'interpréter de façon à imposer l'obligation au gouvernement d'accorder priorité à l'intérêt des

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held that the deportation of a parent was not a decision “concerning” children within the meaning of article 3. Finally, Strayer J.A. considered the appellant’s argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

IV. Issues

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

(1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?

(2) Were the principles of procedural fairness violated in this case?

(i) Were the participatory rights accorded consistent with the duty of procedural fairness?

(ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?

(iii) Was there a reasonable apprehension of bias in the making of this decision?

(3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker’s children?

I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by Simpson J.

enfants dans une procédure comme l’expulsion. Il conclut que l’expulsion du père ou de la mère n’est pas une décision «concernant» les enfants au sens de l’article 3. Enfin, le juge Strayer, examinant l’argument de l’appelante fondé sur la doctrine de l’attente légitime, conclut que puisque l’attente légitime ne crée aucun droit matériel et que le fait d’exiger qu’un décideur donne priorité à l’intérêt supérieur des enfants sous le régime du par. 114(2) aurait pour effet de créer un droit matériel, la doctrine ne s’appliquait pas.

IV. Les questions en litige

Comme, à mon avis, l’appel peut être tranché en vertu des principes du droit administratif et de l’interprétation des lois, il n’est pas nécessaire d’examiner les divers moyens fondés sur la *Charte* qui ont été invoqués par l’appelante et les intervenants qui l’ont appuyée. Par conséquent, les questions examinées sont les suivantes:

(1) Quel effet juridique la question énoncée aux termes du par. 83(1) de la *Loi sur l’immigration* a-t-elle sur la portée de l’examen en appel?

(2) Les principes d’équité procédurale ont-ils été enfreints en l’espèce?

(i) Les droits de participation accordés étaient-ils compatibles avec l’obligation d’équité procédurale?

(ii) Le défaut de l’agent Caden d’exposer les motifs de sa décision a-t-il enfreint les principes d’équité procédurale?

(iii) Y avait-il une crainte raisonnable de partialité dans la prise de cette décision?

(3) Le pouvoir discrétionnaire a-t-il été incorrectement exercé en raison de la façon d’aborder l’intérêt des enfants de M^{me} Baker?

Je note que c’est la troisième question qui soulève directement les points mentionnés dans la question certifiée de portée générale énoncée par le juge Simpson.

V. AnalysisA. *Stated Questions Under Section 83(1) of the Immigration Act*

The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4, that the requirement, in s. 83(1), that a “serious question of general importance” be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

The certification of a “question of general importance” is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 370 (T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a “question of general importance” has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

B. *The Statutory Scheme and the Nature of the Decision*

Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

V. AnalyseA. *Les questions énoncées en vertu du par. 83(1) de la Loi sur l'immigration*

La Cour d'appel a conclu, conformément à son arrêt *Liyanagamage c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1994), 176 N.R. 4, que le par. 83(1), en exigeant qu'une «question grave de portée générale» soit certifiée pour qu'un appel puisse être autorisé, limite l'appel aux questions soulevées par la question certifiée. Toutefois, dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, au par. 25, notre Cour a conclu que le par. 83(1) n'exige pas que la Cour d'appel traite uniquement de la question énoncée et des points qui s'y rapportent:

Sans la certification d'une «question grave de portée générale», l'appel ne serait pas justifié. L'objet de l'appel est bien le jugement lui-même, et non simplement la question certifiée.

Le juge Rothstein dit, dans le jugement *Ramoutar c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] 3 C.F. 370 (1^{re} inst.), que lorsqu'une question a été certifiée, la Cour d'appel peut examiner tous les aspects de l'appel qui relèvent de sa compétence. Je suis d'accord. Le libellé du par. 83(1) indique, et l'arrêt *Pushpanathan* le confirme, que la certification d'une «question grave de portée générale» permet un appel du jugement de première instance qui, normalement, ne serait pas autorisé, mais ne limite pas la Cour d'appel ni notre Cour à la question énoncée ou aux points qui s'y rapportent directement. Par conséquent, nous pouvons examiner tous les points soulevés dans le pourvoi.

B. *Le régime législatif et la nature de la décision*

Avant d'examiner les divers moyens invoqués dans la demande de contrôle judiciaire, il est nécessaire d'aborder brièvement la nature de la décision rendue en vertu du par. 114(2) de la *Loi sur l'immigration*, du rôle que joue cette décision dans le régime législatif, et des directives données par le ministre aux agents d'immigration à ce sujet.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the Act, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as "H & C decisions".

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the Act and the Regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Minister of Employment and Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565, at p. 569. In addition, while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of

Le paragraphe 114(2) habilite le gouverneur en conseil à autoriser le ministre à accorder une dispense d'application d'un règlement pris aux termes de la Loi, ou à faciliter l'admission d'une personne au Canada. Le pouvoir du ministre d'accorder une dispense pour des raisons d'ordre humanitaire découle de l'art. 2.1 du *Règlement sur l'immigration*:

Le ministre est autorisé à accorder, pour des raisons d'ordre humanitaire, une dispense d'application d'un règlement pris aux termes du paragraphe 114(1) de la Loi ou à faciliter l'admission au Canada de toute autre manière.

Pour plus de clarté, je référerai aux décisions rendues conformément à une combinaison du par. 114(2) de la Loi et de l'art. 2.1 du règlement de «décisions d'ordre humanitaire».

Les demandes de résidence permanente doivent normalement être présentées à l'extérieur du Canada, conformément au par. 9(1) de la Loi. L'une des exceptions à cette règle est l'admission fondée sur des raisons d'ordre humanitaire. En droit, conformément à la Loi et au règlement, c'est le ministre qui prend les décisions d'ordre humanitaire, alors qu'en pratique, ces décisions sont prises en son nom par des agents d'immigration: voir, par exemple, *Ministre de l'Emploi et de l'Immigration c. Jiminez-Perez*, [1984] 2 R.C.S. 565, à la p. 569. En outre, même si, en droit, une décision d'ordre humanitaire est une décision qui prévoit une dispense d'application du règlement ou de la Loi, en pratique, il s'agit d'une décision, dans des affaires comme celle dont nous sommes saisis, qui détermine si une personne qui est au Canada, mais qui n'a pas de statut, peut y demeurer ou sera tenue de quitter l'endroit où elle s'est établie. Il s'agit d'une décision importante qui a des conséquences capitales sur l'avenir des personnes visées. Elle peut également avoir des répercussions importantes sur la vie des enfants canadiens de la personne qui a fait la demande fondée sur des raisons d'ordre humanitaire puisqu'ils peuvent être séparés d'un de leurs parents ou déracinés de leur pays de

citizenship, where they have settled and have connections.

Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the Regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined — public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, has become established, and has become an "illegal de facto resident", and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address

citoyenneté, où ils se sont installés et ont des attaches.

Les agents d'immigration qui prennent des décisions d'ordre humanitaire reçoivent une série de lignes directrices, figurant au chapitre 9 du *Guide de l'immigration: examen et application de la loi*, qui leur servent d'instructions sur la façon d'exercer le pouvoir discrétionnaire qui leur est délégué. Le public a aussi accès à ces lignes directrices. Dans ces lignes directrices, plusieurs énoncés s'appliquent à la demande de M^{me} Baker. La directive 9.05 met l'accent sur le devoir des agents de décider quelles affaires devraient recevoir une recommandation favorable, en étudiant avec soin les cas sous tous leurs aspects, en faisant preuve de discernement, et en se demandant ce qu'une personne sensée ferait dans une telle situation. Elle dit également que les agents ne doivent pas «tente[r] d'approfondir des questions qui ne sont pas soulevées au cours des examens ou des entrevues. Toutefois, ils doivent essayer d'obtenir des précisions relativement à des raisons possibles d'intérêt public ou d'ordre humanitaire, même si celles-ci ne sont pas clairement formulées».

Ces directives définissent également les fondements de l'exercice du pouvoir discrétionnaire conféré par le par. 114(2) et le règlement. Deux types de raisons pouvant mener à une décision favorable sont indiqués — les raisons d'intérêt public et les considérations humanitaires. Conformément à la directive 9.07, les agents d'immigration doivent s'assurer d'abord qu'il n'existe pas de raisons d'intérêt public, et, s'il n'y en a pas, s'il existe des considérations humanitaires. Les raisons d'intérêt public comprennent, notamment, le mariage à un résident du Canada, le fait qu'une personne a vécu au Canada, s'y est établie et est devenue un résident «de fait en situation administrative irrégulière», et le fait que la personne est titulaire d'un permis de travail de longue date ou a travaillé comme travailleur domestique étranger. La directive 9.07 dit qu'il existe des considérations humanitaires lorsque «des difficultés inhabituelles, injustes ou indues seraient causées à la personne sollicitant l'examen de son cas si celle-ci devait quitter le Canada». Les directives traitent expressé-

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situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

C. Procedural Fairness

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Director of Kent Institution*,

ment de situations où il existe des liens familiaux de dépendance, et soulignent que l'obligation de quitter le Canada pour présenter une demande de l'étranger peut occasionner des difficultés à certains membres de la famille proche d'un résident canadien, parents, enfants ou autres proches qui n'ont pas de liens de sang avec le demandeur. Elles précisent que dans de tels cas, il faut aussi tenir compte des raisons pour lesquelles la personne n'a pas présenté sa demande à l'étranger et de la présence d'une famille ou d'autres personnes susceptibles de l'aider dans son pays d'origine.

C. L'équité procédurale

Comme premier moyen pour contester la décision de l'agent Caden, l'appelante allègue qu'elle n'a pas bénéficié de l'équité procédurale. L'appelante estime que l'obligation d'agir équitablement exige le respect des procédures suivantes quand des parents ayant des enfants canadiens présentent une demande fondée sur des raisons d'ordre humanitaire: une entrevue orale devant le décideur, un avis de la tenue de cette entrevue aux enfants et à l'autre parent, un droit pour les enfants et l'autre parent de présenter des arguments au cours de cette entrevue, un avis à l'autre parent de la tenue de l'entrevue et du droit de cette personne d'être représentée par un avocat. Elle allègue également que l'équité procédurale exige que le décideur, soit l'agent Caden, motive sa décision, et que les notes de l'agent Lorenz donnent lieu à une crainte raisonnable de partialité.

En traitant des questions d'équité, j'examinerai d'abord les principes applicables à la détermination de la nature de l'obligation d'équité procédurale, et ensuite les arguments de M^{me} Baker sur l'insuffisance des droits de participation qui lui ont été accordés, sur l'existence d'une obligation de motiver la décision et sur la crainte raisonnable de partialité.

Les deux parties admettent que l'obligation d'équité procédurale s'applique aux décisions d'ordre humanitaire. Le fait qu'une décision soit administrative et touche «les droits, privilèges ou biens d'une personne» suffit pour entraîner l'application de l'obligation d'équité: *Cardinal c.*

[1985] 2 S.C.R. 643, at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H & C decisions: *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 81 (F.C.T.D.), at p. 88; *Said v. Canada (Minister of Employment and Immigration)* (1992), 6 Admin. L.R. (2d) 23 (F.C.T.D.); *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238 (F.C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

Directeur de l'établissement Kent, [1985] 2 R.C.S. 643, à la p. 653. Il est évident que la décision quant à savoir si un demandeur sera dispensé des exigences prévues par la Loi entre dans cette catégorie, et il est admis depuis longtemps que l'obligation d'équité s'applique aux décisions d'ordre humanitaire: *Sobrie c. Canada (Ministre de l'Emploi et de l'Immigration)* (1987), 3 Imm. L.R. (2d) 81 (C.F. 1^{re} inst.), à la p. 88; *Said c. Canada (Ministre de l'Emploi et de l'Immigration)* (1992), 6 Admin. L.R. (2d) 23 (C.F. 1^{re} inst.); *Shah c. Ministre de l'Emploi et de l'Immigration* (1994), 170 N.R. 238 (C.A.F.).

(1) Les facteurs ayant une incidence sur la nature de l'obligation d'équité

L'existence de l'obligation d'équité, toutefois, ne détermine pas quelles exigences s'appliqueront dans des circonstances données. Comme je l'écrivais dans l'arrêt *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653, à la p. 682, «la notion d'équité procédurale est éminemment variable et son contenu est tributaire du contexte particulier de chaque cas». Il faut tenir compte de toutes les circonstances pour décider de la nature de l'obligation d'équité procédurale: *Knight*, aux pp. 682 et 683; *Cardinal*, précité, à la p. 654; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170, le juge Sopinka.

Bien que l'obligation d'équité soit souple et variable et qu'elle repose sur une appréciation du contexte de la loi particulière et des droits visés, il est utile d'examiner les critères à appliquer pour définir les droits procéduraux requis par l'obligation d'équité dans des circonstances données. Je souligne que l'idée sous-jacente à tous ces facteurs est que les droits de participation faisant partie de l'obligation d'équité procédurale visent à garantir que les décisions administratives sont prises au moyen d'une procédure équitable et ouverte, adaptée au type de décision et à son contexte légal institutionnel et social, comprenant la possibilité donnée aux personnes visées par la décision de présenter leur points de vue complètement ainsi que des éléments de preuve de sorte qu'ils soient considérés par le décideur.

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Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight, supra*, at p. 683, it was held that “the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making”. The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface, supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 896, per Sopinka J.

La jurisprudence reconnaît plusieurs facteurs pertinents en ce qui a trait aux exigences de l'obligation d'équité procédurale en common law dans des circonstances données. Un facteur important est la nature de la décision recherchée et le processus suivi pour y parvenir. Dans l'arrêt *Knight*, précité, à la p. 683, on a conclu que «la mesure dans laquelle le processus administratif se rapproche du processus judiciaire est de nature à indiquer jusqu'à quel point ces principes directeurs devraient s'appliquer dans le domaine de la prise de décisions administratives». Plus le processus prévu, la fonction du tribunal, la nature de l'organisme rendant la décision et la démarche à suivre pour parvenir à la décision ressemblent à une prise de décision judiciaire, plus il est probable que l'obligation d'agir équitablement exigera des protections procédurales proches du modèle du procès. Voir également *Vieux St-Boniface*, précité, à la p. 1191; *Russell c. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), à la p. 118; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879, à la p. 896, le juge Sopinka.

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A second factor is the nature of the statutory scheme and the “terms of the statute pursuant to which the body operates”: *Old St. Boniface, supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

Le deuxième facteur est la nature du régime législatif et les «termes de la loi en vertu de laquelle agit l'organisme en question»: *Vieux St-Boniface*, précité, à la p. 1191. Le rôle que joue la décision particulière au sein du régime législatif, et d'autres indications qui s'y rapportent dans la loi, aident à définir la nature de l'obligation d'équité dans le cadre d'une décision administrative précise. Par exemple, des protections procédurales plus importantes seront exigées lorsque la loi ne prévoit aucune procédure d'appel, ou lorsque la décision est déterminante quant à la question en litige et qu'il n'est plus possible de présenter d'autres demandes: voir D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), aux pp. 7-66 et 7-67.

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A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its

Le troisième facteur permettant de définir la nature et l'étendue de l'obligation d'équité est l'importance de la décision pour les personnes visées. Plus la décision est importante pour la vie des personnes visées et plus ses répercussions sont

impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface, supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty

grandes pour ces personnes, plus les protections procédurales requises seront rigoureuses. C'est ce que dit par exemple le juge Dickson (plus tard Juge en chef) dans l'arrêt *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105, à la p. 1113:

Une justice de haute qualité est exigée lorsque le droit d'une personne d'exercer sa profession ou de garder son emploi est en jeu. [. . .] Une suspension de nature disciplinaire peut avoir des conséquences graves et permanentes sur une carrière.

Comme le juge Sedley (maintenant Lord juge Sedley) le dit dans *R. c. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), à la p. 667:

[TRADUCTION] Dans le monde moderne, les décisions rendues par des organismes administratifs peuvent avoir un effet plus immédiat et plus important sur la vie des gens que les décisions des tribunaux et le droit public a depuis l'arrêt *Ridge c. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40, reconnu ce fait. Bien que le caractère judiciaire d'une fonction puisse élever les exigences pratiques en matière d'équité au-delà de ce qu'elles seraient autrement, par exemple en exigeant que soit présenté et vérifié oralement un élément de preuve contesté, ce qui le rend «judiciaire» dans ce sens est principalement la nature de la question à trancher, et non le statut formel de l'organisme décisionnel.

L'importance d'une décision pour les personnes visées a donc une incidence significative sur la nature de l'obligation d'équité procédurale.

Quatrièmement, les attentes légitimes de la personne qui conteste la décision peuvent également servir à déterminer quelles procédures l'obligation d'équité exige dans des circonstances données. Notre Cour a dit que, au Canada, l'attente légitime fait partie de la doctrine de l'équité ou de la justice naturelle, et qu'elle ne crée pas de droits matériels: *Vieux St-Boniface*, précité, à la p. 1204; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, à la p. 557. Au Canada, la reconnaissance qu'une attente légitime existe aura une incidence sur la nature de l'obligation d'équité envers les personnes visées par la décision. Si le demandeur s'attend légitimement à ce qu'une certaine procédure soit suivie, l'obliga-

of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

tion d'équité exigera cette procédure: *Qi c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1995), 33 Imm. L.R. (2d) 57 (C.F. 1^{re} inst.); *Mercier-Néron c. Canada (Ministre de la Santé nationale et du Bien-être social)* (1995), 98 F.T.R. 36; *Bendahmane c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1989] 3 C.F. 16 (C.A.). De même, si un demandeur s'attend légitimement à un certain résultat, l'équité peut exiger des droits procéduraux plus étendus que ceux qui seraient autrement accordés: D. J. Mullan, *Administrative Law* (3^e éd. 1996), aux pp. 214 et 215; D. Shapiro, «Legitimate Expectation and its Application to Canadian Immigration Law» (1992), 8 *J.L. & Social Pol'y* 282, à la p. 297; *Canada (Procureur général) c. Comité du tribunal des droits de la personne (Canada)* (1994), 76 F.T.R. 1. Néanmoins, la doctrine de l'attente légitime ne peut pas donner naissance à des droits matériels en dehors du domaine de la procédure. Cette doctrine, appliquée au Canada, est fondée sur le principe que les «circonstances» touchant l'équité procédurale comprennent les promesses ou pratiques habituelles des décideurs administratifs, et qu'il serait généralement injuste de leur part d'agir en contravention d'assurances données en matière de procédures, ou de revenir sur des promesses matérielles sans accorder de droits procéduraux importants.

²⁷ Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *per* Gonthier J.

Cinquièmement, l'analyse des procédures requises par l'obligation d'équité devrait également prendre en considération et respecter les choix de procédure que l'organisme fait lui-même, particulièrement quand la loi laisse au décideur la possibilité de choisir ses propres procédures, ou quand l'organisme a une expertise dans le choix des procédures appropriées dans les circonstances: Brown et Evans, *op. cit.*, aux pp. 7-66 à 7-70. Bien que, de toute évidence, cela ne soit pas déterminant, il faut accorder une grande importance au choix de procédures par l'organisme lui-même et à ses contraintes institutionnelles: *IWA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, le juge Gonthier.

²⁸ I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed

Je dois mentionner que cette liste de facteurs n'est pas exhaustive. Tous ces principes aident le tribunal à déterminer si les procédures suivies res-

respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

(2) Legitimate Expectations

I turn now to an application of these principles to the circumstances of this case to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H & C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H & C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

pectent l'obligation d'équité. D'autres facteurs peuvent également être importants, notamment dans l'examen des aspects de l'obligation d'agir équitablement non reliés aux droits de participation. Les valeurs qui sous-tendent l'obligation d'équité procédurale relèvent du principe selon lequel les personnes visées doivent avoir la possibilité de présenter entièrement et équitablement leur position, et ont droit à ce que les décisions touchant leurs droits, intérêts ou privilèges soient prises à la suite d'un processus équitable, impartial et ouvert, adapté au contexte légal, institutionnel et social de la décision.

(2) L'attente légitime

Je passe maintenant à une application de ces principes aux circonstances de l'espèce pour déterminer si les procédures suivies respectaient l'obligation d'équité procédurale. Je déciderai d'abord si l'existence d'une attente légitime fondée sur le texte des articles de la Convention et le fait que le Canada l'ait ratifiée a une incidence, comme l'appelante le soutient, sur l'obligation d'équité procédurale qui serait autrement applicable. À mon avis, les articles de la Convention et leur libellé n'ont pas créé chez M^{me} Baker l'attente légitime que sa demande fondée sur des raisons d'ordre humanitaire donne lieu à l'application de droits procéduraux particuliers autres que ceux qui seraient normalement exigés en vertu de l'obligation d'équité, à une conclusion positive, ou à l'utilisation de critères particuliers. Cette convention n'est pas, à mon avis, l'équivalent d'une déclaration gouvernementale sur la façon dont les demandes fondées sur des raisons d'ordre humanitaire doivent être tranchées, elle n'indique pas non plus que des droits autres que les droits de participation dont il est question ci-dessous seront accordés. Par conséquent, dans la présente affaire, il n'existe pas d'attente légitime ayant une incidence sur la nature de l'obligation d'équité et le quatrième facteur identifié plus haut n'affecte donc pas l'analyse. Il n'est pas nécessaire de décider si un instrument international ratifié par le Canada pourrait, dans d'autres circonstances, donner lieu à une attente légitime.

(3) Participatory Rights

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The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

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Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although judicial review may be applied for with leave of the Federal Court — Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result — the claimant and his or her close family members — and this leads to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister are significant, though of course not determinative

(3) Les droits de participation

La question suivante est de savoir si, compte tenu des autres facteurs déterminant la nature de l'obligation d'équité, le défaut d'accorder une audience et de donner avis à M^{me} Baker ou à ses enfants était incompatible avec les droits de participation qu'exige l'obligation d'équité dans ces circonstances. Au cœur de cette analyse, il faut se demander si, compte tenu de toutes les circonstances, les personnes dont les intérêts étaient en jeu ont eu une occasion valable de présenter leur position pleinement et équitablement. La procédure en l'espèce se composait d'une demande écrite accompagnée de documents justificatifs, résumée par l'agent subalterne (Lorenz) et transmise avec une recommandation faite par ce dernier. Le résumé, la recommandation et les documents ont alors été examinés par l'agent principal (Caden), qui a pris la décision.

Plusieurs des facteurs susmentionnés servent à déterminer quel type de droits de participation sont requis par l'obligation d'équité procédurale dans les circonstances. En premier lieu, une décision d'ordre humanitaire est très différente d'une décision judiciaire, car elle suppose l'exercice d'un pouvoir discrétionnaire étendu et l'examen de facteurs multiples. Deuxièmement, son rôle est aussi, dans le cadre du régime législatif, une exception aux principes généraux du droit canadien de l'immigration. Ces facteurs militent en faveur d'une application moins stricte de l'obligation d'équité. D'autre part, il n'existe pas de procédure d'appel, bien qu'il puisse y avoir un contrôle judiciaire sur autorisation de la Cour fédérale, Section de première instance. En outre, au vu du troisième facteur, il s'agit là d'une décision qui, en pratique, a une importance exceptionnelle sur la vie des personnes concernées — le demandeur et les membres de sa famille proche, ce qui accroît l'étendue de l'obligation d'équité. Enfin, appliquant le cinquième facteur ci-haut décrit, la loi donne au ministre une grande latitude pour décider de la procédure appropriée, et les agents d'immigration, dans la pratique, ne procèdent pas à des entrevues dans tous les cas. Les pratiques et les choix institutionnels que fait le ministre sont

factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah*, *supra*, at p. 239, that the duty of fairness owed in these circumstances is simply “minimal”. Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.

I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H & C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or

importants, bien que ce ne soient évidemment pas des facteurs déterminants dans l'analyse. On peut donc voir que, si certains facteurs indiquent des exigences plus strictes en matière d'obligation d'équité, d'autres indiquent des exigences moins strictes, plus éloignées du modèle judiciaire.

Pondérant ces facteurs, je ne suis pas d'accord avec la conclusion de la Cour d'appel fédérale dans l'arrêt *Shah*, précité, à la p. 239, que l'obligation d'équité dans ces circonstances est simplement «minimale». Au contraire, les circonstances nécessitent un examen complet et équitable des questions litigieuses, et le demandeur et les personnes dont les intérêts sont profondément touchés par la décision doivent avoir une possibilité valable de présenter les divers types de preuves qui se rapportent à leur affaire et de les voir évalués de façon complète et équitable.

Toutefois, on ne peut pas dire non plus qu'une audience est toujours nécessaire pour garantir l'audition et l'examen équitables des questions en jeu. La nature souple de l'obligation d'équité reconnaît qu'une participation valable peut se faire de différentes façons dans des situations différentes. La Cour fédérale a statué que l'équité procédurale n'exige pas la tenue d'une audience dans ces circonstances: voir, par exemple, *Said*, précité, à la p. 30.

Je conviens que la tenue d'une audience n'est pas une exigence générale pour les décisions fondées sur des raisons d'ordre humanitaire. Il n'est pas indispensable qu'il y ait une entrevue pour exposer à un agent d'immigration les renseignements relatifs à une demande fondée sur des raisons d'ordre humanitaire et pour que les raisons d'ordre humanitaire présentées puissent être évaluées de façon complète et équitable. En l'espèce, l'appelante a eu la possibilité d'exposer par écrit, par l'entremise de son avocat, sa situation, celle de ses enfants et leur dépendance émotive vis-à-vis d'elle, et de présenter à l'appui de sa demande des lettres d'un travailleur social de la Société d'aide à l'enfance et de son psychiatre. Ces documents étaient à la disposition des décideurs, et ils contenaient les renseignements nécessaires pour la prise de décision. Compte tenu de tous les facteurs

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notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

(4) The Provision of Reasons

³⁵ The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

³⁶ This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah, supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-maker's reasons: see *Tylo v. Minister of Employment and Immigration* (1995), 90 F.T.R. 157, at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170 (F.C.T.D.), and *Chan v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 62, it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v. Canada (Minister of Citizenship and Immigration) (No. 1)* (1995), 116 F.T.R. 241, an H & C decision was set aside because the decision-making officer

pertinents pour évaluer le contenu de l'obligation d'équité, le fait qu'il n'y a pas eu d'audience ni d'avis d'audience ne constituait pas, selon moi, un manquement à l'obligation d'équité procédurale envers M^{me} Baker dans les circonstances, particulièrement en raison du fait que plusieurs des facteurs militaient en faveur d'une norme plus souple. La possibilité qui a été offerte à l'appelante et à ses enfants de produire une documentation écrite complète relativement à tous les aspects de sa demande remplit les exigences en matière de droits de participation que commandait l'obligation d'équité en l'espèce.

(4) L'exposé des motifs

L'appelante soutient également que l'obligation d'équité, dans les circonstances, exige que le décideur motive ses décisions. Elle soutient qu'il faut soit considérer les notes de l'agent Lorenz comme les motifs de la décision, soit conclure que le défaut de l'agent Caden de donner les motifs écrits de sa décision, ou un affidavit subséquent les expliquant, est un manquement aux principes d'équité.

Cette question a été abordée dans plusieurs cas de contrôle judiciaire de demandes fondées sur des raisons d'ordre humanitaire. La Cour d'appel fédérale a statué qu'il n'était pas nécessaire que les décisions soient motivées: *Shah*, précité, aux pp. 239 et 240. Elle a également statué que les notes de l'historique des faits préparées par un agent subalterne ne doivent pas être considérées comme les motifs du décideur: voir *Tylo c. Ministère de l'Emploi et de l'Immigration* (1995), 90 F.T.R. 157, aux pp. 159 et 160. Les décisions *Gheorlan c. Canada (Secrétaire d'État)* (1995), 26 Imm. L.R. (2d) 170 (C.F. 1^{re} inst.), et *Chan c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1994), 87 F.T.R. 62, concluent qu'il ne faut pas considérer les notes de l'agent de réexamen comme des motifs de décision, mais que ces notes peuvent servir à déterminer s'il existe une erreur susceptible de contrôle judiciaire. Dans *Marques c. Canada (Ministre de la Citoyenneté et de l'Immigration) (n° 1)* (1995), 116 F.T.R. 241, une décision d'ordre humanitaire a été annulée parce que le décideur n'avait pas motivé sa

failed to provide reasons or an affidavit explaining the reasons for his decision.

More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions: *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (H.C.A.), at pp. 665-66.

Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal. . . .

The importance of reasons was recently reemphasized by this Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 180-81.

Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 146; *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A.), at para. 38. Those affected may

décision, ni fourni d'affidavit expliquant les motifs de sa décision.

Plus généralement, la common law a traditionnellement reconnu que l'obligation d'équité n'exige pas, en règle générale, que les décisions administratives soient motivées: *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *Supermarchés Jean Labrecque Inc. c. Flamand*, [1987] 2 R.C.S. 219, à la p. 233; *Public Service Board of New South Wales c. Osmond* (1986), 159 C.L.R. 656 (H.C.A.), aux pp. 665 et 666.

Toutefois, les tribunaux et les auteurs ont maintes fois souligné l'utilité des motifs pour assurer la transparence et l'équité de la prise de décision. Quoique l'arrêt *Northwestern Utilities* traite d'une obligation légale de motiver des décisions, le juge Estey fait l'observation suivante, à la p. 706, sur l'utilité d'une règle de common law qui exigerait la production de motifs:

Cette obligation est salutaire: elle réduit considérablement les risques de décisions arbitraires, raffermir la confiance du public dans le jugement et l'équité des tribunaux administratifs et permet aux parties aux procédures d'évaluer la possibilité d'un appel . . .

L'importance des motifs a récemment été réitérée par la Cour dans le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, aux par. 180 et 181.

On a soutenu que la rédaction de motifs favorise une meilleure prise de décision en ce qu'elle exige une bonne formulation des questions et du raisonnement et, en conséquence, une analyse plus rigoureuse. Le processus de rédaction des motifs d'une décision peut en lui-même garantir une meilleure décision. Les motifs permettent aussi aux parties de voir que les considérations applicables ont été soigneusement étudiées, et ils sont de valeur inestimable si la décision est portée en appel, contestée ou soumise au contrôle judiciaire: R. A. Macdonald et D. Lametti, «Reasons for Decision in Administrative Law» (1990), 3 C.J.A.L.P. 123, à la p. 146; *Williams c. Canada*

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be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

(*Ministre de la Citoyenneté et de l'Immigration*), [1997] 2 C.F. 646 (C.A.), au par. 38. Il est plus probable que les personnes touchées ont l'impression d'être traitées avec équité et de façon appropriée si des motifs sont fournis: de Smith, Woolf & Jowell, *Judicial Review of Administrative Action* (5^e éd. 1995), aux pp. 459 et 460. Je suis d'accord qu'il s'agit là d'avantages importants de la rédaction de motifs écrits.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond*, *supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it "might in some cases induce a lack of candour on the part of the administrative officers concerned". Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of "archival" reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

D'autres ont émis des réserves quant à l'utilité d'une règle de common law qui exigerait la production de motifs écrits. Dans l'arrêt *Osmond*, précité, le juge en chef Gibbs a dit, à la p. 668, qu'il craignait qu'une obligation de rédiger des motifs puisse finir par imposer un fardeau indu aux décideurs administratifs, entraîner une augmentation des coûts et des délais, et [TRADUCTION] «dans certains cas occasionner un manque de sincérité de la part des fonctionnaires concernés». Même s'ils conviennent que l'équité devrait exiger que des motifs soient donnés dans certaines circonstances, Macdonald et Lametti, *loc. cit.*, font une mise en garde contre une exigence donnant lieu à des motifs [TRADUCTION] «d'archives» s'apparentant aux décisions judiciaires, et notent qu'il faut tenir compte de la nature particulière de l'organisme décisionnel dans différents contextes pour évaluer l'exigence des motifs. À mon avis, cependant, on peut répondre à ces préoccupations en veillant à ce que toute obligation de motiver la décision en raison de l'obligation d'équité laisse aux décideurs assez de latitude, en acceptant comme suffisants divers types d'explications écrites.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M. H. Morris, "Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate" (1997), 11 *C.J.A.L.P.* 155, at pp. 164-68; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310 (C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531, imposed a reasons requirement on the Home

En Angleterre, un droit de common law à la production de motifs dans certaines circonstances est apparu dans la jurisprudence: voir M. H. Morris, «Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate» (1997), 11 *C.J.A.L.P.* 155, aux pp. 164 à 168; de Smith, Woolf & Jowell, *op. cit.*, aux pp. 462 à 465. L'arrêt *R. c. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310 (C.A.), a conclu qu'une commission décidant de l'appel du congédiement d'un agent de prison devait motiver sa décision. La Chambre des lords, dans l'arrêt *R. c. Secretary of State for the Home Department, ex*

Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances, a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.), at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541 (B.C.C.A.), at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the decision. In *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 55 N.S.R. (2d) 71 (C.A.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith D.J., in *Taabea v. Refugee Status Advisory Committee*, [1980] 2 F.C. 316 (T.D.), imposed a reasons requirement on a ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 179 N.B.R. (2d) 43 (C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the Federal Court of Appeal recently rejected the submission that reasons were required in rela-

parte *Doody*, [1994] 1 A.C. 531, a exigé que le Secrétaire de l'Intérieur fournisse des motifs quand il exerce le pouvoir discrétionnaire dont l'investit la loi de décider du temps qu'une personne condamnée à l'emprisonnement à perpétuité devait passer en prison avant d'avoir droit à un réexamen. Lord Mustill, au nom de tous les lords juristes dans l'affaire, conclut que même s'il n'existe pas d'obligation générale de fournir des motifs en common law, dans les circonstances visées, il était inéquitable de ne pas fournir des motifs. D'autres décisions anglaises ont conclu que la common law exige que les décisions soient motivées quand il existe un droit d'appel prévu par la loi: voir *Norton Tool Co. c. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.), à la p. 49; *Alexander Machinery (Dudley) Ltd. c. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

Certains tribunaux canadiens ont imposé aux décideurs administratifs, dans des circonstances particulières, une obligation de common law de motiver leurs décisions, tandis que d'autres ont été plus hésitants à le faire. L'arrêt *Orlowski c. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541 (C.A.C.-B.), aux pp. 551 et 552, conclut qu'en général une commission d'examen agissant sous le régime de la partie XX.1 du *Code criminel* devait motiver ses décisions, en raison notamment de l'existence d'un droit d'appel prévu par la loi et de l'importance des droits touchés par ces décisions. Dans l'arrêt *R.D.R. Construction Ltd. c. Rent Review Commission* (1982), 55 N.S.R. (2d) 71 (C.A.), la cour a statué qu'en raison de l'existence d'un droit d'appel prévu par la loi, il existait implicitement une obligation de donner des motifs. Le juge suppléant Smith, dans l'affaire *Taabea c. Comité consultatif sur le statut de réfugié*, [1980] 2 C.F. 316 (1^{re} inst.), a imposé une obligation de motiver une décision ministérielle portant sur le statut de réfugié, en raison du droit d'en demander le réexamen devant la Commission d'appel de l'immigration. De même, alors qu'il examinait si l'exigence prévue par la loi de donner des motifs avait été convenablement remplie, le juge Bastarache (alors juge à la Cour d'appel) a souligné, dans l'arrêt *Boyle c. Commission de la santé, de la sécurité et de l'indemnisation des accidents au travail (N.-B.)* (1996), 179 R.N.-B. (2^e) 43

tion to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams, supra*.

(C.A.), à la p. 55, qu'il était important de disposer de motifs appropriés quand une décision est portée en appel. Toutefois, la Cour d'appel fédérale a récemment conclu qu'il n'était pas nécessaire de motiver une décision dont le but était de déclarer qu'un résident permanent constituait un danger pour le public en vertu du par. 70(5) de la *Loi sur l'immigration*: *Williams, précité*.

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in *Orlowski*, *Cunningham*, and *Doody*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

À mon avis, il est maintenant approprié de reconnaître que, dans certaines circonstances, l'obligation d'équité procédurale requerra une explication écrite de la décision. Les solides arguments démontrant les avantages de motifs écrits indiquent que, dans des cas comme en l'espèce où la décision revêt une grande importance pour l'individu, dans des cas où il existe un droit d'appel prévu par la loi, ou dans d'autres circonstances, une forme quelconque de motifs écrits est requise. Cette exigence est apparue dans la common law ailleurs. Les circonstances de l'espèce, à mon avis, constituent l'une de ces situations où des motifs écrits sont nécessaires. L'importance cruciale d'une décision d'ordre humanitaire pour les personnes visées, comme celles dont il est question dans les arrêts *Orlowski*, *Cunningham* et *Doody*, milite en faveur de l'obligation de donner des motifs. Il serait injuste à l'égard d'une personne visée par une telle décision, si essentielle pour son avenir, de ne pas lui expliquer pourquoi elle a été prise.

44 In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness

J'estime, toutefois, que cette obligation a été remplie en l'espèce par la production des notes de l'agent Lorenz à l'appelante. Les notes ont été remises à M^{me} Baker lorsque son avocat a demandé des motifs. Pour cette raison, et parce qu'il n'existe pas d'autres documents indiquant les motifs de la décision, les notes de l'agent subalterne devraient être considérées, par déduction, comme les motifs de la décision. L'admission de documents tels que ces notes comme motifs de la décision fait partie de la souplesse nécessaire, ainsi que l'ont souligné Macdonald et Lametti, *loc. cit.*, quand des tribunaux évaluent les exigences de l'obligation d'équité tout en tenant compte de la réalité quotidienne des organismes administratifs et des nombreuses façons d'assurer le respect des

can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

(5) Reasonable Apprehension of Bias

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an

valeurs qui fondent les principes de l'équité procédurale. Cela confirme le principe selon lequel les individus ont droit à une procédure équitable et à la transparence de la prise de décision, mais reconnaît aussi qu'en matière administrative, cette transparence peut être atteinte de différentes façons. Je conclus qu'en l'espèce les notes de l'agent Lorenz remplissent l'obligation de donner des motifs en vertu de l'obligation d'équité procédurale, et qu'elles seront considérées comme les motifs de la décision.

(5) La crainte raisonnable de partialité

L'équité procédurale exige également que les décisions soient rendues par un décideur impartial, sans crainte raisonnable de partialité. L'intimé soutient que le juge Simpson a eu raison de conclure que les notes de l'agent Lorenz ne peuvent pas donner lieu à une crainte raisonnable de partialité, parce que le vrai décideur était l'agent Caden, qui a simplement fait une revue de la recommandation préparée par son subalterne. L'obligation d'agir équitablement et, en conséquence, d'une façon qui ne donne pas lieu à une crainte raisonnable de partialité, s'applique, à mon avis, à tous les agents d'immigration qui jouent un rôle significatif dans la prise de décision, qu'ils soient des agents de réexamen subalternes, ou ceux qui rendent la décision finale. L'agent subordonné joue un rôle important dans le processus, et si une personne ayant un rôle aussi central n'agit pas de façon impartiale, la décision elle-même ne peut pas être considérée comme ayant été rendue de façon impartiale. En outre, comme je le dis au paragraphe précédent, les notes de l'agent Lorenz constituent les motifs de la décision, et si elles donnent lieu à une crainte raisonnable de partialité, la décision elle-même en est viciée.

Le test de la crainte raisonnable de partialité a été exposé par le juge de Grandpré, dissident, dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, à la p. 394:

... la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. [...] [C]e critère consiste à se

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informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 11, *per* Major J.; at para. 31, *per* L'Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Croirait-elle que, selon toute vraisemblance, [le décideur], consciemment ou non, ne rendra pas une décision juste?»

Notre Cour a souvent souscrit à cette définition du test, plus récemment dans l'arrêt *R. c. S. (R.D.)*, [1997] 3 R.C.S. 484, au par. 11, le juge Major; au par. 31, les juges L'Heureux-Dubé et McLachlin; et au par. 111, le juge Cory.

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It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Old St. Boniface*, *supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

Il a été décidé que le test relatif à la crainte raisonnable de partialité pouvait varier, comme d'autres éléments de l'équité procédurale, selon le contexte et le genre de fonction exercée par le décideur administratif concerné: *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623; *Vieux St-Boniface*, précité, à la p. 1192. Le contexte en l'espèce est que les agents d'immigration doivent régulièrement prendre des décisions qui ont une très grande importance pour les personnes visées, mais qui souvent ont aussi une incidence sur les intérêts du Canada comme pays. Ce sont des décisions de nature individuelle plutôt que générale. Elles exigent également une grande sensibilité. Le Canada est une nation en grande partie composée de gens dont les familles ont émigré dans les siècles derniers. Notre histoire démontre l'importance de l'immigration, et notre société est l'exemple des avantages de la diversité de gens originaires d'une multitude de pays. Parce qu'elles visent nécessairement des personnes de provenances diverses, issues de cultures, de races et de continents différents, les décisions en matière d'immigration exigent de ceux qui les rendent sensibilité et compréhension. Elles exigent qu'on reconnaisse la diversité ainsi qu'une compréhension des autres et une ouverture d'esprit à la différence.

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In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they

À mon avis, les membres bien informés de la communauté percevraient la partialité dans les commentaires de l'agent Lorenz. Ses notes, et la façon dont elles sont rédigées, ne témoignent ni d'un esprit ouvert ni d'une absence de stéréotypes dans l'évaluation des circonstances particulières de l'affaire. Plus regrettable encore est le fait qu'elles

seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

D. Review of the Exercise of the Minister's Discretion

Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the "serious question of general importance" which was certified by Simpson J. relating to the approach to be taken to children's interests when reviewing the exercise of the discretion conferred by the Act and the Regulations. Since it is important to address the central questions which led to this appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

semblent établir un lien entre les troubles mentaux de M^{me} Baker, sa formation comme domestique, le fait qu'elle ait plusieurs enfants, et la conclusion qu'elle serait, en conséquence, un fardeau pour notre système d'aide sociale pour le restant de sa vie. En outre, la conclusion tirée était contraire à la lettre du psychiatre, qui disait qu'avec un traitement, l'état de M^{me} Baker pouvait continuer de s'améliorer et qu'elle pouvait redevenir un membre productif de la société. Qu'elles aient été faites dans cette intention ou non, ces déclarations donnent l'impression que l'agent Lorenz peut avoir tiré des conclusions en se fondant non pas sur la preuve dont il disposait, mais sur le fait que M^{me} Baker était une mère célibataire ayant plusieurs enfants, et était atteinte de troubles psychiatriques. L'utilisation de majuscules par l'agent pour souligner le nombre des enfants de M^{me} Baker peut également indiquer au lecteur que c'était là une raison de lui refuser sa demande. À la lecture des commentaires de l'agent, je ne crois pas qu'un membre raisonnable et bien informé de la communauté conclurait que l'agent a traité cette affaire avec l'impartialité requise de la part d'un agent d'immigration rendant ce genre de décision. Un observateur raisonnable noterait que la propre frustration de l'agent face au «système» l'empêchait d'évaluer avec impartialité si l'admission de l'appelante devrait être facilitée pour des raisons d'ordre humanitaire. Je conclus que les notes de l'agent Lorenz donnent lieu à une crainte raisonnable de partialité.

D. Le contrôle de l'exercice du pouvoir discrétionnaire du ministre

Bien que l'existence d'une crainte raisonnable de partialité suffise pour trancher le présent pourvoi, cette conclusion ne règle pas les points litigieux énoncés dans la «question grave de portée générale», certifiée par le juge Simpson, concernant la façon d'aborder l'intérêt des enfants dans le contrôle de l'exercice du pouvoir discrétionnaire conféré par la Loi et le règlement. Comme il est important de traiter des questions centrales qui ont conduit au présent pourvoi, j'examinerai également si, sur le fond, la décision d'ordre humanitaire a été incorrectement rendue dans la présente affaire.

50 The appellant argues that the notes provided to her show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness, that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the Regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

(1) The Approach to Review of Discretionary Decision-Making

51 As stated earlier, the legislation and Regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The Regulations state that “[t]he Minister is . . . authorized to” grant an exemption or otherwise facilitate the admission to Canada of any person “where the Minister is satisfied that” this should be done “owing to the existence of compassionate or humanitarian considerations”. This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion,

L’appelante allègue que les notes qu’on lui a remises montrent que, en droit, la décision devrait être annulée par voie de contrôle judiciaire. Elle soutient que la décision devrait respecter la norme de la décision correcte, que les principes de droit administratif exigent que ce pouvoir discrétionnaire soit exercé conformément à la Convention, et que le ministre devrait faire de l’intérêt supérieur de l’enfant une considération primordiale dans les décisions d’ordre humanitaire. L’intimé soutient que la Convention n’a pas été incorporée dans le droit canadien, et qu’il serait inapproprié d’exiger que le par. 114(2) et son règlement d’application soient interprétés conformément à la Convention, parce que cela empiéterait sur le pouvoir discrétionnaire étendu conféré par le Parlement, et sur le partage des pouvoirs entre les gouvernements fédéral et provinciaux.

(1) La démarche relative au contrôle de décisions discrétionnaires

Comme je l’ai dit précédemment, la loi et le règlement délèguent un très large pouvoir discrétionnaire au ministre dans la décision d’accorder une dispense pour des raisons d’ordre humanitaire. Le règlement dit que «[l]e ministre est autorisé à accorder, pour des raisons d’ordre humanitaire, une dispense [. . .] ou à faciliter l’admission au Canada de toute autre manière». Ce langage témoigne de l’intention de laisser au ministre une grande latitude dans sa décision d’accorder ou non une demande fondée sur des raisons d’ordre humanitaire.

La notion de pouvoir discrétionnaire s’applique dans les cas où le droit ne dicte pas une décision précise, ou quand le décideur se trouve devant un choix d’options à l’intérieur de limites imposées par la loi. K. C. Davis écrit ceci dans *Discretionary Justice* (1969), à la p. 4:

[TRADUCTION] Un fonctionnaire possède un pouvoir discrétionnaire quand les limites réelles de son pouvoir lui donnent la liberté de choisir entre divers modes d’action ou d’inaction possibles.

Il faut examiner en l’espèce l’approche du contrôle judiciaire en matière de pouvoir discrétionnaire

taking into account the “pragmatic and functional” approach to judicial review that was first articulated in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 601-7, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; and *Pushpanathan*, *supra*.

Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231. A general doctrine of “unreasonableness” has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v.*

administratif, en tenant compte de l'analyse «pragmatique et fonctionnelle» du contrôle judiciaire qui a été énoncée pour la première fois dans l'arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, et appliquée dans des arrêts postérieurs dont *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554, aux pp. 601 à 607, le juge L'Heureux-Dubé, dissidente sur d'autres points; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; et *Pushpanathan*, précité.

Le droit administratif a traditionnellement abordé le contrôle judiciaire des décisions discrétionnaires séparément de décisions sur l'interprétation de règles de droit. Le principe est qu'on ne peut exercer un contrôle judiciaire sur les décisions discrétionnaires que pour des motifs limités, comme la mauvaise foi des décideurs, l'exercice du pouvoir discrétionnaire dans un but incorrect, et l'utilisation de considérations non pertinentes: voir, par exemple, *Maple Lodge Farms Ltd. c. Gouvernement du Canada*, [1982] 2 R.C.S. 2, aux pp. 7 et 8; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231. Un principe général relatif au «caractère déraisonnable» a parfois été appliqué aussi à des décisions discrétionnaires: *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). À mon avis, ces principes englobent deux idées centrales — qu'une décision discrétionnaire, comme toute autre décision administrative, doit respecter les limites de la compétence conférée par la loi, mais que les tribunaux devront exercer une grande retenue à l'égard des décideurs lorsqu'ils contrôlent ce pouvoir discrétionnaire et déterminent l'étendue de la compétence du décideur. Ces principes reconnaissent que lorsque le législateur confère par voie législative des choix étendus aux organismes administratifs, son intention est d'indiquer que les tribunaux ne devraient pas intervenir à la légère dans de telles décisions, et devraient accorder une marge considérable de respect aux décideurs lorsqu'ils révisent la façon dont les décideurs ont exercé leur discrétion. Toutefois, l'exercice du pouvoir discrétionnaire doit quand même rester dans les limites d'une

Duplessis, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

interprétation raisonnable de la marge de manœuvre envisagée par le législateur, conformément aux principes de la primauté du droit (*Roncarelli c. Duplessis*, [1959] R.C.S. 121), suivant les principes généraux de droit administratif régissant l'exercice du pouvoir discrétionnaire, et de façon conciliable avec la *Charte canadienne des droits et libertés* (*Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038).

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It is, however, inaccurate to speak of a rigid dichotomy of “discretionary” or “non-discretionary” decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

J'estime qu'il est inexact de parler d'une dichotomie stricte entre les décisions «discrétionnaires» et les décisions «non discrétionnaires». La plupart des décisions administratives comporte l'exercice d'un pouvoir discrétionnaire implicite relativement à de nombreux aspects de la prise de décision. Pour ne donner qu'un seul exemple, les décideurs peuvent avoir un pouvoir discrétionnaire très étendu dans les réparations qu'ils accordent. En outre, il n'est pas facile d'établir une distinction entre l'interprétation et l'exercice du pouvoir discrétionnaire; l'interprétation de règles de droit comporte un pouvoir discrétionnaire étendu pour ce qui est de clarifier, de combler les vides juridiques, et de choisir entre différentes options. Comme le disent Brown et Evans, *op. cit.*, à la p. 14-47:

The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as “structured” discretion.

[TRADUCTION] Le degré de discrétion dans l'attribution d'un pouvoir peut aller d'un pouvoir dans lequel le décideur est contraint seulement par les objectifs de la loi, à un pouvoir si défini que n'intervient pratiquement pas de discrétion. Entre les deux, évidemment, il existe plusieurs limites à la liberté de choix du décideur, parfois appelé une discrétion «structurée».

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The “pragmatic and functional” approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications

La démarche «pragmatique et fonctionnelle» reconnaît qu'il y a une large gamme de normes de contrôle judiciaire des erreurs de droit, certaines décisions exigeant plus de retenue, et d'autres moins: *Pezim*, précité, aux pp. 589 et 590; *Southam*, précité, au par. 30; *Pushpanathan*, précité, au par. 27. Trois normes de contrôle ont été définies: la décision manifestement déraisonnable, la décision raisonnable *simpliciter* et la décision correcte: *Southam*, précité, aux par. 54 à 56. Je suis d'avis que la norme de contrôle des éléments de fond d'une décision discrétionnaire est mieux envisagée dans ce cadre, compte tenu particulièrement

between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is “polycentric” and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam*, *supra*.

Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the “proper purposes” or “relevant considerations” involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

de la difficulté de faire des classifications rigides entre les décisions discrétionnaires et les décisions non discrétionnaires. La démarche pragmatique et fonctionnelle tient compte de considérations comme l'expertise du tribunal, la nature de la décision qui est prise, et le libellé de la disposition et des lois qui s'y rapportent. Elle comprend des facteurs comme le caractère «polycentrique» d'une décision et l'intention exprimée par le langage employé par la loi. La latitude que laisse le Parlement au décideur administratif et la nature de la décision qui est prise sont également d'importantes considérations dans l'analyse. La gamme de normes de contrôle peut comprendre le principe que, dans certains cas, la législature a fait part de son intention de laisser des choix plus grands aux décideurs que dans d'autres, mais qu'il faut qu'un tribunal intervienne quand une telle décision dépasse l'étendue du pouvoir conféré par le Parlement. Enfin, je signalerais que notre Cour a déjà appliqué ce cadre à des dispositions législatives qui accordent une latitude importante à des organismes administratifs, par exemple, en contrôlant l'exercice des pouvoirs de réparation conférés par la loi en cause dans l'arrêt *Southam*, précité.

L'intégration du contrôle judiciaire de décisions comportant un large pouvoir discrétionnaire dans l'analyse pragmatique et fonctionnelle en raison d'erreurs de droit ne devrait pas être considérée comme une diminution du niveau de retenue accordé aux décisions de nature hautement discrétionnaire. En fait, des normes de contrôle judiciaire empreintes de retenue peuvent donner au décideur discrétionnaire une grande liberté d'action dans la détermination des «objectifs appropriés» ou des «considérations pertinentes». La démarche pragmatique et fonctionnelle peut tenir compte du fait que plus le pouvoir discrétionnaire accordé à un décideur est grand, plus les tribunaux devraient hésiter à intervenir dans la manière dont les décideurs ont choisi entre diverses options. Toutefois, même si, en général, il sera accordé un grand respect aux décisions discrétionnaires, il faut que le pouvoir discrétionnaire soit exercé conformément aux limites imposées dans la loi, aux principes de la primauté du droit, aux principes du droit administratif, aux valeurs fondamentales de la société canadienne, et aux principes de la *Charte*.

(2) The Standard of Review in This Case(2) La norme de contrôle en l'espèce

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I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan*, *supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

J'examine maintenant l'application de la démarche pragmatique et fonctionnelle pour déterminer la norme de contrôle appropriée à l'égard de décisions rendues en vertu du par. 114(2) et de l'art. 2.1 du règlement, et les facteurs à considérer mis en évidence dans l'arrêt *Pushpanathan*, précité. Cet arrêt conclut que la décision, qui se rapportait à la détermination d'une question de droit par la Commission de l'immigration et du statut de réfugié, devait respecter la norme de la décision correcte. Bien qu'elle ait également été rendue sous le régime de la *Loi sur l'immigration*, la décision en litige était très différente, tout comme l'était le décideur. Il faut donc évaluer la norme de contrôle appropriée distinctement dans la présente affaire.

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The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without leave of the Federal Court — Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a “serious question of general importance” by the Federal Court — Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means there should be a lower level of deference on issues related to the certified question itself. However, this is only one of the factors involved in determining the standard of review, and the others must also be considered.

Le premier facteur à examiner est la présence ou l'absence d'une clause privative et, le cas échéant, le libellé de cette clause: *Pushpanathan*, au par. 30. La *Loi sur l'immigration* ne contient pas de clause privative, mais le contrôle judiciaire ne peut se faire sans l'autorisation de la Cour fédérale, Section de première instance, selon l'art. 82.1. Comme je l'ai dit précédemment, le par. 83(1) exige la certification d'une «question grave de portée générale» par la Cour fédérale, Section de première instance, pour que cette décision puisse être portée en appel devant la Cour d'appel. L'arrêt *Pushpanathan* montre que l'existence de cette disposition signifie un degré moindre de retenue à l'égard des points litigieux liés à la question certifiée. Toutefois, il ne s'agit que de l'un des facteurs à considérer pour déterminer la norme de contrôle, et il faut également évaluer les autres.

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The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

Le deuxième facteur est l'expertise du décideur. En l'espèce, le décideur est le ministre de la Citoyenneté et de l'Immigration ou son représentant. Le fait que, officiellement, le décideur soit le ministre est un facteur militant en faveur de la retenue. Le ministre a une certaine expertise par rapport aux tribunaux en matière d'immigration, surtout en ce qui concerne les dispenses d'application des exigences habituelles.

The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively “open-textured” legal principles, a factor militating in favour of greater deference: *Pushpanathan*, *supra*, at para. 36. The purpose of the provision in question is also to exempt applicants, in certain circumstances, from the requirements of the Act or its Regulations. This factor, too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them. Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to the determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person’s case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather

Le troisième facteur est l’objet de la disposition en particulier, et de la Loi dans son ensemble. Cette décision implique une grande latitude pour le ministre qui doit décider si des raisons d’ordre humanitaire justifient une dispense des exigences de la Loi. La décision commande aussi l’application de principes juridiques relativement peu «limitatifs», un facteur militant en faveur d’une plus grande retenue: *Pushpanathan*, précité, au par. 36. L’objet de la disposition en question est également de dispenser les demandeurs, dans certaines circonstances, des exigences de la Loi ou de son règlement. Ce facteur joue aussi en faveur d’une plus grande retenue envers la décision du ministre. Toutefois, il faut également signaler, en faveur d’une norme plus stricte, que cette décision vise directement les droits et les intérêts d’un individu par rapport au gouvernement plutôt qu’elle n’évalue ou ne pondère les intérêts de divers groupes. Le but de la décision est de déterminer si l’admission au Canada d’un individu particulier, dans des circonstances données, devrait être facilitée.

Le quatrième facteur mis en relief dans l’arrêt *Pushpanathan* vise la nature du problème en question, particulièrement s’il s’agit de droit ou de faits. La décision d’accorder une dispense fondée sur des raisons d’ordre humanitaire demande principalement l’appréciation de faits relatifs au cas d’une personne, et ne porte pas sur l’application ni sur l’interprétation de règles de droit précises. Le fait que cette décision soit de nature hautement discrétionnaire et factuelle est un facteur qui milite en faveur de la retenue.

Tous ces facteurs doivent être soupesés afin d’en arriver à la norme d’examen appropriée. Je conclus qu’on devrait faire preuve d’une retenue considérable envers les décisions d’agents d’immigration exerçant les pouvoirs conférés par la loi, compte tenu de la nature factuelle de l’analyse, de son rôle d’exception au sein du régime législatif, du fait que le décideur est le ministre, et de la large discrétion accordée par le libellé de la loi. Toutefois, l’absence de clause privative, la possibilité expressément prévue d’un contrôle judiciaire par la Cour fédérale, Section de première instance, et la Cour d’appel fédérale dans certaines circonstances, ainsi

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than polycentric nature of the decision, also suggest that the standard should not be as deferential as “patent unreasonableness”. I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

(3) Was this Decision Unreasonable?

63 I will next examine whether the decision in this case, and the immigration officer’s interpretation of the scope of the discretion conferred upon him, were unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam*, *supra*, at para. 56:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

In particular, the examination of this question should focus on the issues arising from the “serious question of general importance” stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

64 The notes of Officer Lorenz, in relation to the consideration of “H & C factors”, read as follows:

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity.

65 In my opinion, the approach taken to the children’s interests shows that this decision was unreasonable in the sense contemplated in *Southam*,

que la nature individuelle plutôt que polycentrique de la décision, tendent aussi à indiquer que la norme applicable ne devrait pas en être une d’aussi grande retenue que celle du caractère «manifestement déraisonnable». Je conclus, après avoir évalué tous ces facteurs, que la norme de contrôle appropriée est celle de la décision raisonnable *simpliciter*.

(3) La décision était-elle déraisonnable?

J’examinerai maintenant si la décision dans la présente affaire, et l’interprétation par l’agent d’immigration de l’étendue du pouvoir discrétionnaire qui lui était conféré, étaient déraisonnables au sens où l’entend le juge Iacobucci dans l’arrêt *Southam*, précité, au par. 56:

Est déraisonnable la décision qui, dans l’ensemble, n’est étayée par aucun motif capable de résister à un examen assez poussé. En conséquence, la cour qui contrôle une conclusion en regard de la norme de la décision raisonnable doit se demander s’il existe quelque motif étayant cette conclusion. Le défaut, s’il en est, pourrait découler de la preuve elle-même ou du raisonnement qui a été appliqué pour tirer les conclusions de cette preuve.

L’examen de cette question devrait être axé sur les points découlant de la «question grave de portée générale» énoncée par le juge Simpson: la façon d’aborder la question de l’intérêt des enfants dans le contrôle d’une décision d’ordre humanitaire.

Les notes de l’agent Lorenz relatives à l’examen des raisons d’ordre humanitaire, disent ceci:

[TRADUCTION] PC est atteinte de schizophrénie paranoïde et reçoit l’assistance sociale. Elle n’a pas d’autres qualifications que de domestique. Elle a QUATRE ENFANTS EN JAMAÏQUE ET QUATRE AUTRES NÉS ICI. Elle sera, bien entendu, un fardeau excessif pour nos systèmes d’aide sociale (probablement) pour le reste de sa vie. Il n’existe pas d’autres facteurs d’ordre humanitaire que ses QUATRE ENFANTS NÉS AU CANADA. Devons-nous lui permettre de rester pour ça? Je suis d’avis que le Canada ne peut plus se permettre cette sorte de générosité.

À mon avis, la façon dont elle traite l’intérêt des enfants montre que cette décision était déraisonnable au sens de l’arrêt *Southam*, précité. L’agent n’a

supra. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:

Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision. . . .

(D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon "compassionate or humanitarian considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H & C request when an application is made: *Jiminez-Perez*, *supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

prêté aucune attention à l'intérêt des enfants de M^{me} Baker. Comme je le démontrerai avec plus de détails dans les paragraphes qui suivent, j'estime que le défaut d'accorder de l'importance et de la considération à l'intérêt des enfants constitue un exercice déraisonnable du pouvoir discrétionnaire conféré par l'article, même s'il faut exercer un degré élevé de retenue envers la décision de l'agent d'immigration. Le professeur Dyzenhaus énonce ainsi la notion de la [TRADUCTION] «retenue au sens de respect»:

[TRADUCTION] La retenue au sens de respect ne demande pas la soumission, mais une attention respectueuse aux motifs donnés ou qui pourraient être donnés à l'appui d'une décision . . .

(D. Dyzenhaus, «The Politics of Deference: Judicial Review and Democracy», dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, à la p. 286.)

Les motifs de l'agent d'immigration démontrent que sa décision n'était pas compatible avec les valeurs sous-jacentes à l'octroi d'un pouvoir discrétionnaire. Ils ne peuvent donc pas résister à l'examen assez poussé qu'exige la norme du caractère raisonnable.

Le libellé du par. 114(2) et de l'art. 2.1 du règlement exige que le décideur exerce le pouvoir en se fondant sur «des raisons d'ordre humanitaire» (je souligne). Ces mots et leur sens doivent se situer au cœur de la réponse à la question de savoir si une décision d'ordre humanitaire particulière constituait un exercice raisonnable du pouvoir conféré par le Parlement. La loi et le règlement demandent au ministre de décider si l'admission d'une personne devrait être facilitée pour des raisons humanitaires. Ils démontrent que l'intention du Parlement est que ceux qui exercent le pouvoir discrétionnaire conféré par la loi agissent de façon humanitaire. Notre Cour a jugé que le ministre est tenu d'examiner les demandes d'ordre humanitaire qui sont présentées: *Jiminez-Perez*, précité. De même, quand il procède à cet examen, le ministre doit évaluer la demande d'une manière qui soit respectueuse des raisons d'ordre humanitaire.

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Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

(a) *The Objectives of the Act*

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The objectives of the Act include, in s. 3(c):

to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

Although this provision speaks of Parliament's objective of reuniting citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(c).

(b) *International Law*

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Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratifi-

Afin de décider si la démarche de l'agent d'immigration respectait les limites imposées par le libellé de la loi et les valeurs du droit administratif, une analyse contextuelle est requise comme l'exige en général l'interprétation des lois: voir *R. c. Gladue*, [1999] 1 R.C.S. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, aux par. 20 à 23. À mon avis, l'exercice raisonnable du pouvoir conféré par l'article exige que soit prêté une attention minutieuse aux intérêts et aux besoins des enfants. Les droits des enfants, et la considération de leurs intérêts, sont des valeurs d'ordre humanitaire centrales dans la société canadienne. Une indication que l'intérêt des enfants est une considération importante dans l'exercice des pouvoirs en matière humanitaire se trouve, par exemple, dans les objectifs de la Loi, dans les instruments internationaux, et dans les lignes directrices régissant les décisions d'ordre humanitaire publiées par le ministre lui-même.

a) *Les objectifs de la Loi*

Un des objectifs de la Loi est notamment, selon l'al. 3c):

de faciliter la réunion au Canada des citoyens canadiens et résidents permanents avec leurs proches parents de l'étranger;

Bien que cette disposition traite de l'objectif du Parlement de réunir des citoyens et des résidents permanents avec leurs proches parents de l'étranger, elle permet, à mon avis, en utilisant une interprétation large et libérale des valeurs sous-jacentes à cette loi et à son objet, de présumer que le Parlement estime important également de garder ensemble des citoyens et des résidents permanents avec leurs proches parents qui sont déjà au Canada. L'objectif à l'al. 3c) énonce l'obligation d'accorder une grande importance au maintien des enfants en contact avec leurs deux parents, si cela est possible, et au maintien du lien entre les membres d'une proche famille.

b) *Le droit international*

Un autre indice de l'importance de tenir compte de l'intérêt des enfants dans une décision d'ordre humanitaire est la ratification par le Canada de la

cation by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assis-

Convention relative aux droits de l'enfant, et la reconnaissance de l'importance des droits des enfants et de l'intérêt supérieur des enfants dans d'autres instruments internationaux ratifiés par le Canada. Les conventions et les traités internationaux ne font pas partie du droit canadien à moins d'être rendus applicables par la loi: *Francis c. The Queen*, [1956] R.C.S. 618, à la p. 621; *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141, aux pp. 172 et 173. Je suis d'accord avec l'intimé et la Cour d'appel que la Convention n'a pas été mise en vigueur par le Parlement. Ses dispositions n'ont donc aucune application directe au Canada.

Les valeurs exprimées dans le droit international des droits de la personne peuvent, toutefois, être prises en compte dans l'approche contextuelle de l'interprétation des lois et en matière de contrôle judiciaire. Comme le dit R. Sullivan, *Driedger on the Construction of Statutes* (3^e éd. 1994), à la p. 330:

[TRADUCTION] [L]a législature est présumée respecter les valeurs et les principes contenus dans le droit international, coutumier et conventionnel. Ces principes font partie du cadre juridique au sein duquel une loi est adoptée et interprétée. Par conséquent, dans la mesure du possible, il est préférable d'adopter des interprétations qui correspondent à ces valeurs et à ces principes. [Je souligne.]

D'autres pays de common law ont aussi mis en relief le rôle important du droit international des droits de la personne dans l'interprétation du droit interne: voir, par exemple, *Tavita c. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), à la p. 266; *Vishaka c. Rajasthan*, [1997] 3 L.R.C. 361 (C.S. Inde), à la p. 367. Il a également une incidence cruciale sur l'interprétation de l'étendue des droits garantis par la *Charte*: *Slaight Communications*, précité; *R. c. Keegstra*, [1990] 3 R.C.S. 697.

Les valeurs et les principes de la Convention reconnaissent l'importance d'être attentif aux droits des enfants et à leur intérêt supérieur dans les décisions qui ont une incidence sur leur avenir. En outre, le préambule, rappelant la *Déclaration universelle des droits de l'homme*, reconnaît que «l'enfance a droit à une aide et à une assistance

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tance”. A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child “needs special safeguards and care”. The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

(c) *The Ministerial Guidelines*

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Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

spéciales». D'autres instruments internationaux mettent également l'accent sur la grande valeur à accorder à la protection des enfants, à leurs besoins et à leurs intérêts. La *Déclaration des droits de l'enfant* (1959) de l'Organisation des Nations Unies, dans son préambule, dit que l'enfant «a besoin d'une protection spéciale et de soins spéciaux». Les principes de la Convention et d'autres instruments internationaux accordent une importance spéciale à la protection des enfants et de l'enfance, et à l'attention particulière que méritent leurs intérêts, besoins et droits. Ils aident à démontrer les valeurs qui sont essentielles pour déterminer si la décision en l'espèce constituait un exercice raisonnable du pouvoir en matière humanitaire.

c) *Les lignes directrices ministérielles*

Troisièmement, les directives données par le ministre aux agents d'immigration reconnaissent et révèlent les valeurs et la démarche qui sont décrites ci-dessus et qui sont énoncées dans la Convention. Comme il est dit plus haut, les agents d'immigration sont censés rendre la décision qu'une personne raisonnable rendrait, en portant une attention particulière à des considérations humanitaires comme maintenir des liens entre les membres d'une famille et éviter de renvoyer des gens à des endroits où ils n'ont plus d'attaches. Les directives révèlent ce que le ministre considère comme une décision d'ordre humanitaire, et elles sont très utiles à notre Cour pour décider si les motifs de l'agent Lorenz sont valables. Elles soulignent que le décideur devrait être conscient des considérations humanitaires possibles, devrait tenir compte des difficultés qu'une décision défavorable imposerait au demandeur ou aux membres de sa famille proche, et devrait considérer comme un facteur important les liens entre les membres d'une famille. Les directives sont une indication utile de ce qui constitue une interprétation raisonnable du pouvoir conféré par l'article, et le fait que cette décision était contraire aux directives est d'une grande utilité pour évaluer si la décision constituait un exercice déraisonnable du pouvoir en matière humanitaire.

The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the “humanitarian” and “compassionate” considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker’s children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

It follows that I disagree with the Federal Court of Appeal’s holding in *Shah*, *supra*, at p. 239, that a s. 114(2) decision is “wholly a matter of judgment and discretion” (emphasis added). The wording of s. 114(2) and of the Regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister’s guidelines them-

Les facteurs susmentionnés montrent que les droits, les intérêts, et les besoins des enfants, et l’attention particulière à prêter à l’enfance sont des valeurs importantes à considérer pour interpréter de façon raisonnable les raisons d’ordre humanitaire qui guident l’exercice du pouvoir discrétionnaire. Je conclus qu’étant donné que les motifs de la décision n’indiquent pas qu’elle a été rendue d’une manière réceptive, attentive ou sensible à l’intérêt des enfants de M^{me} Baker, ni que leur intérêt ait été considéré comme un facteur décisionnel important, elle constituait un exercice déraisonnable du pouvoir conféré par la loi et doit donc être infirmée. En outre, les motifs de la décision n’accordent pas suffisamment d’importance ou de poids aux difficultés qu’un retour en Jamaïque pouvait susciter pour M^{me} Baker, alors qu’elle avait passé 12 ans au Canada, qu’elle était malade et n’était pas assurée de pouvoir suivre un traitement en Jamaïque, et qu’elle serait forcément séparée d’au moins certains de ses enfants.

Il en résulte que je ne suis pas d’accord avec la conclusion de la Cour d’appel fédérale dans l’arrêt *Shah*, précité, à la p. 239, qu’une décision en vertu du par. 114(2) «relève entièrement [du] jugement et [du] pouvoir discrétionnaire» (je souligne). Le libellé du par. 114(2) et du règlement montre que le pouvoir discrétionnaire conféré est assorti de limites. Bien que je sois d’accord avec la Cour d’appel que la Loi ne donne au demandeur aucun droit à un résultat précis ou à l’application d’un critère juridique particulier, et que la doctrine de l’attente légitime ne commande pas un résultat conforme au libellé d’instruments internationaux, la décision doit être prise suivant une démarche qui respecte les valeurs humanitaires. Par conséquent, l’attention et la sensibilité à l’importance des droits des enfants, de leur intérêt supérieur, et de l’épreuve qui pourrait leur être infligée par une décision défavorable sont essentielles pour qu’une décision d’ordre humanitaire soit raisonnable. Même s’il faut faire preuve de retenue dans le contrôle judiciaire de décisions rendues par les agents d’immigration en vertu du par. 114(2), ces décisions ne doivent pas être maintenues quand elles résultent d’une démarche ou sont elles-mêmes en

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selves reflect this approach. However, the decision here was inconsistent with it.

conflit avec des valeurs humanitaires. Les directives du ministre elles-mêmes soutiennent cette approche. Toutefois, la décision en l'espèce était incompatible avec cette approche.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

La question certifiée demande s'il faut considérer l'intérêt supérieur des enfants comme une considération primordiale dans l'examen du cas d'un demandeur sous le régime du par. 114(2) et du règlement. Les principes susmentionnés montrent que, pour que l'exercice du pouvoir discrétionnaire respecte la norme du caractère raisonnable, le décideur devrait considérer l'intérêt supérieur des enfants comme un facteur important, lui accorder un poids considérable, et être réceptif, attentif et sensible à cet intérêt. Cela ne veut pas dire que l'intérêt supérieur des enfants l'emportera toujours sur d'autres considérations, ni qu'il n'y aura pas d'autres raisons de rejeter une demande d'ordre humanitaire même en tenant compte de l'intérêt des enfants. Toutefois, quand l'intérêt des enfants est minimisé, d'une manière incompatible avec la tradition humanitaire du Canada et les directives du ministre, la décision est déraisonnable.

E. *Conclusions and Disposition*

E. *Conclusions et dispositif*

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

En conséquence, parce qu'il y a eu manquement aux principes d'équité procédurale en raison d'une crainte raisonnable de partialité, et parce que l'exercice du pouvoir en matière humanitaire était déraisonnable, je suis d'avis d'accueillir le présent pourvoi.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134:

L'appelante a demandé que lui soient adjugés les dépens comme entre procureur et client si elle avait gain de cause dans son pourvoi. Notre Cour a conclu à la majorité dans l'arrêt *Young c. Young*, [1993] 4 R.C.S. 3, à la p. 134:

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

Les dépens comme entre procureur et client ne sont généralement accordés que s'il y a eu conduite répréhensible, scandaleuse ou outrageante d'une des parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-

Il n'a pas été démontré que le ministre a eu une telle conduite au cours du présent litige, et je ne crois pas qu'il s'agisse d'un des cas exceptionnels où les dépens devraient être adjugés comme entre procureur et client. Je suis d'avis d'accueillir le pourvoi, et d'annuler la décision de l'agent Caden

and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

The reasons of Cory and Iacobucci JJ. were delivered by

IACOBUCCI J. — I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of ministerial discretion pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. The certified question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, a multi-lateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141. I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.

In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the

en date du 18 avril 1994, avec les dépens entre parties dans toutes les cours. L'affaire sera renvoyée au ministre pour qu'un agent d'immigration différent rende une nouvelle décision.

Version française des motifs des juges Cory et Iacobucci rendus par

LE JUGE IACOBUCCI — Je souscris aux motifs du juge L'Heureux-Dubé et au dispositif qu'elle propose dans le présent pourvoi, sauf pour la question de l'effet du droit international sur l'exercice du pouvoir discrétionnaire conféré au ministre par le par. 114(2) de la *Loi sur l'immigration*, L.R.C. (1985), ch. I-2. La question certifiée en l'espèce vise à déterminer si les autorités d'immigration fédérales doivent traiter l'intérêt supérieur de l'enfant comme une considération primordiale dans l'examen d'une demande fondée sur des raisons d'ordre humanitaire en vertu du par. 114(2) de la Loi, alors que cette loi ne donne pas effet aux dispositions de la *Convention relative aux droits de l'enfant*, R.T. Can. 1992 n° 3, une convention multilatérale dont le Canada est signataire. À mon avis, la question certifiée devrait recevoir une réponse négative.

Il est bien établi qu'une convention internationale ratifiée par le pouvoir exécutif n'a aucun effet en droit canadien tant que ses dispositions ne sont pas incorporées dans le droit interne par une loi les rendant applicables: *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141. Je ne suis pas d'accord avec l'analyse de ma collègue lorsqu'elle se réfère aux valeurs sous-jacentes à un traité international non-applicable dans une approche contextuelle de l'interprétation des lois et du droit administratif, parce qu'une telle approche n'est pas conforme à la jurisprudence de la Cour sur la question du statut du droit international dans le système juridique interne.

À mon avis, il faut aborder avec prudence des décisions de ce genre, sous peine de rompre l'équilibre établi par notre tradition parlementaire ou de conférer par inadvertance à l'exécutif le pouvoir de

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power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.

lier les administrés sans la participation du pouvoir législatif. Je ne partage pas la certitude de ma collègue que le précédent établi par notre Cour dans *Capital Cities*, précité, peut survivre intact après l'adoption d'un principe de droit qui autorise le recours, dans le processus d'interprétation des lois, aux dispositions d'une convention qui n'a pas été intégrée dans la législation. Au lieu de cela, le résultat sera que l'appelante pourra parvenir indirectement à ce qu'elle ne peut faire directement, c'est-à-dire donner effet dans le système juridique interne à des obligations internationales assumées par le pouvoir exécutif seul et qui n'ont pas encore été soumises à la volonté démocratique du Parlement.

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The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my colleague concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

La primauté donnée aux droits des enfants dans la Convention — à supposer pour les fins de la discussion que les faits du pourvoi ressortissent aux dispositions pertinentes — est sans effet tant et aussi longtemps que ces dispositions n'ont pas été incorporées par une loi adoptée par le Parlement. En donnant une réponse négative à la question certifiée, je suis conscient du fait que le résultat aurait pu être différent si ma collègue avait conclu que la demande de l'appelante relevait de l'application des droits garantis par la *Charte canadienne des droits et libertés*. Si cela avait été le cas, la Cour aurait eu la possibilité d'envisager l'application de la présomption interprétative établie par notre Cour dans l'arrêt *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, et confirmée dans la jurisprudence qui a suivi, selon laquelle le pouvoir administratif discrétionnaire touchant des droits garantis par la *Charte* doit être exercé en conformité avec des normes internationales similaires en matière de droits de la personne.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellant: Roger Rowe and Rocco Galati, North York.

Procureurs de l'appelante: Roger Rowe et Rocco Galati, North York.

Solicitor for the respondent: The Deputy Attorney General of Canada, Toronto.

Procureur de l'intimé: Le sous-procureur général du Canada, Toronto.

Solicitor for the interveners the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and

Procureur des intervenants la Canadian Foundation for Children, Youth and the Law, la Défense des enfants-International-Canada et le

the Canadian Council for Refugees: The Canadian Foundation for Children, Youth and the Law, Toronto.

Solicitors for the intervener the Charter Committee on Poverty Issues: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitors for the intervener the Canadian Council of Churches: Jackman and Associates, Toronto.

Conseil canadien pour les réfugiés: La Canadian Foundation for Children, Youth and the Law, Toronto.

Procureurs de l'intervenant le Comité de la Charte et des questions de pauvreté: Tory, Tory, DesLauriers & Binnington, Toronto.

Procureurs de l'intervenant le Conseil canadien des églises: Jackman and Associates, Toronto.

Joseph Apsassin, Chief of the Blueberry River Indian Band, and Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band, the Blueberry River Indian Band and all present descendants of the Beaver Band of Indians *Appellants*

v.

Her Majesty The Queen in right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans' Land Act *Respondent*

and

The Musqueam Nation and Ermineskin Tribal Council, Chief Abel Bosum et al., Chief Terry Buffalo et al. and the Samson Indian Band and Nation, and the Assembly of First Nations *Interveniers*

INDEXED AS: BLUEBERRY RIVER INDIAN BAND v. CANADA (DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT)

File No.: 23516.

1995: June 13, 14; 1995: December 14.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Major JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Indians — Surrender — Reserve — Nature of duty owed by Crown prior to surrender — Whether Crown under a fiduciary duty — Indian Act, R.S.C. 1927, c. 98.

Indians — Surrender — Validity — Indian chiefs not personally certifying surrender on oath — Whether surrender invalid for failure to comply with s. 51 of Indian Act — Whether s. 51 mandatory or directory — Indian Act, R.S.C. 1927, c. 98, s. 51.

Joseph Apsassin, chef de la bande indienne de la rivière Blueberry, et Jerry Attachie, chef de la bande indienne de la rivière Doig, en leur nom et en celui de tous les autres membres de la bande indienne de la rivière Doig, de la bande indienne de la rivière Blueberry ainsi que de tous les descendants encore vivants de la bande indienne des Castors *Appellants*

c.

Sa Majesté la Reine du chef du Canada, représentée par le ministère des Affaires indiennes et du Nord canadien et le Directeur des terres destinées aux anciens combattants *Intimée*

et

La Nation Musqueam et le Conseil tribal Ermineskin, le chef Abel Bosum et autres, le chef Terry Buffalo et autres, la bande et nation indiennes de Samson, et l'Assemblée des premières nations *Intervenants*

RÉPERTORIÉ: BANDE INDIENNE DE LA RIVIÈRE BLUEBERRY c. CANADA (MINISTÈRE DES AFFAIRES INDIENNES ET DU NORD CANADIEN)

N° du greffe: 23516.

1995: 13 et 14 juin; 1995: 14 décembre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Indiens — Cession — Réserve — Nature de l'obligation de la Couronne avant la cession — La Couronne a-t-elle une obligation de fiduciare? — Loi des Indiens, S.R.C. 1927, ch. 98.

Indiens — Cession — Validité — Les chefs indiens n'ont pas attesté personnellement, sous serment, la cession — La cession était-elle invalide en raison de l'inobservation de l'art. 51 de la Loi des Indiens? — L'article 51 a-t-il un caractère impératif ou directif? — Loi des Indiens, S.R.C. 1927, ch. 98, art. 51.

Indians — Surrender — Reserve — Indian band surrendering reserve to Crown “to sell or lease” — Indian band claiming that Crown breached its fiduciary duty — Whether Crown should have leased land of former reserve rather than sell it — Whether Crown sold land under value — Whether Crown should have restored reserve to Band after surrender in view of Band’s impoverished situation.

Indians — Surrenders — Mineral rights — Reserve — Indian band surrendering mineral rights on reserve to Crown in 1940 and surrendering reserve in 1945 — Whether mineral rights included in 1945 surrender — Indian Act, R.S.C. 1927, c. 98, ss. 2(e), (j), 51.

Indians — Crown — Fiduciary duty — Mineral rights — Indian band surrendering mineral rights on reserve to Crown “to lease” in 1940 and surrendering reserve “to sell or lease” in 1945 — Department of Indian Affairs transferring land of former reserve to Department of Veteran Affairs in 1948 — Department of Indian Affairs aware in 1949 that mineral rights had been erroneously transferred to Department of Veteran Affairs and of potential value of these rights — Whether Crown breached its fiduciary duty by transferring mineral rights in 1948 — Whether Crown breached its fiduciary duty by failing to correct its error in 1949 when it learned of erroneous transfer — Indian Act, R.S.C. 1927, c. 98, s. 64.

Limitation of actions — Breach of fiduciary duty — Running of time postponed — Indian band surrendering mineral rights on reserve to Crown in 1940 and surrendering reserve in 1945 — Department of Indian Affairs transferring land of former reserve to Department of Veteran Affairs in 1948 — Mineral rights inadvertently acquired by Department of Veteran Affairs in transfer — Land and mineral rights subsequently sold to veterans between 1948 and 1956 — Band learning of mineral rights’ transfer in 1977 and commencing action in 1978 claiming that Crown breached its fiduciary duty — Whether action barred by limitation periods — Limitation Act, R.S.B.C. 1979, c. 236, ss. 3(4), 6(3), 8.

Indiens — Cession — Réserve — La bande indienne a cédé à la Couronne la réserve aux fins «de vendre ou de louer» — La bande indienne prétend que la Couronne a manqué à son obligation de fiduciaire — La Couronne aurait-elle dû louer les terres de l’ancienne réserve plutôt que les vendre? — La Couronne a-t-elle vendu les terres à un prix inférieur à leur valeur? — La Couronne aurait-elle dû remettre la réserve à la bande après la cession, vu l’état d’appauvrissement dans lequel se trouvait la bande?

Indiens — Cessions — Droits miniers — Réserve — La bande indienne a cédé à la Couronne les droits miniers afférents à la réserve en 1940, et elle a cédé la réserve en 1945 — Les droits miniers étaient-ils inclus dans la cession de 1945? — Loi des Indiens, S.R.C. 1927, ch. 98, art. 2h), l), 51.

Indiens — Couronne — Obligation de fiduciaire — Droits miniers — La bande indienne a, en 1940, cédé à la Couronne les droits miniers afférents à la réserve aux fins «de leur location», et, en 1945, elle a cédé la réserve aux fins «de vendre ou de louer» les terres visées — Le ministère des Affaires indiennes a transféré, en 1948, les terres de l’ancienne réserve au ministère des Affaires des anciens combattants — Le ministère des Affaires indiennes savait, en 1949, que les droits miniers avaient été transférés par erreur au ministère des Affaires des anciens combattants, et il était également au courant de la valeur potentielle de ces droits — La Couronne a-t-elle manqué à son obligation de fiduciaire en transférant les droits miniers en 1948? — La Couronne a-t-elle manqué à son obligation de fiduciaire en omettant de corriger son erreur en 1949, lorsqu’elle a pris connaissance du transfert fait par erreur? — Loi des Indiens, S.R.C. 1927, ch. 98, art. 64.

Prescription — Manquement à l’obligation de fiduciaire — Report du moment où le délai de prescription commence à courir — La bande indienne a, en 1940, cédé à la Couronne les droits miniers afférents à la réserve, et, en 1945, elle a cédé la réserve — Le ministère des Affaires indiennes a transféré, en 1948, les terres de l’ancienne réserve au ministère des Affaires des anciens combattants — Le ministère des Affaires des anciens combattants a acquis par inadvertance les droits miniers lors du transfert — Les terres et les droits miniers ont par la suite été vendus à des anciens combattants entre 1948 et 1956 — La bande a appris en 1977 l’existence du transfert des droits miniers et, en 1978, elle a intenté une action, reprochant à la Couronne d’avoir manqué à son obligation de fiduciaire — L’action est-elle prescrite? — Limitation Act, R.S.B.C. 1979, ch. 236, art. 3(4), 6(3), 8.

In 1916 the Beaver Band of Indians entered into a treaty with the Crown. In exchange for surrendering aboriginal title, the Band was given a parcel of land in British Columbia. The Band was nomadic, subsisting through trapping and hunting. The reserve was used as the site of its summer campground; in the winter, the Band trapped further north. In 1940, the Band surrendered the mineral rights on its reserve to the Crown, in trust "to lease" for its benefit. At the end of World War II, the federal government instituted a program under which agricultural land was made available to veterans for settlement. The Band was not using the reserve land for farming and, after considerable discussion, agreed in 1945 to surrender the reserve to the Crown "to sell or lease". The Department of Indian Affairs ("DIA") then transferred the reserve land to the Director of *The Veterans' Land Act* ("DVLA") for \$70,000 in March 1948. Part of that sum was later used by the DIA to purchase other lands for the Band closer to its trap lines. The DVLA also obtained the mineral rights "by inadvertence" because they had not been reserved from the 1948 transfer. In the same year gas was discovered near the former reserve and, in 1949, oil companies expressed interest in exploring the land for oil and gas. Between 1948 and 1956, the land of the former reserve was sold to veterans. In 1976, oil and gas were discovered and the revenue from this discovery went to the veterans or their assigns. In 1977, the Beaver Band was divided into the Blueberry River and the Doig River Indian Bands. That same year, a DIA officer found out how the Beaver Band had lost the mineral rights and informed the appellant Bands. The appellants commenced their action on September 18, 1978, claiming damages against the Crown for allowing it to make an improvident surrender of the reserve, and once surrendered, for disposing of it under value. They also claimed damages for permitting the transfer of the mineral rights to the DVLA and thence to the veterans. In the Federal Court, Trial Division, the trial judge dismissed the claims except for the sale of the surface rights to the DVLA, which he found to be under value. He held, however, that the appellants' action was barred by the 30-year limitation period under the *British Columbia Limitation Act*. The majority of the Federal Court of Appeal dismissed the appellants' appeal and the Crown's cross-appeal on the issue of sale under value.

En 1916, la bande indienne des Castors a conclu un traité avec la Couronne. En échange de la cession de son titre ancestral, la bande a reçu un lopin de terre en Colombie-Britannique. La bande était nomade et vivait du piégeage et de la chasse. Elle utilisait sa réserve comme camp d'été; durant l'hiver, la bande faisait du piégeage plus au nord. En 1940, la bande a cédé à la Couronne, en fiducie, les droits miniers afférents à sa réserve pour que celle-ci les loue au profit de la bande. À la fin de la Seconde Guerre mondiale, le gouvernement fédéral a établi un programme visant à mettre des terres agricoles à la disposition des anciens combattants pour qu'ils s'y établissent. La bande n'utilisait pas les terres de la réserve à des fins agricoles et, après de longues discussions, la bande a accepté de céder sa réserve à la Couronne aux fins «de vendre ou de louer» les terres visées. Le ministère des Affaires indiennes («MAI») a alors transféré, en mars 1948, les terres de la réserve au Directeur de la *Loi sur les terres destinées aux anciens combattants* («DTAC») pour la somme de 70 000 \$. Plus tard, une partie de cette somme a été utilisée par le MAI pour acquérir d'autres terres se trouvant plus près des sentiers de piégeage de la bande. Le DTAC a aussi obtenu les droits miniers «par inadvertance» parce qu'ils n'avaient pas été réservés au moment du transfert en 1948. La même année, on a découvert du gaz près de l'ancienne réserve et, en 1949, des sociétés pétrolières se sont montrées intéressées à faire de l'exploration en vue d'y trouver du pétrole et du gaz. Entre 1948 et 1956, les terres de l'ancienne réserve ont été vendues à des anciens combattants. En 1976, on a découvert du pétrole et du gaz et les revenus sont allés aux anciens combattants ou à leurs ayants droit. En 1977, la bande des Castors s'est scindée en deux: la bande indienne de la rivière Blueberry et la bande indienne de la rivière Doig. La même année, un fonctionnaire du MAI a découvert de quelle manière la bande des Castors avait perdu les droits miniers et il en a informé les bandes appelantes. Les appelants ont, le 18 septembre 1978, intenté une action dans laquelle ils réclamaient des dommages-intérêts contre la Couronne, lui reprochant, d'une part, d'avoir autorisé la bande à faire une cession inconsidérée de la réserve et, une fois la cession réalisée, d'avoir aliéné celle-ci à un prix inférieur à sa valeur, et, d'autre part, d'avoir permis le transfert des droits miniers, d'abord au DTAC puis aux anciens combattants. En Section de première instance de la Cour fédérale, le juge a rejeté les réclamations des bandes, sauf celle concernant la vente des droits de superficie au DTAC, droits qui, a-t-il conclu, avaient été vendus à un prix inférieur à leur valeur réelle. Cependant, il a conclu que l'action des appelants était prescrite par le délai de prescription de 30 ans prévu par la

The appellants appeal to this Court, and the Crown cross-appeals.

Held: The appeal and cross-appeal should be allowed.

The appellants have not established that the Crown wrongly failed to prevent the surrender of the reserve in 1945. The measure of control which the 1927 *Indian Act* permitted a band to exercise over the surrender of its reserve negates a contention that, absent exploitation, the Act imposed a fiduciary obligation on the Crown with respect to the surrender of a reserve. Under the Act, a band had the right to decide whether or not to surrender its reserve, and its decision was to be respected. The Crown's obligation was limited to preventing exploitative bargains. The Crown could thus refuse its consent if the band's decision was foolish or improvident. Here, subject to the matter of mineral rights, the Beaver Band's surrender of its reserve did not amount to exploitation. Further, the circumstances of this case did not give rise to a fiduciary duty on the Crown with respect to the 1945 surrender. While the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences in relation to the surrender of the reserve and the acquisition of new reserve lands, the Band did not abnegate or entrust its power of decision over the surrender of the reserve to the Crown. Finally, the failure to comply with s. 51(3) of the 1927 *Indian Act* does not invalidate the 1945 surrender. The word "shall" in s. 51(3) should not be considered mandatory. The true object of ss. 51(3) and 51(4) was to ensure that the surrender was validly assented to by the Band and the evidence amply established valid assent. The non-compliance with s. 51 was technical.

The 1945 surrender imposed a fiduciary duty on the Crown with respect to the subsequent sale or lease of the land, and the Crown did not breach that duty when it sold the land to the DVLA in 1948. First, the sale of the land was made in the best interests of the Beaver Band. Different options, including leasing, were considered. While in retrospect, with the decline of trapping and the

Limitation Act de la Colombie-Britannique. La Cour d'appel fédérale a, à la majorité, rejeté l'appel formé par les appelants ainsi que l'appel incident de la Couronne sur la question de la vente des droits de superficie à un prix inférieur à leur valeur réelle. Les appelants se pourvoient devant notre Cour, et la Couronne interjette un pourvoi incident.

Arrêt: Le pourvoi et le pourvoi incident sont accueillis.

Les appelants n'ont pas établi que la Couronne a eu tort de ne pas empêcher la cession de la réserve en 1945. L'étendue du contrôle que la *Loi des Indiens* de 1927 permettait à la bande d'exercer sur la cession de la réserve réfute l'argument que, en l'absence d'exploitation, la Loi imposait une obligation de fiduciaire à la Couronne relativement à la cession de la réserve. En vertu de la Loi, une bande avait le droit de décider si elle voulait céder sa réserve, et sa décision devait être respectée. L'obligation de la Couronne se limitait à prévenir les marchés abusifs. La Couronne pouvait donc refuser son consentement si la décision de la bande était imprudente ou inconsidérée. En l'espèce, sous réserve de la question des droits miniers, la cession de sa réserve par la bande des Castors n'équivalait pas à de l'exploitation. Par ailleurs, les circonstances de l'espèce n'ont pas donné naissance à une obligation de fiduciaire de la Couronne à l'égard de la cession de 1945. Même si la bande escomptait que la Couronne la renseignerait sur les diverses solutions qui s'offraient à elle — et sur les conséquences prévisibles de ces solutions — relativement à la cession de la réserve et à l'acquisition de nouvelles terres, la bande n'avait pas renoncé à son pouvoir de décision quant à la cession de la réserve et ne s'en était pas remis à la Couronne à cet égard. Enfin, l'inobservation du par. 51(3) de la *Loi des Indiens* de 1927 n'a pas pour effet d'invalider la cession de 1945. Le mot «shall» (le mot «doit» et l'indicatif présent dans le texte français) utilisé au par. 51(3) ne devrait pas être considéré comme ayant un sens impératif. L'objet véritable des par. 51(3) et (4) était de faire en sorte que le consentement de la bande à la cession soit valide, et les éléments de preuve ont amplement établi l'existence d'un consentement valide. L'inobservation de l'art. 51 constituait un vice de forme.

La cession de 1945 a imposé à la Couronne une obligation de fiduciaire en ce qui concerne la vente ou la location subséquentes des terres visées, et la Couronne n'a pas manqué à cette obligation lorsque, en 1948, elle a vendu les terres au DTAC. Premièrement, la vente des terres a été faite dans l'intérêt de la bande des Castors. Un certain nombre de possibilités, dont la location, ont

discovery of oil and gas, the decision to sell, rather than to lease, may be argued to have been unfortunate, at the time it was defensible as a reasonable decision since that choice had the advantage of meeting the Band's need and wish to purchase lands closer to its trap lines. Second, the Crown did not breach its fiduciary duty by selling the land for \$70,000. The DIA received a higher appraisal but there were also appraisals giving lower value to the land. Since the Crown adduced evidence showing that the sale price lay within a range established by the appraisals, this raised a *prima facie* case that the sale price was reasonable. The onus then shifted to the appellants, who failed to demonstrate that the sale price was unreasonable. Third, the Crown did not breach its fiduciary duty after the surrender of the reserve by failing to restore the land to the Band. Although the Band lived in apparent poverty between 1945 and 1961, one cannot infer that the solution was to cancel the 1945 surrender or refuse to sell the reserve land. The Band's condition appears to have been unrelated to possession of the reserve.

Per La Forest, L'Heureux-Dubé, Sopinka and Gonthier JJ.: Under the 1945 surrender, both the surface and mineral rights in the reserve were surrendered to the Crown in trust "to sell or lease". This conclusion rests on reasoning unrelated to the scope of the 1927 *Indian Act* surrender regime and, in particular, to the issue of whether or not the 1940 surrender of mineral rights was actually governed by the 1927 Act, and therefore holds even if the mineral rights had attained the status of "Indian lands" through the 1940 dealings. The ultimate issue to be determined in this case is the impact of the 1945 surrender of the reserve on the 1940 surrender of the mineral rights in that reserve. The 1927 Act is entirely silent on the subjects of surrender variation, surrender revocation, and resurrender, yet no one would seriously suggest that this silence renders all surrenders, including the 1940 surrender, permanent and irrevocable.

The legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the Band's intention. The principles of common law property are not helpful in the context of

été envisagées. Bien que l'on puisse, avec le recul du temps, compte tenu du déclin du piégeage et de la découverte de pétrole et de gaz, affirmer que la décision de vendre les terres plutôt que de les louer s'est révélée malencontreuse, il s'agissait à l'époque d'un choix défendable, en tant que solution raisonnable, puisqu'il avait l'avantage de répondre au besoin et au désir de la bande d'obtenir d'autres terres situées plus près de ses sentiers de piégeage. Deuxièmement, la Couronne n'a pas manqué à son obligation de fiduciaire en vendant les terres pour la somme de 70 000 \$. Le MAI avait reçu une évaluation plus élevée, mais il existait également des évaluations attribuant une valeur moindre aux terres. Puisque la Couronne a présenté des éléments de preuve indiquant que le prix de vente se situait dans la fourchette établie par les évaluations, cette preuve a établi, *prima facie*, que le prix de vente était raisonnable. Il y a alors eu déplacement du fardeau de la preuve, mais les appellants n'ont pas prouvé que ce prix était déraisonnable. Troisièmement, la Couronne n'a pas, après la cession de la réserve, manqué à son obligation de fiduciaire en ne remettant pas ces terres à la bande. Même si celle-ci vivait dans un état de pauvreté évident entre 1945 et 1961, on ne peut en déduire que la solution était d'annuler la cession de 1945 ou de refuser de vendre les terres de la réserve. Il ne semble pas qu'il y ait eu un rapport entre la situation de la bande et le fait qu'elle n'était pas en possession de la réserve.

Les juges La Forest, L'Heureux-Dubé, Sopinka et Gonthier: En vertu de la cession de 1945, les droits de superficie de la réserve et les droits miniers y afférents ont été cédés à la Couronne, en fiducie, aux fins «de vendre ou de louer» les terres visées. Cette conclusion ne s'appuie d'aucune façon sur la portée du régime établi par la *Loi des Indiens* de 1927 relativement aux cessions ni, en particulier, sur la question de savoir si la cession de 1940 était ou non régie par la Loi de 1927, et elle vaut donc même si les droits miniers avaient pris la qualité de «terres indiennes» par suite des opérations de 1940. En l'espèce, la question revient en définitive à déterminer l'effet de la cession de la réserve en 1945 sur la cession des droits miniers afférents à cette réserve en 1940. Même si la Loi de 1927 ne traite ni de la modification des cessions, ni de leur annulation, ni de la possibilité de refaire cession, on ne saurait prétendre sérieusement que, en raison de ce silence, toutes les cessions, y compris celle de 1940, ont un caractère permanent et irrévocable.

Le caractère juridique de la cession de 1945 et son effet sur celle de 1940 doivent être déterminés au regard de l'intention de la bande. Les principes généraux du droit des biens en common law ne sont pas utiles dans le

this case. When determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings. Accordingly, unless some statutory bar exists (which is not the case here), the Band members' intention should be given legal effect. Here, the trial judge's findings indicate that the Band members neither expected nor intended to hold rights over the reserve once the 1945 surrender was completed. They understood that by agreeing to the 1945 surrender they would be transferring all their rights in the reserve to the Crown in trust, and that the Crown would either sell or lease those rights for the benefit of the Band. The Band's intention is also evidenced by the terms of the 1945 surrender. It is reasonable to conclude that the term "Reserve", as used in that surrender, was intended to have the same meaning as the term "reserve" in the 1927 *Indian Act*, which is defined in s. 2(j) as an unsundered tract of land including the "minerals . . . thereon or therein". The true nature of the 1945 surrender can best be characterized as a variation of a trust in Indian land. The 1945 surrender subsumed the 1940 surrender, and expanded upon it. Although a trust in Indian land cannot be equated with a common law trust, "trust-like" obligations and principles are relevant to the analysis of a surrender of Indian lands. Both surrenders in this case were framed as trusts, and the parties therefore intended to create a trust-like relationship. In light of the guiding principle that the decisions of aboriginal peoples should be honoured and respected, this surrender variation should be given effect since the Band's understanding of its terms was adequate, and since the Crown's conduct did not taint the dealings in a manner which made it unsafe to rely on the Band's understanding and intention. There was also substantial compliance with the technical surrender requirements embodied in s. 51 of the 1927 *Indian Act*.

By taking on the obligations of a trustee in relation to the reserve, the DIA was under a fiduciary duty to deal with the land in the best interests of the Band members.

contexte du présent pourvoi. Dans l'examen des effets juridiques des opérations conclues par les peuples autochtones et la Couronne relativement à des terres faisant partie de réserves, il ne faut pas oublier que, compte tenu du caractère *sui generis* du titre ancestral, les tribunaux doivent faire abstraction des restrictions habituelles qui sont imposées par la common law afin de donner effet à l'objet véritable de ces opérations. En conséquence, hormis quelque empêchement prescrit par la loi (ce qui n'est pas le cas en l'espèce), il faut laisser l'intention des membres de la bande produire ses effets juridiques. En l'espèce, les conclusions du juge de première instance indiquent que la bande ne s'attendait pas à détenir des droits sur la réserve une fois la cession de 1945 complétée, et que ce n'était pas non plus son intention. La bande comprenait, d'une part, qu'en acceptant la cession de 1945 elle transférerait à la Couronne, en fiducie, tous les droits qu'elle avait dans la réserve et, d'autre part, que la Couronne vendrait ou louerait ces droits au profit de la bande. L'intention de la bande ressort aussi des termes mêmes de l'acte de cession de 1945. Il est raisonnable de conclure que l'on désirait, dans l'acte de cession, utiliser le mot «réserve» suivant le sens que lui donne la *Loi des Indiens*, à l'al. 2h), soit une étendue de terre qui n'a pas été rétrocédée et comprend les «minéraux [. . .] qui se trouvent à la surface ou à l'intérieur du sol». La meilleure façon de décrire la nature véritable des opérations de 1945 est de les qualifier de modification d'une fiducie visant des terres indiennes. La cession de 1945 subsumait celle de 1940, et elle en élargissait la portée. Bien que l'on ne puisse assimiler les fiducies visant des terres indiennes aux fiducies en common law, des obligations et principes «semblable[s] à [ceux d'une fiducie]» sont pertinents dans le cadre de l'analyse d'une cession visant des terres indiennes. En l'espèce, comme les deux cessions visaient des fiducies, les parties avaient en conséquence l'intention de créer des rapports semblables à ceux créés par une fiducie. Compte tenu du principe directeur qui veut que l'on respecte les décisions des peuples autochtones, il y a lieu de donner effet à cette modification de cession, puisque la bande en avait bien saisi les conditions et que la conduite de la Couronne n'a pas vicié les négociations au point qu'il serait hasardeux de tenir pour acquis que la bande avait bien compris la situation et avait eu l'intention de faire ce qu'elle a fait. De plus, les exigences de forme en matière de cession prévues par l'art. 51 de la *Loi des Indiens* de 1927 ont, pour l'essentiel, été respectées.

En assumant les obligations d'un fiduciaire relativement à la réserve, le MAI avait l'obligation de fiduciaire d'agir dans l'intérêt des membres de la bande. Cette

This duty extended to both the surface rights and the mineral rights. Although the 1945 surrender was "to sell or lease", there was no clear authorization from the Band which justified the DIA in departing from its long-standing policy of reserving mineral rights for the benefit of the aboriginal peoples when surface rights were sold. Given these circumstances, the DIA was under a fiduciary duty to continue the leasing arrangement which had been established in the 1940 surrender. It was a violation of this fiduciary duty to sell the mineral rights to the DVLA in 1948.

The evidence showed that by August 9, 1949, the DIA was aware that the mineral rights in the reserve were potentially of considerable value, and that these rights had been sold to the DVLA in 1948. The DIA breached its fiduciary duty to deal with the reserve in the best interests of the Band because, as of August 9, 1949, a reasonable person in the position of the DIA would have realized that a mistake had occurred, and would have exercised its power under s. 64 of the 1927 *Indian Act* to reacquire the mineral rights for the purpose of effecting a leasing arrangement for the benefit of the Band. Therefore, for the reasons given by McLachlin J., the appellants may recover any losses stemming from transfers by the DVLA after August 9, 1949 as such losses fall within the 30-year limitation period imposed by the *British Columbia Limitation Act*, and are not barred by any other provision of that Act.

Per Cory, McLachlin and Major JJ.: The 1945 surrender of the reserve did not include the mineral rights. When the Band surrendered the reserve, it could transfer only those rights in the reserve which it still possessed. Since the Band had already surrendered the mineral rights to the Crown in 1940, the 1945 surrender involved only the surface rights of the reserve. This result is dictated not only by the most basic principles of property transfer, but by the 1927 *Indian Act* itself. The 1940 surrender was a valid surrender of a portion of the reserve which converted that portion into "Indian lands". As "Indian lands" held by the Crown in trust, they could not be surrendered again in 1945. By the definition in s. 2(j) of the Act, a reserve cannot include what has already been surrendered. The Crown therefore continued to hold the mineral rights in trust "to lease" for the welfare of the Band. The suggestion that mineral rights cannot be conveyed except in conjunction with surface rights is inconsistent with the general policy of the law permitting severance of the various property

obligation visait à la fois les droits de superficie et les droits miniers. Bien que la cession de 1945 ait été faite aux fins «de vendre ou de louer» les terres visées, la bande n'a jamais clairement autorisé le MAI à déroger à sa politique de longue date, qui était de réserver les droits miniers au profit des autochtones concernés lorsqu'elle vendait des droits de superficie. Dans ces circonstances, le MAI avait l'obligation de fiduciaire de continuer la location prévue par la cession de 1940. La vente des droits miniers au DTAC en 1948 a constitué une violation de cette obligation de fiduciaire.

La preuve démontre que, le 9 août 1949, le MAI savait qu'il était possible que les droits miniers afférents à la réserve aient une valeur considérable, et qu'il était au courant du fait que les droits miniers avaient été vendus au DTAC en 1948. Le MAI a manqué à l'obligation de fiduciaire qu'il avait d'agir dans l'intérêt de la bande lorsqu'il effectuait des opérations touchant la réserve, parce qu'une personne raisonnable, placée dans la situation du MAI, se serait aperçue, le 9 août 1949, qu'une erreur avait été commise, et elle aurait exercé le pouvoir que lui conférait l'art. 64 de la *Loi sur les Indiens* de 1927 pour acquérir de nouveau les droits miniers afin de conclure une entente de location au profit de la bande. En conséquence, pour les motifs donnés par le juge McLachlin, les appelants peuvent recouvrer les pertes découlant des transferts faits par le DTAC après le 9 août 1949, puisqu'elles se situent à l'intérieur du délai de prescription de 30 ans fixé par la *Limitation Act* de la Colombie-Britannique, et que les réclamations présentées à cet égard ne sont pas écartées par quelque autre disposition de cette loi.

Les juges Cory, McLachlin et Major: La cession de la réserve en 1945 n'incluait pas les droits miniers. Lorsque la bande a cédé la réserve, elle ne pouvait transférer que les droits qu'elle possédait encore. Puisque la bande avait déjà cédé les droits miniers à la Couronne en 1940, elle ne pouvait céder en 1945 que les droits de superficie de la réserve. Cette conclusion s'impose non seulement de par l'effet des principes les plus fondamentaux du transfert des biens immobiliers, mais aussi de par l'effet de la *Loi des Indiens* de 1927 elle-même. La cession de 1940 était une cession valide d'une partie de la réserve, et elle a eu pour effet de faire de la portion ainsi cédée des «terres indiennes». En tant que «terres indiennes» détenues en fiducie par la Couronne, les droits miniers ne pouvaient être cédés de nouveau en 1945. De par la définition figurant à l'al. 2h) de la Loi, une réserve ne peut pas comprendre ce qui a déjà été cédé. La Couronne a donc continué de détenir les droits miniers pour la bande, en fiducie, aux fins de les louer pour le bien-être de celle-ci. La thèse selon laquelle le titre relatif aux

interests in a given parcel of land, the wording of the 1927 *Indian Act* and the regulations governing oil and gas enacted under it.

The general language of the 1945 surrender did not constitute a revocation of the 1940 surrender and a resurrender of the mineral rights. The mineral rights were not discussed in the negotiations leading to the 1945 surrender, nor referred to in the 1945 document of surrender. As well, the appropriate administrative formalities for a resurrender of the mineral rights complying with the provisions of the 1927 *Indian Act* were not followed. An intention by the Band to transfer the mineral rights in 1945 cannot sweep aside the provisions of the Act or of the 1940 surrender and, even if it could, such an intention has not been established in this case. In the absence of evidence of intention, the 1940 surrender should not be overturned and the Band should be entitled to the protection of the 1927 *Indian Act* and the common law which prevent the Crown from unilaterally changing the terms under which it held the property as fiduciary without obtaining the informed consent of the Band.

While there was no breach of the Crown's fiduciary duty with respect to the sale of the surface rights of the reserve, the 1940 surrender also imposed a fiduciary duty on the Crown with respect to the mineral rights, and the DIA breached this duty and the terms of the 1940 surrender by conveying these rights to the DVLA in 1948. The 1940 surrender restricted the DIA to leasing the mineral rights for the benefit of the Band. In any event, even if one were to assume that the 1945 surrender revoked the previous surrender of mineral rights, the 1945 surrender still imposed an obligation on the Crown to lease or sell in the best interests of the Band. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band. The duty on the Crown as

droits miniers ne peut être transféré qu'avec les droits de superficie est contraire à l'orientation générale de la loi — qui permet la séparation des divers droits fonciers sur une parcelle donnée — ainsi qu'au libellé de la *Loi des Indiens* de 1927 et à son règlement d'application touchant les droits pétroliers et gaziers.

Le libellé général de la cession de 1945 ne constituait pas une annulation de la cession de 1940 et une nouvelle cession des droits miniers. La question des droits miniers n'a pas été discutée lors des négociations qui ont abouti à la cession de 1945, et l'acte de cession de 1945 ne fait pas mention de ces droits. De plus, on n'a pas respecté les formalités administratives appropriées applicables en cas de nouvelle cession de droits miniers et conformes aux dispositions de la *Loi des Indiens* de 1927. L'intention de la bande de transférer les droits miniers en 1945 ne peut écarter les dispositions de la Loi ou de l'acte de cession de 1940. D'ailleurs, même si elle le pouvait, l'existence d'une telle intention n'a pas été établie en l'espèce. En l'absence de preuve de l'intention, la cession de 1940 ne devrait pas être invalidée et la bande devrait pouvoir invoquer les mesures de protection prévues par la *Loi des Indiens* de 1927 et la common law et qui ont pour effet d'empêcher la Couronne de modifier unilatéralement les conditions en vertu desquelles elle détenait les biens en qualité de fiduciaire, sans obtenir le consentement éclairé de la bande.

Même si, pour ce qui concerne la vente des droits de superficie de la réserve, aucun manquement à une obligation de fiduciaire de la Couronne n'a été prouvé, la cession des droits miniers en 1940 a toutefois eu aussi pour effet d'imposer une obligation de fiduciaire envers la bande relativement aux droits miniers, et le MAI a manqué à cette obligation et aux conditions de la cession de 1940 en transférant ces droits au DTAC en 1948. En vertu de la cession de 1940, le MAI n'était autorisé qu'à louer les droits en question au profit de la bande. Quoi qu'il en soit, même si on accepte l'argument que la cession de 1945 a eu pour effet d'annuler la cession antérieure des droits miniers, la Couronne avait toujours, aux termes de la cession de 1945, l'obligation de vendre ou de louer les terres visées dans l'intérêt de la bande. Une personne raisonnable ne se départit pas par inadvertance d'un bien qui peut avoir de la valeur et dont la capacité de produire un revenu a déjà été démontrée. Pas plus qu'une personne raisonnable se départit, sans contrepartie, d'un bien qui ne lui coûte rien à conserver et qui pourrait un jour avoir de la valeur, aussi mince que puisse être cette possibilité. Dans la gestion de ses propres affaires, la Couronne réservait ses droits miniers. Elle aurait dû faire de même pour la bande. En tant que fiduciaire, la Couronne avait l'obligation d'agir

fiduciary was that of a man of ordinary prudence in managing his own affairs.

The transfer of the mineral rights to the DVLA was made in March 1948 and the appellants' action filed in September 1978 is thus outside the 30-year limitation period in s. 8 of the *Limitation Act* of British Columbia. However, while the fiduciary duty associated with the administration of the reserve as Indian lands may have terminated with the sale of the lands in 1948, an ongoing fiduciary duty to act to correct error in the best interests of the Indians may be inferred from the exceptional nature of s. 64 of the 1927 *Indian Act*. Under that section, the DIA had the power to revoke the erroneous transfer of the mineral rights to the DVLA up to the time they were sold by the DVLA. The Crown committed a second breach of fiduciary duty by failing to correct its error on August 9, 1949 when it learned of the erroneous transfer and of the potential value of the mineral rights. Since the present action was filed in September 1978, any losses stemming from sales after August 9, 1949 are still permissible under the 30-year general limitation period. Claims for breach of fiduciary duty regarding mineral rights which survive the 30-year limitation period are not barred by the 6-year limitation period provided by s. 3(4) of the *Limitation Act*. Although the action falls well beyond 6 years from the agreements for sale with the veterans, which took place between 1948 and 1956, by virtue of s. 6(3) of the *Limitation Act* the running of time was postponed until 1977 since it is only in that year that the appellants became aware of the true facts, placing their writ well within the applicable limitation period. The appellants are therefore entitled to damages against the Crown for breach of fiduciary duty with respect to such mineral rights as were conveyed by agreement for sale after August 9, 1949.

Cases Cited

By Gonthier J.

Referred to: *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

By McLachlin J.

Applied: *Guerin v. The Queen*, [1984] 2 S.C.R. 335; **referred to:** *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211; *Frame v. Smith*,

avec le soin et la diligence qu'un bon père de famille apporte à l'administration de ses propres affaires.

Comme le transfert des droits miniers au DTAC a été fait en mars 1948, l'action intentée par les appelants en septembre 1978 est donc prescrite par suite de l'écoulement du délai de 30 ans prévu à l'art. 8 de la *Limitation Act* de la Colombie-Britannique. Toutefois, même si l'obligation de fiduciaire touchant l'administration des terres des Indiens a pu cesser au moment de la vente des terres en 1948, on peut néanmoins inférer du caractère exceptionnel de l'art. 64 de la *Loi des Indiens* de 1927 le maintien d'une obligation de fiduciaire d'agir dans l'intérêt des Indiens afin de corriger une erreur. Cette disposition conférerait au MAI le pouvoir d'annuler le transfert des droits miniers fait par erreur au DTAC, et ce jusqu'au moment où ils ont été vendus par ce dernier. La Couronne a commis un deuxième manquement à son obligation de fiduciaire en omettant de corriger l'erreur en question le 9 août 1949, lorsqu'elle a pris connaissance de cette erreur et de la valeur potentielle des droits miniers. Puisque la présente action a été déposée en septembre 1978, toutes les pertes découlant des transferts faits après le 9 août 1949 donnent donc ouverture à action compte tenu du délai de prescription général de 30 ans. Les réclamations concernant les droits miniers qui subsistent à l'application du délai de prescription trentenaire ne sont pas prescrites par le délai de prescription de 6 ans prévu au par. 3(4) de la *Limitation Act*. Même si l'action dépasse de beaucoup le délai de 6 ans qui a commencé à courir à compter des conventions de vente conclues avec les anciens combattants entre 1948 et 1956, en raison de l'effet du par. 6(3) de la *Limitation Act*, le délai de prescription n'a commencé à courir qu'en 1977, puisque les appelants n'ont appris les faits véritables qu'en 1977. Leur action a donc été intentée bien à l'intérieur du délai de prescription applicable. Les appelants ont donc droit à des dommages-intérêts de la part de la Couronne par suite du manquement de celle-ci à l'obligation de fiduciaire qui lui incombait relativement aux droits miniers qui ont été cédés par actes de vente après le 9 août 1949.

Jurisprudence

Citée par le juge Gonthier

Arrêt mentionné: *Guerin c. La Reine*, [1984] 2 R.C.S. 335.

Citée par le juge McLachlin

Arrêt appliqué: *Guerin c. La Reine*, [1984] 2 R.C.S. 335; **arrêts mentionnés:** *St. Ann's Island Shooting and Fishing Club Ltd. c. The King*, [1950] R.C.S. 211;

[1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170; *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41; *Berkheiser v. Berkheiser*, [1957] S.C.R. 387; *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 A.C. 295; *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302; *M. (K). v. M. (H)*, [1992] 3 S.C.R. 6.

Statutes and Regulations Cited

Act to amend the Indian Act, S.C. 1938, c. 31, s. 1.
Dominion Lands Act, R.S.C. 1927, c. 113.
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 38(1).
Federal Court Act, R.S.C., 1985, c. F-7, s. 39(1).
Indian Act, R.S.C. 1927, c. 98, ss. 2(e), (j), 50, 51, 53, 54, 64, 93(3).
Land Act, R.S.B.C. 1924, c. 131, ss. 119, 120.
Limitation Act, R.S.B.C. 1979, c. 236, ss. 3(2), (4), 6(3), 8.
Order in Council P.C. 8939, November 19, 1941.
Regulations for the Disposal of Petroleum and Gas on the Indian Reserves in the Provinces of Alberta and Saskatchewan and the Northwest Territories, May 17, 1910, Order in Council P.C. 987.
Regulations for the Disposal of Petroleum and Natural Gas Rights on Indian Reserves, (1938) 72 Can. Gaz. 725, s. 1(a).
Soldier Settlement Act, 1919, S.C. 1919, c. 71.
Veterans' Land Act, 1942, S.C. 1942, c. 33, s. 5(2).

Authors Cited

A. H. Oosterhoff: *Text, Commentary and Cases on Trusts*, 4th ed. By A. H. Oosterhoff and E. E. Gillese. Toronto: Carswell, 1992.
Chambers English Dictionary, 7th ed. Cambridge: Cambridge University Press, 1988.
Concise Oxford Dictionary, 8th ed. Oxford: Clarendon Press, 1990.
 Shepherd, J. C. *The Law of Fiduciaries*, Toronto: Carswell, 1981.

APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, [1993] 3 F.C. 28, 100 D.L.R. (4th) 504, 151 N.R. 241, [1993] 2 C.N.L.R. 20, dismissing an appeal and a cross-

Frame c. Smith, [1987] 2 R.C.S. 99; *Norberg c. Wynrib*, [1992] 2 R.C.S. 226; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Montreal Street Railway Co. c. Normandin*, [1917] A.C. 170; *Colombie-Britannique (Procureur général) c. Canada (Procureur général)*, [1994] 2 R.C.S. 41; *Berkheiser c. Berkheiser*, [1957] R.C.S. 387; *Attorney-General of British Columbia c. Attorney-General of Canada* (1889), 14 A.C. 295; *Fales c. Canada Permanent Trust Co.*, [1977] 2 R.C.S. 302; *M. (K). c. M. (H)*, [1992] 3 R.C.S. 6.

Lois et règlements cités

Décret C.P. 8939, 19 novembre 1941.
Land Act, R.S.B.C. 1924, ch. 131, art. 119, 120.
Limitation Act, R.S.B.C. 1979, ch. 236, art. 3(2), (4), 6(3), 8.
Loi des Indiens, S.R.C. 1927, ch. 98, art. 2h), l), 50, 51, 53, 54, 64, 93(3).
Loi des terres fédérales, S.R.C. 1927, ch. 113.
Loi d'établissement des soldats, 1919, S.C. 1919, ch. 71.
Loi modifiant la Loi des Indiens, S.C. 1938, ch. 31, art. 1.
Loi sur la Cour fédérale, L.R.C. (1985), ch. F-7, art. 39(1).
Loi sur la Cour fédérale, S.R.C. 1970 (2^e suppl.), ch. 10, art. 38(1).
Loi de 1942 sur les terres destinées aux anciens combattants, S.C. 1942, ch. 33, art. 5(2).
Regulations for the Disposal of Petroleum and Gas on the Indian Reserves in the Provinces of Alberta and Saskatchewan and the Northwest Territories, 17 mai 1910, décret C.P. 987.
Regulations for the Disposal of Petroleum and Natural Gas Rights on Indian Reserves, (1938) 72 Can. Gaz. 725, art. 1a).

Doctrine citée

A. H. Oosterhoff: *Text, Commentary and Cases on Trusts*, 4th ed. By A. H. Oosterhoff and E. E. Gillese. Toronto: Carswell, 1992.
Nouveau Petit Robert, Paris: Le Robert, 1994.
Petit Larousse illustré 1994, Paris: Larousse, 1993.
 Shepherd, J. C. *The Law of Fiduciaries*, Toronto: Carswell, 1981.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel fédérale, [1993] 3 C.F. 28, 100 D.L.R. (4th) 504, 151 N.R. 241, [1993] 2 C.N.L.R. 20, qui a rejeté l'appel et l'appel incident

appeal from a judgment of the Trial Division, [1988] 3 F.C. 20 (abridged version), 14 F.T.R. 161, [1988] 1 C.N.L.R. 73. Appeal and cross-appeal allowed.

Thomas R. Berger, Q.C., Leslie J. Pinder, Arthur Pape and Gary A. Nelson, for the appellants.

I. G. Whitehall, Q.C., John R. Haig, Q.C., and Mitchell R. Taylor, for the respondent.

Marvin R. V. Storrow, Q.C., and Maria Morellato, for the interveners the Musqueam Nation and Ermineskin Tribal Council.

James O'Reilly, Edward H. Molstad, Q.C., and Chantal Chatelain, for the interveners Chief Abel Bosum et al.

James O'Reilly, Edward H. Molstad, Q.C., and L. Douglas Rae, for the interveners Chief Terry Buffalo et al.

Peter K. Doody and John E. S. Briggs, for the interveners the Assembly of First Nations.

The judgment of La Forest, L'Heureux-Dubé, Sopinka and Gonthier JJ. was delivered by

GONTHIER J. —

I. Introduction

I have had the benefit of reading the reasons of my colleague, McLachlin J. While I agree with her analyses of the surrender of the surface rights in Indian Reserve 172 ("I.R. 172"), and the application of the British Columbia *Limitation Act*, R.S.B.C. 1979, c. 236, and with her ultimate disposition of the case, I find that I cannot agree with her conclusion that the 1945 surrender of I.R. 172 to the Crown did not include the mineral rights in the reserve. In my view, the 1945 agreement constituted a complete surrender to the Crown of the surface and mineral rights in the St. John Indian Reserve, in trust, "to sell or lease". The Beaver Band's intention at the time of the 1945 surrender, and the terms of the surrender instrument, bear this

formés contre un jugement de la Section de première instance, [1988] 3 C.F. 20 (version abrégée), 14 F.T.R. 161, [1988] 1 C.N.L.R. 73. Pourvoi et pourvoi incident accueillis.

Thomas R. Berger, c.r., Leslie J. Pinder, Arthur Pape et Gary A. Nelson, pour les appelants.

I. G. Whitehall, c.r., John R. Haig, c.r., et Mitchell R. Taylor, pour l'intimée.

Marvin R. V. Storrow, c.r., et Maria Morellato, pour les intervenants la Nation Musqueam et le Conseil tribal Ermineskin.

James O'Reilly, Edward H. Molstad, c.r., et Chantal Chatelain, pour les intervenants le chef Abel Bosum et autres.

James O'Reilly, Edward H. Molstad, c.r., et L. Douglas Rae, pour les intervenants le chef Terry Buffalo et autres.

Peter K. Doody et John E. S. Briggs, pour l'intervenante l'Assemblée des premières nations.

Version française du jugement des juges La Forest, L'Heureux-Dubé, Sopinka et Gonthier rendu par

LE JUGE GONTHIER —

I. Introduction

J'ai eu l'avantage de lire les motifs de ma collègue le juge McLachlin. Même si je suis d'accord avec son analyse de la cession des droits de superficie de la réserve indienne 172 («R.I. 172») et de l'application de la *Limitation Act* de la Colombie-Britannique, R.S.B.C. 1979, ch. 236, ainsi qu'avec la façon dont elle tranche le pourvoi, je ne peux cependant me rallier à sa conclusion que la cession de la R.I. 172 à la Couronne en 1945 n'incluait pas les droits miniers afférents à la réserve. À mon avis, l'accord de 1945 était une cession complète à la Couronne, en fiducie, des droits de superficie de la réserve indienne de St. John et des droits miniers y afférents, aux fins [TRADUCTION] «de vendre ou de louer» les terres visées. L'intention

out. Moreover, while I agree with my colleague that in dealing with the mineral rights subsequent to the 1945 surrender, the Department of Indian Affairs ("DIA") committed a breach of fiduciary duty, my reasons are somewhat different. I set them out below.

II. The Effect of the 1945 Surrender of I.R. 172 on the 1940 Surrender of the Mineral Rights in I.R. 172

McLachlin J.'s position, in brief, is that since there had already been a surrender of the mineral rights in I.R. 172 for "lease" in 1940, these mineral rights could not have been included in the 1945 surrender. The basis of her position lies in the *Indian Act*, R.S.C. 1927, c. 98, scheme governing the transfer of reserve lands to the Crown. Once such lands are surrendered, they become "Indian lands" under the Act. Section 2(e) of the Act defines "Indian lands" as follows:

"Indian lands" means any reserve or portion of a reserve which has been surrendered to the Crown;

It is therefore clear that "Indian lands" must constitute a "reserve or portion of a reserve". "Reserve" is defined in s. 2(j) of the Act:

"reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein;

McLachlin J. argues that when the Band surrendered the mineral rights in I.R. 172 to the Crown in 1940, this severed the mineral rights from the "reserve". The mineral rights thus constituted "Indian lands" under s. 2(e) of the Act, because they were a "portion of a reserve" which had been "surrendered". Therefore, the 1945 agreement could not have included the Band's rights over the

de la bande des Castors au moment de la cession de 1945 de même que les conditions de l'acte de cession appuient mon opinion. Qui plus est, même si je conviens avec ma collègue que le ministère des Affaires indiennes («MAI») a manqué à une obligation de fiduciaire dans le cadre des opérations qu'il a effectuées relativement aux droits miniers après la cession de 1945, ma conclusion repose sur des motifs quelque peu différents, que j'expose ci-après.

II. L'effet de la cession de la R.I. 172 en 1945 sur la cession des droits miniers afférents à la R.I. 172 en 1940

Le juge McLachlin soutient à cet égard que, comme il y avait déjà eu, en 1940, cession des droits miniers afférents à la R.I. 172 à des fins de «location», ces droits ne pouvaient être inclus dans la cession de 1945. Ma collègue appuie sa position sur le régime établi par la *Loi des Indiens*, S.R.C. 1927, ch. 98, en matière de transfert à la Couronne de terres faisant partie de réserves. Une fois cédées, ces terres deviennent des «terres indiennes» au sens de l'al. 2l) de la Loi, qui se lit:

«terres indiennes», «terres des Indiens» signifie toute réserve ou partie de réserve qui a été cédée à la Couronne;

Il est donc clair que les «terres indiennes» doivent être une «réserve ou partie de réserve». L'alinéa 2h) définit ainsi le terme «réserve»:

«réserve» signifie toute étendue de terre mise à part, par traité ou autrement, pour l'usage ou le profit d'une bande particulière d'Indiens ou concédée à cette bande, et dont le titre légal est attribué à la Couronne, et qui fait encore partie de la réserve et n'a pas été rétrocédée à la Couronne, et comprend les arbres, le bois, la terre, la pierre, les minéraux, les métaux et autres choses de valeur qui se trouvent à la surface ou à l'intérieur du sol;

Le juge McLachlin affirme que les droits miniers afférents à la R.I. 172 ont été détachés de la «réserve» lorsque la bande a, en 1940, cédé les droits en question à la Couronne. Les droits miniers sont donc devenus des «terres indiennes» au sens de l'al. 2l) de la Loi, puisqu'ils étaient une «partie de réserve» qui avait été «cédée». Par conséquent, l'accord de 1945 ne pouvait pas inclure

minerals, since the surrendered "reserve", as defined in s. 2(j) of the Act, was composed of only those portions of I.R. 172 which had not yet been surrendered. Furthermore, because the parties did not comply with certain administrative procedures associated with the resurrender of reserve lands (i.e., the execution of a formal revocation document prior to resurrender), McLachlin J. rejects the notion that the 1945 agreement constituted a revocation of the 1940 surrender of mineral rights for "lease", and a resurrender of those same rights "to sell or lease". She concludes that the 1940 surrender was unaffected by the 1945 agreement, and that s. 54 of the Act prevented the DIA from selling the mineral rights since it was required to continue to lease the mineral rights according to the 1940 terms.

les droits de la bande sur les minéraux puisque la «réserve» — au sens de l'al. 2h) de la Loi — qui était cédée n'était formée que des parties de la R.I. 172 qui n'avaient pas encore été cédées. Par ailleurs, du fait que les parties à l'accord n'ont pas respecté certaines formalités applicables en cas de nouvelle cession de terres de la réserve (la conclusion d'un acte formel d'annulation avant cette nouvelle cession), le juge McLachlin rejette la thèse que l'accord de 1945 constituait une annulation de la cession des droits miniers en 1940 à des fins de «location» ainsi qu'une nouvelle cession de ces droits aux fins «de [les] vendre ou de [les] louer». Ma collègue conclut que la cession de 1940 n'a pas été touchée par celle de 1945, et que l'art. 54 de la Loi empêchait le MAI de vendre les droits miniers, étant donné qu'il était tenu de continuer de les louer conformément aux conditions de la cession de 1940.

3 The issue of whether the 1940 surrender of mineral rights was governed by the 1927 *Indian Act* surrender regime has been a source of considerable controversy. In the courts below, both Addy J. and Stone J.A. were of the view that the surrender by a band of the right to exploit indeterminate mineral deposits within reserve lands was outside the scope of the 1927 Act. This conclusion was based on their view that the statutory regime only applied to the surrender of surface rights and mineral rights together, and that mineral rights themselves could not be a "reserve" with the status of "Indian lands". Isaac C.J., and my colleague McLachlin J., have both reached the opposite conclusion, finding that the 1927 Act applied also to a surrender of mineral rights only, since such rights constituted a "portion of a reserve", and therefore, would have the status of "Indian lands" following surrender.

La question de savoir si la cession des droits miniers, en 1940, était assujettie au régime de cession de terres établi par la *Loi des Indiens* de 1927 a suscité une importante controverse. En effet, dans les décisions dont appel, tant le juge Addy que le juge Stone ont conclu que la cession par une bande du droit d'exploitation de gisements minéraux indéterminés à l'intérieur d'une réserve n'était pas visée par la Loi de 1927. Ils fondaient cette conclusion sur le fait que, à leur avis, le régime établi par la loi ne s'appliquait que lorsque les droits de superficie et des droits miniers étaient cédés ensemble, et sur le fait que des droits miniers ne pouvaient pas, à eux seuls, constituer une «réserve» ayant qualité de «terres indiennes». Le juge en chef Isaac et ma collègue le juge McLachlin sont tous deux arrivés à la conclusion contraire, statuant que la Loi de 1927 s'appliquait aussi à une cession isolée de droits miniers, puisque ces droits constituaient une «partie de réserve» et auraient, en conséquence, qualité de «terres indiennes» après la cession.

4 In my view, the debate as to the juridical nature of the 1940 surrender is academic in the circumstances of this case, and the matter need not be determined here. Whether or not the 1940 surrender was actually governed by the 1927 Act, there

À mon avis, le débat concernant la nature juridique de la cession de 1940 est théorique en l'espèce et n'a pas à être tranché. Que la cession de 1940 ait ou non été régie par la Loi de 1927, la légitimité de la cession n'a pas été contestée dans

has been no challenge to its legitimacy in this appeal. Nor should there be, since the Band gave its full and informed consent, the Crown fulfilled its fiduciary duty in relation to the surrender, and the parties complied with the statutory surrender procedures. My conclusion that the mineral rights in I.R. 172 were surrendered as part of the 1945 agreement rests on reasoning unrelated to the scope of the statutory surrender regime, and therefore holds even if the mineral rights had attained the status of "Indian lands" through the 1940 dealings. This is because the ultimate issue to be determined in this case is the impact of the 1945 surrender of I.R. 172 on the earlier 1940 surrender of the mineral rights in I.R. 172, regardless of the latter's effectiveness. The 1927 Act is entirely silent on the subjects of surrender variation, surrender revocation, and resurrender, yet no one would seriously suggest that this silence renders all surrenders, including the 1940 agreement, permanent and irrevocable. In fact, the DIA developed its own administrative procedures for the revocation of a surrender, in order to facilitate resurrender and fill the void left by the statute. It is this statutory void which must be addressed here, and I do not think that the analysis is advanced by a finding one way or the other as to whether "Indian lands" are in dispute.

To explain the impact of the 1945 surrender of I.R. 172 "to sell or lease" on the 1940 surrender of the mineral rights in I.R. 172 for "lease", both the appellants and the Crown have advanced different common law property concepts in support of their competing positions. The Crown's position, which is essentially that of the trial judge, Addy J., is that the mineral rights were transferred in the 1945 surrender through the operation of the legal presumption that a general conveyance of land passes all interests except those specifically reserved in the deed of transfer. The appellants, whose position is adopted by my colleague McLachlin J., prefer the common law principle *nemo dat quod non habet* — a person cannot give what she does not possess. According to the reasons of McLachlin J., the

le cadre du présent pourvoi. D'ailleurs, elle ne saurait l'être, vu que la bande a donné un consentement libre et éclairé, que la Couronne s'est acquittée de son obligation de fiduciaire relativement à la cession et que les parties se sont conformées aux formalités prévues par la loi en matière de cession. Ma conclusion que les droits miniers afférents à la R.I. 172 ont été cédés dans le cadre de l'accord de 1945 ne s'appuie d'aucune façon sur la portée du régime établi par la loi relativement aux cessions et vaut donc même si les droits miniers avaient pris la qualité de «terres indiennes» par suite des opérations de 1940. Il en est ainsi parce que la question revient en définitive à déterminer l'effet de la cession de la R.I. 172 en 1945 sur la cession des droits miniers afférents à la R.I. 172 en 1940, quoi qu'il en soit de la validité de cette dernière. Même si la Loi de 1927 ne traite ni de la modification des cessions, ni de leur annulation, ni de la possibilité de refaire cession, on ne saurait prétendre sérieusement que, en raison de ce silence, toutes les cessions, y compris l'accord de 1940, ont un caractère permanent et irrévocable. De fait, le MAI avait établi sa propre procédure administrative en matière d'annulation de cession afin de faciliter la possibilité de refaire cession et de combler le vide existant dans la Loi à cet égard. C'est ce vide qu'il faut examiner en l'espèce, et je ne crois pas que l'on fait avancer l'analyse en décidant, dans un sens ou dans l'autre, si des «terres indiennes» sont en cause.

Pour expliquer l'effet de la cession, en 1945, de la R.I. 172 aux fins de «vendre ou de louer» les terres visées sur la cession, en 1940, des droits miniers afférents à la R.I. 172 à des fins de «location», les appelants et la Couronne ont, au soutien de leurs thèses opposées, invoqué différents concepts du droit des biens en common law. La thèse de la Couronne, qui est essentiellement celle du juge de première instance, le juge Addy, est qu'il y a eu transfert des droits miniers lors de la cession de 1945 par suite de l'effet de la présomption légale qui veut que, en cas de cession générale de terres, il y a transfert de tous les droits, sauf ceux réservés expressément dans l'acte de cession. Les appelants, dont ma collègue le juge McLachlin a retenu la thèse, préfèrent le principe de common

Band could not surrender the mineral rights in I.R. 172 in 1945, since these rights had already been surrendered in 1940.

law *nemo dat quod non habet* — nul ne peut donner ce qu'il n'a pas. Suivant les motifs du juge McLachlin, la bande ne pouvait céder les droits miniers afférents à la R.I. 172 en 1945, puisque ces droits avaient déjà été cédés en 1940.

6 In my view, principles of common law property are not helpful in the context of this case. Since Indian title in reserves is *sui generis*, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band, in relation to their dealings with I.R. 172. For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of the Band. Unless some statutory bar exists (which, as noted above, is not the case here), then the Band members' intention should be given legal effect.

À mon avis, les principes généraux du droit des biens en common law ne sont pas utiles dans le contexte du présent pourvoi. Puisque le titre indien sur les réserves a un caractère *sui generis*, il serait fort malencontreux que les exigences de forme de la common law en matière de transfert foncier viennent frustrer l'intention des parties, tout particulièrement celle de la bande, à l'égard de leurs intérêts dans la R.I. 172. Voilà pourquoi le caractère juridique de la cession de 1945 et son effet sur celle de 1940 doivent être déterminés au regard de l'intention de la bande. Hormis quelque empêchement prescrit par la loi (ce qui, comme nous l'avons vu précédemment, n'est pas le cas en l'espèce), il faut laisser l'intention des membres de la bande produire ses effets juridiques.

7 An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical approach operates to the benefit of the aboriginal peoples. However, one can well imagine situations where that same approach would be detrimental, frustrating the well-considered plans of the aboriginals. In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in

Selon moi, l'application d'une analyse fondée sur l'intention des parties offre un avantage important. Ainsi que l'a fait remarquer le juge McLachlin, la loi traite les peuples autochtones comme des acteurs autonomes en ce qui concerne l'acquisition et la cession de leurs terres, il faut donc respecter leurs décisions. En conséquence, il est préférable de s'en remettre à l'intention des membres de la bande et à leur compréhension de la situation en 1945, plutôt que de conclure que, quelle qu'ait été cette intention, c'est par un coup de chance — résultant de règles et autres formalités procédurales applicables aux transferts fonciers — qu'est invalidée la cession des droits miniers en 1945. Dans un cas comme celui-ci, l'application d'une analyse plus formaliste est à l'avantage des peuples autochtones. Cependant, il est facile d'imaginer des cas où cette même analyse serait préjudiciable aux autochtones et ferait obstacle à leurs plans mûrement réfléchis. À mon avis, dans l'examen des effets juridiques des opérations conclues par les peuples autochtones et la Couronne relativement à des terres faisant partie de réserves, il ne faut pas oublier que, compte tenu

order to give effect to the true purpose of the dealings.

While McLachlin J. dedicates a considerable portion of her reasons to an analysis of the Band's intention, the fact remains that under her approach, the Band's intention in 1945 is irrelevant. Even if McLachlin J. were to agree with my conclusion that the Band intended to surrender the mineral rights as part of the 1945 agreement, she would be forced to the conclusion that the mineral rights were not part of the 1945 surrender because of her findings in relation to the 1927 Act, the operation of *nemo dat quod non habet*, and the administrative procedures adopted by the DIA for surrender revocation. Although McLachlin J. and I might disagree on the Band's intention in this case, since I prefer to rely on the factual findings of the trial judge, I think that in principle an intention-based approach is preferable to my colleague's more technical reasoning.

In applying this approach in the circumstances of this case, one must have regard to the factual findings of the trial judge, Addy J. Three are particularly relevant in determining the Band members' intention when they agreed to the surrender of I.R. 172 in 1945:

1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;

. . . .

6. That Mr. Grew [the local Indian agent] fully explained to the Indians the consequences of a surrender;

7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their

du caractère *sui generis* du titre autochtone, les tribunaux doivent faire abstraction des restrictions habituelles imposées par la common law afin de donner effet à l'objet véritable de ces opérations.

Bien que le juge McLachlin consacre une partie considérable de ses motifs à l'analyse de l'intention de la bande, le fait demeure que, dans le cadre de l'approche qu'elle applique, l'intention de la bande en 1945 n'est pas un facteur pertinent. Même si le juge McLachlin souscrivait à ma conclusion que la bande avait eu l'intention de céder les droits miniers dans l'accord de 1945, elle serait néanmoins forcée de conclure que ces droits n'étaient pas visés par la cession de 1945, vu ses conclusions concernant la Loi de 1927, l'application du principe *nemo dat quod non habet* et la procédure administrative adoptée par le MAI relativement à l'annulation des cessions. Même si le juge McLachlin et moi-même pouvons être en désaccord quant à l'intention de la bande en l'espèce, vu que je préfère m'appuyer sur les conclusions de fait du juge de première instance, j'estime qu'en principe une approche fondée sur l'intention est préférable au raisonnement plus formaliste de ma collègue.

Dans l'application de cette approche aux circonstances de l'espèce, il faut tenir compte des conclusions de fait du juge de première instance, le juge Addy. Trois sont particulièrement pertinentes afin d'établir quelle était l'intention des membres de la bande lorsqu'ils ont convenu de céder la R.I. 172 en 1945:

1. Les demandeurs savaient depuis longtemps qu'une cession absolue de la R.I. 172 était envisagée;

. . . .

6. M. Grew [l'agent des Indiens pour l'endroit] avait expliqué aux Indiens toutes les conséquences d'une cession;

7. Même s'ils n'ont pas saisi exactement la nature du droit, en *common law*, qu'ils cédaient, ils en étaient probablement incapables, ils ont bel et bien compris, dans les faits, que par la cession ils renonçaient pour toujours à tous leurs droits sur la R.I. 172 en échange de l'argent qui serait versé à leur crédit après la vente de la réserve,

credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased from the proceeds; [Emphasis added.]

([1988] 3 F.C. 20, at pp. 66-67.)

The Band understood that by agreeing to the 1945 surrender, they would be transferring all their rights in I.R. 172 to the Crown in trust, and that the Crown would either sell or lease those rights for the benefit of the Band. The sale or lease of I.R. 172 by the Crown would provide the funds necessary for the Band to purchase alternate reserve sites better suited to their traditional hunting and gathering activities. The Band neither expected nor intended to hold rights over I.R. 172 once the 1945 surrender was completed. This was entirely appropriate, as my colleague McLachlin J. points out, because I.R. 172 was virtually useless to the Band at the time.

et d'autres terrains situés près de leurs sentiers de piégeage qui seraient achetés avec le produit de la vente; [Je souligne.]

([1988] 3 C.F. 20, aux pp. 66 et 67.)

La bande comprenait, d'une part, qu'en acceptant la cession de 1945 elle transférerait à la Couronne, en fiducie, tous les droits qu'elle avait dans la R.I. 172, et, d'autre part, que la Couronne vendrait ou louerait ces droits au profit de la bande. La vente ou la location de la R.I. 172 par la Couronne rapporterait les fonds nécessaires à l'achat, par la bande, d'autres terres visant à lui servir de réserve et convenant mieux à ses activités traditionnelles de chasse et de cueillette. La bande ne s'attendait pas à détenir des droits sur la R.I. 172 une fois la cession de 1945 complétée, et ce n'était pas non plus son intention. Cette décision était tout à fait justifiée, comme le signale ma collègue le juge McLachlin, puisque la R.I. 172 n'avait pratiquement aucune utilité pour la bande à l'époque.

10

The Band's intention is evidenced by the terms of the 1945 surrender instrument, signed by Chief Succona, Joseph Apsassin and two councillors on behalf of the Band. This instrument states that the Band did "release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, his Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises . . . composed of St. John Indian Reserve No. 172". Since this instrument effected the surrender of certain land forming a "reserve", it is reasonable to conclude that the term "Reserve", as used in the surrender instrument, was intended to have the same meaning as the term "reserve" in the *Indian Act*. As I noted above, s. 2(j) of the Act defines "reserve" as an unsurrendered tract of land including the "minerals . . . thereon or therein". Therefore, the 1945 surrender included the tract of land forming I.R. 172, the minerals in that tract of land, and the right to exploit those minerals. On this basis, I must respectfully disagree with McLachlin J.'s assertion that the surrender document was silent concerning the mineral rights.

L'intention de la bande ressort des termes mêmes de l'acte de cession de 1945, que le chef Succona, Joseph Apsassin et deux conseillers ont signé au nom de la bande. Ce document indique que la bande a [TRADUCTION] «cédé au Roi, [son] maître souverain, ainsi qu'à ses héritiers et successeurs, tous les biens-fonds et bâtiments . . . dont la réserve indienne 172 de St. John est composée, et y a renoncé, pour toujours». Comme cet acte portait cession de certaines terres formant une «réserve», il est raisonnable de conclure que l'on désirait, dans l'acte de cession, utiliser le mot «réserve» suivant le sens que lui donne la *Loi des Indiens*. Comme je l'ai fait remarquer précédemment, aux termes de la définition figurant à l'al. 2h) de la Loi, le mot «réserve» s'entend d'une étendue de terre qui n'a pas été rétrocédée et comprend les «minéraux [. . .] qui se trouvent à la surface ou à l'intérieur du sol». En conséquence, la cession de 1945 incluait l'étendue de terre formant la R.I. 172, les minéraux s'y trouvant ainsi que le droit d'exploiter ces minéraux. Pour ce motif, je ne peux, avec égards, souscrire à l'affirmation du juge McLachlin que l'acte de cession était silencieux en ce qui concerne les droits miniers.

Given the Band's intention *vis-à-vis* the 1945 surrender, and the terms of that surrender, Stone J.A., in the court below, concluded:

It would seem to me that the overall effect of the 1945 transaction was essentially the same as might have been achieved by first cancelling the 1940 surrender with consent of the Indians followed by the acceptance of that cancellation by the Governor in Council. According to the Trial Judge's finding the Indians agreed to the release of their rights in I.R. 172; their consent was reflected in the language of the formal surrender instrument and the surrender was afterwards accepted by the Governor in Council.

([1993] 3 F.C. 28, at pp. 122-23.)

He therefore construed the 1945 surrender as a revocation of the 1940 agreement, and a transfer of I.R. 172, including the mineral rights, to the Crown "to sell or lease".

Although the "revocation-resurrender" description offered by Stone J.A. is one plausible construction of the 1945 agreement, I think that the true nature of the 1945 dealings can best be characterized as a variation of a trust in Indian land. In 1940, the Band transferred the mineral rights in I.R. 172 to the Crown in trust, requiring the Crown to lease those rights for the benefit of the Band. The 1945 agreement was also framed as a trust, in which the Band surrendered all of its rights over I.R. 172 to the Crown "to sell or lease". The 1945 agreement subsumed the 1940 agreement, and expanded upon it in two ways: first, while the 1940 surrender concerned mineral rights only, the 1945 surrender covered all rights in I.R. 172, including both mineral rights and surface rights; and second, while the 1940 surrender constituted a trust for "lease", the 1945 surrender gave the Crown, as trustee, the discretion "to sell or lease". This two-pronged variation of the 1940 trust agreement afforded the Crown considerably greater power to act as a fiduciary on behalf of the Band. Of course, under the terms of the trust, and because of the Crown's fiduciary role in the deal-

Vu l'intention de la bande dans le cadre de la cession de 1945 et les conditions de cette cession, le juge Stone de la Cour d'appel fédérale a conclu ainsi:

Il me semble que l'effet général de la cession de 1945 était essentiellement le même que celui auquel on aurait pu en arriver en annulant d'abord la cession de 1940 avec le consentement des Indiens, le gouverneur en conseil acceptant ensuite cette annulation. Selon la conclusion tirée par le juge de première instance, les Indiens ont consenti à la cession des droits qu'ils possédaient sur la R.I. 172; leur consentement se manifestait dans le libellé de l'acte officiel de cession et la cession a par la suite été acceptée par le gouverneur en conseil.

([1993] 3 C.F. 28, aux pp. 122 et 123.)

Il a en conséquence considéré la cession de 1945 comme une annulation de celle de 1940 et un transfert à la Couronne de la R.I. 172, y compris les droits miniers y afférents, aux fins «de vendre ou de louer» les terres visées.

Même si la thèse de l'«annulation suivie d'une nouvelle cession» proposée par le juge Stone est une interprétation plausible de l'accord de 1945, je crois que la meilleure façon de décrire la nature véritable des opérations de 1945 est de les qualifier de modification d'une fiducie visant des terres indiennes. En effet, en 1940, la bande a transféré à la Couronne, en fiducie, les droits miniers afférents à la R.I. 172, exigeant de cette dernière qu'elle les loue au profit de la bande. L'accord de 1945 visait également une fiducie, dans laquelle la bande cédait à la Couronne tous les droits qu'elle détenait sur la R.I. 172 à des fins de vente ou de location. L'accord de 1945 subsumait celui de 1940, et il en élargissait la portée à deux points de vue: premièrement, alors que la cession de 1940 ne visait que les droits miniers, celle de 1945 englobait tous les droits afférents à la R.I. 172, y compris les droits miniers et les droits de superficie; deuxièmement, tandis que la cession de 1940 constituait une fiducie [TRADUCTION] «aux fins de [...] location», celle de 1945 conférait à la Couronne, en qualité de fiduciaire, le pouvoir discrétionnaire «de vendre ou de louer» les terres visées. Cette double modification de l'acte de fiducie de 1940 conférait à la Couronne un pouvoir beaucoup plus grand d'agir à titre de fiduciaire pour le compte de la bande.

ings, the DIA was required to exercise its enlarged powers in the best interests of the Band.

13

I should add that my reasons should not be interpreted to equate a trust in Indian land with a common law trust. I am well aware that this issue was not resolved in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, and I do not wish to pronounce upon it in this case. However, this Court did recognize in *Guerin* that “trust-like” obligations and principles would be relevant to the analysis of a surrender of Indian lands. In this case, both the 1940 and 1945 surrenders were framed as trusts, and the parties therefore intended to create a trust-like relationship. Thus, for lack of a better label, I think that it is appropriate to refer to these surrenders as trusts in Indian land.

14

I should also add that I would be reluctant to give effect to this surrender variation if I thought that the Band’s understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band’s understanding and intention. However, neither of these situations arises here. As the trial judge found, the consequences of the 1945 surrender were fully explained to the Indians by the local agent of the DIA during the negotiations. There was also substantial compliance with the technical surrender requirements embodied in s. 51 of the 1927 *Indian Act*, and as McLachlin J. concludes, the evidence amply demonstrates the valid assent of the Band members to the 1945 agreement. Moreover, by the terms of the surrender instrument, the DIA was required to act in the best interests of the Band in dealing with the mineral rights. In fact, the DIA was under a fiduciary duty to put the Band’s interests first. I therefore see nothing during the negotiations prior to the 1945 surrender, or in the terms of the surrender instrument, which would make it

Certes, compte tenu des conditions de la fiducie et du rôle de fiduciaire qu’assumait la Couronne lorsqu’elle effectuait des opérations, le MAI était tenu d’exercer ses pouvoirs élargis dans l’intérêt de la bande.

Je tiens à ajouter qu’il ne faut pas interpréter mes motifs comme ayant pour effet d’assimiler les fiducies visant des terres indiennes aux fiducies en common law. Je suis bien conscient que cette question n’a pas été tranchée dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335, et je ne désire pas le faire en l’espèce. Cependant, notre Cour a, dans cet arrêt, reconnu que des obligations et principes «semblable[s] à [ceux d’une fiducie] étaient pertinents dans le cadre de l’analyse d’une cession visant des terres indiennes. Dans le présent cas, tant la cession de 1940 que celle de 1945 étaient conçues comme des fiducies, et les parties avaient en conséquence l’intention de créer des rapports semblables à ceux créés par une fiducie. En conséquence, à défaut d’un meilleur qualificatif, j’estime approprié d’appeler ces cessions des fiducies visant des terres indiennes.

Je tiens à ajouter que j’hésiterais à donner effet à cette modification de cession si je croyais que la bande n’en avait pas bien saisi les conditions, ou si la conduite de la Couronne avait, d’une manière ou d’une autre, vicié les négociations au point qu’il serait hasardeux de tenir pour acquis que la bande avait bien compris la situation et avait eu l’intention de faire ce qu’elle a fait. Cependant, ni l’une ni l’autre de ces situations ne se sont produites en l’espèce. Comme l’a conclu le juge de première instance, l’agent local du MAI a pleinement expliqué les conséquences de la cession de 1945 aux Indiens pendant les négociations. De plus, les exigences de forme en matière de cession prévues par l’art. 51 de la *Loi des Indiens* de 1927 ont, pour l’essentiel, été respectées, et, comme l’a conclu le juge McLachlin, la preuve démontre amplement que les membres de la bande ont ratifié de façon valide l’accord de 1945. Par ailleurs, de par les termes de l’acte de cession, le MAI était tenu d’agir dans l’intérêt de la bande dans le cadre des opérations touchant les droits miniers. De fait, le MAI avait l’obligation de fiduciaire de donner pré-

inappropriate to give effect to the Band's intention to surrender all their rights in I.R. 172 to the Crown in trust "to sell or lease". In fact, the guiding principle that the decisions of aboriginal peoples should be honoured and respected leads me to the opposite conclusion.

I therefore conclude that under the 1945 agreement, both the surface rights and the mineral rights in I.R. 172 were surrendered to the Crown in trust "to sell or lease".

III. Breach of Fiduciary Duty by the DIA Subsequent to the 1945 Surrender

The terms of the 1945 surrender transferred I.R. 172 to the Crown "in trust to sell or lease the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people". By taking on the obligations of a trustee in relation to I.R. 172, the DIA was under a fiduciary duty to deal with the land in the best interests of the members of the Beaver Band. This duty extended to both the surface rights and the mineral rights.

In my view, it is critical to the outcome of this case that the 1945 agreement was a surrender in trust, to sell or lease. The terms of the trust agreement provided the DIA with the discretion to sell or lease, and since the DIA was under a fiduciary duty *vis-à-vis* the Band, it was required to exercise this discretion in the Band's best interests. Of equal importance is the fact that the 1945 surrender gave the DIA a virtual *carte blanche* to determine the terms upon which I.R. 172 would be sold or leased. The only limitation was that these terms had to be "conducive" to the "welfare" of the Band. Because of the scope of the discretion granted to the DIA, it would have been open to the

séance aux intérêts de la bande. En conséquence, rien dans les négociations qui ont précédé la cession de 1945 ou dans les conditions de l'acte de cession lui-même ne m'amène à conclure qu'il serait inapproprié de donner effet à l'intention de la bande, savoir de céder en fiducie à la Couronne tous ses droits dans la R.I. 172 pour que cette dernière «vend[e] ou . . . lou[e]» les terres visées. De fait, le principe directeur qui veut que l'on respecte les décisions des peuples autochtones m'amène à la conclusion contraire.

En conséquence, je conclus que, en vertu de l'accord de 1945, tant les droits de superficie de la R.I. 172 et les droits miniers y afférents ont été cédés à la Couronne, en fiducie, pour qu'elle «vend[e] ou . . . lou[e]» les terres visées.

III. Manquement du MAI à son obligation de fiduciaire après la cession de 1945

Aux termes de la cession de 1945, la bande transférait la R.I. 172 à la Couronne [TRADUCTION] «en fiducie aux fins [. . .] de vendre ou de louer [. . .] les dites terres à une ou plusieurs personnes et selon les conditions que le gouvernement du Canada peut juger les plus appropriées pour assurer notre bien-être et celui de notre peuple». En assumant les obligations d'un fiduciaire relativement à la R.I. 172, le MAI avait l'obligation de fiduciaire d'agir dans le meilleur intérêt des membres de la bande des Castors dans les opérations concernant les terres. Cette obligation visait à la fois les droits de superficie et les droits miniers.

À mon avis, le fait que l'accord de 1945 était une cession en fiducie conclue aux fins de vendre ou de louer les terres visées est décisif en l'espèce. Aux termes de l'acte de fiducie, le MAI avait le pouvoir discrétionnaire de vendre ou de louer les terres visées et, comme il était tenu à une obligation de fiduciaire envers la bande, il devait exercer ce pouvoir discrétionnaire dans l'intérêt de cette dernière. Autre fait tout aussi important, la cession de 1945 donnait virtuellement carte blanche au MAI pour décider à quelles conditions la R.I. 172 serait vendue ou louée. La seule restriction était que ces conditions devaient être «appropriées pour assurer [le] bien-être» de la bande. Compte tenu de

DIA to sell the surface rights in I.R. 172 to the Director, *The Veterans' Land Act* ("DVLA"), while continuing to lease the mineral rights for the benefit of the Band, as per the 1940 surrender agreement.

l'étendue du pouvoir discrétionnaire qui était accordé au MAI, il lui aurait été possible de vendre les droits de superficie de la R.I. 172 au Directeur de la *Loi sur les terres destinées aux anciens combattants* («DTAC»), tout en continuant de louer les droits miniers au profit de la bande, conformément à l'acte de cession de 1940.

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Why this option was not chosen is a mystery. As my colleague McLachlin J. observes, the DIA had a long-standing policy, pre-dating the 1945 surrender, to reserve out mineral rights for the benefit of the aboriginal peoples when surrendered Indian lands were sold off. This policy was adopted precisely because reserving mineral rights was thought to be "conducive to the welfare" of aboriginal peoples in all cases. The existence and rationale of this policy (the wisdom of which, though obvious, is evidenced by the facts of this case) justifies the conclusion that the DIA was under a fiduciary duty to reserve, for the benefit of the Beaver Band, the mineral rights in I.R. 172 when it sold the surface rights to the DVLA in March 1948. In other words, the DIA should have continued to lease the mineral rights for the benefit of the Band as it had been doing since 1940. Its failure to do so can only be explained as "inadvertence".

La raison pour laquelle cette solution n'a pas été retenue est un mystère. Comme le fait remarquer ma collègue le juge McLachlin, suivant une politique de longue date, antérieure à la cession de 1945, lorsqu'il vendait des terres indiennes cédées, le MAI réservait les droits miniers au profit des autochtones concernés. Cette politique avait justement été adoptée parce qu'on estimait que, dans tous les cas, le fait de réserver les droits miniers était une mesure [TRADUCTION] «appropri[ée] pour assurer [le] bien-être» des autochtones visés. L'existence et la raison d'être de cette politique (dont le bien-fondé, bien qu'évident, ressort des faits de la présente affaire) justifient la conclusion que le MAI avait l'obligation de fiduciaire de réserver, au profit de la bande des Castors, les droits miniers afférents à la R.I. 172, lorsqu'il a vendu les droits de superficie au DTAC en mars 1948. Autrement dit, le MAI aurait dû continuer de louer les droits miniers comme il l'avait fait depuis 1940. Son omission de le faire ne peut s'expliquer que par une «inadvertance».

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The DIA's failure to continue the leasing arrangement could be excused if the Department had received a clear mandate from the Band to sell the mineral rights. As I stated above, the Band's intention leads me to the conclusion that both the surface and mineral rights in I.R. 172 were included in the 1945 surrender. However, the 1945 surrender was "to sell or lease". At no time during the negotiations leading to the 1945 agreement was the sale of the mineral rights discussed specifically. The authorization given encompassed leasing as well as selling. There was therefore no clear authorization from the Band which justified the DIA in departing from its long-standing policy of reserving mineral rights for the benefit of the aboriginals when surface rights were sold. This underscores the critical distinction between the

L'omission du MAI de continuer la location pourrait être excusée si le ministère avait reçu de la bande le mandat clair de vendre les droits miniers. Comme je l'ai affirmé plus tôt, l'intention de la bande m'amène à la conclusion que la cession de 1945 visait à la fois les droits de superficie de la R.I. 172 et les droits miniers y afférents. Cependant, la cession de 1945 était faite aux fins «de vendre ou de louer» les terres visées. À aucun moment au cours des négociations ayant abouti à l'accord de 1945, la question de la vente des droits miniers n'a été discutée de manière explicite. L'autorisation donnée accordait autant le pouvoir de louer les terres visées que celui de les vendre. En conséquence, la bande n'a jamais clairement autorisé le MAI à déroger à sa politique de longue date, qui était de réserver les droits miniers au pro-

Band's intention to include the mineral rights in the 1945 surrender, and an intention of the Band that the mineral rights must be sold and not leased by the Crown. Given these circumstances, the DIA was under a fiduciary duty to continue the leasing arrangement which had been established in the 1940 surrender. It was a violation of the fiduciary duty to sell the mineral rights to the DVLA in 1948.

IV. Limitation of Actions

I agree with McLachlin J. that the breach of fiduciary duty committed by the DIA is not limited to the date when the mineral rights in I.R. 172 were sold to the DVLA. The DIA was under a duty to act in the best interests of the Beaver Band in all of its dealings with the mineral rights in I.R. 172, and as I noted above, this gave rise to a specific duty to lease those mineral rights for the benefit of the Band according to the terms of the 1945 agreement. So long as the DIA had the power, whether under the terms of the surrender instrument, or under the *Indian Act*, to reserve the mineral rights through a leasing arrangement, the DIA was under a fiduciary duty to exercise this power. Thus, like McLachlin J., I think that s. 64 of the Act is very significant, since it gave the DIA the power to revoke an erroneous sale or lease of Indian lands. Because the mineral rights in I.R. 172 were sold inadvertently, s. 64 provided the DIA with the power to reacquire the reserve lands, and thus afforded the DIA a "second chance" to effect a lease of the mineral rights.

In her reasons, McLachlin J. amply demonstrates that between July 15, 1949 and August 9, 1949, the DIA became aware of two facts: (1) the mineral rights in I.R. 172 were potentially of considerable value; and (2) the mineral rights had been sold to the DVLA in 1948. It should also be recalled that the DIA had a long-standing policy of reserving mineral rights for the benefit of aborigi-

fit des autochtones concernés lorsqu'il vendait des droits de superficie. Cette situation fait bien ressortir l'importance de la distinction entre l'intention de la bande d'inclure les droits miniers dans la cession de 1945 et une quelconque intention de la bande de demander à la Couronne de vendre ces droits plutôt que de les louer. Dans ces circonstances, le MAI avait l'obligation de fiduciaire de continuer la location prévue par la cession de 1940. La vente des droits miniers au DTAC en 1948 a constitué une violation de cette obligation de fiduciaire.

IV. Prescription

Je suis d'accord avec le juge McLachlin que le manquement par le MAI à son obligation de fiduciaire n'est pas limité à la date à laquelle les droits miniers afférents à la R.I. 172 ont été vendus au DTAC. Le MAI avait l'obligation d'agir dans l'intérêt de la bande des Castors dans toutes ses opérations concernant les droits miniers afférents à la R.I. 172, ce qui, comme je l'ai déjà mentionné, a donné naissance à l'obligation spécifique de louer ces droits au profit de la bande, conformément aux conditions de l'accord de 1945. Dans la mesure où le MAI détenait, soit en vertu de l'acte de cession soit en vertu de la *Loi des Indiens*, le pouvoir de réserver les droits miniers dans le cadre d'une entente de location, il avait l'obligation de fiduciaire d'exercer ce pouvoir. En conséquence, à l'instar du juge McLachlin, je suis d'avis que l'art. 64 de la Loi est très important, car il conférait au MAI le pouvoir d'annuler les ventes ou affermages de terres indiennes faits par erreur. Étant donné que les droits miniers afférents à la R.I. 172 ont été vendus par inadvertance, l'art. 64 donnait au MAI le pouvoir de se porter de nouveau acquéreur des terres de la réserve, lui accordant ainsi une «deuxième chance» de louer les droits miniers.

Dans ses motifs, le juge McLachlin démontre amplement que, entre le 15 juillet 1949 et le 9 août 1949, le MAI avait appris deux faits: (1) la possibilité que les droits miniers afférents à la R.I. 172 aient une valeur considérable; (2) les droits miniers avaient été vendus au DTAC en 1948. Il faut également se rappeler que le MAI appliquait une politique de longue date, qui consistait à réserver les

nal peoples when selling Indian lands. Given these circumstances, it is rather astonishing that no action was taken by the DIA to determine how the mineral rights could have been sold to the DVLA. Little effort would have been required to detect the error which had occurred.

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As a fiduciary, the DIA was required to act with reasonable diligence. In my view, a reasonable person in the DIA's position would have realized by August 9, 1949 that an error had occurred, and would have exercised the s. 64 power to correct the error, reacquire the mineral rights, and effect a leasing arrangement for the benefit of the Band. That this was not done was a clear breach of the DIA's fiduciary duty to deal with I.R. 172 according to the best interests of the Band.

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Thus, I conclude that the appellants may recover any losses stemming from transfers by the DVLA after August 9, 1949 as such losses fall within the 30-year limitation period imposed by the British Columbia *Limitation Act*, and are not barred by any other provision of that Act as explained in the reasons of McLachlin J.

V. Conclusion

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For the reasons given above, I would allow the appeal in the manner stated by McLachlin J. and remit the action to the Federal Court, Trial Division, for assessment of damages accordingly. I would also allow the cross-appeal for the reasons given by her. In the circumstances, I would award costs to the appellants throughout, and would make no order as to costs on the cross-appeal.

droits miniers au profit des autochtones visés lorsqu'il vendait des terres indiennes. Vu ces circonstances, il est plutôt étonnant que le MAI n'ait pris aucune mesure pour déterminer comment les droits miniers avaient pu être vendus au DTAC. Il aurait suffi de peu pour découvrir l'erreur qui s'était produite.

En tant que fiduciaire, le MAI était tenu d'agir avec diligence raisonnable. À mon avis, une personne raisonnable, placée dans la situation du MAI, se serait aperçue, le 9 août 1949, qu'une erreur avait été commise, et elle aurait exercé le pouvoir que lui conférait l'art. 64 pour la corriger, pour acquérir de nouveau les droits miniers et pour conclure une entente de location au profit de la bande. Cette omission constitue un manquement évident à l'obligation de fiduciaire qu'avait le MAI d'agir dans l'intérêt de la bande lorsqu'il effectuait des opérations touchant la R.I. 172.

En conséquence, je conclus que les appelants peuvent recouvrer les pertes découlant des transferts faits par le DTAC après le 9 août 1949, puisqu'elles se situent à l'intérieur du délai de prescription de 30 ans fixé par la *Limitation Act* de la Colombie-Britannique et que les réclamations présentées à cet égard ne sont pas écartées par quelque autre disposition de cette loi comme l'a expliqué le juge McLachlin dans ses motifs.

V. Conclusion

Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi de la manière indiquée par le juge McLachlin et de renvoyer l'action à la Section de première instance de la Cour fédérale pour qu'elle établisse, en conséquence, les dommages-intérêts. Je suis également d'avis, pour les motifs formulés par le juge McLachlin, d'accueillir le pourvoi incident. Compte tenu des circonstances, j'accorde aux appelants leurs dépens devant toutes les cours, mais je ne rends pas d'ordonnance à cet égard pour ce qui est du pourvoi incident.

The reasons of Cory, McLachlin and Major JJ. were delivered by

MCLACHLIN J. —

I. Introduction

In 1916 the Beaver Indian Band (the “Band”) entered into a treaty with the Crown. In exchange for surrendering aboriginal title, the Band was given a parcel of land near Fort St. John, in North-eastern British Columbia (also referred to as “I.R. 172”). The Band was nomadic, subsisting through trapping and hunting. Its Fort St. John reserve was used as the site of its summer campground. In the winter, the Band trapped further north.

In 1940, the Band surrendered the mineral rights on its Fort St. John reserve to the Crown, in trust to lease for its benefit. In the same year, the Crown issued permits to prospect on the land for the sum of \$1,800 and divided the money among the Band members.

At the end of World War II, the federal government instituted a program under which agricultural land was made available to veterans for settlement. The possibility of making the Fort St. John reserve available under this scheme came under discussion. The reserve contained good agricultural land, and the Indians, who made their living by trapping and hunting rather than agriculture, were not using it for farming. After considerable discussion, the Band agreed to surrender its reserve to the Crown, pursuant to the provisions of the *Indian Act*, R.S.C. 1927, c. 98, so that it could ultimately be distributed under *The Veterans' Land Act*, 1942, S.C. 1942, c. 33. After negotiations between the Department of Indian Affairs (“DIA”), and the Director, *The Veterans' Land Act* (“DVLA”), a price of \$70,000 was agreed upon and paid to the DIA by the DVLA. The DIA used some of this money in 1950 to purchase other lands further north and

Version française des motifs des juges Cory, McLachlin et Major rendus par

LE JUGE MCLACHLIN —

I. Introduction

En 1916, la bande indienne des Castors (la «bande») a conclu un traité avec la Couronne. En échange de la cession de son titre ancestral, la bande a reçu un lopin de terre près de Fort St. John (également appelé «R.I. 172»), dans le nord-est de la Colombie-Britannique. La bande était nomade et vivait du piégeage et de la chasse. Elle utilisait sa réserve de Fort St. John comme camp d'été. Durant l'hiver, la bande faisait du piégeage plus au nord.

En 1940, la bande a cédé à la Couronne, en fiducie, les droits miniers afférents à sa réserve de Fort St. John pour que celle-ci les loue au profit de la bande. La même année, la Couronne a délivré des permis de prospection visant ces terres pour la somme de 1 800 \$, qu'elle a répartie entre les membres de la bande.

À la fin de la Seconde Guerre mondiale, le gouvernement fédéral a établi un programme visant à mettre des terres agricoles à la disposition des anciens combattants pour qu'ils s'y établissent. La possibilité d'appliquer ce régime à la réserve de Fort St. John a été discutée, car cette dernière contenait de bonnes terres agricoles et les Indiens, qui vivaient du piégeage et de la chasse plutôt que de l'agriculture, ne les utilisaient pas à des fins agricoles. Après de longues discussions, la bande a accepté de céder sa réserve à la Couronne, conformément aux dispositions de la *Loi des Indiens*, S.R.C. 1927, ch. 98, pour que les terres en question puissent par la suite être attribuées en vertu de la *Loi de 1942 sur les terres destinées aux anciens combattants*, S.C. 1942, ch. 33. Au terme de négociations, le ministère des Affaires indiennes («MAI») et le Directeur de la *Loi sur les terres destinées aux anciens combattants* («DTAC») ont convenu du prix de 70 000 \$, et cette somme a été versée au MAI par le DTAC. En 1950, le MAI a utilisé une partie de cette somme pour acquérir d'autres terres se trouvant plus au nord, plus près

nearer to the Band's trap lines, which became the Band's new reserves.

des sentiers de piégeage de la bande, et qui sont devenues la nouvelle réserve de la bande.

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Between 1948 and 1956, the land which had formerly been the Band's Fort St. John reserve was sold to veterans by way of agreements for sale. In 1948 gas was discovered about 40 miles southeast of the reserve. In 1949 oil companies expressed interest in exploring the land for oil and gas. The question arose of who held the mineral rights to the property, the Band or the veterans? Correspondence ensued between the DIA and the DVLA on the subject. It was concluded that the DVLA held the mineral rights, having obtained them because they had not been reserved from the transfer of the reserve to the DVLA in 1948. In the 1960s it was concluded that the failure to reserve the mineral rights was by "inadvertence". In 1952 the veterans entered into a pooling arrangement with respect to the mineral rights. In 1976, oil and gas were discovered. The revenue from this discovery (an amount not determined in the current proceedings, but estimated by the trial judge to be roughly \$300 million) went to the veterans or their assigns.

Entre 1948 et 1956, les terres qui constituaient anciennement la réserve de la bande à Fort St. John ont été cédées à des anciens combattants par actes de vente. En 1948, on a découvert du gaz à environ 40 milles au sud-est de la réserve. En 1949, des sociétés pétrolières se sont montrées intéressées à faire de l'exploration en vue d'y trouver du pétrole et du gaz. S'est alors posée la question de savoir qui était titulaire des droits miniers afférents au bien-fonds. Était-ce la bande ou les anciens combattants? Il y a eu échange de correspondance entre le MAI et le DTAC à cet égard. Il a été décidé que le DTAC était titulaire des droits miniers, et qu'il les avait obtenus parce qu'ils n'avaient pas été réservés au moment du transfert de la réserve au DTAC en 1948. Au cours des années 1960, on a conclu que c'est par suite d'une «inadvertance» que les droits miniers n'avaient pas été réservés. En 1952, les anciens combattants ont conclu une convention de mise en commun relativement aux droits miniers. En 1976, on a découvert du pétrole et du gaz. Le revenu tiré de cette découverte (montant indéterminé en l'espèce, mais que le juge de première instance a évalué à environ 300 millions de dollars) est allé aux anciens combattants ou à leurs ayants droit.

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In 1977, the Band was divided into the Blueberry River Band and the Doig River Band (the "Bands"). In the same year, a concerned officer of the DIA was moved to inquire into how the Band had lost the mineral rights. He brought the matter to the attention of the Bands and took them to see a lawyer. On September 18, 1978 the writ commencing these proceedings was filed. The Bands claimed damages against the Crown for allowing the Band to make an improvident surrender of the reserve, and once surrendered, for disposing of it under value. They also claimed damages for permitting the transfer of the mineral rights to the DVLA and thence to the veterans.

En 1977, la bande s'est scindée en deux: la bande indienne de la rivière Blueberry et la bande indienne de la rivière Doig (les «bandes»). La même année, un fonctionnaire du MAI qui s'intéressait à la question a décidé d'enquêter sur la façon dont la bande avait perdu les droits miniers. Il a porté la question à l'attention des bandes et les a emmenées consulter un avocat. Le bref introduisant la présente instance a été déposé le 18 septembre 1978. Les bandes y réclamaient des dommages-intérêts contre la Couronne, lui reprochant d'une part d'avoir autorisé la bande à faire une cession inconsidérée de la réserve et, une fois la cession réalisée, d'avoir aliéné celle-ci à un prix inférieur à sa valeur, et d'autre part d'avoir permis le transfert des droits miniers, d'abord au DTAC puis aux anciens combattants.

Addy J. at trial dismissed all the Bands' claims except for the sale of the surface rights to the DVLA, which he found to be under value: [1988] 3 F.C. 20 (abridged version), 14 F.T.R. 161, [1988] 1 C.N.L.R. 73. The majority of the Federal Court of Appeal, Isaac C.J. dissenting, dismissed the appeal and the Crown's cross-appeal: [1993] 3 F.C. 28, 100 D.L.R. (4th) 504, 151 N.R. 241, [1993] 2 C.N.L.R. 20. The Bands appeal to this Court, and the Crown cross-appeals on the issue of sale under value.

The appeal raises many issues relating to the duties on the Crown, the alleged breaches of those duties and whether the claims are statute-barred. I propose to consider them under the following headings: (1) Pre-surrender duties and breaches; (2) Post-surrender duties and breaches regarding surface rights; (3) Post-surrender duties and breaches regarding mineral rights; and (4) Limitations issues.

II. Analysis

(1) *Pre-surrender Duties and Breaches*

The Bands argue that the Crown was under a fiduciary obligation prior to the 1945 surrender of the land to ensure that the Band did not enter into the surrender improvidently. This raises the issue of the nature of the duty owed by the Crown when a band wishes to surrender its reserve. The Bands admit that in 1945 they wished to surrender the Fort St. John reserve in order to obtain other lands closer to its trap lines, and the remaining cash lump sum. They contend that the Crown should not have allowed them to make this surrender since, viewed in the long term, surrender was not in their best interest.

Au procès, le juge Addy a rejeté toutes les réclamations des bandes sauf celle concernant la vente des droits de superficie au DTAC, droits qui, a-t-il conclu, avaient été vendus à un prix inférieur à leur valeur réelle: [1988] 3 C.F. 20 (version abrégée), 14 F.T.R. 161, [1988] 1 C.N.L.R. 73. La Cour d'appel fédérale a, à la majorité, le juge en chef Isaac étant dissident, rejeté l'appel ainsi que l'appel incident de la Couronne: [1993] 3 C.F. 28, 100 D.L.R. (4th) 504, 151 N.R. 241, [1993] 2 C.N.L.R. 20. Les bandes se pourvoient auprès de notre Cour, et la Couronne interjette un pourvoi incident sur la question de la vente des droits de superficie à un prix inférieur à leur valeur réelle.

Le pourvoi soulève de nombreuses questions en ce qui a trait aux obligations de la Couronne, aux prétendus manquements à ces obligations et au fait de savoir si les réclamations sont prescrites. Je me propose d'examiner ces questions sous les rubriques suivantes: (1) les obligations antérieures à la cession et les manquements à ces obligations; (2) les obligations relatives aux droits de superficie et postérieures à la cession, et les manquements à ces obligations; (3) les obligations relatives aux droits miniers et postérieures à la cession, et les manquements à ces obligations; (4) les questions relatives à la prescription des réclamations.

II. Analyse

(1) *Les obligations antérieures à la cession et les manquements à ces obligations*

Les bandes prétendent que, avant la cession des terres en 1945, la Couronne avait l'obligation de fiduciaire de s'assurer que la bande ne conclue pas de cession inconsidérée. Cet argument soulève la question de la nature de l'obligation qui incombe à la Couronne lorsqu'une bande désire céder sa réserve. Les bandes admettent que, en 1945, elles désiraient céder la réserve de Fort St. John afin d'obtenir d'autres terres situées plus près de leurs sentiers de piégeage ainsi qu'une somme forfaitaire pour le solde du prix de vente. Elles affirment toutefois que la Couronne n'aurait pas dû leur permettre de faire cette cession puisque, à long terme, celle-ci n'était pas dans leur intérêt.

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(a) Whether the *Indian Act* Imposed a Duty on the Crown to Prevent the Surrender of the Reserve

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The first issue is whether the *Indian Act* imposed a duty on the Crown to refuse the Band's surrender of its reserve. The answer to this question is found in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, where the majority of this Court, *per* Dickson J. (as he then was), held that the duty on the Crown with respect to surrender of Indian lands was founded on preventing exploitative bargains.

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The Bands contend that the *Indian Act* imposed a duty on the Crown to refuse to allow the Band to surrender its lands in light of its interest in the land and the paternalistic scheme of the *Indian Act*. When a reserve is granted to a band, as was done here in 1916, title does not pass to the band. Rather the Crown holds the fee simple title. The Crown thus possesses power with respect to those lands and must, it is argued, exercise that power as a fiduciary on behalf of the band. This is reinforced by the paternalistic tone of the *Indian Act*, which it is argued imposes a duty upon the Crown to protect the Indians from themselves and prevent them from making foolish decisions with respect to their land. This is why, it is submitted, title remains in the Crown. The Crown, on the other hand, paints the Band as an independent agent with respect to the surrender of its lands.

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My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision

a) La *Loi des Indiens* imposait-elle à la Couronne l'obligation d'empêcher la cession de la réserve?

Il s'agit d'abord de déterminer si la *Loi des Indiens* imposait à la Couronne l'obligation de refuser que la bande cède sa réserve. La réponse à cette question se trouve dans l'arrêt *Guerin c. La Reine*, [1984] 2 R.C.S. 335, où le juge Dickson (plus tard Juge en chef du Canada) a statué, au nom des juges de la majorité de la Cour, que le fondement de l'obligation de la Couronne relativement à la cession des terres des Indiens était la prévention des marchés abusifs.

Les bandes prétendent que la *Loi des Indiens* imposait à la Couronne l'obligation de refuser à la bande l'autorisation de céder ses terres, vu la nature de l'intérêt de la bande sur les terres et le caractère paternaliste du régime établi par la *Loi des Indiens*. Lorsqu'une réserve est accordée à une bande, comme ce fut le cas en l'espèce en 1916, le titre n'est pas transmis à la bande visée, mais c'est plutôt la Couronne qui détient le titre en fief simple. La Couronne est donc investie de certains pouvoirs à l'égard de ces terres et elle doit, fait-on valoir, les exercer en qualité de fiduciaire, pour le compte de la bande concernée. Ce fait est renforcé par le ton paternaliste de la *Loi des Indiens*, qui, allègue-t-on, impose à la Couronne l'obligation de protéger les Indiens contre eux-mêmes et de les empêcher de prendre des décisions imprudentes relativement à leurs terres. Voilà pourquoi, prétend-on, la Couronne conserve le titre de propriété. Cette dernière, quant à elle, décrit la bande comme un acteur indépendant pour ce qui est de la cession de ses terres.

À mon avis, les dispositions de la *Loi des Indiens* relatives à la cession des réserves des bandes établissent un équilibre entre les deux pôles extrêmes que constituent l'autonomie et la protection. Il fallait que la bande visée consente à la cession de sa réserve, à défaut de quoi celle-ci ne pouvait pas être vendue. Par ailleurs, il fallait également que la Couronne, par l'intermédiaire du gouverneur en conseil, consente à la cession. L'exigence que la Couronne consente à la cession n'avait pas pour objet de substituer la décision de

for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin* (at p. 383):

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.

It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident — a decision that constituted exploitation — the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.

Subject to the issue of the value of the reserve and the matter of mineral rights, which I deal with later, the evidence does not support the view that the surrender of the Fort St. John reserve was foolish, improvident or amounted to exploitation. In fact, viewed from the perspective of the Band at the time, it made good sense. The measure of control which the Act permitted the Band to exercise over the surrender of the reserve negates the contention that absent exploitation, the Act imposed a fiduciary obligation on the Crown with respect to the surrender of the reserve.

(b) Whether the Circumstances of the Case Gave Rise to a Fiduciary Duty on the Crown with Respect to the Surrender

If the *Indian Act* did not impose a duty on the Crown to block the surrender of the reserve, the further question arises of whether on the particular facts of this case a fiduciary relationship was superimposed on the regime for alienation of Indian lands contemplated by the *Indian Act*.

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2

cette dernière à celle des bandes, mais plutôt d'empêcher que celles-ci se fassent exploiter. Le juge Dickson a décrit ainsi cette exigence dans *Guerin* (à la p. 383):

Cette exigence d'une cession vise manifestement à interposer Sa Majesté entre les Indiens et tout acheteur ou locataire éventuel de leurs terres, de manière à empêcher que les Indiens se fassent exploiter.

Il s'ensuit que, en vertu de la *Loi des Indiens*, les bandes avaient le droit de décider si elles voulaient céder leur réserve, et que leur décision devait être respectée. Par ailleurs, si la décision de la bande concernée était imprudente ou inconsidérée — et équivalait à de l'exploitation — la Couronne pouvait refuser son consentement. Bref, l'obligation de la Couronne se limitait à prévenir les marchés abusifs.

Sous réserve de la question de la valeur de la réserve et de la question des droits miniers, que j'examine plus loin, la preuve n'étaye pas l'argument que la cession de la réserve de Fort St. John était imprudente ou inconsidérée, ou qu'elle équivalait à de l'exploitation. De fait, du point de vue de la bande, à l'époque, cette décision se défendait. L'étendue du contrôle que la Loi permettait à la bande d'exercer sur la cession de la réserve réfute l'argument que, en l'absence d'exploitation, la Loi imposait une obligation de fiduciaire à la Couronne relativement à la cession de la réserve.

(b) Les circonstances de l'espèce ont-elles donné naissance à une obligation de fiduciaire de la Couronne à l'égard de la cession?

Si la *Loi des Indiens* n'imposait pas à la Couronne l'obligation de bloquer la cession de la réserve, se pose alors la question de savoir si, compte tenu des faits particuliers de l'espèce, des rapports de fiduciaire ne venaient pas s'ajouter au régime d'aliénation des terres indiennes établi par la *Loi des Indiens*.

En règle générale, une obligation de fiduciaire prend naissance lorsqu'une personne possède un pouvoir unilatéral ou discrétionnaire à l'égard d'une question touchant une autre personne «particulièrement vulnérable»: voir *Frame c. Smith*,

S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

[1987] 2 R.C.S. 99; *Norberg c. Wynrib*, [1992] 2 R.C.S. 226, et *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377. La partie vulnérable est tributaire de la partie qui possède le pouvoir unilatéral ou discrétionnaire, qui, à son tour, est obligée d'exercer ce pouvoir uniquement au profit de la partie vulnérable. La personne qui cède (ou, plus souvent, qui se trouve dans la situation où quelqu'un d'autre a cédé pour elle) son pouvoir sur quelque chose à une autre personne escompte que la personne à qui le pouvoir en question est cédé l'exercera avec loyauté et diligence. Cette notion est la pierre d'assise de l'obligation de fiduciaire.

The evidence supports the view that the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. It does not support the contention that the Band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown, as attested by the following findings of Addy J. (at pp. 66-67 F.C.):

Il ressort de la preuve que la bande escomptait que la Couronne la renseignerait sur les diverses solutions qui s'offraient à elle — et sur les conséquences prévisibles de ces solutions — relativement à la cession de la réserve de Fort St. John et à l'acquisition de nouvelles terres qui conviendraient mieux à son mode de vie fondé sur le piégeage et la chasse. Comme l'attestent les conclusions suivantes du juge Addy (aux pp. 66 et 67 C.F.), la preuve n'étaye pas la prétention que la bande avait renoncé à son pouvoir de décision quant à la cession de la réserve ou qu'elle s'en était remis à la Couronne à cet égard:

1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
2. That they had discussed the matter previously on at least three formal meetings where representatives of the Department were present;
3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;
4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
5. That [Crown representatives had not] attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter appears to have been dealt with most conscientiously by the departmental representatives concerned;

1. Les demandeurs savaient depuis longtemps qu'une cession absolue de la R.I. 172 était envisagée;
2. Ils en avaient discuté auparavant au moins à trois reprises à l'occasion d'assemblées officielles tenues en présence de représentants du Ministère;
3. Contrairement à ce que prétendent les demandeurs, il serait absurde de conclure que les Indiens n'auraient pas débattu la question entre eux à de nombreuses occasions et de façon informelle au sein des groupes familiaux et des groupes de chasse;
4. À l'assemblée de la cession elle-même, la question avait fait l'objet d'un débat complet. Les Indiens en avaient discuté entre eux et avec les représentants du Ministère avant la signature de l'acte de cession;
5. [Les représentants de la Couronne n'avaient pas] essayé d'influencer les demandeurs soit avant, soit pendant l'assemblée de la cession. Au contraire, la question semble avoir été résolue de façon très consciencieuse par les représentants du Ministère concernés;

6. That Mr. Grew [the local Indian agent] fully explained to the Indians the consequences of a surrender;

7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased from the proceeds;

8. That the said alternate sites had already been chosen by them, after mature consideration.

I conclude that the evidence does not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band.

(c) Whether the Surrender Was Invalid for Failure to Comply with Section 51 of the *Indian Act*

Section 51(1) of the 1927 *Indian Act* indicates that no surrender shall be valid unless the surrender is assented to by the majority of male members of the band at a meeting summoned for the purpose. Subsections (3) and (4) then provide:

3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

These subsections were not complied with in obtaining the 1945 surrender from the Band. The non-compliance was technical. The chiefs should have personally certified the surrender on oath. Instead, they told the commissioner that they

6. M. Grew [l'agent des Indiens pour l'endroit] avait expliqué aux Indiens toutes les conséquences d'une cession;

7. Même s'ils n'ont pas saisi exactement la nature du droit, en *common law*, qu'ils cédaient, ils en étaient probablement incapables, ils ont bel et bien compris, dans les faits, que par la cession ils renonçaient pour toujours à tous leurs droits sur la R.I. 172 en échange de l'argent qui serait versé à leur crédit après la vente de la réserve, et d'autres terrains situés près de leurs sentiers de piégeage qui seraient achetés avec le produit de la vente;

8. Lesdits terrains avaient déjà été choisis par les Indiens, après mûre réflexion.

Je conclus que la preuve n'appuie pas l'existence d'une obligation de fiduciaire qui aurait incombé à la Couronne avant la cession de la réserve par la bande.

c) La cession était-elle invalide en raison de l'inobservation de l'art. 51 de la *Loi des Indiens*?

Aux termes du par. 51(1) de la *Loi des Indiens* de 1927, une cession n'est valide que si elle a été ratifiée par la majorité des hommes de la bande à une assemblée convoquée pour en délibérer. Les paragraphes (3) et (4) sont ainsi rédigés:

3. Le fait que la cession ou rétrocession a été consentie par la bande, à ce conseil ou à cette assemblée, doit être attesté sous serment par le surintendant général ou par le fonctionnaire qu'il a autorisé à assister à ce conseil ou à cette assemblée, et par l'un des chefs ou des anciens qui y a assisté et y a droit de vote, devant toute personne autorisée à faire prêter serment et ayant juridiction dans l'endroit où le serment est prêté.

4. Après que ce consentement a été ainsi attesté, comme susdit, la cession ou rétrocession est soumise au gouverneur en son conseil, pour qu'il l'accepte ou la refuse.

On ne s'est pas conformé à ces paragraphes pour obtenir de la bande la cession de 1945. Il ne s'est agi là, toutefois, que d'un simple vice de forme. En effet, les chefs auraient dû attester personnellement, sous serment, qu'ils consentaient à la ces-

wished to surrender, which the commissioner certified on oath.

sion. Au lieu de cela, ils ont plutôt dit au commissaire qu'ils désiraient céder la réserve, et c'est ce dernier qui a attesté ce fait sous serment.

42 This raises the question of whether the ss. 51(3) and 51(4) are mandatory or merely directory. Addy J. and Stone J.A. below held that despite the use of the word "shall", the provisions were directory rather than mandatory, relying on *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.), which summarized the factors relevant to determining whether a statutory direction is mandatory or directory as follows (at p. 175):

Cela soulève la question de savoir si les par. 51(3) et (4) ont un caractère soit impératif, soit simplement supplétif ou directif. Le juge Addy de la Section de première instance de la Cour fédérale et le juge Stone de la Cour d'appel fédérale ont statué que malgré l'utilisation du mot *shall* («doit» ou l'indicatif présent, selon le cas, dans le texte français) les dispositions avaient un caractère supplétif et non pas impératif, appuyant leur conclusion sur l'arrêt *Montreal Street Railway Co. c. Normandin*, [1917] A.C. 170 (C.P.), dans lequel on a résumé ainsi (à la p. 175) les facteurs servant à déterminer si une directive contenue dans une disposition législative a un caractère soit impératif, soit supplétif ou directif:

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only

[TRADUCTION] Lorsque les dispositions d'une loi se rapportent à l'exécution d'un devoir public et que, dans un cas donné, déclarer nuls et non avenue des actes accomplis par manquement à ce devoir entraînerait, pour des personnes qui n'ont aucun contrôle sur ceux chargés de ce devoir, une injustice ou des inconvénients généraux graves, et en même temps n'aiderait pas à atteindre l'objet principal visé par le législateur, on conclut habituellement que ces dispositions ne sont que directives

Addy J. concluded that to read the provisions in a mandatory way would not promote the main object of the legislation, which is to ensure that the sale of the reserve is made pursuant to the wishes of the Band. Stone J.A. agreed. This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41.

Le juge Addy a conclu que le fait de reconnaître à ces dispositions un caractère impératif ne favoriserait pas la réalisation de l'objet principal de la loi, qui est de faire en sorte que la vente de la réserve se fasse selon les désirs de la bande. Le juge Stone a souscrit à cette conclusion. Depuis, notre Cour a jugé que l'objet de la loi ainsi que la conséquence d'une décision dans un sens ou dans l'autre sont les considérations les plus importantes pour déterminer si une directive a un caractère impératif ou directif: *Colombie-Britannique (Procureur général) c. Canada (Procureur général)*, [1994] 2 R.C.S. 41.

43 The true object of ss. 51(3) and 51(4) of the *Indian Act* was to ensure that the surrender was validly assented to by the Band. The evidence, including the voter's list, in the possession of the DIA amply established valid assent. Moreover, to read the provisions as mandatory would work seri-

L'objet véritable des par. 51(3) et (4) de la *Loi des Indiens* était de faire en sorte que le consentement de la bande à la cession soit valide. Les éléments de preuve en la possession du MAI, notamment la liste des personnes ayant participé au vote, établissaient amplement l'existence d'un consente-

ous inconvenience, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and then certifying the assent. I therefore agree with the conclusion of the courts below that the “shall” in the provisions should not be considered mandatory. Failure to comply with s. 51 of the *Indian Act* therefore does not defeat the surrender.

(d) Conclusions on Pre-surrender Duty and Breach

I conclude that the Bands have not established that the Crown wrongly failed to prevent the surrender of the Fort St. John reserve in 1945.

(2) *Post-surrender Duties and Breaches Regarding Surface Rights*

The 1945 surrender conveyed the Band’s lands to the Crown “in trust to sell or lease the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people” (emphasis added). The Crown concedes that this surrender imposed a fiduciary duty on the Crown with respect to the subsequent sale or lease of the lands: *Guerin, supra*. The only issue is whether the Crown breached that duty when in 1948 it sold the lands to the DVLA for \$70,000.

The duty imposed upon the Crown by the terms of surrender (converted to a statutory duty by s. 54 of the Act) was broad. It extended not only to the monetary aspects of the transaction, but to whether the arrangement would be conducive to the welfare of the Indians in the broader sense. The Bands

ment valide. De plus, interpréter ces dispositions comme étant impératives entraînerait de graves inconvénients, non seulement dans le cas où la cession est contestée plus tard, mais également dans tous ceux où on ne s’est pas conformé à la disposition, car il faudrait alors que la bande tienne une nouvelle assemblée, consente à la cession et atteste ce consentement. Je suis donc d’accord avec la conclusion des tribunaux inférieurs que le mot «shall» («doit» ou l’indicatif présent, selon le cas, dans le texte français) utilisé dans les dispositions en cause ne devrait pas être considéré comme ayant un sens impératif. L’inobservation de l’art. 51 de la *Loi des Indiens* n’invalide donc pas la cession.

d) Les conclusions relatives à l’existence d’une obligation avant la cession et au manquement à cette obligation

Je conclus que les bandes n’ont pas établi que la Couronne a eu tort de ne pas empêcher la cession de la réserve de Fort St. John en 1945.

(2) *Les obligations relatives aux droits de superficie et postérieures à la cession, et les manquements à ces obligations*

La cession de 1945 a eu pour effet de transférer les terres de la bande à la Couronne [TRADUCTION] «en fiducie aux fins de vendre ou de louer lesdites terres à une ou plusieurs personnes et selon les conditions que le gouvernement du Canada peut juger les plus appropriées pour assurer notre bien-être et celui de notre peuple» (je souligne). La Couronne admet que cette cession lui a imposé une obligation de fiduciaire en ce qui concerne la vente ou la location subséquentes des terres visées: *Guerin*, précité. La seule question qui se pose est de déterminer si la Couronne a manqué à cette obligation lorsque, en 1948, elle a vendu les terres au DTAC pour la somme de 70 000 \$.

L’obligation imposée à la Couronne par les conditions de la cession (obligation qui est devenue une obligation légale par l’effet de l’art. 54 de la Loi) était considérable. Elle visait non seulement les aspects financiers de l’opération, mais également la question de savoir si l’entente assurerait,

argue that the Crown breached this duty by: (a) failing to consider leasing rather than selling the land; (b) selling the land under value; and (c) not restoring the reserve to the Band after surrender in view of its impoverished situation. I will consider each allegation in turn.

(a) Failure to Consider Leasing Rather than Sale of the Surface Rights

The trial judge held that the Crown considered the best interests of the Band in disposing of the land and that, viewed from the perspective of the time, the sale of the land to the Department of Veterans Affairs was in fact in the best interests of the Band. He held that the Band was interested in obtaining reserves nearer to its hunting and trapping grounds. If the surface rights had been leased rather than sold, the Band might not have had enough money up front to purchase replacement lands.

Against this, the Bands point to policy statements of the DIA in the early 1940's which suggest that the DIA would have preferred to lease unused Indian interests rather than sell them, so that the land would be available for use by the Indians and their descendants in the future. The Bands claim that the DIA failed to follow its own policy. The Bands also rely on the fact that the Director of Indian Affairs, Dr. McGill, wrote to the Deputy Minister in August 1944, strongly advising against the sale of the lands and suggesting that the annoyance of seeing good agricultural land unused could be assuaged by leasing it to suitable tenants, if available.

The evidence is clear that the government's general policy was against selling Indian lands. The evidence is also clear that a debate took place over whether the Fort St. John reserve, which the Crown now held upon trust for the Indians, should be sold. In the end, the initial inclination of the

au sens large du terme, le bien-être des Indiens. Les bandes prétendent que la Couronne a manqué à cette obligation: a) en n'envisageant pas de louer les terres plutôt que de les vendre; b) en vendant les terres à un prix inférieur à leur valeur; c) en ne remettant pas la réserve à la bande, après la cession, vu l'état d'appauvrissement dans lequel se trouvait la bande. Je vais examiner chacune de ces allégations à tour de rôle.

a) L'omission d'envisager la location des droits de superficie plutôt que leur vente

Le juge de première instance a conclu que la Couronne a tenu compte de l'intérêt de la bande en aliénant les terres et que, avec le recul du temps, la vente des terres au ministère des Affaires des anciens combattants était effectivement dans l'intérêt de la bande. Il a jugé que cette dernière était intéressée à obtenir des terres situées plus près de ses territoires de chasse et de piégeage. Si les droits de superficie avaient été loués plutôt que vendus, la bande n'aurait peut-être pas eu, sur le coup, suffisamment d'argent pour acheter des terres de remplacement.

À l'encontre de ce point, les bandes renvoient aux énoncés de politique du MAI du début des années 1940, énoncés qui tendent à indiquer que le MAI préférerait louer les intérêts fonciers non utilisés des Indiens plutôt que de les vendre, de sorte que les Indiens et leurs descendants disposent, dans le futur, de terres qu'ils pourraient utiliser. Les bandes prétendent que le MAI n'a pas suivi sa propre politique. Elles invoquent également le fait que le directeur des Affaires indiennes, M. McGill, a écrit au sous-ministre, en août 1944, et lui a fortement déconseillé de vendre les terres, tout en lui indiquant qu'il était possible d'apaiser le mécontentement que causait le fait que de bonnes terres agricoles n'étaient pas utilisées en louant ces terres à des occupants convenables, s'il s'en trouvait.

Il ressort clairement de la preuve que la politique générale du gouvernement était de ne pas vendre les terres des Indiens. La preuve indique aussi de façon claire que des discussions ont eu lieu afin de décider si la réserve de Fort St. John, que la Couronne détenait alors en fiducie pour les

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DIA not to sell the reserve was outweighed by two factors: the desire of the Band to get money for the purchase of substitute lands nearer their trap lines; coupled with political pressure for release of the lands for agricultural purposes. Dr. McGill pointed out that although the Band did not use the reserve for agriculture, it might be compelled to use it in the future due to dwindling fur supplies. The Deputy Minister responded that he agreed that any suggestion to dispose of Indian lands "should be most carefully considered before any final decision is reached", and wrote to the Canadian Legion (interested in acquiring the land for veterans) suggesting an alternative plan in which only a portion of the reserve would be sold. A non-surrender lease, pursuant to s. 93(3) of the 1927 *Indian Act*, was also considered by the Superintendent of Reserves and Trusts in 1945. Throughout this time, the DIA took the view that it should bring no pressure to bear on the Band to promote the sale.

Armed with these instructions, the local agent, Grew, visited the Band. He reported back that the Band was willing to surrender the land for sale or lease provided that they would be supplied with other lands, nearer their trap lines. He also suggested that it was unlikely that the Band would ever make use of the reserve for farming, as they were trappers. The Director of Indian affairs (then a Mr. Hoey) wrote back that in addition to political pressure to open the lands for "ordinary settlement", the cash received as a result of the sale would be "for many years of more practical value to the Indians" than the land of the reserve. Once Dr. McGill left office, the general policy of maintaining the Fort St. John reserve for the Band appears to have succumbed to political demands for farm land. This, coupled with the apparent desire of the Band to exchange their more southern

Indiens, devait être vendue. En fin de compte, deux facteurs ont amené le MAI à changer son idée première, qui était de ne pas vendre la réserve: le désir de la bande d'obtenir de l'argent pour acheter des terres de remplacement situées plus près de ses sentiers de piégeage, et les pressions politiques qui étaient exercées en vue de la cession des terres à des fins agricoles. Monsieur McGill a signalé que, même si la bande n'utilisait pas la réserve à de telles fins, elle pourrait être contrainte de le faire dans le futur en raison de la diminution des populations d'animaux à fourrure. Le sous-ministre a répondu qu'il était d'accord que toute proposition de vente de terres indiennes [TRADUCTION] «devrait être étudiée très attentivement avant qu'une décision définitive soit prise», et il a écrit à la Légion canadienne (qui était intéressée à acquérir les terres pour les anciens combattants) et proposé une solution de rechange, soit la vente d'une partie seulement de la réserve. Le surintendant des réserves et des fidéicommissaires a également envisagé, en 1945, la possibilité d'affermier les terres, sans qu'il y ait eu rétrocession, en vertu du par. 93(3) de la *Loi des Indiens* de 1927. Pendant toute cette période, le MAI a jugé bon de ne pas exercer de pressions sur la bande en vue de l'inciter à vendre les terres.

Muni de ces instructions, Grew, l'agent des Indiens pour l'endroit, a rendu visite à la bande. Dans son rapport, il a relaté que celle-ci désirait céder les terres afin qu'elles soient vendues ou louées, pourvu qu'on lui en fournisse d'autres situées plus près de ses sentiers de piégeage. Il a également affirmé qu'il était peu probable que la bande se serve jamais de la réserve à des fins agricoles, car ses membres étaient des trappeurs. Le directeur des Affaires indiennes (à l'époque un certain M. Hoey) a répondu que, outre le fait que des pressions politiques étaient exercées pour que l'on ouvre ces terres à la [TRADUCTION] «colonisation ordinaire», le produit de la vente serait «pendant bon nombre d'années plus utile aux Indiens» que les terres de la réserve. Après que M. McGill eut quitté son poste, la politique générale, qui était de conserver la réserve de Fort St. John pour la bande, semble avoir cédé le pas aux demandes insistantes qui étaient formulées, sur le plan poli-

reserve for other lands nearer their trap lines, resulted in the sale of the land to the DVLA.

tique, en vue d'obtenir des terres agricoles. Ce fait, conjugué au désir manifeste de la bande d'échanger sa réserve qui se trouvait plus au sud pour d'autres terres situées plus près de ses sentiers de piégeage, a entraîné la vente des terres visées au DTAC.

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In the face of this evidence, it cannot be said that Addy J. erred in concluding that the sale of the land to the DVLA was not in breach of the Crown's fiduciary duty. A number of options — lease, partial sale and outright sale — were considered. The interests and wishes of the Band were given utmost consideration throughout. The choice that was made — to sell the land — possessed the advantage of allowing the Band to get other lands nearer its trap lines. At the time, that was a defensible choice. Indeed, it can be argued that the sale of the surface rights was the only alternative that met the Band's apparent need to obtain land nearer its trap lines. In retrospect, with the decline of trapping and the discovery of oil and gas, the decision may be argued to have been unfortunate. But at the time, it may be defended as a reasonable solution to the problems the Band faced.

À la lumière de ces éléments de preuve, il est impossible d'affirmer que le juge Addy a fait erreur en concluant que la vente des terres au DTAC ne constituait pas un manquement par la Couronne à son obligation de fiduciaire. Un certain nombre de possibilités — location, vente partielle et vente en bloc — ont été envisagées. On a accordé la plus grande attention aux intérêts et aux désirs des Indiens avant de décider. La solution retenue — en l'occurrence la vente des terres — avait l'avantage de permettre à la bande d'obtenir d'autres terres situées plus près de ses sentiers de piégeage. À l'époque, il s'agissait d'un choix défendable. De fait, on peut prétendre que la vente des droits de superficie était la seule solution qui répondait au besoin manifeste de la bande d'obtenir des terres plus près de ses sentiers de piégeage. Avec le recul du temps, compte tenu du déclin du piégeage et de la découverte de pétrole et de gaz, il est possible d'affirmer que la vente des terres s'est révélée une décision malencontreuse. Toutefois, à l'époque, elle pouvait se défendre en tant que solution raisonnable aux problèmes auxquels la bande faisait alors face.

(b) Sale at Undervalue

b) La vente des terres à un prix inférieur à leur valeur

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The DIA received an appraisal of the land which placed its value at approximately \$93,160. The DVLA's appraisals suggested a lower value. Ultimately, the DIA sold the land to the DVLA *en bloc* for \$70,000. The trial judge accepted the Bands' contention that the Crown breached its fiduciary duty by selling the land under value, since it sold at less than value suggested by its appraisers. He stated (at p. 76 F.C.):

Le MAI avait reçu une évaluation fixant la valeur des terres à approximativement 93 160 \$, alors que les évaluations du DTAC suggéraient une valeur moindre. En fin de compte, le MAI a vendu les terres en bloc au DTAC pour 70 000 \$. Le juge de première instance a retenu l'argument des bandes que la Couronne a manqué à son obligation de fiduciaire en vendant les terres à un prix inférieur à leur valeur, puisqu'elle les a vendues à un prix inférieur à la valeur suggérée par ses évaluateurs. Il a déclaré ceci (à la p. 76 C.F.):

The defendant had a duty to convince the Court that it could not reasonably have been expected to obtain a bet-

Il incombait à la défenderesse de convaincre la Cour qu'elle ne pouvait raisonnablement s'attendre à obtenir

ter price. There was no evidence as to what other offers were sought and what efforts were made to obtain a better price elsewhere. Since the onus of establishing that a full and fair price was in fact obtained in March 1948 has not been discharged by the defendant, I find that the latter was guilty of a breach of its fiduciary duty towards the plaintiffs in that regard.

The Crown appeals this finding, arguing first that the onus was on the Bands to show that the sale was under value, and second, that the price of \$70,000 was unreasonable.

The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J. C. Shepherd, *The Law of Fiduciaries* (1981), at pp. 157-59; and A. H. Oosterhoff: *Text, Commentary and Cases on Trusts* (4th ed. 1992). The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.

More problematic is the trial judge's conclusion that the Crown failed to discharge the onus of showing the price of \$70,000 to be reasonable. While the DIA received a higher appraisal, there were also appraisals giving lower value to the land. In fact, there appears to have been no alternate market for the land at the time, which might be expected to make accurate appraisal difficult. The evidence reveals the price was arrived at after a course of negotiations conducted at arm's length between the DIA and the DVLA.

This evidence does not appear to support the trial judge's conclusion that the Crown was in breach of its fiduciary obligation to sell the land at a fair value. In finding a breach despite this evi-

un meilleur prix. Aucune preuve n'a été présentée pour établir que d'autres offres avaient été recherchées ni pour montrer que des efforts avaient été faits pour obtenir un meilleur prix ailleurs. Comme la défenderesse ne s'est pas acquittée du fardeau d'établir qu'un prix équitable avait en réalité été obtenu en mars 1948, je conclus qu'elle a manqué sur ce point à ses obligations de fiduciaire à l'égard des demandeurs.

La Couronne se pourvoit contre cette conclusion et prétend, dans un premier temps, qu'il incombait aux bandes de prouver que les terres avaient été vendues à un prix inférieur à leur valeur, et, dans un deuxième temps, que le prix de 70 000 \$ était déraisonnable.

Le juge de première instance a eu raison de conclure que le fiduciaire qui participe à une opération intéressée, c'est-à-dire qui est en conflit d'intérêts, a le fardeau de prouver qu'il n'a pas tiré d'avantages personnels de ses pouvoirs de fiduciaire: J. C. Shepherd, *The Law of Fiduciaries* (1981), aux pp. 157 à 159, et A. H. Oosterhoff: *Text, Commentary and Cases on Trusts* (4th ed. 1992). Il est possible de prétendre que la Couronne était en conflit d'intérêts, car elle faisait l'objet de pressions politiques divergentes l'incitant, d'une part, à conserver les terres en cause pour la bande et, d'autre part, à prendre des mesures pour qu'elles puissent être distribuées aux anciens combattants.

La conclusion du juge de première instance que la Couronne ne s'est pas acquittée du fardeau de prouver que le prix de 70 000 \$ était raisonnable soulève cependant plus de problèmes. En effet, même si le MAI avait reçu une évaluation plus élevée, il existait également des évaluations attribuant une valeur moindre aux terres. De fait, il semble qu'il n'y avait pas d'autre marché pour ces terres à l'époque, ce qui, comme on peut s'y attendre, rendait difficile l'établissement d'une évaluation précise. Il ressort de la preuve que le prix a été fixé au terme de négociations entre le MAI et le DTAC qui se sont déroulées dans des conditions de pleine concurrence.

Cette preuve ne semble pas étayer la conclusion du juge de première instance que la Couronne a manqué à l'obligation de fiduciaire qu'elle avait de vendre les terres à leur juste valeur. En concluant à

dence, the trial judge misconstrued the effect of the onus on the Crown. The Crown adduced evidence showing that the sale price lay within a range established by the appraisals. This raised a *prima facie* case that the sale price was reasonable. The onus then shifted to the Bands to show it was unreasonable. The Bands did not adduce such evidence. On this state of the record, a presumption of breach of the Crown's fiduciary duty to exact a fair price cannot be based on a failure to discharge the onus upon it. I note that the trial judge made no finding as to the true value of the property, nor any finding that it was significantly greater than \$70,000, deferring this to the stage of assessment of damages.

l'existence d'un manquement en dépit de cette preuve, le juge de première instance a mal interprété les effets du fardeau de la preuve qui incombait à la Couronne. Cette dernière a présenté des éléments de preuve indiquant que le prix de vente se situait dans la fourchette établie par les évaluations. Cette preuve a établi, *prima facie*, que le prix de vente était raisonnable. Il y a alors eu déplacement du fardeau de la preuve, et c'est aux bandes qu'il appartenait de prouver que ce prix était déraisonnable. Les bandes n'ont pas apporté cette preuve. Compte tenu de la preuve au dossier sur ce point, une présomption de manquement par la Couronne à son obligation de fiduciaire, qui consistait à obtenir un juste prix, ne peut donc découler d'une omission de la Couronne de s'acquitter du fardeau de la preuve qui lui incombait. Je remarque que le juge de première instance ne s'est pas prononcé sur la valeur réelle du bien-fonds et qu'il n'a pas statué que cette valeur dépassait largement les 70 000 \$, mais qu'il a plutôt reporté l'examen de cette question à l'étape de la détermination des dommages-intérêts.

56 I conclude that the trial judge erred in concluding that the Crown breached its fiduciary duty to the Band by selling the land for \$70,000.

Je conclus que le juge de première instance a commis une erreur en statuant que la Couronne a manqué à son obligation de fiduciaire envers la bande en vendant les terres pour la somme de 70 000 \$.

(c) Failure to Restore the Surface Rights to the Band after the 1945 Surrender

c) L'omission de remettre les droits de superficie à la bande après la cession de 1945

57 The Bands argue that they should have been given their reserve back because of their apparent impoverishment between 1945 and 1961. The Crown, in the Bands' submission, should have realized that the surrender had been a mistake. Instead of confirming the mistake by selling the land to the DVLA, it should have cancelled the surrender and transferred the land back to the Band.

Les bandes font valoir qu'on aurait dû leur remettre leur réserve en raison de l'état d'appauvrissement évident dans lequel elles se trouvaient entre 1945 et 1961. La Couronne, au dire des bandes, aurait dû se rendre compte que la cession avait été une erreur. Au lieu d'exacerber cette erreur en vendant les terres au DTAC, elle aurait dû annuler la cession et remettre les terres à la bande.

58 There can be no doubt that the Band lived in abject poverty and ill-health between 1945 and 1961. The problem the Bands' argument faces is that their condition appears to have been unrelated to possession of the Fort St. John reserve. In fact, the Band did not make significant use of the

Il ne fait aucun doute que, entre 1945 et 1961, la bande vivait dans la misère et que l'état de santé de ses membres était déplorable. Le problème que pose cet argument des bandes est qu'il semble ne pas y avoir de rapport entre leur situation durant cette période et le fait qu'elles ne possédaient pas

reserve from 1916 to 1945, one of the primary reasons behind the move to surrender it and purchase more suitable property. Nor did the Band make much use of the land from 1945 to 1950 when alternative lands were purchased, despite the fact that it was entitled to use the land during this period. Finally, the purchase of new lands in 1950 did not, by the Bands' own admission, alleviate the situation.

Accepting that the Band was living in poverty, one cannot infer that the solution was to cancel the 1945 surrender or refuse to sell the Fort St. John reserve land. The Crown cannot be said to have breached the fiduciary duty it owed the Band after surrender of the Fort St. John reserve by failing to restore the land to the Indians.

(d) Conclusions on Post-surrender Duty and Breach with Respect to Surface Rights

I conclude that the Bands have not established breach of fiduciary duty with respect to the sale of the surface rights.

(3) *Post-surrender Duties and Breaches Regarding Mineral Rights*

The Band surrendered "Petroleum and Natural Gas and the mining rights in connection therewith" in the Fort St. John reserve to the Crown in 1940, "in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people". Section 54 of the 1927 *Indian Act* required the Crown to hold these lands for the purpose specified in the surrender — for lease for the benefit of the Band. The right to explore for minerals was leased in 1940 for \$1,800. In 1948, by means which to this day remain the subject of debate, the mineral rights were transferred to the DVLA and hence to the veterans who took up the Fort St. John land. When

la réserve de Fort St. John. De fait, la bande n'a pas beaucoup utilisé cette réserve de 1916 à 1945, et ce fait constituait d'ailleurs une des principales raisons de sa décision de la vendre et d'acquérir des terres convenant davantage à ses besoins. La bande ne s'est pas non plus beaucoup servi des terres de la réserve de 1945 à 1950, année au cours de laquelle des terres de remplacement ont été achetées, et ce même si elle avait le droit de les utiliser durant cette période. Enfin, l'achat de nouvelles terres en 1950 n'a pas, de l'aveu même des bandes, amélioré leur sort.

Même en admettant que la bande vivait dans la pauvreté, on ne peut en déduire que la solution était d'annuler la cession de 1945 ou de refuser de vendre les terres de la réserve de Fort St. John. Il est impossible d'affirmer que, après la cession de la réserve de Fort St. John, la Couronne a manqué à son obligation de fiduciaire envers la bande en ne remettant pas ces terres aux Indiens.

d) Les conclusions sur l'obligation relative aux droits de superficie et postérieure à la cession, et le manquement à cette obligation

Je conclus que les bandes n'ont pas prouvé qu'il y a eu manquement à l'obligation de fiduciaire en ce qui concerne la vente des droits de superficie.

(3) *Les obligations relatives aux droits miniers et postérieures à la cession, et les manquements à ces obligations*

La bande a, en 1940, cédé à la Couronne [TRANSDUCTION] «les droits au pétrole et au gaz naturel ainsi que les droits connexes» dans la réserve de Fort St. John [TRANSDUCTION] «en fiducie aux fins de leur location à une ou plusieurs personnes et selon les conditions que le gouvernement du Canada peut juger les plus appropriées pour assurer notre bien-être et celui de notre peuple». Aux termes de l'art. 54 de la *Loi des Indiens* de 1927, la Couronne devait détenir ces terres pour les fins mentionnées dans la cession — c'est-à-dire aux fins de leur location au profit de la bande. Le droit de faire de l'exploration sur ces terres en vue d'y trouver des minéraux a été loué, en 1940, pour la somme de 1 800 \$. En 1948, par une mesure qui, à ce jour,

oil and gas were discovered on the lands in 1976, it was not the Indians, but the veterans and their assigns, who obtained the revenues that flowed from the mineral rights.

demeure litigieuse, les droits miniers ont été transférés au DTAC et ensuite aux anciens combattants qui se sont établis sur les terres de Fort St. John. Lorsqu'on a découvert du pétrole et du gaz sur ces terres en 1976, ce ne sont pas les Indiens mais les anciens combattants et leurs ayants droit qui ont touché les revenus découlant des droits miniers.

To this résumé must be added two additional uncontested facts. First, at the time the mineral rights passed to the DVLA, and hence to the veterans, the Indians were unsophisticated and may not have fully understood the concept of different interests in land and how they might be lost. Second, they were never advised of the transfer of the mineral rights to the DVLA. They discovered it only in 1977, when an employee of the DIA brought to their attention that oil and gas had been discovered on their former lands and queried how the mineral rights had come to be transferred from the Band to the veterans.

Il faut ajouter à ce résumé deux autres faits incontestés. Premièrement, à l'époque où les droits miniers ont été transférés, d'abord au DTAC puis aux anciens combattants, les Indiens n'étaient pas des gens avertis, et il est possible qu'ils n'aient pas bien compris les principes concernant l'existence de droits fonciers distincts et la façon dont de tels droits pouvaient être perdus. Deuxièmement, ils n'ont jamais été informés du transfert des droits miniers au DTAC. Ils ne l'ont découvert qu'en 1977, lorsqu'un employé du MAI les a informés de la découverte de pétrole et de gaz sur leurs anciennes terres et a cherché à savoir comment les droits miniers étaient passés de la bande aux anciens combattants.

The trial judge held that the mineral rights were not severable from the surface rights and consequently passed to the DVLA with the general surrender of the reserve in 1945. He failed to consider whether the earlier surrender of the mineral rights raised special considerations and imposed special obligations on the Crown. He further held that the Crown acted properly with respect to the mineral rights because they were not considered valuable at the time. In my view, he erred on both counts.

Le juge de première instance a conclu que les droits miniers n'étaient pas séparables des droits de superficie et qu'ils avaient par conséquent été transférés au DTAC au moment de la cession générale de la réserve en 1945. Il a toutefois omis de se demander si la cession des droits miniers, survenue précédemment, ne soulevait pas de questions particulières et n'avait pas pour effet d'imposer des obligations spéciales à la Couronne. Le juge a également conclu que la Couronne avait agi correctement pour ce qui est des droits miniers, étant donné que ces droits n'étaient pas considérés comme ayant une grande valeur à l'époque. À mon avis, il a fait erreur dans les deux cas.

(a) The Effect of the 1940 Surrender of Mineral Rights

a) L'effet de la cession des droits miniers en 1940

The duties of the Crown with respect to the surrender of the mineral rights after the 1940 surrender are clear. The mineral rights were conveyed to the Crown in trust to lease for the welfare of the Band. The Crown owed the Band a fiduciary duty with respect to the minerals after the 1940 surrender as a matter of general law: *Guerin, supra*.

Les obligations de la Couronne en ce qui concerne la cession des droits miniers après la cession de 1940 sont claires. Ces droits ont été transportés à la Couronne en fiducie aux fins de leur location pour le bien-être de la bande. La Couronne avait envers la bande, en vertu des règles générales du droit, une obligation de fiduciaire relativement aux

Quite apart from this, the terms of the surrender and the Act, s. 54, make it clear that the Crown took the mineral rights as a fiduciary for the Band on terms which limited the Crown to leasing them for the Band's benefit.

(b) The Effect of the 1945 Surrender on the Mineral Rights

The trial judge found that the mineral rights were surrendered to the DIA by virtue of the general surrender of land in 1945, due to the failure to exclude mineral rights. The matter of the subsequent transfer of the mineral rights to the DVLA appears never to have been considered in any of the discussions between the DIA and the DVLA, and the Band was never advised that its mineral rights would be transferred. The mineral rights were transferred, on the trial judge's view, not because anyone intended them to be transferred, but by reason of the presumption of law that a general conveyance of land passes all interest except those specifically reserved in the deed of transfer.

In my view, this analysis is in error. Prior to 1940, the Band held a right in both the surface rights and the mineral rights of the reserve. The Band surrendered the mineral rights in the reserve to the Crown in 1940. The effect of this was to remove the mineral rights from the reserve. When the Band surrendered its interest in the Fort St. John reserve to the Crown in 1945, it could transfer only those rights in the reserve which it still possessed: *nemo dat quod non habet* — a person cannot give what he does not possess. The 1945 surrender could not therefore have included surrender of the Band's reserve rights over the minerals. Rather, it involved only the surrender of those rights which still belonged to the Band to surrender, namely the surface rights. The minerals remained in the Crown and the Crown remained bound by the terms of the 1940 surrender, even after the 1945 surrender of the Indian's remaining interest in the lands.

minéraux après la cession de 1940: *Guerin*, précité. Cela mis à part, toutefois, il ressort clairement de l'art. 54 de la Loi et des conditions de la cession que les droits miniers ont été transférés à la Couronne, en qualité de fiduciaire de la bande, et que la Couronne n'était habilitée qu'à les louer au profit de la bande.

(b) L'effet de la cession de 1945 sur les droits miniers

Le juge de première instance a conclu que les droits miniers ont été cédés au MAI en vertu de la cession générale des terres en 1945, en raison de l'omission d'en exclure les droits miniers. Il semble que la question du transfert subséquent des droits miniers au DTAC n'a jamais fait l'objet de discussions entre le MAI et le DTAC, et la bande n'a jamais été informée du fait que ses droits miniers seraient transférés. De l'avis du juge de première instance, ces droits ont été transférés, non pas parce que quelqu'un entendait qu'ils le soient mais plutôt par suite de l'effet de la présomption légale qui veut que, en cas de cession générale de terres, il y a transfert de tous les droits sauf ceux réservés expressément dans l'acte de cession.

Selon moi, cette analyse est erronée. Avant 1940, la bande était titulaire tant des droits de superficie de la réserve que des droits miniers y afférents. La bande a, en 1940, cédé à la Couronne les droits miniers dans la réserve. Cela a eu pour effet de retrancher ces droits de la réserve. Lorsque la bande a cédé ses droits sur la réserve de Fort St. John à la Couronne en 1945, elle ne pouvait transférer que les droits qu'elle possédait encore: *nemo dat quod non habet* — nul ne peut donner ce qu'il n'a pas. La cession de 1945 ne pouvait donc pas comprendre les droits de la bande sur les minéraux de la réserve. Au contraire, elle ne visait que les droits qui appartenaient encore à la bande et que cette dernière pouvait céder, savoir les droits de superficie. Les minéraux sont restés en la possession de la Couronne, qui continuait d'être liée par les conditions de la cession de 1940, même après la cession, en 1945, des droits qu'avaient encore les Indiens sur les terres en cause.

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This result is dictated not only by the most basic principles of property transfer, but by the *Indian Act* itself. Section 2 of the 1927 Act differentiates between a “reserve” and “Indian lands”:

- (e) “Indian lands” means any reserve or portion of a reserve which has been surrendered to the Crown;

- (j) “reserve” means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein; [Emphasis added.]

Only a “reserve” or “a portion of a reserve” can be surrendered: ss. 50, 51, 53 and 54. Once a reserve or a “portion of a reserve” is surrendered, it becomes “Indian lands”: s. 2(e); and *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211. This was the status of the mineral rights after the 1940 surrender. As “Indian lands” held by the Crown in trust, they could not be surrendered again in 1945.

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A number of arguments are raised against the proposition that the mineral rights, having already been surrendered in 1940, were not affected by the 1945 surrender. I will consider each in turn. The first argument is that offered by the trial judge. The trial judge took the view that mineral rights cannot be surrendered except in conjunction with a surrender of surface rights. The trial judge based this conclusion on the definition of reserve in the 1927 *Indian Act*:

Cette conclusion s'impose non seulement de par l'effet des principes les plus fondamentaux du transfert des biens immobiliers, mais aussi de par l'effet de la *Loi des Indiens* elle-même. À l'article 2 de la Loi de 1927, on fait la distinction suivante entre «réserve» et «terres indiennes»:

- h) «réserve» signifie toute étendue de terre mise à part, par traité ou autrement, pour l'usage ou le profit d'une bande particulière d'Indiens ou concédée à cette bande, et dont le titre légal est attribué à la Couronne, et qui fait encore partie de la réserve et n'a pas été rétrocédée à la Couronne, et comprend les arbres, le bois, la terre, la pierre, les minéraux, les métaux et autres choses de valeur qui se trouvent à la surface ou à l'intérieur du sol [Je souligne.]

- l) «terres indiennes», «terres des Indiens» signifie toute réserve ou partie de réserve qui a été cédée à la Couronne;

Seule une «réserve» ou «une partie de réserve» peut être cédée: art. 50, 51, 53 et 54. Une fois cédée, la réserve ou «partie de réserve» devient des «terres indiennes»: al. 2l) et *St. Ann's Island Shooting and Fishing Club Ltd. c. The King*, [1950] R.C.S. 211. Voilà quel était le statut des droits miniers après la cession de 1940. En tant que «terres indiennes» détenues en fiducie par la Couronne, ces droits ne pouvaient être cédés de nouveau en 1945.

On soulève un certain nombre d'arguments contre la proposition que les droits miniers n'ont pas été touchés par la cession de 1945 puisqu'ils avaient déjà été cédés en 1940. J'examinerai séparément chacun de ces arguments. Le premier est celui du juge de première instance, qui a dit être d'avis que les droits miniers ne peuvent être cédés qu'en même temps que les droits de superficie. Il a fondé cette conclusion sur la définition du terme «réserve» dans la *Loi des Indiens* de 1927:

“reserve” means any tract or tracts of land . . . and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein;

The trial judge concluded that since a reserve means a tract of land including, *inter alia*, minerals, a portion of a reserve must mean a portion of a tract of land including minerals. If this interpretation is adopted, mineral rights can never be surrendered under the 1927 *Indian Act* without the surface rights and conversely, the surface rights can never be surrendered without the mineral rights. With the greatest of respect, this interpretation is unwarranted on the wording of the definition. While a reserve is defined as a tract of land it is also defined as including, *inter alia*, minerals. Therefore, the reserve as a whole includes the minerals. In plain English, a portion is part of the whole: *Chambers English Dictionary* (7th ed. 1988), and *Concise Oxford Dictionary* (8th ed. 1990). The minerals and the rights pertaining thereto are included as part of the whole reserve and therefore constitute a portion of the reserve.

The trial judge concluded that the 1940 surrender was not a surrender of a “portion” of the reserve, but only of an indivisible right “in a part of the whole reserve”. In this way, the words of the Act prohibiting resurrender of a portion of a reserve previously surrendered were avoided. The trial judge distinguished *St. Ann’s Island, supra*, by pointing out that in that case, it was an island which was considered a portion of the reserve.

This reasoning raises a number of problems. The *Indian Act* makes no mention of a right in a “part” of a whole reserve, nor any provision for its surrender. The trial judge’s reasoning leaves us with this question: how could the surrender of 1940 have been effected under the *Indian Act* if the mineral rights were not a “portion” of a reserve? Moreover, the narrow and technical interpretation

«réserve» signifie toute étendue de terre [. . .] et comprend les arbres, le bois, la terre, la pierre, les minéraux, les métaux et autres choses de valeur qui se trouvent à la surface ou à l’intérieur du sol;

Le juge de première instance a conclu que, comme une réserve est une étendue de terre comprenant notamment les minéraux qui s’y trouvent, une partie de réserve doit aussi signifier une partie d’étendue de terre et les minéraux s’y trouvant. Si l’on retenait cette interprétation, les droits miniers ne pourraient jamais, en vertu de la *Loi des Indiens* de 1927, être cédés sans les droits de superficie, et, inversement, les droits de superficie ne pourraient jamais l’être sans les droits miniers. En toute déférence, le texte de la définition en question ne justifie pas cette interprétation. Bien que le texte dise qu’une réserve est une étendue de terre, il précise également que la réserve comprend notamment les minéraux qui s’y trouvent. En conséquence, l’ensemble de la réserve comprend les minéraux. Dans son sens courant, le terme «partie» désigne un élément d’un tout: *Le nouveau Petit Robert* (1994) et *Le Petit Larousse illustré 1994*. Les minéraux et les droits y afférents sont un élément de l’ensemble de la réserve et constituent, de ce fait, une partie de la réserve.

Le juge de première instance a conclu que la cession de 1940 ne visait pas une «partie» de réserve, mais seulement un droit indivisible «sur une partie de l’ensemble de la réserve». En exprimant ainsi sa conclusion, le juge a évité les termes de la Loi qui interdisent de céder à nouveau une partie d’une réserve qui a déjà été cédée. Le juge de première instance a distingué le cas dont il était saisi de l’arrêt *St. Ann’s Island*, précité, en signalant que, dans cet arrêt, il était question d’une île qui avait été considérée comme une partie de réserve.

Ce raisonnement soulève un certain nombre de problèmes. Le premier est que la *Loi des Indiens* ne fait aucune mention d’un droit sur une «partie» de l’ensemble d’une réserve, ni ne pourvoit à la cession d’un tel droit. Le raisonnement du juge de première instance nous laisse devant la question suivante: Comment la cession de 1940 aurait-elle pu être réalisée en vertu de la *Loi des Indiens* si les

of the phrase "portion of a reserve" adopted by the trial judge violates the wording of the *Indian Act*, and is not supported by the incorporeal nature of Indian title. It runs contrary to the general policy of the law, which permits severance of the various property interests in a given parcel of land, and to the provisions and the legislative intention of the *Indian Act* and regulations dealing with severance of interests in general, and of oil and gas in particular. From a practical perspective, it deprives the Indian people of the ability to deal with mineral interests in their reserves separate from the surface rights while retaining the significant protections of the *Indian Act*.

droits miniers n'étaient pas une «partie» d'une réserve? Par ailleurs, l'interprétation restrictive et formaliste de l'expression «partie de réserve» adoptée par le juge de première instance va à l'encontre du texte de la *Loi des Indiens*, et ne trouve pas appui dans le caractère incorporel du titre des Indiens. Elle est contraire à l'orientation générale de la loi — qui permet la séparation des divers droits fonciers sur une parcelle donnée — ainsi qu'aux dispositions et à l'objet de la *Loi des Indiens* et de son règlement d'application touchant la séparation des droits en général, tout particulièrement des droits pétroliers et gaziers. D'un point de vue pratique, une telle interprétation prive les Indiens de la possibilité de faire des opérations touchant les droits miniers afférents à leur réserve sans porter atteinte aux droits de superficie de celle-ci, tout en continuant de bénéficier des importantes mesures de protection qu'offre la *Loi des Indiens*.

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Dealing first with the general policy of the law, the proposition that mineral rights cannot be severed from surface rights on reserve lands is novel. No authority is cited for it. The general rule is that mineral title can be severed from the realty and form the basis for a separate chain of title: *Berkheiser v. Berkheiser*, [1957] S.C.R. 387, at p. 395, *per* Kellock J.

Tout d'abord, en ce qui concerne l'orientation générale de la loi, l'argument que, dans le cas des terres constituant les réserves, les droits miniers ne peuvent pas être séparés des droits de superficie est une proposition nouvelle. Aucune jurisprudence n'est citée à l'appui de cette proposition. Selon la règle générale, le titre relatif aux minéraux peut être séparé du bien-fonds et constituer la base d'une chaîne de titres distincte: *Berkheiser c. Berkheiser*, [1957] R.C.S. 387, à la p. 395, les motifs du juge Kellock.

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This might not be determinative if the nature of the Band's interests in land required a departure from the usual rule. But that is not the case. The trial judge's apparent assumption that the mineral interest in the reserve cannot be severed from the corporeal interest loses its force when it is realized that the only and entire interest of a band in a reserve is incorporeal. Even the right of the Band in the surface area of the reserve was not a corporeal property interest but rather a personal right guaranteed in perpetuity; for this reason it could not form the *res* of a trust according to the majority in *Guerin*. Indian title in reserves is *sui generis* in that it does not include the fee simple title but consists rather in a right of perpetual usufruct. This

Cette règle pourrait ne pas être déterminante si la nature des droits fonciers de la bande exigeait qu'on y déroge. Cependant, tel n'est pas le cas en l'espèce. L'hypothèse qu'a visiblement faite le juge de première instance et selon laquelle les droits miniers afférents à la réserve ne peuvent pas être séparés du droit corporel perd de sa valeur lorsqu'on se rend compte que le seul et unique droit que possède une bande à l'égard d'une réserve est incorporel. Même le droit de la bande à l'égard de la superficie de la réserve n'était pas un droit de propriété de nature corporelle mais plutôt un droit personnel garanti à perpétuité; pour cette raison, il ne pouvait constituer l'objet (*res*) d'une fiducie suivant les motifs des juges de la majorité

renders suspect the trial judge's conclusion that a "portion of a reserve" must include a physical piece of the realty.

The wording of the *Indian Act* and the regulations governing oil and gas which have been enacted under it, confirm that mineral rights in Indian reserves have consistently been viewed as capable of being transferred without transferring surface rights. Pursuant to the Act, Parliament early on introduced a separate regime governing mineral interests in Indian lands. In 1910 it passed the first regulations: *Regulations for the Disposal of Petroleum and Gas on the Indian Reserves in the Provinces of Alberta and Saskatchewan and the Northwest Territories*, May 17, 1910, Order in Council P.C. 987. This was followed in 1938 by a comprehensive scheme to regulate the leasing of Indian oil and gas interests pursuant to an amendment to the *Indian Act* authorizing the Governor in Council to make regulations in this respect, see: *An Act to amend the Indian Act*, S.C. 1938, c. 31, s. 1; and *Regulations for the Disposal of Petroleum and Natural Gas Rights on Indian Reserves*, (1938) 72 Can. Gaz. 725.

More specifically, s. 50 of the Act and the regulations in place in 1938 confirm that in 1940, when the surrender of mineral rights at issue was made, it was possible to surrender mineral rights without surrendering surface title. Section 50 of the Act provides that no reserve "or portion of a reserve" can be sold or leased unless first surrendered to the Crown. Section 1(a) of the 1938 regulations confirms that oil and natural gas rights were viewed as "portion of a reserve" which might be surrendered, with or without surface rights. Section 1(a) requires that a statutory surrender be made before the regulations can be applied to Indian oil and gas

dans *Guerin*. Le titre des Indiens sur les réserves a un caractère *sui generis*, en ce sens qu'il ne comprend pas le titre en fief simple mais constitue plutôt un droit d'usufruit perpétuel. Cela jette des doutes sur la conclusion du juge de première instance qu'une «partie de réserve» doit comprendre une partie concrète du bien immeuble visé.

Le texte de la *Loi des Indiens* et son règlement d'application concernant le pétrole et le gaz confirment que l'on a toujours considéré que les droits miniers afférents aux réserves indiennes pouvaient être transférés indépendamment des droits de superficie. Comme l'y autorisait la Loi, le Parlement n'a pas mis de temps à établir un régime distinct visant à régir les droits miniers afférents aux terres indiennes. En 1910, il a pris le premier règlement à cet égard: *Regulations for the Disposal of Petroleum and Gas on the Indian Reserves in the Provinces of Alberta and Saskatchewan and the Northwest Territories*, 17 mai 1910, décret C.P. 987. Cette mesure a été suivie, en 1938, par l'établissement, conformément à une modification qui avait été apportée à la *Loi des Indiens* afin d'autoriser le gouverneur en conseil à prendre des règlements à ce sujet, d'un régime exhaustif visant à réglementer la location des droits pétroliers et gaziers des Indiens; voir: *Loi modifiant la Loi des Indiens*, S.C. 1938, ch. 31, art. 1; *Regulations for the Disposal of Petroleum and Natural Gas Rights on Indian Reserves*, (1938) 72 Can. Gaz. 725.

Plus particulièrement, l'art. 50 de la Loi ainsi que le règlement en vigueur en 1938 confirment qu'il était possible, en 1940, lors de la cession en cause des droits miniers, de céder des droits miniers sans céder le titre relatif aux droits de superficie. L'article 50 de la Loi indique qu'aucune réserve «ou portion de réserve» ne peut être vendue ou affermée à moins d'avoir été d'abord cédée à la Couronne. L'alinéa 1a) du règlement de 1938 confirme que les droits pétroliers et gaziers étaient considérés comme une [TRADUCTION] «partie de réserve» susceptible d'être cédée, avec ou sans les droits de superficie. De plus, l'al. 1a) exige qu'il y ait eu cession en vertu de la Loi pour que le règlement s'applique aux

interests and before oil and gas interests can be leased by the Crown:

1. (a) The petroleum and natural gas rights on any Indian Reserve in Canada may be leased to applicants at a rental of fifty cents an acre for the first year, and for each subsequent year a rental at the rate of one dollar an acre, payable yearly in advance, provided that such petroleum and natural gas rights have been released or surrendered to His Majesty in trust, in accordance with the provisions of Subsection One of Section 50 of the Indian Act . . . [Emphasis added.]

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It is undisputed that the Band's 1940 surrender of its mineral rights precisely met the formal requirements of the surrender provisions of the 1927 *Indian Act*. The surrender was assented to by a majority as required by s. 51(1). This was certified on oath as required by s. 51(3), and the surrender was accepted by the Governor in Council as required by s. 51(4). The Order in Council P.C. 8939, November 19, 1941, which accepts the 1940 surrender of the mineral rights specifically references the statutory nature of the surrender and directs that the mineral rights be leased in accordance with the regulations:

His Excellency the Governor General in Council, on the recommendation of the Minister of Mines and Resources, is pleased to accept the attached surrender, dated July 9, 1940, of the petroleum and natural gas and the mining rights in connection therewith on all that parcel or tract of land and premises situate, lying and being in the St. Johns Indian Reserve No. 172 in the Province of British Columbia . . . which has been duly executed in accordance with the provisions of the Indian Act and Regulations, by the members of the St. Johns Band of Indians in the said Province, in order that the said petroleum and natural gas and the mining rights in connection therewith may be leased for their benefit, and it is hereby accepted as provided in Section 51(4) of the Indian Act, Chapter 98, Revised Statutes of Canada 1927.

His Excellency in Council, on the same recommendation, and pursuant to the provisions of Section 54 of the said Indian Act is further pleased, hereby, to direct that the said petroleum and natural gas and the mining rights in connection therewith be leased as agreed upon, subject to the terms and conditions of the Regulations for the disposal of Petroleum and Natural Gas rights on Indian Reserves and subject further to the conditions of

droits pétroliers et gaziers des Indiens et que ces droits puissent être loués par la Couronne:

[TRADUCTION] a) Les droits au pétrole et au gaz naturel afférents à une réserve indienne au Canada peuvent être loués moyennant un loyer annuel de cinquante cents l'acre pour la première année et d'un dollar pour les années subséquentes, payable à l'avance, pourvu que les droits en question aient d'abord été cédés ou rétrocédés en fiducie à Sa Majesté conformément à l'article 50 de la Loi des Indiens . . . [Je souligne.]

Il n'est pas contesté que la cession par la bande, en 1940, de ses droits miniers respectait pleinement les exigences de forme prévues par les dispositions relatives aux cessions de la *Loi des Indiens* de 1927. Cette cession a été ratifiée par la majorité prévue au par. 51(1). Ce fait a été attesté sous serment conformément au par. 51(3), et la cession a été acceptée par le gouverneur en son conseil comme le prévoit le par. 51(4). Le décret C.P. 8939, daté du 19 novembre 1941, par lequel on a accepté la cession de 1940 des droits miniers, indique expressément qu'il s'agit d'une cession faite en vertu de la Loi et ordonne que les droits miniers soient loués conformément au règlement:

[TRADUCTION] Sur avis conforme du ministre des Mines et des Ressources, il plaît à Son Excellence le gouverneur général en conseil d'accepter l'acte de cession ci-annexé, daté du 9 juillet 1940, visant le pétrole, le gaz naturel et les droits miniers connexes, afférents à l'ensemble de cette parcelle ou étendue de terre se trouvant dans la réserve indienne n° 172 de St. Johns dans la province de la Colombie-Britannique [. . .] qui a été dûment passé conformément aux dispositions de la Loi des Indiens et de son règlement d'application, par les membres de la bande des Indiens de St. Johns dans ladite province, pour que le pétrole, le gaz et les droits miniers connexes puissent être affermé au profit de la bande, et il est accepté conformément au par. 51(4) de la Loi des Indiens, chapitre 98, Statuts révisés du Canada, 1927.

Conformément au même avis et à l'article 54 de la Loi des Indiens, il plaît aussi à Son Excellence en conseil d'ordonner que le pétrole, le gaz naturel et les droits miniers connexes soient affermé comme convenu, sous réserve des conditions prévues par le Regulations for the Disposal of Petroleum and Natural Gas rights on Indian

the said surrender and the provisions of Part One of the said Indian Act. [Emphasis added.]

The scheme of the Act and regulations, in 1938 as now, is clear. Indians may surrender mineral rights which in turn must be dealt with by the Crown according to the terms of the surrender. The statute and the regulations protect the Indians by requiring that the formalities of surrender be complied with before the mineral rights can be leased or otherwise dealt with. The result is beneficial to Indians, who are able to retain the surface rights so important to their sense of place and belonging, while profiting from the lease and sale of their mineral rights. Today, as in 1940, the vast majority of the oil and gas interests managed by the Crown on behalf of the Indians underlie reserves whose surface rights have not been surrendered to Crown. The suggestion that mineral title cannot be conveyed except in conjunction with surface rights undermines this statutory regime.

The second argument brought against the conclusion that the 1945 surrender did not include the Band's mineral rights is that the right to "resurrender" the mineral rights previously surrendered for a new purpose must be presumed. Otherwise, the 1940 surrender would preclude the Band from ever changing the terms of the trust, for example, to permit sale of the mineral rights instead of lease. My colleague Gonthier J. relies on this argument. He states that the 1927 Act is entirely silent on the subject of resurrender. With respect, this is incorrect. The Act does not permit resurrender. The Act only permits surrender of a "reserve" or "portion of a reserve" which has not been surrendered to the Crown. It does not allow for resurrender of "Indian lands" which has already been surrendered.

This does not mean, however, that an Indian band is forever bound by the terms of the initial

Reserves et ladite cession, et des dispositions de la partie I de la Loi des Indiens. [Je souligne.]

L'économie de la Loi et de son règlement d'application, tant en 1938 que de nos jours, est claire. Les Indiens peuvent céder des droits miniers, auquel cas la Couronne doit ensuite agir à l'égard de ces droits conformément aux conditions de la cession. La Loi et le règlement protègent les Indiens en exigeant le respect des formalités régissant les cessions avant que les droits miniers puissent être loués ou faire l'objet d'autres opérations. Cette situation est à l'avantage des Indiens, car ils peuvent ainsi conserver les droits de superficie, droits si importants pour leur sentiment d'enracinement et d'appartenance, et continuer de profiter des avantages découlant de la location ou de la vente de leurs droits miniers. De nos jours, comme en 1940, la vaste majorité des intérêts pétroliers et gaziers gérés par la Couronne pour le compte des Indiens se trouvent dans le sous-sol de réserves dont les droits de superficie n'ont pas été cédés à la Couronne. La thèse selon laquelle le titre relatif aux droits miniers ne peut être transféré qu'avec les droits de superficie sape le régime établi par la loi.

Suivant le deuxième argument formulé à l'encontre de la conclusion que la cession de 1945 n'incluait pas les droits miniers, il faut présumer l'existence d'un droit de «céder à nouveau», à une autre fin, les droits miniers déjà cédés. En l'absence d'un tel droit, la cession de 1940 aurait pour effet d'empêcher pour toujours la bande de modifier les conditions de la fiducie, par exemple pour permettre la vente des droits miniers plutôt que leur location. Mon collègue le juge Gonthier s'appuie sur cet argument. Il affirme que la Loi de 1927 ne traite pas de la possibilité de refaire cession. Avec égards, cette affirmation est inexacte. La Loi ne permet pas qu'il y ait une nouvelle cession. Elle ne permet que la cession d'une «réserve» ou d'une «partie de réserve» qui n'a pas été cédée à la Couronne. Elle ne permet pas de céder à nouveau des «terres indiennes» qui ont déjà été cédées.

Toutefois, cela ne veut pas dire que la bande indienne concernée est liée pour toujours par les

surrender and is incapable of varying the terms of a surrender. Joe Leask, a Crown witness and Director of Reserves and Trusts for Indian affairs, testified that the settled practice under the Act was that once land was surrendered, it could not be resurrendered unless the initial surrender was first revoked. When a change was sought in the terms of a surrender, the process used in the DIA required the Crown to revoke the original surrender and restore the previously surrendered "Indian lands" to the band, by way of an order in council. At this point the "Indian lands" once again became a "reserve" or "portion of a reserve", which could be surrendered on new terms pursuant to the Act. This administrative procedure allowed surrenders to be varied while retaining the provisions and protections of the *Indian Act*.

conditions de la cession initiale et qu'elle est incapable de les faire modifier. Joe Leask, témoin de la Couronne et directeur des réserves et des fidéicommis pour les Affaires indiennes, a déposé que, suivant la pratique établie en vertu de la Loi, une fois que des terres avaient été cédées, elles ne pouvaient pas être cédées à nouveau à moins d'annulation de la cession initiale. Lorsqu'on voulait modifier une cession, il fallait, conformément à la méthode appliquée par le MAI, que la Couronne annule la cession originale et remette à la bande, par décret, les «terres indiennes» cédées antérieurement. À ce moment-là, les «terres indiennes» redeviennent une «réserve» ou «partie de réserve», qui pouvait alors être cédée à de nouvelles conditions conformément à la Loi. Cette procédure administrative permettait de modifier les conditions des cessions, tout en maintenant l'application des dispositions de la *Loi des Indiens* et des mécanismes de protection prévus par celle-ci.

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A third argument against the view that the 1940 surrender of mineral rights precluded their resurrender in 1945 asserts that the general language of the 1945 surrender constituted a revocation of the 1940 surrender and a resurrender of the mineral rights. Again, the argument is tenuous. To achieve a revocation of the 1940 surrender, according to the Crown witness Leask, a formal revocation document would have had to be executed by the Crown and approved by the Governor in Council, followed by a resurrender complying with the provisions of the Act. And even if these formalities could somehow be dispensed with, the Crown is faced by the fact that the mineral rights were not discussed in 1945, nor referred to in the 1945 document of surrender. To accept the Crown's argument would be to infer revocation of the 1940 surrender not from the words of the 1945 document, but from the absence of exclusionary words.

Dans un troisième argument présenté contre la thèse que la cession des droits miniers, en 1940, avait eu pour effet d'empêcher qu'ils soient cédés à nouveau en 1945, on faisait valoir que le libellé général de la cession de 1945 constituait une annulation de la cession de 1940 et une nouvelle cession des droits miniers. Encore une fois, il s'agit d'un argument plutôt faible. D'après Leask, le témoin de la Couronne, il aurait fallu, pour qu'il y ait annulation de la cession de 1940, qu'un acte formel d'annulation ait été passé par la Couronne et approuvé par le gouverneur en conseil, et qu'il y ait eu ensuite une nouvelle cession conforme aux dispositions de la Loi. D'ailleurs, même s'il avait été possible, d'une manière ou d'une autre, d'éviter ces formalités, la Couronne doit reconnaître que la question des droits miniers n'a pas été discutée en 1945 et que l'acte de cession de 1945 ne fait pas mention de ces droits. Accepter l'argument de la Couronne reviendrait à inférer l'annulation de la cession de 1940 non pas des termes mêmes du document de 1945, mais plutôt de l'absence de termes portant exclusion des droits miniers.

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Before leaving my conclusion that the 1940 surrender of mineral rights precluded the resurrender of the mineral rights in 1945, I must deal with the

Avant de clore l'examen de ma conclusion que la cession des droits miniers en 1940 empêchait qu'ils soient cédés à nouveau en 1945, il me faut

comments of Gonthier J. with respect to it. Gonthier J. suggests that this argument is academic. In his view, the result in this case should not depend on "technical" interpretations of the *Indian Act* and rules of property transfer, but only on the intention of the Band in 1945. If the Band intended to transfer the mineral rights in 1945, then the mineral rights should be deemed to be transferred, in his view.

With respect, I cannot agree. My reasons are two. First, neither the 1940 transfer and the obligations the Crown incurred under it, nor the provisions of the *Indian Act* can be swept aside by some vague intention five years later. Second, the alleged intention, in my view, is not established.

If intention were all that mattered, there would be no purpose to the detailed provisions of the *Indian Act* and regulations under it regarding surrender, nor any substance to the fiduciary duty which the Crown assumed with respect to the Band's mineral rights when it accepted their surrender in 1940. It is not disputed that the property of Indians, like the property of any other person, must be dealt with according to law. The stark facts are that the Band conveyed the mineral rights in I.R. 172 to the Crown in 1940, on the trust that the Crown would lease those mineral rights for their benefit. With respect, I find it neither academic nor technical to suggest, that the 1940 surrender removed the mineral rights from I.R. 172, with the result that they could not pass when what remained of the Band's rights in I.R. 172 was surrendered in 1945.

The basic purpose of the surrender provisions of the *Indian Act* is to ensure that the intention of Indian bands with respect to their interest in their reserves be honoured. One must wonder why, if the Band intended to alter the terms of the 1940 conditional surrender to make an absolute surrender, it did not avail itself of the provisions of the *Indian Act* for the proper legal expression of that intention? One may also ask why, if it was the

répondre aux commentaires du juge Gonthier à ce sujet. Mon collègue affirme qu'il s'agit d'un argument théorique. À son avis, la solution du présent litige ne devrait pas dépendre d'interprétations «formalistes» de la *Loi des Indiens* et des règles régissant le transfert des biens fonciers, mais seulement de l'intention de la bande en 1945. De l'avis du juge Gonthier, si la bande entendait transférer les droits miniers en 1945, ces droits devraient alors être considérés comme ayant été transférés.

Avec égards, je ne puis accepter cette position, et ce pour deux motifs. Premièrement, ni le transfert de 1940 et les obligations en découlant pour la Couronne, ni les dispositions de la *Loi des Indiens* ne peuvent être écartés par quelque vague intention de la bande cinq ans plus tard. Deuxièmement, on n'a pas, à mon avis, établi l'intention alléguée.

Si l'intention était le seul facteur à prendre en considération, les dispositions détaillées de la *Loi des Indiens* et de son règlement d'application en ce qui concerne les cessions n'auraient aucun objet, et l'obligation de fiduciaire qu'a assumée la Couronne relativement aux droits miniers de la bande, lorsqu'elle a accepté la cession en 1940, serait dépourvue de tout fondement. Il n'est pas contesté que les biens des Indiens doivent, à l'instar de ceux appartenant à toute autre personne, être traités conformément à la loi. La réalité est que la bande a, en 1940, cédé en fiducie à la Couronne les droits miniers afférents à la R.I. 172 pour qu'elle les loue au profit de la bande. Avec égards, je suis d'avis qu'il n'est ni théorique ni formaliste d'affirmer que la cession de 1940 a eu pour effet de retrancher les droits miniers de la R.I. 172, et qu'en conséquence ces droits n'ont pu être transférés au moment de la cession, en 1945, des droits que détenait encore la bande sur la R.I. 172.

L'objet fondamental des dispositions de la *Loi des Indiens* relatives aux cessions est de faire en sorte que l'on respecte l'intention des bandes indiennes relativement à leurs droits sur les réserves. Si la bande entendait modifier les modalités de la cession conditionnelle de 1940 pour faire une cession absolue, il convient alors de se demander pourquoi elle n'a pas eu recours aux dispositions de la *Loi des Indiens* afin de réaliser con-

intention of the Band to surrender the mineral rights for purposes of sale in 1945, mineral rights were never discussed in the negotiations leading to the 1945 surrender?

venablement cette intention sur le plan juridique. De même, si la bande avait l'intention, en 1945, de céder les droits miniers pour qu'ils soient vendus, il est également permis de se demander pourquoi on n'a jamais discuté de ces droits au cours des négociations qui ont abouti à la cession de 1945.

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Even assuming that an intention to transfer the mineral rights in 1945 could somehow sweep aside these problems, finding such an intention in 1945 is difficult. My colleague Gonthier J. asserts that the trial judge found as a fact that the Band intended to give up all rights in I.R. 172 forever in 1945. With respect, the trial judge's findings fall short of this.

Même en supposant que l'intention de transférer les droits miniers en 1945 pourrait, de quelque manière, écarter ces problèmes, il est difficile de déceler l'existence d'une telle intention en 1945. Mon collègue le juge Gonthier affirme que le juge de première instance est arrivé à la conclusion de fait que la bande avait l'intention, en 1945, de renoncer pour toujours à ses droits afférents à la R.I. 172. Avec égards, les conclusions du juge de première instance ne vont pas jusque-là.

85

The trial judge did not make an explicit finding of fact as to whether the Band gave full, free and informed consent to the surrender of the mineral rights in 1945. He began his discussion of this issue at p. 54 F.C. as follows:

Le juge de première instance n'est pas spécifiquement arrivé à la conclusion de fait que la bande avait librement consenti, en toute connaissance de cause, à la cession des droits miniers en 1945. Voici comment il a commencé son analyse de la question à la p. 54 C.F.:

Assuming for the moment that full, free and informed consent was given by the plaintiffs to the 1945 surrender, one would normally conclude on the mere reading of those two documents and failing evidence to the contrary, that it was intended by both parties on executing the 1945 surrender, that all of the property rights of the plaintiffs, including any property or other rights in minerals which they might possibly have were being surrendered for the purposes mentioned in that document, that is, for sale or lease by the Crown for the benefit of the Indians. [Emphasis added.]

Si on présume pour l'instant que les demandeurs ont librement consenti, en toute connaissance de cause, à la cession effectuée en 1945, on pourrait normalement conclure à la simple lecture des deux documents, et en l'absence de preuve contraire, que les deux parties voulaient, en signant la cession de 1945, que tous les droits de propriété des demandeurs, y compris les droits de propriété ou autres droits qu'ils pouvaient posséder sur les minéraux de la réserve, soient cédés aux fins mentionnées dans cet acte, c'est-à-dire leur vente ou leur location par la Couronne pour le profit des Indiens. [Je souligne.]

The trial judge then continued to discuss the wording of the 1945 document and concluded that the wording of that document (by its failure to exclude the mineral rights) evidenced an intention of the Band to resurrender those rights on different terms. He somehow reached this conclusion in spite of his recognition at p. 64 F.C. that "[t]he legal effect could only be to grant or surrender whatever rights the plaintiffs had in I.R. 172." Clearly if the effect of the 1940 surrender was to sever mineral rights from the reserve then the legal effect of the 1945 surrender could not include those rights. He never

Le juge de première instance a ensuite poursuivi l'examen du document de 1945 et il a conclu que ce document, de par son libellé (le fait qu'il n'excluait pas les droits miniers), attestait l'intention de la bande de céder à nouveau les droits en question, mais à des conditions différentes. Il est arrivé à cette conclusion même s'il avait reconnu, à la p. 64 C.F., que «[s]euls les droits que les demandeurs détenaient sur la R.I. 172 pouvaient être légalement cédés.» De toute évidence, si la cession de 1940 avait eu pour effet de retrancher les droits miniers de la réserve, celle de 1945 ne pouvait

returned to consider the validity of his initial assumption that full, free and informed consent was given by the Band.

It follows that the finding of the trial judge that the Band intended to give up all rights in I.R. 172 forever is a legal finding based on his reading of the wording of the 1945 surrender rather than a finding of fact based on the evidence presented at trial. In fact the only witness whose oral testimony with respect to the 1945 surrender was accepted by the trial judge testified: "No mention of mineral rights were made at the meeting" (p. 201 F.T.R.). Likewise, the notes of the Indian agent in Fort St. John, Galibois, indicate that no mention was made of mineral rights. At page 184 F.T.R., the trial judge states that "from and including the surrender in 1945 . . . mineral rights were never mentioned or considered either one way or the other". What the evidence does establish is that the Band was promised replacement reserves at the 1945 surrender meeting. It also establishes that the replacement reserves purchased for the Band did not include mineral rights.

While the reasons of my colleague Gonthier J. claim to reflect the intention of the Band, the only evidence on the record of an intention to vary the terms under which the Crown held the mineral rights is that they were not mentioned either at the meeting at which assent was given to the 1945 surrender nor in the 1945 surrender document. With respect, this constitutes a weak evidentiary basis on which to establish an intention which would have the effect of revoking or varying an explicit surrender on different terms to which full and informed consent was given. In fact, later in his reasons, my colleague accepts that in 1945 the Crown did not receive a clear mandate from the Band to sell the mineral rights.

In my opinion, we should not overturn a deliberately executed and statutorily authorized surrender

donc, sur le plan juridique, les inclure. Le juge de première instance n'a cependant jamais réexaminé la validité de son hypothèse initiale, savoir que la bande avait donné librement son consentement, en toute connaissance de cause.

Il s'ensuit que la conclusion du juge de première instance que la bande entendait renoncer pour toujours à tous ses droits afférents à la R.I. 172 est une conclusion de droit, fondée sur son interprétation du texte de l'acte de cession de 1945, plutôt qu'une conclusion de fait fondée sur la preuve présentée au procès. En fait, la seule personne dont le témoignage a été retenu par le juge de première instance a dit: [TRADUCTION] «Aucune allusion à des droits miniers n'a été faite à l'assemblée» (p. 201 F.T.R.). De même, les notes de l'agent des Indiens, Galibois, indiquent qu'il n'a pas été question des droits miniers. À la page 184 F.T.R., le juge de première instance affirme «qu'à compter de la cession en 1945 [. . .] on n'a jamais fait allusion d'une manière ou d'une autre aux droits miniers ou on n'a jamais examiné cette question». Ce qu'établit la preuve, toutefois, c'est que, à l'occasion de l'assemblée concernant la cession en 1945, on avait promis à la bande des terres pour remplacer sa réserve. La preuve établit également que les terres de remplacement achetées pour la bande n'incluaient pas les droits miniers.

Même si, dans ses motifs, mon collègue le juge Gonthier dit tenir compte de l'intention de la bande, la seule preuve au dossier de l'intention de modifier les conditions auxquelles la Couronne détenait les droits miniers est qu'il n'en a été question ni à l'assemblée au cours de laquelle on a consenti à la cession de 1945, ni dans l'acte constatant cette cession. Avec égards, cette preuve constitue un fondement plutôt faible pour étayer l'existence d'une intention qui aurait eu pour effet d'annuler ou de modifier une cession explicite, à des conditions différentes, auxquelles on aurait consenti librement et de manière éclairée. De fait, plus loin dans ses motifs, mon collègue reconnaît que la Couronne n'avait pas, en 1945, reçu de la bande le mandat clair de vendre les droits miniers.

À mon avis, nous ne devrions pas, en l'absence de preuve, invalider un acte de cession dûment

on the basis of no evidence. In determining something as nebulous as intention over 40 years later one must look to all available sources. Here the written source is silent where one would have expected clear wording to revoke the previous surrender and the oral testimony establishes that the issue was never even discussed. This cannot be evidence of intention and the Band should be entitled to the protection of the *Indian Act* and the common law which prevent the Crown from unilaterally changing the terms under which it held the property as fiduciary without obtaining the informed consent of the Band. In the words of Gonthier J., the DIA never received a clear mandate from the Band to sell the mineral rights. How then, one may ask, can one conclude that the Band intended that the mineral rights be surrendered for purposes of sale?

passé et autorisé par la loi. Lorsqu'il s'agit de déterminer quelque chose d'aussi nébuleux que l'intention, et ce plus de 40 ans après le fait, il faut examiner toutes les sources disponibles. En l'espèce, la preuve écrite est muette sur cette question, alors qu'on se serait attendu à ce que l'annulation de la cession précédente y soit constatée en termes clairs. De plus, les témoignages oraux établissent que cette question n'a même jamais été discutée. Cela ne peut constituer la preuve de l'intention, et la bande devrait pouvoir invoquer les mesures de protection prévues par la *Loi des Indiens* et la common law et qui ont pour effet d'empêcher la Couronne de modifier unilatéralement les conditions en vertu desquelles elle détenait les biens en qualité de fiduciaire, sans obtenir le consentement éclairé de la bande. Suivant les mots mêmes du juge Gonthier, le MAI n'a jamais reçu de la bande le mandat clair de vendre les droits miniers. Cela étant, comment peut-on conclure que la bande a eu l'intention de céder les droits miniers pour qu'ils soient vendus?

89

My colleague, Gonthier J. asserts that the 1945 surrender specifically included the mineral rights. He reaches this conclusion by importing the definition of "reserve" from the 1927 *Indian Act* into the 1945 surrender agreement. He notes that the statutory definition in s. 2(j) includes "minerals" and therefore that minerals were included in the 1945 surrender. With respect, this assertion conveniently overlooks the requirement in s. 2(j) that a reserve includes only that which "has not been surrendered to the Crown". Given the legitimacy of the 1940 surrender with respect to the mineral rights, which my colleague accepts, it would be more accurate to say that applying the statutory definition of "reserve" to the 1945 surrender would specifically exclude minerals from that surrender.

Mon collègue le juge Gonthier affirme que la cession de 1945 visait spécifiquement les droits miniers. Il arrive à cette conclusion en important dans l'acte de cession de 1945 la définition de «réserve» de la *Loi des Indiens* de 1927. Il signale que, comme la définition figurant à l'al. 2h) de la Loi vise les «minéraux», ceux-ci étaient visés par la cession de 1945. Avec égards, cette affirmation fait opportunément abstraction de l'exigence énoncée dans ce même alinéa et selon laquelle une réserve inclut uniquement ce qui «n'a pas été rétrocéd[é] à la Couronne». Compte tenu du caractère légitime de la cession des droits miniers en 1940, ce qu'admet mon collègue, il serait plus exact d'affirmer que l'application à la cession de 1945 de la définition de «réserve» figurant dans la Loi a plutôt pour effet d'en exclure spécifiquement les minéraux.

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It should be remembered that this is not a case where an Indian band is arguing that the Crown's failure to follow the proper administrative procedures has thwarted its true intentions. Rather, this is a case where the Crown, as fiduciary, has acted in a manner not authorized by the original surren-

Il faut se rappeler qu'il ne s'agit pas d'une affaire où une bande indienne prétend que ses véritables intentions ont été contrecarrées par suite de l'omission de la Couronne de suivre la procédure administrative applicable. Au contraire, nous sommes plutôt en présence d'un cas où la Cou-

der under which it became the fiduciary of the property. If the Crown wished to gain a broader discretion with respect to the property that it held in a "trust-like" manner there were certain steps it was required to follow. These steps included informing the Band specifically of the Crown's intention to alter the terms on which it held the mineral rights and following its own administrative procedures by revoking the 1940 surrender by order in council to allow for a new surrender in accordance with the *Indian Act*. Neither of these steps were taken here.

Gonthier J. suggests that the 1945 dealings may best be "characterized as a variation of a trust in Indian land" (para. 12), a concept of trust which we are told is not to be equated with a common law trust. Whatever the legal characteristics of the proposed "trust in Indian land", it is difficult to see how it advances the case. The difficulties of applying trust principles directly to the *sui generis* Indian interest in their reserves point to the fact that it is better to stay within the protective confines of the *Indian Act*. The 1927 *Indian Act* contains provisions which regulate in some detail the manner in which Indians may surrender their reserves or interests in their reserves to the Crown. The formal surrender requirements contained in the *Indian Act* serve to protect the Indians' interest by requiring that free and informed consent is given by a band to the precise manner in which the Crown handles property which it holds on behalf of the Band. The Act also recognizes the Indians as autonomous actors capable of making decisions concerning their interest in reserve property and ensures that the true intent of an Indian Band is respected by the Crown. No matter how appealing it may appear, this Court should be wary of discarding carefully drafted protections created under validly enacted legislation in favour of an *ad hoc*

ronne, en tant que fiduciaire, a agi d'une manière qui n'était pas autorisée par la cession originale en vertu de laquelle elle était devenue fiduciaire des biens visés. Si la Couronne souhaitait obtenir un pouvoir discrétionnaire plus grand à l'égard des biens qu'elle détenait selon une formule «semblable à une fiducie», certaines étapes devaient être suivies. Parmi ces étapes, mentionnons l'obligation de la Couronne d'informer expressément la bande de son intention de modifier les conditions auxquelles la Couronne détenait les droits miniers, ainsi que l'obligation de cette dernière de suivre sa propre procédure administrative et d'annuler, par décret, la cession de 1940, afin de permettre l'accomplissement d'une nouvelle cession conforme à la *Loi des Indiens*. Ni l'une ni l'autre de ces étapes n'ont été suivies en l'espèce.

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Le juge Gonthier affirme que la meilleure façon de décrire les opérations de 1945 est de les «qualifier de modification d'une fiducie visant des terres indiennes» (par. 12), forme de fiducie qui, de poursuivre le juge, ne doit pas être assimilée à une fiducie en common law. Quelles que soient les caractéristiques juridiques de la notion de «fiducie visant des terres indiennes» que l'on propose, il est difficile de voir en quoi cela aide à trancher le pourvoi. Les difficultés que soulève le fait d'appliquer directement les principes du droit des fiducies au droit *sui generis* des Indiens sur leurs réserves indiquent qu'il vaut mieux s'en tenir aux mécanismes de protection prévus par la *Loi des Indiens*. La *Loi des Indiens* de 1927 renferme des dispositions qui réglementent de manière assez détaillée la façon dont les Indiens peuvent céder à la Couronne leurs réserves ou leurs droits sur celles-ci. Les formalités touchant les cessions qui sont établies par la Loi visent à protéger les droits des Indiens en exigeant que la bande concernée consente, de manière libre et éclairée, à la façon précise dont la Couronne prend charge du bien qu'elle détient pour le compte de la bande. La Loi reconnaît également que les Indiens sont des acteurs autonomes, capables de prendre des décisions relativement aux droits qu'ils détiennent sur leur réserve, et elle fait en sorte que la Couronne respecte l'intention véritable des bandes indiennes. Aussi attirante que puisse paraître une telle solution, notre Cour doit

approach based on novel analogies to other areas of the law.

prendre garde de ne pas écarter des mécanismes de protection soigneusement créés en vertu de lois valablement édictées, pour leur substituer une méthode *ad hoc* fondée sur des analogies nouvelles, établies avec d'autres domaines du droit.

92

I conclude that the 1940 surrender of the mineral rights was a valid surrender of a portion of the reserve which converted that portion into "Indian lands". By the definition of the Act, a reserve cannot include what has already been surrendered. It follows that the 1945 surrender of the reserve could not include the mineral rights as a matter of law and according to the wording and the statutory scheme of the *Indian Act*. I conclude that the 1945 surrender had no effect on the mineral rights. The Crown continued to hold them in trust for the Band on terms that they be leased for the welfare of the Band.

Je conclus que la cession des droits miniers en 1940 était une cession valide d'une partie de la réserve, et qu'elle a eu pour effet de faire de la portion ainsi cédée des «terres indiennes». De par la définition de la Loi, une réserve ne peut pas comprendre ce qui a déjà été cédé. Il s'ensuit que, tant en droit que d'après le texte et l'économie de la *Loi des Indiens*, la cession de la réserve en 1945 ne pouvait pas inclure les droits miniers. Je conclus que la cession de 1945 n'a eu aucun effet sur les droits miniers. La Couronne a continué de les détenir en fiducie pour la bande, aux fins de les louer pour le bien-être de celle-ci.

(c) Did the Transfer of the Mineral Rights in 1948 Constitute a Breach of Fiduciary Duty?

c) Le transfert des droits miniers en 1948 a-t-il constitué un manquement à l'obligation de fiduciaire?

93

Until 1948 the DIA held the surface rights and the mineral rights in trust for the Indians, pursuant to the surrenders of 1945 and 1940 respectively. In 1948, after concluding negotiations for the reserve, it assigned the land to the DVLA. The assignment did not reserve out mineral rights despite the fact that the Crown had no right to sell them under the terms of the 1940 surrender and s. 54 of the Act, and despite the fact that they had not been mentioned in the negotiations leading to the sale and appear to have played no role in determining the price paid. Since the transfer to the DVLA did not reserve out the mineral rights, and since the DIA had always held legal title to both the mineral rights and the surface rights, the transfer must be taken to have legally passed the mineral rights as well as the surface rights: *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 A.C. 295 (P.C.). So the DVLA, without ever having sought them, found itself in possession of the mineral rights. The DVLA in turn passed the mineral rights on to the veterans as they met the terms of their agreements for sale, in the form of original Crown grants, pursuant to s. 5(2) of *The*

Jusqu'en 1948, le MAI a détenu en fiducie pour les Indiens les droits de superficie et les droits miniers, conformément aux cessions de 1945 et de 1940 respectivement. En 1948, au terme de négociations visant la réserve, le MAI a cédé les terres au DTAC. L'acte de transfert ne réservait pas les droits miniers, malgré le fait, d'une part, que la Couronne n'avait pas, en vertu des conditions de la cession de 1940 et des dispositions de l'art. 54 de la Loi, le droit de les vendre, et, d'autre part, que ces droits n'avaient pas été mentionnés durant les négociations ayant abouti à la vente et qu'ils ne semblent pas avoir eu quelque influence dans la détermination du prix payé. Comme l'acte de transfert au DTAC ne réservait pas les droits miniers et que le MAI n'avait jamais cessé de détenir le titre légal à la fois aux droits miniers et aux droits de superficie, le transfert doit être considéré comme ayant eu pour effet de transporter légalement les droits miniers ainsi que les droits de superficie: *Attorney-General of British Columbia c. Attorney-General of Canada* (1889), 14 A.C. 295 (C.P.). Ainsi, le DTAC s'est retrouvé en possession des droits miniers sans les avoir jamais

Veterans' Land Act, 1942 (later R.S.C. 1952, c. 280; s. 5(3)).

Years later, wonderment persisted as to why the mineral rights had been passed to the DVLA. The wonderment was understandable given the well-known policy of the DIA to reserve out mineral rights and the fact that the only interest of the DVLA was to obtain land for agricultural purposes, not to enrich veterans through procuring mineral rights for them. The best explanation of how the mineral rights came to be transferred to the DVLA appears to lie in simple inadvertence. Thus, in 1961 District Solicitor A. F. McWilliams wrote to the Director of Veteran's Affairs as follows:

It has been known here The Director, The Veterans' Land Act is the owner of the mineral rights underlying the Fort St. John Indian Reserve. It has always been a mystery to the writer how he acquired these mineral rights, and our file on the Fort St. John Indian Reserve does not disclose how this came about. We would be interested to know, therefore, under what arrangement did The Director, The Veterans' Land Act acquire the mineral rights under the Fort St. John Indian Reserve. [Emphasis added.]

The reply from H. R. Holmes, the Superintendent of the Securities and Property Division of the Department of Veterans' Affairs reads as follows:

1. I think the simple answer to your query of June 14th is that the reason we acquired the mineral rights when we acquired the surface rights is because the Letters Patent which issued did not reserve the mines and minerals.

2. The chief and principal men of the St. John Beaver Band of Indians executed a Surrender dated the 22nd of September, 1945, and the Governor in Council by Order in Council P.C. 6506 dated the 16th day of October, 1945, accepted the Surrender and authorized the Minis-

demandés. À son tour, il les a transportés aux anciens combattants, dès que ceux-ci avaient satisfait aux conditions de leur acte de vente respectif qui prenait la forme de concession primitive accordée par la Couronne, conformément au par. 5(2) de la *Loi de 1942 sur les terres destinées aux anciens combattants* (plus tard S.R.C. 1952, ch. 280, par. 5(3)).

Bien des années plus tard, on se demandait encore pourquoi les droits miniers avaient été transférés au DTAC. Cet étonnement était compréhensible compte tenu de la politique notoire du MAI qui était de réserver les droits miniers en cas de cession et du fait que le DTAC désirait seulement obtenir des terres à des fins agricoles et non enrichir les anciens combattants en leur procurant des droits miniers. Il semble que la meilleure façon d'expliquer le transfert des droits miniers au DTAC est de considérer qu'il s'est agi d'une simple inadvertance. D'ailleurs, en 1961, le procureur de district, A. F. McWilliams, a écrit ce qui suit au Directeur des Affaires des anciens combattants:

[TRADUCTION] Nous savons que le Directeur de la Loi sur les terres destinées aux anciens combattants est propriétaire des droits miniers afférents au sous-sol de la réserve indienne de Fort St. John. Je me suis toujours demandé comment il avait acquis ces droits miniers, et notre dossier sur la réserve indienne de Fort St. John ne révèle pas comment cela s'est produit. Nous serions par conséquent intéressés de savoir de quelle façon le Directeur de la Loi sur les terres destinées aux anciens combattants a acquis ces droits miniers. [Je souligne.]

Voici la réponse qu'a donnée H. R. Holmes, surintendant de la Division des propriétés et valeurs du ministère des Affaires des anciens combattants:

[TRADUCTION]

1. Je pense que la réponse à votre demande de renseignements du 14 juin est tout simplement que nous avons acquis les droits miniers en même temps que les droits de superficie, en raison du fait que les lettres patentes délivrées à cette fin ne réservaient pas les mines et les minéraux.

2. Le chef et les principaux membres masculins de la bande indienne des Castors de St. John ont signé un acte de cession daté du 22 septembre 1945, et le gouverneur en conseil a, par le décret C.P. 6506 daté du 16 octobre 1945, accepté la cession et autorisé le ministre des

ter of Mines and Resources [under which Ministry the DIA existed at the time] to sell or lease the said lands subject to the conditions of the Surrender and the provisions of the Indian Act. During purchase negotiations with Indian Affairs, there was no reference, to the best of my knowledge and belief, to the question of mineral rights. As I have already said, the mines and minerals, either deliberately or inadvertently, were not reserved with the result that we acquired them. I think possibly the failure to reserve the sub-surface rights was inadvertent. [Emphasis added.]

Mines et Ressources [ministère dont relevait le MAI à l'époque] à vendre ou à louer lesdites terres sous réserve des conditions de la cession et des dispositions de la Loi des Indiens. Durant les négociations avec les Affaires indiennes relativement à l'achat, il n'a pas été question, autant que je sache, des droits miniers. Comme je l'ai dit plus tôt, qu'il se soit agi d'une décision délibérée ou d'une inadvertance, les mines et les minéraux n'ont pas été réservés, de sorte que nous les avons acquis. Il est possible, selon moi, que l'omission de réserver les droits relatifs au sous-sol de la réserve résulte d'une inadvertance. [Je souligne.]

95 There exist two grounds for arguing that transfer of the minerals to the DVLA in 1948 constituted a breach of fiduciary duty by the Crown. The first argument is that the transfer breached the 1940 surrender of the minerals, which restricted the DIA to leasing them for the benefit of the Band. A fiduciary is at very least bound to adhere to the terms of the instrument which bestows his powers and creates the trust.

Deux arguments permettent de prétendre que le transfert des minéraux au DTAC en 1948 a constitué un manquement aux obligations de fiduciaire de la Couronne. Le premier argument est que ce transfert a violé les conditions de la cession des droits miniers réalisée en 1940, cession en vertu de laquelle le MAI n'était autorisé qu'à louer les droits en question au profit de la bande. Un fiduciaire est à tout le moins tenu de respecter les dispositions de l'acte qui lui confère ses pouvoirs et crée la fiducie.

96 In any event, even if one were to accept for the sake of the argument that the 1945 surrender revoked the 1940 surrender of mineral rights, the 1945 surrender still imposed an obligation on the Crown to lease or sell in the best interests of the Band. This would leave for consideration the argument that the Crown breached its fiduciary obligations by transferring the mineral rights to the DVLA in 1948, because transfer rather than reservation for future leasing was contrary to the best interests of the Indians.

Quoi qu'il en soit, même si on accepte, pour les fins de la discussion, l'argument que la cession de 1945 a eu pour effet d'annuler celle des droits miniers en 1940, la Couronne avait toujours, aux termes de la cession de 1945, l'obligation de vendre ou de louer les terres visées dans l'intérêt de la bande. Il reste alors à examiner l'argument voulant que, en transférant les droits miniers au DTAC en 1948, la Couronne a manqué à son obligation de fiduciaire, parce que la décision de transférer ces droits plutôt que de les réserver en vue de leur location dans le futur n'était pas dans l'intérêt des Indiens.

97 The trial judge rejected this argument on the ground that it was not foreseeable in 1948 that the mineral rights could have any value (at p. 49 F.C.):

Le juge de première instance a rejeté cet argument pour le motif qu'il était impossible, en 1948, de prévoir que les droits miniers pourraient prendre quelque valeur (à la p. 49 C.F.):

I find that, taking into account the fiduciary relationship then existing between Her Majesty the Queen and the plaintiffs, none of her officers, servants or agents, exercising due care, consideration and attention in the discharge of those fiduciary duties, could reasonably be expected to have anticipated at any time during 1948 or previously that there would be any real value attached to

J'estime que, si on tient compte du rapport fiduciaire liant alors Sa Majesté la Reine aux demandeurs, on ne pouvait raisonnablement s'attendre à ce qu'aucun des fonctionnaires, préposés ou mandataires de cette dernière, exerçant toute la prudence et l'attention voulues dans l'exécution de ses obligations fiduciaires, ait pu prévoir à quelque moment que ce soit, en 1948 ou avant,

potential mineral rights under I.R. 172 or that there would be any reasonably foreseeable advantage in retaining them.

The finding of the trial judge that the Crown could not have known in 1948 that the mineral rights might possess value flies in the face of the evidence on record. Accordingly, this is one of those rare cases where departure from a trial judge's finding may be warranted.

The Crown's own prior experience sufficed to establish that the mineral rights had actual and potential value. After taking the surrender in 1940, it issued a permit for prospecting for oil and gas on the property. The 1940 permit alone was worth \$1,800, a not insignificant sum given that the annual interest of 5 percent on the \$70,000 purchase price for the surface rights yielded about \$3,500.

Moreover, the Crown had much earlier realized the potential value of mineral rights and routinely excluded them from its grants. As early as 1919, in *The Soldier Settlement Act, 1919*, S.C. 1919, c. 71, the federal Crown had reserved out mines and minerals from land grants to returning veterans. The *Dominion Lands Act*, R.S.C. 1927, c. 113, covering all federal land on the Prairies and in the Peace River District did the same. Provinces adopted the same policy. For example, the B.C. *Land Act*, R.S.B.C. 1924, c. 131, ss. 119 and 120, reserved mineral rights to the B.C. Crown on all grants of provincial lands. As a result, the new reserves obtained for the Band in 1950 did not include mineral rights.

If more were required, events close in time to 1948 reveal that these particular mineral rights might have considerable value, if only from the

que les droits miniers éventuels afférents à la R.I. 172 auraient une valeur réelle ou qu'il y aurait un avantage raisonnablement prévisible à conserver ces droits.

La constatation du juge de première instance que la Couronne ne pouvait pas savoir, en 1948, que les droits miniers pourraient avoir de la valeur est incompatible avec la preuve figurant au dossier. Par conséquent, nous sommes en présence d'un des rares cas où il est justifié d'écarter une constatation du juge de première instance.

Les expériences antérieures de la Couronne à cet égard permettaient à elles seules de savoir que les droits miniers avaient une valeur à la fois concrète et potentielle. Après avoir conclu la cession en 1940, la Couronne a délivré un permis de prospection pétrolière et gazière sur le bien-fonds. Le permis de 1940 valait à lui seul 1 800 \$, somme non négligeable puisque l'intérêt annuel de 5 pour 100 obtenu sur la somme de 70 000 \$, qui constituait le prix d'achat des droits de superficie, rapportait environ 3 500 \$.

En outre, la Couronne avait déjà pris conscience, bien longtemps auparavant, de la valeur qu'étaient susceptibles de prendre les droits miniers, et, en conséquence, elle les excluait habituellement des concessions qu'elle accordait. Dès 1919, dans la *Loi d'établissement des soldats, 1919*, S.C. 1919, ch. 71, la Couronne fédérale se réservait les mines et les minéraux dans les concessions de terres accordées aux anciens combattants démobilisés. La *Loi des terres fédérales*, S.R.C. 1927, ch. 113, faisait de même à l'égard de toutes les terres fédérales dans les Prairies et dans le district de la rivière de la Paix. Les provinces appliquaient la même politique. Par exemple, la *Land Act* de la Colombie-Britannique, R.S.B.C. 1924, ch. 131, art. 119 et 120, réservait les droits miniers à la Couronne de la Colombie-Britannique dans toutes les concessions de terres provinciales. Par conséquent, les nouvelles terres acquises pour la bande en 1950 n'incluaient pas les droits miniers.

Si tant est que cela était nécessaire, des événements survenus aux environs de 1948 indiquaient que les droits miniers en cause pouvaient avoir une

point of view of revenues from exploration rights. In 1949 interest in further exploration on the land for oil and gas gave rise to negotiations which resulted in a pooling agreement by the veterans in 1952. The Department of Mines and Minerals noted in its 1949 recommendation that gas had been discovered (in 1948) 40 miles south of the reserve and that detailed geological exploration of the reserve was in order. In view of the fact that the 1952 lease was in the same terms as the 1940 lease, the trial judge's suggestion that the 1952 lease constituted the first evidence that the mineral rights could be potentially valuable is difficult to understand. Equally inexplicable is the trial judge's emphasis on the fact that oil was not discovered on the land until 1976 and then only by chance. Those observations do not negate the clear evidence that the potential value of the mineral rights was apparent at a much earlier date. In so far as he confused potential with actual value, the trial judge erred.

valeur considérable, ne serait-ce que du point de vue des revenus émanant des droits d'exploration. En 1949, l'intérêt manifesté en vue de la poursuite de l'exploration des terres visées pour y chercher du pétrole et du gaz donna lieu à des négociations qui aboutirent à la conclusion par les anciens combattants, en 1952, d'un accord de mise en commun. Le ministère des Mines et des Minéraux a noté, dans sa recommandation de 1949, que du gaz avait été découvert (en 1948) à 40 milles au sud de la réserve et qu'il convenait de procéder à une exploration géologique minutieuse de la réserve. Comme les conditions du bail de 1952 étaient les mêmes que celles du bail de 1940, il est difficile de comprendre comment le juge de première instance peut dire que le bail de 1952 constituait le premier élément de preuve indiquant que les droits miniers pouvaient avoir une certaine valeur. Tout aussi inexplicable est l'insistance du juge de première instance sur le fait que ce n'est qu'en 1976 que du pétrole a été découvert sur les terres visées, et encore là, par hasard seulement. Ces observations n'ont pas pour effet de réfuter la preuve manifeste que la valeur potentielle des droits miniers était évidente bien avant cette date. Dans la mesure où il a confondu valeur potentielle et valeur réelle, le juge de première instance a commis une erreur.

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Secondly, the trial judge's inference from low value of the absence of a duty to reserve the mineral from the 1948 transfer is suspect. If indeed the mineral rights had minimal sale value in 1948, it does not follow that a prudent person would give them away. It is more logical to argue that since nothing could be obtained for them at the time, and since it would cost nothing to keep them, they should be kept against the chance, however remote, that they might acquire some value in the future. The wisdom of the latter course is demonstrated by the Crown's policy with respect to its own mineral rights; it reserved them to itself, regardless of actual value. It lies ill in the mouth of the Crown to argue that it should have done less

Deuxièmement, l'inférence du juge de première instance que, en raison de la faible valeur des droits miniers, il n'y avait aucune obligation de les réserver à l'occasion du transfert de 1948, est douteuse. Si, de fait, les droits miniers n'avaient qu'une valeur de vente minimale en 1948, il ne s'ensuit pas qu'une personne prudente en aurait fait cadeau pour autant. Il est plus logique de prétendre que, comme on ne pouvait rien en tirer à l'époque et qu'il n'en coûtait rien pour les conserver, il fallait les garder au cas où par l'effet de quelque chance, si mince soit-elle, ils prendraient une certaine valeur par la suite. La sagesse de cette dernière solution ressort de la politique de la Couronne à l'égard de ses propres droits miniers. En effet, celle-ci réservait ses droits, indépendamment de leur valeur réelle au moment pertinent. La Couronne est malvenue d'affirmer qu'elle était tenue à

with the property entrusted to it as fiduciary to lease for the welfare of the Band.

The trial judge's emphasis on the apparent low value of the mineral rights suggests an underlying concern with the injustice of conferring an unexpected windfall on the Indians at the Crown's expense. This concern is misplaced. It amounts to bringing foreseeability into the fiduciary analysis through the back door. This constitutes an error of law. The beneficiary of a fiduciary duty is entitled to have his or her property restored or value in its place, even if the value of the property turns out to be much greater than could have been foreseen at the time of the breach: *Hodgkinson v. Simms*, *supra*, at p. 440, *per* La Forest J.

The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.

(d) Conclusions on Post-surrender Duty and Breach with Respect to Mineral Rights

I conclude that the 1940 surrender of the mineral rights imposed a fiduciary duty to the Band with respect to the mineral rights under the terms of the 1940 surrender, and that the DIA breached this duty by conveying the mineral rights to the DVLA.

moins en ce qui concerne le bien qui, en sa qualité de fiduciaire, lui avait été confié pour qu'elle le loue pour le bien-être de la bande.

L'insistance du juge de première instance sur la valeur apparemment peu élevée des droits miniers tend à indiquer qu'il craint qu'il y ait injustice à accorder, aux frais de la Couronne, des profits inattendus aux Indiens. Cette crainte est déplacée, car elle revient à introduire subrepticement le critère de la prévisibilité dans l'analyse concernant l'obligation de fiduciaire. Ceci constitue une erreur de droit. Le bénéficiaire d'une obligation de fiduciaire a droit à ce qu'on lui rende son bien ou la valeur de ce bien, et ce même si cette valeur se révèle beaucoup plus élevée que ce qu'il était possible de prévoir au moment du manquement à l'obligation: *Hodgkinson c. Simms*, précité, à la p. 440, le juge La Forest.

Voilà à quoi se résume la question. En tant que fiduciaire, la Couronne avait l'obligation d'agir avec le soin et la diligence «qu'un bon père de famille apporte à l'administration de ses propres affaires»: *Fales c. Canada Permanent Trust Co.*, [1977] 2 R.C.S. 302, à la p. 315. Une personne raisonnable ne se départit pas par inadvertance d'un bien qui peut avoir de la valeur et dont la capacité de produire un revenu a déjà été démontrée. Une personne raisonnable ne se départit pas non plus, sans contrepartie, d'un bien qui ne lui coûte rien à conserver et qui, aussi mince que cette possibilité puisse être, pourrait un jour avoir de la valeur. Dans la gestion de ses propres affaires, la Couronne réservait ses droits miniers. Elle aurait dû faire de même pour la bande.

d) Les conclusions sur l'obligation relative aux droits miniers et postérieure à la cession et sur le manquement à cette obligation

Je conclus que la cession des droits miniers en 1940 a eu pour effet d'imposer, conformément aux conditions de l'acte de cession, une obligation de fiduciaire envers la bande relativement aux droits miniers, et que le MAI a manqué à cette obligation en transférant les droits miniers au DTAC.

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(4) *Limitations Issues*(4) *Les questions relatives à la prescription des réclamations*

106 The Crown argues that if it breached its fiduciary duty to the Band, by conveying the reserve to the DVLA, the action on the breach is statute-barred. The Bands dispute this contention.

La Couronne prétend que si elle a manqué à son obligation de fiduciaire envers la bande en cédant la réserve au DTAC, l'action relative à ce manquement est prescrite. La bande conteste cette prétention.

107 Section 38(1) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, which applies to this litigation (now R.S.C., 1985, c. F-7, s. 39(1)), adopts the limitations legislation in place in the province where the cause of action arose. The relevant legislation in British Columbia is the *Limitation Act*, R.S.B.C. 1979, c. 236 (previously S.B.C. 1975, c. 37). Section 8 of that Act places a general ultimate 30-year limitation on any action: no action may be brought after the expiration of 30 years from the date on which the right to do so arose. In addition, s. 3(2) fixes a 10-year limitation on actions for breach of trust, and s. 3(4) places a 6-year limitation on actions which are not listed in the Act. There is no specific limitation in the Act on claims for breach of fiduciary duty. The 6- and 10-year limitations, but not the general 30-year ultimate limitation, may be postponed in certain circumstances. It is important to determine whether these limitations will affect recovery by the plaintiffs.

Le paragraphe 38(1) de la *Loi sur la Cour fédérale*, S.R.C. 1970 (2^e suppl.), ch. 10 (maintenant L.R.C. (1985), ch. F-7, par. 39(1)), qui s'applique au présent litige, précise que ce sont les règles de droit relatives à la prescription en vigueur dans la province où la cause d'action a pris naissance qui s'appliquent. En Colombie-Britannique le texte de loi pertinent est la *Limitation Act*, R.S.B.C. 1979, ch. 236 (auparavant S.B.C. 1975, ch. 37). L'article 8 de cette loi fixe un délai général et final de prescription de 30 ans applicable à toute action: aucune action ne peut être intentée après l'expiration d'un délai de 30 ans qui commence à courir à compter de la date où le droit de le faire a pris naissance. De plus, le par. 3(2) fixe un délai de prescription de 10 ans à l'égard des actions pour abus de confiance («*breach of trust*»), et le par. 3(4) un délai de prescription de 6 ans à l'égard des actions qui ne sont pas énumérées dans la Loi. Aucun délai de prescription particulier n'est fixé à l'égard des réclamations pour manquement à une obligation de fiduciaire. Il est possible, dans certaines circonstances, de reporter le moment où commencent à courir les délais de prescription de 6 et 10 ans, mais non le délai général et final de 30 ans. Il est important de déterminer si ces délais de prescription influenceront sur le droit des demandeurs d'obtenir réparation.

(a) The Sale of Surface Rightsa) La vente des droits de superficie

108 I earlier concluded that no breach of duty with respect to the sale of the surface rights has been proven. If it had been, it would be statute-barred, because the sale to the DVLA took place in March 1948, 30 years and 6 months prior to the filing of this claim in September 1978.

J'ai conclu précédemment que, en ce qui concerne la vente des droits de superficie, aucun manquement à une obligation n'avait été prouvé. D'ailleurs, même si une telle preuve avait été faite, la demande à ce titre aurait été prescrite étant donné que la vente au DTAC a eu lieu en mars 1948, soit 30 ans et 6 mois avant le dépôt de la présente action en septembre 1978.

(b) The Mineral Rights Claims

I earlier concluded that the Crown breached its fiduciary duty to the Band by inadvertently transferring the mineral rights to the DVLA, which in turn transferred them to the veterans who ultimately took up the reserve land. The Crown argues that since the inadvertent transfer was made in March 1948, the action for this breach is barred by the 30-year limitation period.

Against this, the Bands argue that the 1948 transfer to the DVLA was not a transfer at all, but merely an administrative allocation within the bosom of the unified Crown. Thus, the Crown's fiduciary duty continued, although it was transferred for administrative purposes to the DVLA after 1948. Consequently, the cause of action did not arise until the land was alienated from the DVLA to the veterans.

I cannot accept this argument. Although the transfer was from one Crown entity to another, it remained a transfer and an alienation of title. First, the transfer converted the Band's interest from a property interest into a sum of money, suggesting alienation. Second, the continuing fiduciary duty proposed for the DVLA is problematic from a practical point of view. Any duty would have applied, at least in theory, both to the mineral rights and the surface rights. Each sale to a veteran would have required the DVLA to consider not only those matters he was entitled to consider under his Act, but sometimes conflicting matters under the *Indian Act*. This would have made the sale in 1948 pointless from the DVLA's point of view and have rendered it impossible to administer. Moreover, it is not clear that the DVLA had any knowledge of the fiduciary obligations which bound the DIA. In fact, the DVLA and the DIA acted at arms length throughout, as was appropriate given the different interests they represented and the different mandates of their statutes. In summary, the crystallization of the property interest into a monetary sum and the practical consider-

b) Les réclamations visant les droits miniers

J'ai conclu, plus tôt, que la Couronne a manqué à son obligation de fiduciaire envers la bande en transférant par inadvertance les droits miniers au DTAC qui, à son tour, les a transférés aux anciens combattants qui se sont finalement établis sur les terres de la réserve. La Couronne fait valoir que, comme le transfert effectué par inadvertance est survenu en mars 1948, l'action relative à ce manquement est prescrite en raison de l'écoulement du délai de prescription trentenaire.

À l'encontre de cet argument, les bandes allèguent que le transfert de 1948 au DTAC ne constituait aucunement un transfert, mais simplement une affectation de nature administrative au sein de la Couronne unifiée, et donc que l'obligation de fiduciaire de la Couronne a continué d'exister, quoiqu'elle ait été transférée au DTAC, à des fins administratives, après 1948. Par conséquent, la cause d'action n'aurait pris naissance qu'au moment de l'aliénation des terres aux anciens combattants par le DTAC.

Je ne puis accepter cet argument. Même s'il s'agissait d'un transfert entre entités de la Couronne, il y avait néanmoins transfert et aliénation de titre. Premièrement, le transfert a eu pour effet de convertir le droit foncier de la bande en argent, fait qui tend à indiquer qu'il y a eu aliénation. Deuxièmement, l'argument voulant que l'obligation de fiduciaire ait continué d'exister et que le DTAC en ait été débiteur soulève un problème d'ordre pratique. Une telle obligation se serait appliquée, du moins en théorie, tant aux droits miniers qu'aux droits de superficie. À l'occasion de chaque vente à un ancien combattant, le DTAC aurait dû prendre en considération non seulement les facteurs dont il pouvait tenir compte en vertu de sa Loi habilitante, mais également, dans certains cas, d'autres facteurs incompatibles avec les premiers et prévus par la *Loi des Indiens*. Cette situation aurait rendu la vente de 1948 futile du point de vue du DTAC, en plus de rendre impossible l'administration des terres visées. Qui plus est, il n'est pas évident que le DTAC était au courant des obligations de fiduciaire qui liaient le MAI. De fait, le DTAC et le MAI ont agi tout au long des

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ations negating a duty in the DVLA toward the Band negate the suggestion that the 1948 transfer changed nothing and that the real alienation came later.

négociations dans des conditions de pleine concurrence, attitude appropriée vu les intérêts opposés qu'ils représentaient et les mandats différents qui leur étaient confiés par leur loi habilitante respective. En résumé, la transformation du droit foncier en somme d'argent ainsi que les considérations d'ordre pratique faisant obstacle à l'existence d'une obligation du DTAC envers la bande réfutent l'argument que le transfert de 1948 n'avait rien changé et que la véritable aliénation n'est survenue que plus tard.

112 An alternative argument, not considered below, is that the Crown had a statutory ability under s. 64 of the 1927 *Indian Act* to revoke any sale or lease issued in error or mistake, and that it was under a duty to exercise this power to correct the erroneous transfer of the mineral rights to the DVLA. Section 64 empowered the DIA to revoke erroneous sales or leases from the DIA to third parties:

64. If the Superintendent General is satisfied that any purchaser or lessee of any Indian lands, or any person claiming under or through him, has been guilty of any fraud or imposition, or has violated any of the conditions of the sale or lease, or if any such sale or lease has been made or issued in error or mistake, he may cancel such sale or lease and resume the land therein mentioned, or dispose of it as if no sale or lease thereof had ever been made. [Emphasis added.]

Un autre argument, qui n'a pas été examiné devant les juridictions inférieures, est que la Couronne avait, en vertu de l'art. 64 de la *Loi des Indiens* de 1927, le pouvoir d'annuler les ventes ou affermagés conclus par méprise ou par erreur, et qu'elle avait l'obligation d'exercer ce pouvoir pour corriger le transfert des droits miniers accordé par erreur au DTAC. L'article 64 habilitait le MAI à annuler les ventes ou affermagés conclus par erreur avec des tiers par le MAI:

64. Si le surintendant général s'est assuré qu'un acquéreur ou affermataire de terres indiennes, ou qu'un individu revendiquant du chef de ce dernier ou par son fait, s'est rendu coupable de fraude ou de supercherie, ou a enfreint quelque une des conditions de la vente ou de l'affermage, ou si quelque vente a été faite ou si quelque affermage a été accordé par méprise ou par erreur, il peut annuler cette vente ou cet affermage et reprendre possession de la terre y mentionnée, ou en disposer comme si cette vente ou cet affermage n'eût jamais eu lieu. [Je souligne.]

113 The Crown argues that s. 64 does not apply because the mineral rights were not transferred in error. The evidence does not support this contention. As discussed earlier, the transfer has never been described as intentional and has generally been attributed to inadvertence. This constitutes "error or mistake" within s. 64.

La Couronne affirme que l'art. 64 ne s'applique pas parce que les droits miniers n'ont pas été transférés par erreur. La preuve n'appuie pas cette affirmation. Comme il a été indiqué précédemment, le transfert n'a jamais été qualifié d'intentionnel, mais il a généralement été imputé à une inadvertance. Cela constitue une «méprise ou [une] erreur» au sens de l'art. 64.

114 It follows that the DIA had the power to revoke the inadvertent, erroneous grant of the mineral rights to the DVLA up to the time they were transferred to veterans. The remaining questions are whether the DIA was under a duty to use this

Il s'ensuit que le MAI avait le pouvoir d'annuler le transfert des droits miniers qui avait été fait par erreur, en l'occurrence par inadvertance, au DTAC, et ce jusqu'au transfert de ces droits aux anciens combattants. Il reste à déterminer, d'une part, si le

power to revoke the transfer, and how this affects the timing of a breach of fiduciary duty.

In my view, the DIA was under a duty to use this power to rectify errors prejudicing the interests of the Indians as part of its ongoing fiduciary duty to the Indians. The fiduciary duty associated with the administration of Indian lands may have terminated with the sale of the lands in 1948. However, an ongoing fiduciary duty to act to correct error in the best interests of the Indians may be inferred from the exceptional nature of s. 64. That section gave the DIA the power to revoke erroneous grants of land, even as against *bona fide* purchasers. It is not unreasonable to infer that the enactors of the legislation intended the DIA to use that power in the best interests of the Indians. If s. 64 above is not enough to establish a fiduciary obligation to correct the error, it would certainly appear to do so, when read in the context of jurisprudence on fiduciary obligations. Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other: *Frame v. Smith*, *supra*, per Wilson J.; and *Hodgkinson v. Simms*, *supra*. Section 64 gave to DIA power to correct the error that had wrongly conveyed the Band's minerals to the DVLA. The Band itself had no such power; it was vulnerable. In these circumstances, a fiduciary duty to correct the error lies.

The DIA's duty was the usual duty of a fiduciary to act with reasonable diligence with respect to the Indians' interest. Reasonable diligence required that the DIA move to correct the erroneous transfer when it came into possession of facts suggesting

MAI avait l'obligation d'exercer ce pouvoir afin d'annuler le transfert, et, d'autre part, de quelle manière cela influe sur le moment où serait survenu un manquement à l'obligation de fiduciaire.

À mon avis, le MAI était tenu d'exercer ce pouvoir pour corriger les erreurs qui portaient préjudice aux intérêts des Indiens vu l'obligation de fiduciaire continue qu'il avait envers ces derniers. Même si l'obligation de fiduciaire touchant l'administration des terres des Indiens a pu cesser au moment de la vente des terres en 1948, on peut néanmoins inférer du caractère exceptionnel de l'art. 64 le maintien d'une obligation de fiduciaire d'agir dans l'intérêt des Indiens afin de corriger une erreur. Cette disposition conférait au MAI le pouvoir d'annuler le transfert de terres en cas d'erreur, même à l'égard d'acheteurs de bonne foi. Il n'est pas déraisonnable d'inférer que le législateur voulait que le MAI exerce ce pouvoir dans l'intérêt des Indiens. Si le texte précité de l'art. 64 ne suffit pas à établir l'existence d'une obligation de fiduciaire de corriger l'erreur, il paraît certainement avoir cet effet lorsqu'on l'interprète en corrélation avec la jurisprudence sur les obligations de fiduciaire. Lorsqu'une partie se voit conférer certains pouvoirs touchant les droits d'une autre partie et que cette dernière se voit privée des pouvoirs en question ou est «vulnérable», la première partie, celle qui détient les pouvoirs, a l'obligation de fiduciaire de les exercer dans l'intérêt de l'autre: *Frame c. Smith*, précité, le juge Wilson; et *Hodgkinson c. Simms*, précité. L'article 64 conférait au MAI le pouvoir de corriger l'erreur qui avait eu pour conséquence de transférer à tort au DTAC les droits miniers de la bande. La bande elle-même ne possédait pas ce pouvoir; elle était vulnérable. Dans de telles circonstances, il existe une obligation de fiduciaire de corriger l'erreur.

L'obligation du MAI était celle qui incombe habituellement à un fiduciaire, c'est-à-dire l'obligation de faire montre de diligence raisonnable à l'égard du droit en cause des Indiens. Pour s'acquitter de cette obligation de diligence raisonnable, le MAI devait prendre les mesures requises pour corriger le transfert fait par erreur, lorsqu'il a pris connaissance de faits tendant à indiquer qu'il y

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error and the potential value of the minerals that it had erroneously transferred.

avait eu une erreur et que les droits miniers transférés à tort avaient une certaine valeur potentielle.

117 As of July 15, 1949, the DIA was incontrovertibly in possession of information that I.R. 172 had mineral value potential as determined by the Crown's own officials. On July 12, 1949, acting on the assumption that the DIA still owned the mineral rights, Mr. Allan, the Superintendent of Reserves and Trusts, who had been approached by an oil company, requested advice from the Department of Mines and Resources as to whether exploration on I.R. 172 was appropriate. The answer sent on July 15, 1949 is worth quoting:

Natural gas has recently been discovered about 40 miles to the southeast of the St. John Indian Reserve.

In view of this fact and as there has been no detailed geological exploration of this area and more geological information is desirable it is recommended that the Reserve be made available for permit under the Regulations.

According to the letter from Allan to Galibois on August 3, 1949 the exploration revenues would be \$1,800. That letter requests Galibois to get the necessary surrender from the Band (still assuming mineral rights held by the Band). On August 9, 1949 Galibois informed Allan by letter that I.R. 172 had been sold (with the minerals) to the DVLA. In the months that followed, the DIA responded to the DVLA's concerns as to the validity of its title to the mineral rights by confirming that the mineral rights had indeed been passed to the DVLA in 1948. The DIA took no action to have the transfers set aside, as it could have under s. 64 of the *Indian Act*.

Le 15 juillet 1949, le MAI était indiscutablement en possession de renseignements indiquant que la R.I. 172 avait un potentiel minier, ainsi que l'avaient déterminé les propres employés de la Couronne. Le 12 juillet 1949, présumant que le MAI était toujours propriétaire des droits miniers, M. Allan, surintendant des réserves et des fidéi-commis, auprès de qui une société pétrolière avait fait des démarches, a demandé au ministère des Mines et des Ressources s'il ne convenait pas d'explorer la R.I. 172. La réponse, expédiée le 15 juillet 1949, vaut d'être citée:

[TRADUCTION] On a récemment découvert du gaz naturel à environ 40 milles au sud-est de la réserve indienne de St. John.

Compte tenu de ce fait et du fait qu'il n'y a pas eu d'exploration géologique détaillée de cette région et qu'il est souhaitable de recueillir davantage de données géologiques, il est recommandé de délivrer, en vertu de la réglementation applicable, des permis d'exploration visant la réserve.

D'après la lettre datée du 3 août 1949 expédiée par Allan à Galibois, les revenus d'exploration s'élèveraient à 1 800 \$. Dans cette lettre, on demandait à Galibois d'obtenir de la bande la cession nécessaire (toujours à partir de l'hypothèse que les droits miniers étaient détenus par la bande). Le 9 août 1949, Galibois a informé Allan, par lettre, que la R.I. 172 avait été vendue (avec les minéraux) au DTAC. Dans les mois qui ont suivi, le MAI a répondu aux préoccupations exprimées par le DTAC quant à la validité de son titre sur les droits miniers et lui a confirmé que ces droits avaient bel et bien été transférés au DTAC en 1948. Le MAI n'a pris aucune mesure pour faire annuler les transferts, comme il aurait pu le faire en vertu de l'art. 64 de la *Loi des Indiens*.

118 I conclude that the Crown, having first breached its fiduciary duty to the Indians by transferring the minerals to the DVLA, committed a second breach by failing to correct the error on August 9, 1949 when it learned of the error's existence and the potential value of the mineral rights.

Je conclus que la Couronne, qui avait initialement manqué à son obligation de fiduciaire envers les Indiens en transférant les minéraux au DTAC, a commis un deuxième manquement en omettant de corriger l'erreur en question le 9 août 1949, lorsqu'elle a appris l'existence de cette erreur et de la valeur potentielle des droits miniers.

This action was filed on September 18, 1978. Any losses stemming from transfers after August 9, 1949, are therefore still permissible under the s. 8 general limitation. As of this date, 6.75 sections of the 31 transferred to the DVLA remained in the hands of the DVLA. Had the DIA discharged its duty to the Indians, the mineral title would have been returned to them. Instead, mineral title was passed on to the veterans, and in the case of 2.5 sections, directly conveyed to oil companies to the credit of the Consolidated Revenue Fund.

The remaining issue is whether those claims regarding mineral rights which survive the 30-year limitation period are barred by other limitation periods. The parties treated this action as falling under s. 3(4) of the B.C. *Limitation Act* which prescribes a 6-year limitation for "[a]ny other action not specifically provided for". I am content to do the same.

Clearly the action, commenced in 1978, falls well beyond 6 years from the agreements for sale with the veterans, which took place between 1948 and 1956. However, that is not the end of the matter. Section 6(3) of the *Limitation Act* provides:

6. . . .

(3) The running of time with respect to the limitation periods fixed by this Act for an action

(e) in which material facts relating to the cause of action have been wilfully concealed;

is postponed and time does not commence to run against a plaintiff until . . . those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

La présente action a été déposée le 18 septembre 1978. Toutes les pertes découlant des transferts faits après le 9 août 1949 donnent donc ouverture à action compte tenu du délai de prescription général prévu par l'art. 8. À cette date, 6,75 des 31 lots transférés au DTAC étaient encore entre les mains de ce dernier. Si le MAI s'était acquitté de son obligation envers les Indiens, le titre relatif aux droits miniers leur aurait été remis. Au contraire, ce titre a plutôt été transféré aux anciens combattants et, dans le cas de 2,5 lots, il a été cédé directement à des sociétés pétrolières, et le produit de la cession a été porté au crédit du Trésor.

Il reste à se demander si les réclamations concernant les droits miniers qui subsistent à l'application du délai de prescription trentenaire ne sont pas prescrites par d'autres délais. Les parties ont considéré que la présente action est visée par le par. 3(4) de la *Limitation Act* de la Colombie-Britannique, qui fixe un délai de prescription de 6 ans à l'égard de [TRADUCTION]«[t]oute autre action non expressément prévue». Je me borne à faire de même.

Il est évident que l'action qui a été intentée en 1978, dépasse de beaucoup le délai de 6 ans qui a commencé à courir à compter des conventions de vente conclues avec les anciens combattants entre 1948 et 1956. Toutefois, cela ne met pas fin pour autant à la question. En effet, le par. 6(3) de la *Limitation Act* précise ce qui suit:

[TRADUCTION] 6. . . .

(3) Le délai de prescription fixé par la présente loi à l'égard d'une action concernant

e) des faits importants se rapportant à la cause d'action qui ont délibérément été dissimulés;

ne commence à courir qu'au moment où [. . .] les faits, qu'il [le demandeur] est en mesure de connaître, sont tels qu'une personne raisonnable, connaissant ces faits et ayant reçu les conseils appropriés qu'une personne raisonnable aurait demandés à leur égard, estimerait qu'ils montrent:

- (i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and
- (j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

This section and its equivalents elsewhere embrace a broad definition of discoverability: see *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6. The facts in the case at bar fall within it. Until approached by a member of the DIA in 1977, the Bands were ignorant of critical facts in the exclusive possession of the Crown: the fact that the mineral rights were transferred to the DVLA for no consideration; the fact that the DVLA had no right to that transfer; and the fact that the Crown had in its possession knowledge of its error and the potential value of the mineral rights while it was still within its power to rectify the error. The Bands became aware of the true facts only in 1977, placing their writ well within the applicable limitation period of 6 years.

- i) qu'une action fondée sur la cause d'action aurait, si ce n'était de l'expiration du délai de prescription, des chances de succès raisonnables,
- j) que la personne qui est en mesure de connaître les faits devrait, dans son propre intérêt et compte tenu des circonstances, être capable d'intenter une action.

Ce paragraphe et les dispositions équivalentes applicables ailleurs sont fondées sur une définition libérale de la notion de découverte du préjudice, voir l'arrêt *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6. Les faits de la présente espèce entrent dans le champ d'application de cette définition. Jusqu'à ce qu'un fonctionnaire du MAI communique avec elles en 1977, les bandes n'étaient pas au courant de faits essentiels que la Couronne était la seule à connaître: savoir que les droits miniers avaient été transférés au DTAC sans contrepartie, que le DTAC n'avait pas droit à ce transfert et que la Couronne était au courant de son erreur et de la valeur potentielle des droits miniers, alors qu'elle avait encore le pouvoir de corriger cette erreur. Comme les bandes n'ont appris les faits véritables qu'en 1977, leur action a été intentée bien à l'intérieur du délai de prescription de 6 ans applicable.

122 Other arguments, neither presented nor considered below, were presented by the Bands and interveners in support of relaxing or not applying the limitation periods prescribed by the *Limitation Act* of British Columbia. I find them unpersuasive in the context of this case and consider them no further.

III. Conclusion

123 I would allow the appeal and set aside the judgments below. The Bands are entitled to damages against the Crown for breach of fiduciary duty with respect to such mineral rights as were conveyed by agreement for sale after August 9, 1949. I would also allow the cross-appeal, for the reasons given above. I would award costs to the appellants on the appeal. Since the cross-appeal was as to rea-

Les bandes et les intervenants ont avancé d'autres arguments, qui n'ont pas été présentés et examinés devant les juridictions inférieures et qui visent à obtenir l'assouplissement ou la non-application des délais de prescription prévus par la *Limitation Act* de la Colombie-Britannique. Comme je ne considère pas les arguments convaincants dans le contexte du présent pourvoi, je ne m'y attarderai pas davantage.

III. Conclusion

Je suis d'avis d'accueillir le pourvoi et d'annuler les décisions des juridictions inférieures. Les bandes ont droit à des dommages-intérêts de la part de la Couronne par suite du manquement de celle-ci à l'obligation de fiduciaire qui lui incombait relativement aux droits miniers qui ont été cédés par actes de vente après le 9 août 1949. Je suis également d'avis, pour les motifs qui précèdent, d'accueillir le pourvoi incident. J'accorderais aux appelants leurs dépens dans le cadre du pourvoi. Comme le pourvoi incident ne portait que sur les

sons only and did not affect the result, I would make no order of costs on the cross-appeal.

Appeal allowed with costs and cross-appeal allowed.

Solicitors for the appellants: Mandell, Pinder, Vancouver.

Solicitor for the respondent: George Thomson, Ottawa.

Solicitors for the interveners the Musqueam Nation and Ermineskin Tribal Council: Blake, Cassels & Graydon, Vancouver.

Solicitors for the interveners Chief Abel Bosum et al. and Chief Terry Buffalo et al.: O'Reilly & Associés, Montreal.

Solicitors for the intervener the Assembly of First Nations: Scott & Ayles, Ottawa.

motifs et n'a pas influencé l'issue du pourvoi, je ne rendrais aucune ordonnance concernant les dépens du pourvoi incident.

Pourvoi accueilli avec dépens et pourvoi incident accueilli.

Procureurs des appelants: Mandell, Pinder, Vancouver.

Procureur de l'intimée: George Thomson, Ottawa.

Procureurs des intervenants la Nation Musqueam et le Conseil tribal Ermineskin: Blake, Cassels & Graydon, Vancouver.

Procureurs des intervenants le chef Abel Bosum et autres et le chef Terry Buffalo et autres: O'Reilly & Associés, Montréal.

Procureurs de l'intervenante l'Assemblée des premières nations: Scott & Ayles, Ottawa.

Delgamuukw, also known as Earl Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Delgamuukw and Haaxw (and others suing on their own behalf and on behalf of thirty-eight Gitksan Houses and twelve Wet'suwet'en Houses as shown in Schedule 1) *Appellants/ Respondents on the cross-appeal*

v.

Her Majesty The Queen in Right of the Province of British Columbia *Respondent/ Appellant on the cross-appeal*

and

The Attorney General of Canada *Respondent*

and

The First Nations Summit, the Musqueam Nation et al. (as shown in Schedule 2), the Westbank First Nation, the B.C. Cattlemen's Association et al. (as shown in Schedule 3), Skeena Cellulose Inc., Alcan Aluminum Ltd. *Intervenors*

INDEXED AS: DELGAMUUKW v. BRITISH COLUMBIA

File No.: 23799.

1997: June 16, 17; 1997: December 11.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka*, Cory, McLachlin and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Aboriginal rights — Aboriginal land title — Claim made for large tract — Content of aboriginal title — How aboriginal title protected by s. 35(1) of Constitution Act, 1982 — What required to

*Sopinka J. took no part in this judgment.

Delgamuukw, connu également sous le nom d'Earl Muldoe, en son propre nom et au nom de tous les membres des maisons Delgamuukw et Haaxw (et d'autres personnes en leur propre nom et au nom des membres de trente-huit maisons Gitksan et de douze maisons Wet'suwet'en, selon ce qui est indiqué à l'annexe 1) *Appellants/ Intimés dans le pourvoi incident*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Intimée/ Appelante dans le pourvoi incident*

et

Le procureur général du Canada *Intimé*

et

Le First Nations Summit, la Nation Musqueam et autres (selon ce qui est indiqué à l'annexe 2), la Première nation de Westbank, la B.C. Cattlemen's Association et autres (selon ce qui est indiqué à l'annexe 3), Skeena Cellulose Inc., Alcan Aluminium Ltée *Intervenants*

RÉPERTORIÉ: DELGAMUUKW c. COLOMBIE-BRITANNIQUE

Nº du greffe: 23799.

1997: 16 et 17 juin; 1997: 11 décembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka*, Cory, McLachlin et Major.

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

Droit constitutionnel — Droits ancestraux — Titre aborigène sur des terres — Revendication d'un vaste territoire — Contenu du titre aborigène — Comment l'art. 35(1) de la Loi constitutionnelle de 1982 protège-

*Le juge Sopinka n'a pas pris part au jugement.

prove aboriginal title — Whether claim to self-government made out — Whether province could extinguish aboriginal rights after 1871, either under own jurisdiction or through the operation of s. 88 of the Indian Act (incorporating provincial laws of general application by reference) — Constitution Act, 1982, s. 35(1) — Indian Act, R.S.C., 1985, c. I-5, s. 88.

Constitutional law — Aboriginal rights — Aboriginal land title — Evidence — Oral history and native law and tradition — Weight to be given evidence — Ability of Court to interfere with trial judge's factual findings.

Courts — Procedure — Land claims — Aboriginal title and self-government — Claim altered but no formal amendments to pleadings made — Whether pleadings precluded the Court from entertaining claims.

The appellants, all Gitksan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their "Houses", claimed separate portions of 58,000 square kilometres in British Columbia. For the purpose of the claim, this area was divided into 133 individual territories, claimed by the 71 Houses. This represents all of the Wet'suwet'en people, and all but 12 of the Gitksan Houses. Their claim was originally for "ownership" of the territory and "jurisdiction" over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.) British Columbia counterclaimed for a declaration that the appellants have no right or interest in and to the territory or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.

At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. In addition, the Gitksan Houses have an "adaawk" which is a collection of sacred oral tradition about their ancestors, histories and territories. The Wet'suwet'en each have a "kungax" which is a spiritual song or dance or performance which ties them to their land. Both of these were entered as evidence on behalf of the appellants. The most significant evidence of spiritual connection between the Houses and their territory

t-il le titre aborigène? — Quels sont les éléments de preuve requis pour établir le titre aborigène? — Le bien-fondé de la revendication de l'autonomie gouvernementale a-t-il été établi? — La province pouvait-elle, après 1871, éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la Loi sur les Indiens (qui incorpore par renvoi les lois provinciales d'application générale)? — Loi constitutionnelle de 1982, art. 35(1) — Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 88.

Droit constitutionnel — Droits ancestraux — Titre aborigène sur des terres — Preuve — Récits oraux et règles de droit et traditions autochtones — Poids à donner aux éléments de preuve — Pouvoir d'intervention de la Cour quant aux conclusions de fait du juge de première instance.

Tribunaux — Procédure — Revendications territoriales — Titre aborigène et autonomie gouvernementale — Revendication modifiée mais sans modification formelle des actes de procédure — Les actes de procédure empêchent-ils la Cour d'entendre les revendications?

Les appelants, tous des chefs héréditaires Wet'suwet'en ou Gitksan, revendiquent tant en leur propre nom qu'au nom de leurs «maisons» des parties distinctes d'un territoire de 58 000 kilomètres carrés situé en Colombie-Britannique. Aux fins de la revendication, ce grand territoire a été divisé en 133 territoires distincts, revendiqués par les 71 maisons. Y sont représentés tous les Wet'suwet'en et toutes les maisons Gitksan, à l'exception de 12. Initialement, les appelants revendiquaient la «propriété» du territoire et la «compétence» sur celui-ci. (Devant la Cour, cette revendication a changé et est devenue principalement la revendication d'un titre aborigène sur le territoire en question.) La Colombie-Britannique a présenté une demande reconventionnelle dans laquelle elle sollicite une déclaration portant que les appelants n'ont aucun droit ou intérêt dans le territoire, ou, subsidiairement, que la cause d'action des appelants devrait être l'obtention d'une indemnité de la part du gouvernement du Canada.

Au procès, les appelants ont fondé leur revendication sur la «propriété» et l'utilisation historiques d'un ou de plusieurs des territoires. En outre, les maisons Gitksan ont un «adaawk», c'est-à-dire un ensemble de traditions orales sacrées au sujet de leurs ancêtres, de leur histoire et de leurs territoires. Chaque maison Wet'suwet'en possède un «kungax», c'est-à-dire un chant, une danse ou une représentation spirituelle qui les rattache à leur territoire. Ces deux éléments ont été déposés en preuve au nom des appelants. Le signe le plus important du lien

was a feast hall where the Gitksan and Wet'suwet'en peoples tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose but is also used for making important decisions.

The trial judge did not accept the appellants' evidence of oral history of attachment to the land. He dismissed the action against Canada, dismissed the plaintiffs' claims for ownership and jurisdiction and for aboriginal rights in the territory, granted a declaration that the plaintiffs were entitled to use unoccupied or vacant land subject to the general law of the province, dismissed the claim for damages and dismissed the province's counterclaim. No order for costs was made. On appeal, the original claim was altered in two different ways. First, the claims for ownership and jurisdiction were replaced with claims for aboriginal title and self-government, respectively. Second, the individual claims by each House were amalgamated into two communal claims, one advanced on behalf of each nation. There were no formal amendments to the pleadings to this effect. The appeal was dismissed by a majority of the Court of Appeal.

The principal issues on the appeal, some of which raised a number of sub-issues, were as follows: (1) whether the pleadings precluded the Court from entertaining claims for aboriginal title and self-government; (2) what was the ability of this Court to interfere with the factual findings made by the trial judge; (3) what is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof; (4) whether the appellants made out a claim to self-government; and, (5) whether the province had the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*.

Held: The appeal should be allowed in part and the cross-appeal should be dismissed.

spirituel entre les différentes maisons et leur territoire est la salle des célébrations. C'est là que les Wet'suwet'en et les Gitksan disent et redisent leurs récits et identifient leurs territoires afin de se rappeler le lien sacré qu'ils entretiennent avec leurs terres. Ces célébrations ont une fin rituelle, mais elles sont aussi l'occasion de prise de décisions importantes.

Le juge de première instance n'a pas accepté les récits oraux que les appelants présentaient comme éléments de preuve de leur attachement au territoire. Il a rejeté l'action contre le Canada, il a rejeté les revendications, par les demandeurs, de la propriété du territoire, de la compétence sur celui-ci ou de droits ancestraux à son égard, il a accordé une déclaration portant que les demandeurs avaient le droit d'utiliser toute terre inoccupée ou vacante, sous réserve du respect des lois d'application générale de la province, il a rejeté la demande de dommages-intérêts et il a rejeté la demande reconventionnelle de la province. Il n'a rendu aucune ordonnance concernant les dépens. En appel, la revendication initiale a été modifiée de deux façons. Premièrement, les revendications relatives à la propriété des territoires et à la compétence sur ceux-ci ont été remplacées respectivement par la revendication du titre aborigène et la revendication de l'autonomie gouvernementale. Deuxièmement, les revendications individuelles présentées par chaque maison ont été fusionnées en deux revendications collectives, une au nom de chaque nation. Aucune modification en ce sens n'a été apportée formellement aux actes de procédure. L'appel a été rejeté par la Cour d'appel à la majorité.

Les principales questions dans le pourvoi sont les suivantes: (1) Les actes de procédure empêchent-ils la Cour d'examiner les revendications relatives au titre aborigène et à l'autonomie gouvernementale? (2) Quel pouvoir notre Cour a-t-elle de modifier les conclusions de fait du juge de première instance? (3) Quel est le contenu du titre aborigène, comment est-il protégé par le par. 35(1) de la *Loi constitutionnelle de 1982* et comment fait-on la preuve de son existence? (4) Les appelants ont-ils établi le bien-fondé de leur revendication de l'autonomie gouvernementale? (5) La province avait-elle, après 1871, le pouvoir d'éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la *Loi sur les Indiens*?

Arrêt: Le pourvoi est accueilli en partie et le pourvoi incident est rejeté.

Whether the Claims Were Properly Before the Court

Per Lamer C.J. and Cory, McLachlin, and Major J.J.: The claims were properly before the Court. Although the pleadings were not formally amended, the trial judge did allow a *de facto* amendment to permit a claim for aboriginal rights other than ownership and jurisdiction. The respondents did not appeal this *de facto* amendment and the trial judge's decision on this point must accordingly stand.

No amendment was made with respect to the amalgamation of the individual claims brought by the individual Gitksan and Wet'suwet'en Houses into two collective claims, one by each nation, for aboriginal title and self-government. The collective claims were simply not in issue at trial and to frame the case on appeal in a different manner would retroactively deny the respondents the opportunity to know the appellants' case.

A new trial is necessary. First, the defect in the pleadings prevented the Court from considering the merits of this appeal. The parties at a new trial would decide whether any amendment was necessary to make the pleadings conform with the other evidence. Then, too, appellate courts, absent a palpable and overriding error, should not substitute their own findings of fact even when the trial judge misapprehended the law which was applied to those facts. Appellate intervention is warranted, however, when the trial court fails to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when applying the rules of evidence and interpreting the evidence before it.

Per La Forest and L'Heureux-Dubé J.J.: The amalgamation of the appellants' individual claims technically prevents a consideration of the merits. However, there is a more substantive problem with the pleadings. The appellants sought a declaration of "aboriginal title" but attempted, in essence, to prove that they had complete control over the territory. It follows that what the appellants sought by way of declaration and what they set out

La Cour était-elle régulièrement saisie des revendications?

Le juge en chef Lamer et les juges Cory, McLachlin et Major: La Cour était régulièrement saisie des revendications. Même si les actes de procédure n'ont pas été formellement modifiés, le juge de première instance a bel et bien accepté une modification *de facto* pour permettre la revendication de droits ancestraux autres que la propriété et la compétence. Les intimés n'ont pas interjeté appel contre cette modification *de facto* et la décision du juge de première instance sur ce point doit être maintenue.

Aucune modification n'a été apportée en ce qui a trait à la fusion des revendications individuelles présentées par les maisons Wet'suwet'en et Gitksan en deux revendications collectives, une pour chaque nation, sollicitant un titre aborigène et l'autonomie gouvernementale. Les revendications collectives n'étaient tout simplement pas en litige en première instance, et redéfinir le litige en appel aurait pour effet de nier rétroactivement aux intimés la possibilité de savoir quelle est la cause des appelants.

Il est nécessaire de tenir un nouveau procès. Premièrement, le vice dans les actes de procédure a empêché la Cour d'examiner le fond du pourvoi. Il reviendra aux parties à un nouveau procès de se demander si une modification est nécessaire pour rendre les actes de procédure conformes à la preuve. En outre, sauf erreur manifeste et dominante, les cours d'appel ne devraient pas substituer leurs propres conclusions de fait à celles du juge de première instance, même lorsque ce dernier a mal saisi le droit qu'il a appliqué aux faits en question. Par contre, une cour d'appel est justifiée d'intervenir dans le cas où le juge de première instance n'a pas tenu compte des difficultés de preuve inhérentes à l'examen des revendications de droits ancestraux, lorsqu'il a appliqué les règles de preuve et a interprété la preuve qui lui était présentée.

Les juges La Forest et L'Heureux-Dubé: La fusion des revendications individuelles des appelants a empêché, sur le plan de la forme, la Cour d'examiner le fond de l'affaire. Cependant, les actes de procédure posent un problème encore plus substantiel. Même si les appelants ont sollicité un jugement déclarant l'existence d'un «titre aborigène», ils ont essentiellement tenté d'établir qu'ils exerçaient un contrôle complet sur le territoire en question. Il s'ensuit que ce que les appelants ont demandé à la Cour de leur reconnaître, par voie de jugement déclaratoire, et ce qu'ils se sont efforcés d'établir

to prove by way of the evidence were two different matters. A new trial should be ordered.

McLachlin J. was in substantial agreement.

The Ability of the Court to Interfere with the Trial Judge's Factual Findings

Per Lamer C.J. and Cory, McLachlin and Major J.J.: The factual findings made at trial could not stand because the trial judge's treatment of the various kinds of oral histories did not satisfy the principles laid down in *R. v. Van der Peet*. The oral histories were used in an attempt to establish occupation and use of the disputed territory which is an essential requirement for aboriginal title. The trial judge refused to admit or gave no independent weight to these oral histories and then concluded that the appellants had not demonstrated the requisite degree of occupation for "ownership". Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been very different.

The Content of Aboriginal Title, How It Is Protected by s. 35(1) of the Constitution Act, 1982, and the Requirements Necessary to Prove It

Per Lamer C.J. and Cory, McLachlin and Major J.J.: Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses must not be irreconcilable with the nature of the group's attachment to that land.

Aboriginal title is *sui generis*, and so distinguished from other proprietary interests, and characterized by several dimensions. It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown. Another dimension of aboriginal title is its sources: its recognition by the *Royal Proclamation, 1763* and the relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing assertion of British sovereignty. Finally, aboriginal title is held communally.

par la preuve, étaient deux choses différentes. La tenue d'un nouveau procès doit être ordonnée.

Le juge McLachlin est largement en accord avec ces motifs.

Le pouvoir de la Cour de modifier les conclusions de fait du juge de première instance

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Les conclusions de fait tirées en première instance ne pouvaient être maintenues en raison du fait que le traitement accordé aux divers types de récits oraux par le juge de première instance ne respecte pas les principes établis dans *R. c. Van der Peet*. Ces récits ont été invoqués pour tenter d'établir l'occupation et l'utilisation du territoire contesté, condition essentielle à l'existence du titre aborigène. Après avoir refusé d'admettre ces récits oraux ou de leur accorder quelque valeur probante indépendante que ce soit, le juge de première instance est arrivé à la conclusion que les appelants n'avaient pas démontré l'existence du degré d'occupation requis du territoire pour fonder la «propriété» de celui-ci. Si le juge du procès avait apprécié correctement les récits oraux, ses conclusions sur ces questions de fait auraient pu être très différentes.

Le contenu du titre aborigène, la façon dont il est protégé par le par. 35(1) de la Loi constitutionnelle de 1982 et les exigences en matière de preuve de son existence

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour différentes fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante d'une culture autochtone distinctive. Ces utilisations protégées ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour ces terres.

Le titre aborigène est un droit *sui generis*; il se distingue de ce fait des autres intérêts de propriété et est caractérisé par différentes dimensions. Le titre aborigène est inaliénable et ne peut être transféré, cédé ou vendu à personne d'autre que la Couronne. Les origines du titre aborigène constituent une autre dimension de celui-ci: sa reconnaissance par la *Proclamation royale de 1763* et le rapport entre la common law, qui reconnaît l'occupation comme preuve de la possession en droit, et les systèmes juridiques autochtones qui existaient avant l'affirmation de la souveraineté britannique. Finalement, le titre aborigène est détenu collectivement.

The exclusive right to use the land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimant group's distinctive aboriginal culture. Canadian jurisprudence on aboriginal title frames the "right to occupy and possess" in broad terms and, significantly, is not qualified by the restriction that use be tied to practice, custom or tradition. The nature of the Indian interest in reserve land which has been found to be the same as the interest in tribal lands is very broad and incorporates present-day needs. Finally, aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation. Such a use is certainly not a traditional one.

The content of aboriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands. This inherent limit arises because the relationship of an aboriginal community with its land should not be prevented from continuing into the future. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. Land held by virtue of aboriginal title may not be alienated because the land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value. Finally, the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

Aboriginal title at common law was recognized well before 1982 and is accordingly protected in its full form by s. 35(1). The constitutionalization of common law aboriginal rights, however, does not mean that those rights exhaust the content of s. 35(1). The existence of an aboriginal right at common law is sufficient, but not

Le droit exclusif d'utiliser les terres ne comprend pas simplement le droit d'exercer des activités qui sont des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit. La jurisprudence canadienne relative au titre aborigène définit le «droit d'occuper et de posséder» en termes généraux et, fait important, ne l'assortit pas d'une réserve le limitant aux utilisations liées à des coutumes, pratiques ou traditions. La nature du droit des Indiens sur les terres des réserves, qui a été déclaré être le même que leur droit sur les terres tribales, est très générale et intègre les besoins actuels des collectivités autochtones. Finalement, le titre aborigène comprend les droits miniers, et les terres détenues en vertu d'un titre aborigène devraient pouvoir être exploitées pour ces ressources, ce qui ne constitue certes pas une utilisation traditionnelle.

Le contenu du titre aborigène comporte une limite intrinsèque, savoir que les terres détenues en vertu d'un titre aborigène ne peuvent pas être utilisées d'une manière incompatible avec la nature de l'attachement qu'ont les revendicateurs pour ces terres. Cette limite intrinsèque découle du fait que rien ne devrait empêcher ce rapport de continuer dans le futur. L'occupation est définie en fonction des activités qui ont été exercées sur les terres et des utilisations qui ont été faites de celles-ci par le groupe en question. Si des terres font l'objet d'une telle occupation, il existera entre ce groupe et les terres visées un lien spécial tel que les terres feront partie intégrante de la définition de la culture distinctive du groupe. Les terres détenues en vertu d'un titre aborigène sont inaliénables parce qu'elles ont en elles-mêmes une valeur intrinsèque et unique dont jouit la collectivité qui possède le titre aborigène sur celles-ci. La collectivité ne peut pas faire de ces terres des utilisations qui détruiraient cette valeur. Enfin, l'importance de la continuité du rapport qu'entretient une collectivité autochtone avec ses terres et la valeur non économique ou intrinsèque de celles-ci ne devraient pas être considérées comme faisant obstacle à la possibilité d'une cession à la Couronne moyennant contrepartie de valeur. Au contraire, l'idée de cession renforce la conclusion que le titre aborigène est limité. Si les autochtones désirent utiliser leurs terres d'une manière que ne permet pas le titre, ils doivent alors les céder et les convertir en terres non visées par un titre aborigène.

Le titre aborigène a été reconnu en common law bien avant 1982 et est par conséquent protégé dans sa forme complète par le par. 35(1). Toutefois, la constitutionnalisation par le par. 35(1) des droits ancestraux reconnus en common law ne signifie pas que ces droits épuisent le contenu du par. 35(1). L'existence d'un droit ancestral

necessary, for the recognition and affirmation of that right by s. 35(1).

Constitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At the one end are those aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right but where the use and occupation of the land where the activity is taking place is not sufficient to support a claim of title to the land. In the middle are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. At the other end of the spectrum is aboriginal title itself which confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities.

Aboriginal title is a right to the land itself. That land may be used, subject to the inherent limitations of aboriginal title, for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title. Section 35(1), since its purpose is to reconcile the prior presence of aboriginal peoples with the assertion of Crown sovereignty, must recognize and affirm both aspects of that prior presence — first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land.

The test for the identification of aboriginal rights to engage in particular activities and the test for the identification of aboriginal title, although broadly similar, are

reconnu en common law est donc suffisante, mais pas nécessaire, pour la reconnaissance et la confirmation de ce droit par le par. 35(1).

Les droits ancestraux reconnus et confirmés par le par. 35(1) s'étalent le long d'un spectre, en fonction de leur degré de rattachement avec le territoire visé. À une extrémité du spectre, il y a le cas des droits ancestraux qui sont des coutumes, pratiques et traditions faisant partie intégrante de la culture autochtone distinctive du groupe qui revendique le droit en question mais où l'occupation et l'utilisation du territoire sur lequel l'activité est pratiquée sont insuffisantes pour étayer la revendication du titre sur celui-ci. Au milieu du spectre, on trouve les activités qui, par nécessité, sont pratiquées sur le territoire et, de fait, pourraient même être étroitement rattachées à une parcelle de terrain particulière. Bien qu'un groupe autochtone puisse être incapable de démontrer l'existence d'un titre sur le territoire, il peut quand même avoir le droit — spécifique à un site — de s'adonner à une activité particulière. À l'autre extrémité du spectre, il y a le titre aborigène proprement dit, qui confère quelque chose de plus que le droit d'exercer des activités spécifiques à un site qui sont des aspects de coutumes, pratiques et traditions de cultures autochtones distinctives. L'existence de droits spécifiques à un site peut être établie même si l'existence d'un titre ne peut pas l'être. Étant donné que les droits ancestraux peuvent varier en fonction de leur degré de rattachement au territoire, il est possible que certains groupes autochtones soient incapables d'établir le bien-fondé de leur revendication d'un titre, mais qu'ils possèdent néanmoins des droits ancestraux reconnus et confirmés par le par. 35(1), notamment des droits spécifiques à un site d'exercer des activités particulières.

Le titre aborigène est le droit au territoire lui-même. Sous réserve des limites inhérentes au titre aborigène, ce territoire peut être utilisé pour diverses activités, dont aucune ne doit nécessairement être protégée individuellement en tant que droit ancestral prévu au par. 35(1). Ces activités sont des parasites du titre sous-jacent. Comme l'objet du par. 35(1) est de concilier la présence antérieure des peuples autochtones en Amérique du Nord avec l'affirmation de la souveraineté de la Couronne, cette disposition doit reconnaître et confirmer les deux aspects de cette préexistence, savoir l'occupation du territoire, d'une part, et l'organisation sociale antérieure et les cultures distinctives des peuples autochtones habitant ce territoire, d'autre part.

Bien que le critère applicable pour déterminer l'existence de droits ancestraux autorisant l'exercice d'activités particulières et le critère applicable pour détermi-

distinct in two ways. First, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy. Second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. In the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. The Crown, however, did not gain this title until it asserted sovereignty and it makes no sense to speak of a burden on the underlying title before that title existed. Aboriginal title crystallized at the time sovereignty was asserted. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans. Finally, the date of sovereignty is more certain than the date of first contact.

Both the common law and the aboriginal perspective on land should be taken into account in establishing the proof of occupancy. At common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources. In considering whether occupation sufficient

ner l'existence d'un titre aborigène comportent de grandes similitudes, ils se distinguent l'un de l'autre de deux façons: premièrement, dans le cadre du critère relatif au titre aborigène, l'exigence que le territoire fasse partie intégrante de la culture distincte des demandeurs est subsumée sous l'exigence d'occupation; deuxièmement, alors que c'est le moment du premier contact avec les Européens qui est le moment pertinent pour la détermination des droits ancestraux, dans le cas du titre aborigène, c'est le moment de l'affirmation par la Couronne de sa souveraineté sur le territoire.

Pour établir le bien-fondé de la revendication d'un titre aborigène, le groupe autochtone qui revendique le titre doit démontrer qu'il occupait les terres en question au moment où la Couronne a affirmé sa souveraineté sur ces terres. Lorsqu'il est question de titre aborigène, la période de l'affirmation de la souveraineté est celle qui doit être prise en considération, et ce pour plusieurs raisons. Premièrement, d'un point de vue théorique, le titre aborigène découle de l'occupation antérieure du territoire par les peuples autochtones et du rapport entre la common law et les régimes juridiques autochtones préexistants. Le titre aborigène grève le titre sous-jacent de la Couronne. Cependant, celle-ci n'a acquis ce titre qu'à compter du moment où elle a affirmé sa souveraineté sur le territoire en question et il serait absurde de parler d'une charge grevant le titre sous-jacent avant que celui-ci ait existé. Le titre aborigène s'est cristallisé au moment de l'affirmation de la souveraineté. Deuxièmement, le titre aborigène ne soulève pas le problème que pose la distinction entre les coutumes, pratiques et traditions distinctives faisant partie intégrante d'une société autochtone et celles qui ont été introduites par suite du contact avec les Européens ou influencées par celui-ci. En vertu de la common law, le fait de l'occupation ou de la possession suffit pour fonder un titre aborigène, et il n'est pas nécessaire de prouver que le territoire en question faisait partie intégrante de la société autochtone visée avant l'arrivée des Européens ou qu'il était un élément distinctif de celle-ci. Finalement, la date de l'affirmation de la souveraineté a un caractère plus certain que celle du premier contact avec les Européens.

Tant la common law que le point de vue des autochtones à l'égard du territoire devraient être pris en compte dans la démonstration de l'occupation. En common law, l'occupation physique fait preuve de la possession en droit, fait qui à son tour fondera le droit au titre sur les terres. L'occupation physique peut être prouvée par différents faits, allant de la construction de bâtiments à l'utilisation régulière de secteurs bien définis du territoire pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation de ses ressources, en pas-

to ground title is established, the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed must be taken into account. Given the occupancy requirement, it was not necessary to include as part of the test for aboriginal title whether a group demonstrated a connection with the piece of land as being of central significance to its distinctive culture. Ultimately, the question of physical occupation is one of fact to be determined at trial.

If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation. Since conclusive evidence of pre-sovereignty occupation may be difficult, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. An unbroken chain of continuity need not be established between present and prior occupation. The fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be that the land not be used in ways which are inconsistent with continued use by future generations of aboriginals.

At sovereignty, occupation must have been exclusive. This requirement flows from the definition of aboriginal title itself, which is defined in terms of the right to exclusive use and occupation of land. The test must take into account the context of the aboriginal society at the time of sovereignty. The requirement of exclusive occupancy and the possibility of joint title can be reconciled by recognizing that joint title can arise from shared exclusivity. As well, shared, non-exclusive aboriginal rights short of aboriginal title but tied to the land and permitting a number of uses can be established if exclusivity cannot be proved. The common law should develop to recognize aboriginal rights as they were rec-

sant par la délimitation et la culture de champs. Dans l'examen de la question de savoir si on a fait la preuve d'une occupation suffisante pour fonder un titre aborigène, il faut tenir compte de la taille, du mode de vie, des ressources matérielles et des habiletés technologiques du groupe concerné, ainsi que de la nature des terres revendiquées. Compte tenu de l'exigence d'occupation, il n'est pas nécessaire d'inclure dans le critère relatif au titre aborigène la question de savoir si le groupe concerné a démontré que le lien qui le rattache au territoire visé est d'une importance fondamentale pour sa culture distinctive. En définitive, la preuve de l'occupation physique est une question de fait à trancher au procès.

Si l'occupation actuelle est invoquée comme preuve de l'occupation antérieure à l'affirmation de la souveraineté, il faut qu'il y ait une continuité entre l'occupation antérieure à l'affirmation de la souveraineté et l'occupation actuelle. Étant donné qu'il peut s'avérer difficile d'apporter des éléments de preuve concluants d'une occupation antérieure à l'affirmation de la souveraineté, une collectivité autochtone peut produire, au soutien de la revendication d'un titre aborigène, des éléments de preuve de l'occupation actuelle comme preuve de l'occupation antérieure à l'affirmation de la souveraineté. Il n'est pas nécessaire de faire la preuve d'une continuité parfaite entre l'occupation actuelle et l'occupation antérieure. Le fait que la nature de l'occupation ait changé ne fera généralement pas obstacle à la revendication d'un titre aborigène, dans la mesure où un lien substantiel entre le peuple et le territoire en question a été maintenu. La seule restriction à ce principe pourrait être qu'il ne soit pas fait du territoire des utilisations incompatibles avec son usage continu par les générations autochtones futures.

L'occupation doit avoir été exclusive au moment de l'affirmation de la souveraineté. Cette exigence d'exclusivité découle de la définition même du titre aborigène, défini comme étant le droit d'utiliser et d'occuper de façon exclusive les terres visées. Le critère doit prendre en compte le contexte de la société autochtone au moment de l'affirmation de la souveraineté. Il est possible de concilier l'exigence d'occupation exclusive et l'existence possible d'un titre conjoint en reconnaissant qu'un titre conjoint peut découler d'une exclusivité partagée. De même, l'existence de droits ancestraux non exclusifs partagés ne constituant pas un titre, mais par ailleurs liés au territoire et permettant certaines utilisations, peut être établie, même si l'exclusivité ne peut être prouvée. La common law doit évoluer pour reconnaître les droits ancestraux qui étaient reconnus soit par

ognized by either *de facto* practice or by aboriginal systems of governance.

Per La Forest and L'Heureux-Dubé JJ.: “Aboriginal title” is based on the continued occupation and use of the land as part of the aboriginal peoples’ traditional way of life. This *sui generis* interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. It is personal in that it is generally inalienable except to the Crown and, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat the aboriginal peoples fairly. There is reluctance to define more precisely the right of aboriginal peoples to live on their lands as their forefathers had lived.

The approach to defining the aboriginal right of occupancy is highly contextual. A distinction must be made between (1) the recognition of a general right to occupy and possess ancestral lands and (2) the recognition of a discrete right to engage in an aboriginal activity in a particular area. The latter has been defined as the traditional use, by a tribe of Indians, that has continued from pre-contact times of a particular area for a particular purpose. By contrast, a general claim to occupy and possess vast tracts of territory is the right to use the land for a variety of activities related to the aboriginal society’s habits and mode of life. As well, in defining the nature of “aboriginal title”, reference need not be made to statutory provisions and regulations dealing with reserve lands.

In defining the nature of “aboriginal title”, reference need not be made to statutory provisions and regulations dealing specifically with reserve lands. Though the interest of an Indian band in a reserve has been found to be derived from, and to be of the same nature as, the interest of an aboriginal society in its traditional tribal lands, it does not follow that specific statutory provisions governing reserve lands should automatically apply to traditional tribal lands.

The “key” factors for recognizing aboriginal rights under s. 35(1) are met in the present case. First, the nature of an aboriginal claim must be identified precisely with regard to particular practices, customs and traditions. When dealing with a claim of “aboriginal

une pratique *de facto*, soit par un régime de gestion autochtone.

Les juges La Forest et L'Heureux-Dubé: Le «titre aborigène» se fonde sur l’occupation et l’utilisation ininterrompues des terres visées par le peuple autochtone dans le cadre de son mode de vie traditionnel. Ce droit *sui generis* n’équivaut pas à la propriété en fief simple et il ne peut pas non plus être décrit au moyen des concepts traditionnels du droit des biens. Il est personnel en ce sens qu’il est généralement inaliénable, sauf en faveur de la Couronne qui, dans ses opérations concernant un tel droit, est assujettie à une obligation de fiduciaire, savoir celle de traiter équitablement les peuples autochtones. On hésite à définir avec plus de précision le droit des peuples autochtones de continuer à vivre sur leurs terres comme l’avaient fait leurs ancêtres.

Le point de vue adopté pour définir le droit d’occupation ancestral est éminemment contextuel. Il est nécessaire de faire la distinction entre les deux aspects suivants: (1) la reconnaissance d’un droit général d’occuper et de posséder des terres ancestrales; (2) la reconnaissance d’un droit distinct d’exercer une activité autochtone dans une région particulière. Ce dernier aspect a été défini comme étant l’utilisation traditionnelle — remontant avant l’arrivée des Européens — que fait une tribu indienne d’un territoire donné, à une fin particulière. À l’opposé, une revendication générale visant le droit d’occuper et de posséder de vastes étendues de territoire concerne le droit d’utiliser ces terres pour y exercer différentes activités liées aux habitudes et au mode de vie de la société autochtone concernée. En outre, en définissant la nature du «titre aborigène», il n’est pas nécessaire de se référer aux dispositions législatives et réglementaires concernant les terres des réserves.

En définissant la nature du «titre aborigène», il n’est pas nécessaire de se référer aux dispositions législatives et réglementaires visant spécifiquement les terres des réserves. Même s’il a été jugé que le droit que possède une bande indienne sur une réserve découle du droit de la société autochtone sur ses terres tribales traditionnelles, il ne s’ensuit aucunement que les dispositions législatives particulières régissant les terres des réserves s’appliquent automatiquement aux terres tribales traditionnelles.

Il est satisfait, dans le présent pourvoi, aux facteurs «clés» permettant de reconnaître des droits ancestraux en vertu du par. 35(1). Premièrement, la nature d’une revendication autochtone doit être rattachée précisément à des coutumes, pratiques et traditions particulières. Le

title”, the court will focus on the occupation and use of the land as part of the aboriginal society’s traditional way of life.

Second, an aboriginal society must specify the area that has been continuously used and occupied by identifying general boundaries. Exclusivity means that an aboriginal group must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected aboriginal society. It is possible that two or more aboriginal groups may have occupied the same territory and therefore a finding of joint occupancy would not be precluded.

Third, the aboriginal right of possession is based on the continued occupation and use of traditional tribal lands since the assertion of Crown sovereignty. However, the date of sovereignty may not be the only relevant time to consider. Continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area. Also, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation. Further, it is not necessary to establish an unbroken chain of continuity.

Fourth, if aboriginal peoples continue to occupy and use the land as part of their traditional way of life, the land is of central significance to them. Aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas but also to the use of adjacent lands and even remote territories used to pursue a traditional mode of life. Occupancy is part of aboriginal culture in a broad sense and is, therefore, absorbed in the notion of distinctiveness. The *Royal Proclamation, 1763* supports this approach to occupancy.

McLachlin J. was in substantial agreement.

Infringements of Aboriginal Title: The Test of Justification

Per Lamer C.J. and Cory, McLachlin and Major JJ.: Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal and pro-

tribunal qui examine la revendication d’un «titre aborigène» se demande principalement si l’occupation et l’utilisation des terres visées faisaient partie du mode de vie traditionnel de la société autochtone concernée.

Deuxièmement, la société autochtone doit spécifier le territoire qui a été utilisé et occupé de façon ininterrompue en en indiquant les limites générales. L’exclusivité signifie que le groupe autochtone doit établir que le territoire qu’il revendique est, en fait, son territoire ancestral et non celui d’une autre société autochtone avec laquelle il n’a aucun lien. Comme il est possible que deux groupes autochtones ou plus aient occupé le même territoire, il est donc possible de conclure à l’existence d’une occupation conjointe.

Troisièmement, le droit de possession ancestral se fonde sur l’occupation et l’utilisation ininterrompues de terres tribales traditionnelles depuis l’affirmation par la Couronne de sa souveraineté. Cependant, il est possible que la date de l’affirmation de la souveraineté ne soit pas le seul moment pertinent dont il faille tenir compte. Il peut encore y avoir continuité lorsque l’occupation actuelle d’une région est liée à l’occupation d’une autre région avant l’affirmation de la souveraineté. En outre, les peuples autochtones qui revendiquent un droit de possession peuvent présenter des éléments de preuve de l’occupation actuelle du territoire visé pour établir son occupation antérieure. De plus, il n’est pas nécessaire de faire la preuve d’une continuité parfaite.

Quatrièmement, si des peuples autochtones continuent d’occuper et d’utiliser le territoire visé dans le cadre de leur mode de vie traditionnel, ce territoire a une importance fondamentale pour eux. La notion d’occupation d’un territoire par des autochtones ne s’entend pas seulement de la présence de peuples autochtones dans des villages ou des établissements permanents, mais également de l’utilisation de terres adjacentes et même de territoires éloignés dans le cadre d’un mode de vie traditionnel. L’occupation constitue un aspect de la culture autochtone prise dans un sens large et s’intègre, par conséquent, à la notion de caractère distinctif. Cette approche relative à la nature de l’occupation est étayée par la *Proclamation royale de 1763*.

Le juge McLachlin est largement en accord avec ces motifs.

Les atteintes au titre aborigène: le critère de justification

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Les droits ancestraux reconnus et confirmés par la Constitution ne sont pas absolus, et tant le gouver-

vincial governments if the infringement (1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples. 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, and the building of infrastructure and the settlement of foreign populations to support those aims, are objectives consistent with this purpose. Three aspects of aboriginal title are relevant to the second part of the test. First, the right to exclusive use and occupation of land is relevant to the degree of scrutiny of the infringing measure or action. Second, the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples, suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation and, in most cases, the duty will be significantly deeper than mere consultation. And third, lands held pursuant to aboriginal title have an inescapable economic component which suggests that compensation is relevant to the question of justification as well. Fair compensation will ordinarily be required when aboriginal title is infringed.

Per La Forest and L'Heureux-Dubé JJ.: Rights that are recognized and affirmed are not absolute. Government regulation can therefore infringe upon aboriginal rights if it meets the test of justification under s. 35(1). The approach is highly contextual.

The general economic development of the interior of British Columbia, through agriculture, mining, forestry and hydroelectric power, as well as the related building of infrastructure and settlement of foreign populations, are valid legislative objectives that, in principle, satisfy the first part of the justification analysis. Under the second part, these legislative objectives are subject to accommodation of the aboriginal peoples' interests. This accommodation must always be in accordance with

nement fédéral que les gouvernements provinciaux peuvent y porter atteinte si (1) l'atteinte au droit ancestral visé se rapporte à la poursuite d'un objectif législatif impérieux et réel; (2) l'atteinte est compatible avec les rapports spéciaux de fiduciaire qui existent entre la Couronne et les peuples autochtones. L'extension de l'agriculture, de la foresterie, de l'exploitation minière et de l'énergie hydroélectrique, le développement économique général de l'intérieur de la Colombie-Britannique, la protection de l'environnement et des espèces menacées d'extinction, ainsi que la construction des infrastructures et l'implantation des populations requises par ces fins, sont des types d'objectifs compatibles avec cet objet. Trois aspects du titre aborigène sont pertinents quant à la deuxième étape du critère. Premièrement, le droit d'utiliser et d'occuper de façon exclusive les terres visées est pertinent pour ce qui est du degré d'examen auquel est soumis la mesure ou l'acte qui porte atteinte au titre. Deuxièmement, le droit de choisir les utilisations qui peuvent être faites de ces terres, sous réserve de la restriction ultime que ces usages ne sauraient détruire la capacité de ces terres d'assurer la subsistance des générations futures de peuples autochtones, indique qu'il est possible de respecter les rapports de fiduciaire entre la Couronne et les peuples autochtones en faisant participer les peuples autochtones à la prise des décisions concernant leurs terres. Il y a toujours obligation de consultation et, dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Troisièmement, les terres détenues en vertu d'un titre aborigène ont une composante économique inéluctable qui montre que l'indemnisation est également un facteur pertinent à l'égard de la question de la justification. Il sera généralement nécessaire de verser une juste indemnité en cas d'atteinte à un titre aborigène.

Les juges La Forest et L'Heureux-Dubé: Les droits qui sont reconnus et confirmés ne sont pas absolus. Des mesures de réglementation prises par le gouvernement peuvent porter atteinte aux droits ancestraux si elles satisfont au critère de justification des atteintes aux droits visés au par. 35(1). La méthode adoptée est éminemment contextuelle.

Le développement économique général de l'intérieur de la Colombie-Britannique par l'agriculture, l'exploitation minière, la foresterie et l'énergie hydroélectrique, ainsi que la construction des infrastructures et l'implantation des populations requises par ce développement sont des objectifs législatifs réguliers qui, en principe, satisfont au premier volet du critère de justification. Dans le cadre du second volet de ce critère, ces objectifs législatifs doivent tenir compte des intérêts des peuples

the honour and good faith of the Crown. One aspect of accommodation of “aboriginal title” entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect is fair compensation.

McLachlin J. was in substantial agreement.

Self-Government

Per The Court: The errors of fact made by the trial judge, and the resultant need for a new trial, made it impossible for this Court to determine whether the claim to self-government had been made out.

Extinction

Per Lamer C.J. and Cory, McLachlin and Major J.J.: Section 91(24) of the *Constitution Act, 1867* (the federal power to legislate in respect of Indians) carries with it the jurisdiction to legislate in relation to aboriginal title, and by implication, the jurisdiction to extinguish it. The ownership by the provincial Crown (under s. 109) of lands held pursuant to aboriginal title is separate from jurisdiction over those lands. Notwithstanding s. 91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands.

A provincial law of general application cannot extinguish aboriginal rights. First, a law of general application cannot, by definition, meet the standard “of clear and plain intention” needed to extinguish aboriginal rights without being *ultra vires* the province. Second, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on “Indianness” or the “core of Indianness”.

Provincial laws which would otherwise not apply to Indians *proprio vigore* are allowed to do so by s. 88 of the *Indian Act* which incorporates by reference provincial laws of general application. This provision, however, does not “invigorate” provincial laws which are invalid because they are in relation to Indians and Indian lands.

autochtones. Cette prise en compte doit toujours être faite conformément à l’obligation de la Couronne d’agir honorablement et de bonne foi. L’un des aspects de cette prise en compte, dans un tel contexte, consiste à informer et à consulter les peuples autochtones relativement au développement du territoire visé. Un autre aspect de la prise en compte est la question de la juste indemnisation.

Le juge McLachlin est largement en accord avec ces motifs.

L’autonomie gouvernementale

La Cour: En raison des erreurs de fait commises par le juge de première instance et de la nécessité de tenir un nouveau procès qui en a découlé, il est impossible pour la Cour de décider si le bien-fondé de la revendication de l’autonomie gouvernementale a été établi.

L’extinction

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Le paragraphe 91(24) de la *Loi constitutionnelle de 1867* (le pouvoir du fédéral de légiférer sur les Indiens) emporte le pouvoir de légiférer relativement au titre aborigène et par implication, celui d’éteindre ce titre. Le droit de propriété de la province sur les terres détenues en vertu d’un titre aborigène (en vertu de l’art. 109) est distinct de la compétence exercée à l’égard de ces terres. Malgré le par. 91(24), les lois provinciales d’application générale s’appliquent *proprio vigore* (d’elles-mêmes) aux Indiens et aux terres indiennes.

Une loi provinciale d’application générale ne peut pas éteindre des droits ancestraux. Premièrement, par définition, une loi provinciale d’application générale ne peut pas, sans être *ultra vires*, respecter la norme de l’«intention claire et expresse» établie à l’égard de l’extinction des droits ancestraux. Deuxièmement, le par. 91(24) protège le fondement de la compétence du fédéral, même contre les lois provinciales d’application générale, par l’application du principe de l’exclusivité des compétences. Il a été dit que ce fondement se rapporte à des questions touchant à la «quiddité indienne», ou indianité, ou à l’«essentiel de l’indianité».

Des règles de droit provinciales qui autrement ne s’appliqueraient pas d’elles-mêmes aux Indiens peuvent le faire par l’effet de l’art. 88 de la *Loi sur les Indiens*, qui incorpore par renvoi les lois provinciales d’application générale. Cependant, cette disposition ne «revigore» pas des règles de droit provinciales qui sont invalides parce qu’elles se rapportent aux Indiens et aux terres indiennes.

Per La Forest and L'Heureux-Dubé JJ.: The province had no authority to extinguish aboriginal rights either under the *Constitution Act, 1867* or by virtue of s. 88 of the *Indian Act*.

McLachlin J. was in substantial agreement.

Cases Cited

By Lamer C.J.

Considered: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [1996] 3 S.C.R. 139; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, aff'g sub nom. *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; **referred to:** *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Mabo v. Queensland* (1992), 107 A.L.R. 1; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Uukw v. R.*, [1987] 6 W.W.R. 155; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Roberts v. Canada*, [1989] 1 S.C.R. 322; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657; *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *R. v. Sutherland*, [1980] 2 S.C.R. 451; *R. v. Francis*, [1988] 1 S.C.R. 1025; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.

By La Forest J.

Considered: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *R. v. Van der Peet*, [1996] 2 S.C.R.

Les juges La Forest et L'Heureux-Dubé: La province n'avait pas le pouvoir d'éteindre des droits ancestraux en vertu de la *Loi constitutionnelle de 1867* ni par l'effet de l'art. 88 de la *Loi sur les indiens*.

Le juge McLachlin est largement en accord avec ces motifs.

Jurisprudence

Citée par le juge en chef Lamer

Arrêts examinés: *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *R. c. Adams*, [1996] 3 R.C.S. 101; *R. c. Côté*, [1996] 3 R.C.S. 139; *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 A.C. 46, conf. sub nom. *St. Catharines Milling and Lumber Co. c. The Queen* (1887), 13 R.C.S. 577; *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Baker Lake c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; **arrêts mentionnés:** *R. c. Pamajewon*, [1996] 2 R.C.S. 821; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *Mabo c. Queensland* (1992), 107 A.L.R. 1; *Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031; *Parents naturels c. Superintendent of Child Welfare*, [1976] 2 R.C.S. 751; *Dick c. La Reine*, [1985] 2 R.C.S. 309; *Stein c. Le navire «Kathy K»*, [1976] 2 R.C.S. 802; *N.V. Bocimar S.A. c. Century Insurance Co. of Canada*, [1987] 1 R.C.S. 1247; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Chartier c. Procureur général du Québec*, [1979] 2 R.C.S. 474; *Kruger c. La Reine*, [1978] 1 R.C.S. 104; *R. c. Taylor* (1981), 62 C.C.C. (2d) 227; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *Uukw c. R.*, [1987] 6 W.W.R. 155; *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *Roberts c. Canada*, [1989] 1 R.C.S. 322; *Bande indienne de la rivière Blueberry c. Canada (Ministère des Affaires indiennes et du Nord canadien)*, [1995] 4 R.C.S. 344; *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85; *Bande indienne de St. Mary's c. Cranbrook (Ville)*, [1997] 2 R.C.S. 657; *United States c. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *R. c. Sutherland*, [1980] 2 R.C.S. 451; *R. c. Francis*, [1988] 1 R.C.S. 1025; *Derrickson c. Derrickson*, [1986] 1 R.C.S. 285.

Citée par le juge La Forest

Arrêts examinés: *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *R. c. Van der Peet*, [1996] 2

507; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Wesley*, [1932] 4 D.L.R. 774; *Sikyea v. The Queen*, [1964] S.C.R. 642, aff'g *R. v. Sikyea* (1964), 43 D.L.R. (2d) 150.

R.C.S. 507; *R. c. Côté*, [1996] 3 R.C.S. 139; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; **arrêts mentionnés:** *R. c. Wesley*, [1932] 4 D.L.R. 774; *Sikyea c. The Queen*, [1964] R.C.S. 642, conf. *R. c. Sikyea* (1964), 43 D.L.R. (2d) 150.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 91(24), 109.
Constitution Act, 1982, s. 35(1).
Indian Act, R.S.C., 1985, c. I-5, ss. 18, 88.
Indian Oil and Gas Act, R.S.C., 1985, c. I-7, s. 6(2).
Royal Proclamation, 1763, R.S.C., 1985, App. II, No.1.
Treaty Between Her Majesty And The United States Of America, For The Settlement Of The Oregon Boundary (Oregon Boundary Treaty, 1846), TS 120.

Lois et règlements cités

Loi constitutionnelle de 1867, art. 91(24), 109.
Loi constitutionnelle de 1982, art. 35(1).
Loi sur le pétrole et le gaz des terres indiennes, L.R.C. (1985), ch. I-7, art. 6(2).
Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 18, 88.
Proclamation royale de 1763, L.R.C. (1985), app. II, n° 1.
Treaty Between Her Majesty And The United States Of America, For The Settlement Of The Oregon Boundary (Oregon Boundary Treaty, 1846), TS 120.

Authors Cited

Burn, E. H. *Cheshire and Burn's Modern Law of Real Property*, 14th ed. London: Butterworths, 1988.
 Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, vols. 1 (*Looking Forward, Looking Back*) and 2 (*Restructuring the Relationship*). Ottawa: The Commission, 1996.
 Gagne, Jocelyn. "The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim" (1982-83), 47 *Sask. L. Rev.* 309.
 Hogg, Peter W. *Constitutional Law of Canada*, 3rd ed. Scarborough, Ont.: Carswell, 1992.
 Howard, Michael Newman, Peter Crane and Daniel A. Hochberg. *Phipson on Evidence*, 14th ed. London: Sweet & Maxwell, 1990.
 Macklem, Patrick. "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 *McGill L.J.* 382.
 McLeod, Clay. "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992), 30 *Alta. L. Rev.* 1276.
 McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon Press, 1989.
 McNeil, Kent. "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *Sup. Ct. L. Rev.* 255.

Doctrine citée

Burn, E. H. *Cheshire and Burn's Modern Law of Real Property*, 14th ed. London: Butterworths, 1988.
 Canada. Commission royale sur les peuples autochtones. *Rapport de la Commission royale sur les peuples autochtones*, vol. 1 (*Un passé, un avenir*) et 2 (*Une relation à redéfinir*). Ottawa: La Commission, 1996.
 Gagne, Jocelyn. "The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim" (1982-83), 47 *Sask. L. Rev.* 309.
 Hogg, Peter W. *Constitutional Law of Canada*, 3rd ed. Scarborough, Ont.: Carswell, 1992.
 Howard, Michael Newman, Peter Crane and Daniel A. Hochberg. *Phipson on Evidence*, 14th ed. London: Sweet & Maxwell, 1990.
 Macklem, Patrick. "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 *R.D. McGill* 382.
 McLeod, Clay. "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992), 30 *Alta. L. Rev.* 1276.
 McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon Press, 1989.
 McNeil, Kent. "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *Sup. Ct. L. Rev.* 255.

McNeil, Kent. "The Meaning of Aboriginal Title". In Michael Asch, ed., *Aboriginal and Treaty Rights in Canada*. Vancouver: U.B.C. Press, 1997.

Megarry, Robert E., and H. W. R. Wade. *The Law of Real Property*, 4th ed. London: Stevens, 1975.

O'Reilly, James. "La Loi constitutionnelle de 1982, droit des autochtones" (1984), 25 *C. de D.* 125.

Pentney, William. "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II — Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207.

Sanders, Douglas. "Pre-Existing Rights: The Aboriginal Peoples of Canada". In Gerald-A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. Toronto: Carswell, 1989, 707.

Sanders, Douglas. "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314.

Slaterry, Brian. *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*. Saskatoon: University of Saskatchewan Native Law Centre, 1983.

Slaterry, Brian. "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83), 8 *Queen's L.J.* 232.

Slaterry, Brian. "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1993), 30 B.C.A.C. 1, 49 W.A.C. 1, 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97, [1993] 5 C.N.L.R. 1, [1993] B.C.J. No. 1395 (QL), varying an order of McEachern C.J., [1991] 3 W.W.R. 97, [1991] 5 C.N.L.R. xiii, (1991), 79 D.L.R. (4th) 185, [1991] B.C.J. No. 525 (QL), and dismissing British Columbia's cross-appeal as abandoned. Appeal allowed in part; cross-appeal dismissed.

Stuart Rush, Q.C., Peter Grant, Michael Jackson, Louise Mandell and David Paterson, for the appellants and respondents on the cross-appeal, the Gitksan Hereditary Chiefs *et al.*

Marvin R. V. Storrow, Q.C., Joanne R. Lysyk and Joseph C. McArthur, for the appellants and respondents on the cross-appeal, the Wet'suwet'en Hereditary Chiefs *et al.*

McNeil, Kent. «The Meaning of Aboriginal Title». In Michael Asch, ed., *Aboriginal and Treaty Rights in Canada*. Vancouver: U.B.C. Press, 1997.

Megarry, Robert E., and H. W. R. Wade. *The Law of Real Property*, 4th ed. London: Stevens, 1975.

O'Reilly, James. «La Loi constitutionnelle de 1982, droit des autochtones» (1984), 25 *C. de D.* 125.

Pentney, William. «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II — Section 35: The Substantive Guarantee» (1988), 22 *U.B.C. L. Rev.* 207.

Sanders, Douglas. «Les droits préexistants: les peuples autochtones du Canada». Dans Gerald-A. Beaudoin et Ed Ratushny, dir., *Charte canadienne des droits et libertés*, 2^e éd. Montréal: Wilson & Lafleur, 1989, 779.

Sanders, Douglas. «The Rights of the Aboriginal Peoples of Canada» (1983), 61 *R. du B. can.* 314.

Slaterry, Brian. *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*. Saskatoon: University of Saskatchewan Native Law Centre, 1983.

Slaterry, Brian. «The Constitutional Guarantee of Aboriginal and Treaty Rights» (1982-83), 8 *Queen's L.J.* 232.

Slaterry, Brian. «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (1993), 30 B.C.A.C. 1, 49 W.A.C. 1, 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97, [1993] 5 C.N.L.R. 1, [1993] B.C.J. No. 1395 (QL), modifiant une ordonnance du juge en chef McEachern, [1991] 3 W.W.R. 97, [1991] 5 C.N.L.R. xiii, (1991), 79 D.L.R. (4th) 185, [1991] B.C.J. No. 525 (QL), et rejetant le pourvoi incident de la Colombie-Britannique pour cause d'abandon. Pourvoi accueilli en partie; pourvoi incident rejeté.

Stuart Rush, c.r., Peter Grant, Michael Jackson, Louise Mandell et David Paterson, pour les appelants et intimés dans le pourvoi incident, les chefs héréditaires Gitksan et autres.

Marvin R. V. Storrow, c.r., Joanne R. Lysyk et Joseph C. McArthur, pour les appelants et intimés dans le pourvoi incident, les chefs héréditaires Wet'suwet'en et autres.

Joseph J. Arvay, Q.C., Mark G. Underhill and Brenda Edwards, for the respondent and appellant on the cross-appeal, Her Majesty the Queen in Right of the Province of British Columbia.

Graham Garton, Q.C., Judith Bowers, Q.C., Murray T. Wolf and Geoffrey S. Lester, for the respondent the Attorney General of Canada.

Arthur Pape, Harry A. Slade, Peter Hogg and Jean Teillet, for the intervener the First Nations Summit.

Jack Woodward and Albert C. Peeling, for the intervener the Westbank First Nation.

Marvin R. V. Storrow, Q.C., Joanne R. Lysyk and Joseph C. McArthur, for the interveners the Musqueam Nation *et al.*

J. Keith Lowes, for the interveners the B.C. Cattlemen's Association *et al.*

Charles F. Willms, for the intervener Skeena Cellulose Inc.

J. Edward Gouge, Q.C., and Jill M. Marks, for the intervener Alcan Aluminum Ltd.

The judgment of Lamer C.J. and Cory and Major JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

¹

This appeal is the latest in a series of cases in which it has fallen to this Court to interpret and apply the guarantee of existing aboriginal rights found in s. 35(1) of the *Constitution Act, 1982*. Although that line of decisions, commencing with *R. v. Sparrow*, [1990] 1 S.C.R. 1075, proceeding through the *Van der Peet* trilogy (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723), and ending in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139, have laid down the jurisprudential framework for s. 35(1), this appeal raises a set of

Joseph J. Arvay, c.r., Mark G. Underhill et Brenda Edwards, pour l'intimée et appelante dans le pourvoi incident, Sa Majesté la Reine du chef de la province de la Colombie-Britannique.

Graham Garton, c.r., Judith Bowers, c.r., Murray T. Wolf et Geoffrey S. Lester, pour l'intimé le procureur général du Canada.

Arthur Pape, Harry A. Slade, Peter Hogg et Jean Teillet, pour l'intervenant le First Nations Summit.

Jack Woodward et Albert C. Peeling, pour l'intervenante la Première nation de Westbank.

Marvin R. V. Storrow, c.r., Joanne R. Lysyk et Joseph C. McArthur, pour les intervenants la Nation Musqueam et autres.

J. Keith Lowes, pour les intervenants la B.C. Cattlemen's Association et autres.

Charles F. Willms, pour l'intervenante Skeena Cellulose Inc.

J. Edward Gouge, c.r., et Jill M. Marks, pour l'intervenante Alcan Aluminium Ltée.

Version française du jugement du juge en chef Lamer et des juges Cory et Major rendu par

LE JUGE EN CHEF —

I. Introduction

Le présent pourvoi est le plus récent d'une série d'affaires où notre Cour a été appelée à interpréter et à appliquer la garantie relative aux droits ancestraux existants prévue au par. 35(1) de la *Loi constitutionnelle de 1982*. Bien que cette série de décisions — qui a commencé par l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075, s'est poursuivie par la trilogie *Van der Peet* (*R. c. Van der Peet*, [1996] 2 R.C.S. 507, *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672, et *R. c. Gladstone*, [1996] 2 R.C.S. 723), et s'est terminée par les arrêts *R. c. Pamajewon*, [1996] 2 R.C.S. 821, *R. c. Adams*, [1996] 3 R.C.S. 101, et *R. c. Côté*, [1996] 3 R.C.S. 139 — ait établi le cadre jurisprudentiel d'analyse du

interrelated and novel questions which revolve around a single issue — the nature and scope of the constitutional protection afforded by s. 35(1) to common law aboriginal title.

In *Adams*, and in the companion decision in *Côté*, I considered and rejected the proposition that claims to aboriginal rights must also be grounded in an underlying claim to aboriginal title. But I held, nevertheless, that aboriginal title was a distinct species of aboriginal right that was recognized and affirmed by s. 35(1). Since aboriginal title was not being claimed in those earlier appeals, it was unnecessary to say more. This appeal demands, however, that the Court now explore and elucidate the implications of the constitutionalization of aboriginal title. The first is the specific content of aboriginal title, a question which this Court has not yet definitively addressed, either at common law or under s. 35(1). The second is the related question of the test for the proof of title, which, whatever its content, is a right in land, and its relationship to the definition of the aboriginal rights recognized and affirmed by s. 35(1) in *Van der Peet* in terms of activities. The third is whether aboriginal title, as a right in land, mandates a modified approach to the test of justification first laid down in *Sparrow* and elaborated upon in *Gladstone*.

In addition to the relationship between aboriginal title and s. 35(1), this appeal also raises an important practical problem relevant to the proof of aboriginal title which is endemic to aboriginal rights litigation generally — the treatment of the oral histories of Canada's aboriginal peoples by the courts. In *Van der Peet*, I held that the common law rules of evidence should be adapted to take into account the *sui generis* nature of aboriginal

par. 35(1), le présent pourvoi soulève un ensemble de nouvelles questions interreliées, qui concernent une seule et même question — la nature et la portée de la protection constitutionnelle accordée par le par. 35(1) au titre aborigène reconnu en common law.

Dans *Adams*, ainsi que dans l'arrêt connexe *Côté*, j'ai examiné et rejeté l'argument voulant qu'une revendication visant des droits ancestraux doive aussi s'appuyer sur une revendication sous-jacente visant un titre aborigène. J'ai néanmoins conclu que le titre aborigène était une espèce distincte de droit ancestral reconnu et confirmé par le par. 35(1). Comme aucun titre aborigène n'était revendiqué dans ces pourvois antérieurs, il n'était pas nécessaire d'en dire davantage. Cependant, dans le cadre du présent pourvoi, la Cour doit examiner et élucider les conséquences de la constitutionnalisation du titre aborigène. La première conséquence a trait au contenu précis du titre aborigène, question à laquelle notre Cour n'a pas encore répondu de manière définitive, tant au regard de la common law que du par. 35(1). La deuxième est la question connexe du critère applicable pour faire la preuve du titre qui, quel que soit son contenu, est un droit foncier, et de sa relation avec la définition des droits ancestraux reconnus et confirmés par le par. 35(1) qui a été donnée dans *Van der Peet* en fonction de la notion d'activités. La troisième est la question de savoir si le titre aborigène, en tant que droit foncier, commande une approche modifiée à l'égard du critère de justification qui d'abord a été énoncé dans *Sparrow* puis précisé dans *Gladstone*.

En plus du rapport entre le titre aborigène et le par. 35(1), le présent pourvoi soulève aussi un problème pratique important en matière de preuve du titre aborigène, problème généralement commun à tout litige portant sur des droits ancestraux, soit le traitement réservé par les tribunaux aux récits oraux des peuples autochtones du Canada. Dans *Van der Peet*, j'ai conclu que les règles de la common law en matière de preuve devaient être adaptées pour tenir compte du caractère *sui generis* des droits ancestraux. Dans le présent pourvoi, notre

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rights. In this appeal, the Court must address what specific form those modifications must take.

Cour doit se demander quelle forme précise doivent prendre ces modifications.

4 Finally, given the existence of aboriginal title in British Columbia, this Court must address, on cross-appeal, the question of whether the province of British Columbia, from the time it joined Confederation in 1871, until the entrenchment of s. 35(1) in 1982, had jurisdiction to extinguish the rights of aboriginal peoples, including aboriginal title, in that province. Moreover, if the province was without this jurisdiction, a further question arises — whether provincial laws of general application that would otherwise be inapplicable to Indians and Indian lands could nevertheless extinguish aboriginal rights through the operation of s. 88 of the *Indian Act*, R.S.C., 1985, c. I-5.

Finalement, vu l'existence du titre aborigène en Colombie-Britannique, notre Cour doit examiner, dans un pourvoi incident, la question de savoir si, à compter de son entrée dans la Confédération en 1871 jusqu'à l'inscription du par. 35(1) dans la Constitution en 1982, la province de la Colombie-Britannique a eu le pouvoir d'éteindre, sur son territoire, les droits des peuples autochtones, y compris le titre aborigène. En outre, si la province n'avait pas ce pouvoir, se pose alors une autre question: est-ce que les lois provinciales d'application générale, qui seraient normalement inapplicables aux Indiens et à leurs terres, pourraient néanmoins éteindre les droits ancestraux sous l'effet de l'art. 88 de la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5.

II. Facts

II. Les faits

5 At the British Columbia Supreme Court, McEachern C.J. heard 374 days of evidence and argument. Some of that evidence was not in a form which is familiar to common law courts, including oral histories and legends. Another significant part was the evidence of experts in genealogy, linguistics, archeology, anthropology, and geography.

En Cour suprême de la Colombie-Britannique, le juge en chef McEachern a présidé à 374 jours de déposition et d'argumentation. Une partie de la preuve n'était pas dans une forme familière aux tribunaux de common law et comportait notamment des récits oraux et des légendes. Un autre bloc considérable d'éléments de preuve était constitué de témoignages d'experts en généalogie, en linguistique, en archéologie, en anthropologie et en géographie.

6 The trial judge's decision (reported at [1991] 3 W.W.R. 97) is nearly 400 pages long, with another 100 pages of schedules. Although I am of the view that there must be a new trial, I nevertheless find it useful to summarize some of the relevant facts, so as to put the remainder of the judgment into context.

La décision du juge de première instance (publié à [1991] 3 W.W.R. 97) compte près de 400 pages, auxquelles s'ajoute une autre centaine de pages d'annexes. Même si je suis d'avis qu'il faut un nouveau procès, je crois néanmoins utile de résumer certains des faits pertinents, de manière à mettre en contexte le reste du jugement.

A. *The Claim at Trial*

A. *La revendication au procès*

7 This action was commenced by the appellants, who are all Gitksan or Wet'suwet'en hereditary chiefs, who, both individually and on behalf of their "Houses" claimed separate portions of 58,000 square kilometres in British Columbia. For the purpose of the claim, this area was divided into

La présente action a été engagée par les appelants, tous des chefs héréditaires Wet'suwet'en ou Gitksan, qui, tant en leur propre nom qu'au nom de leurs «maisons», revendiquent des parties distinctes d'un territoire de 58 000 kilomètres carrés situé en Colombie-Britannique. Aux fins de la revendication,

133 individual territories, claimed by the 71 Houses. This represents all of the Wet'suwet'en people, and all but 12 of the Gitksan Houses. Their claim was originally for "ownership" of the territory and "jurisdiction" over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.) The province of British Columbia counterclaimed for a declaration that the appellants have no right or interest in and to the territory or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.

B. *The Gitksan and Wet'suwet'en Peoples*

(1) Demography

The Gitksan consist of approximately 4,000 to 5,000 persons, most of whom now live in the territory claimed, which is generally the watersheds of the north and central Skeena, Nass and Babine Rivers and their tributaries. The Wet'suwet'en consist of approximately 1,500 to 2,000 persons, who also predominantly live in the territory claimed. This territory is mainly in the watersheds of the Bulkley and parts of the Fraser-Nechako River systems and their tributaries. It lies immediately east and south of the Gitksan.

Of course, the Gitksan and Wet'suwet'en are not the only people living in the claimed territory. As noted by both McEachern C.J. at trial (at p. 440) and Lambert J.A. on appeal (at p. 243), there are other aboriginals who live in the claimed territory, notably the Carrier-Sekani and Nishga peoples. Some of these people have unsettled land claims overlapping with the territory at issue here. Moreover, there are also numerous non-aboriginals living there. McEachern C.J. found that, at the time of the trial, the non-aboriginal population in the territory was over 30,000.

cation, ce grand territoire a été divisé en 133 territoires distincts, revendiqués par les 71 maisons. Y sont représentés tous les Wet'suwet'en et toutes les maisons Gitksan, à l'exception de 12. Initialement, les appelants revendiquaient la «propriété» du territoire et la «compétence» sur celui-ci. (Devant notre Cour, cette revendication a changé et est devenue principalement la revendication d'un titre aborigène sur le territoire en question.) La province de la Colombie-Britannique a présenté une demande reconventionnelle dans laquelle elle sollicite une déclaration portant que les appelants n'ont aucun droit ou intérêt dans le territoire, ou, subsidiairement, que la cause d'action des appelants devrait être l'obtention d'une indemnité de la part du gouvernement du Canada.

B. *Les Gitksan et les Wet'suwet'en*

(1) La démographie

Les Gitksan sont un groupe d'environ 4 000 à 5 000 personnes, dont la plupart vivent maintenant dans le territoire revendiqué, c'est-à-dire de façon générale le bassin centre-nord des rivières Skeena, Nass et Babine et de leurs affluents. Les Wet'suwet'en, qui sont environ 1 500 à 2 000, habitent eux aussi de façon prédominante le territoire revendiqué. Leur territoire est situé principalement dans le bassin de la rivière Bulkley et, en partie, dans le système hydrographique formé par les rivières Fraser et Nechako et leurs affluents. Ce territoire se trouve immédiatement à l'est et au sud de celui des Gitksan.

Les Gitksan et les Wet'suwet'en ne sont évidemment pas les seules personnes vivant dans le territoire revendiqué. Comme l'ont souligné tant le juge en chef McEachern en première instance (à la p. 440) que le juge Lambert en appel (à la p. 243), d'autres autochtones vivent sur ce territoire, notamment les Carrier-Sekani et les Nishga. Certains d'entre eux ont des revendications territoriales pendantes qui chevauchent en partie le territoire en cause dans la présente affaire. En outre, de nombreux non-autochtones y vivent. Le juge en chef McEachern a conclu que, au moment du procès, la population non autochtone du territoire dépassait 30 000 personnes.

(2) History

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There were numerous theories of the history of the Gitksan and Wet'suwet'en peoples before the trial judge. His conclusion from the evidence was that their ancestors migrated from Asia, probably through Alaska, and spread south and west into the areas which they found to be liveable. There was archeological evidence, which he accepted, that there was some form of human habitation in the territory and its surrounding areas from 3,500 to 6,000 years ago, and intense occupation of the Hagwilget Canyon site (near Hazelton), prior to about 4,000 to 3,500 years ago. This occupation was mainly in or near villages on the Skeena River, the Babine River or the Bulkley River, where salmon, the staple of their diet, was easily obtainable. The other parts of the territory surrounding and between their villages and rivers were used for hunting and gathering for both food and ceremonial purposes. The scope of this hunting and gathering area depended largely on the availability of the required materials in the areas around the villages. Prior to the commencement of the fur trade, there was no reason to travel far from the villages for anything other than their subsistence requirements.

(3) North American Exploration

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There was little European influence in western Canada until the arrival of Capt. Cook at Nootka on Vancouver Island in 1778, which led to the sea otter hunt in the north Pacific. This influence grew with the establishment of the first Hudson's Bay trading post west of the Rockies (although east of the territories claimed) by Simon Fraser in 1805-1806. Trapping for the commercial fur trade was not an aboriginal practice, but rather one influenced by European contact. The trial judge held that the time of direct contact between the Aboriginal Peoples in the claimed territory was approximately 1820, after the trader William Brown

(2) L'histoire

De nombreuses thèses ont été présentées au juge de première instance sur l'histoire des Gitksan et des Wet'suwet'en. De la preuve présentée, il a conclu que leurs ancêtres ont émigré d'Asie, probablement en passant par l'Alaska, et qu'ils se sont dispersés au sud et à l'ouest dans les régions qu'ils jugèrent habitables. Il a accepté des éléments de preuve archéologique indiquant que le territoire et ses alentours ont connu une certaine forme d'occupation humaine il y a de 3 500 à 6 000 ans et qu'il y a eu une occupation intense du site du canyon Hagwilget (près de Hazelton) il y a plus de 4 000 à 3 500 ans. Cette occupation s'est faite principalement dans des villages ou près de villages situés sur les rivières Skeena, Babine ou Bulkley, où le saumon, l'élément principal de leur régime alimentaire, était abondant. Les autres parties du territoire, autour des villages et des rivières ou entre ceux-ci, étaient utilisées pour la chasse et la cueillette tant à des fins alimentaires que rituelles. L'étendue de ce territoire de chasse et de cueillette était largement tributaire de la disponibilité des denrées requises autour des villages. Avant le début du commerce des fourrures, les personnes qui habitaient les villages n'avaient aucune raison de s'en éloigner si ce n'était pour assurer leur subsistance.

(3) L'exploration de l'Amérique du Nord

L'influence européenne ne s'est vraiment fait sentir dans l'Ouest du Canada qu'à l'arrivée du capitaine Cook à Nootka, sur l'île de Vancouver, en 1778, événement qui a entraîné la chasse à la loutre de mer dans le Pacifique Nord. Cette influence a crû par suite de l'établissement du premier poste de traite de la Baie d'Hudson à l'ouest des Rocheuses (quoiqu'à l'est des territoires revendiqués) par Simon Fraser en 1805 et 1806. Le trapage des fourrures à des fins commerciales n'était pas une pratique autochtone, mais plutôt une pratique qui a été induite par le contact avec les Européens. Le juge de première instance a statué que la date approximative du contact direct entre les peuples autochtones habitant le territoire revendiqué et les Européens était 1820, après l'arrivée

arrived and Hudson's Bay had merged with the North West Company.

(4) Present Social Organization

McEachern C.J. set out a description of the present social organization of the appellants. In his opinion, this was necessary because "one of the ingredients of aboriginal land claims is that they arise from long-term communal rather than personal use or possession of land" (at p. 147). The fundamental premise of both the Gitksan and the Wet'suwet'en peoples is that they are divided into clans and Houses. Every person born of a Gitksan or Wet'suwet'en woman is automatically a member of his or her mother's House and clan. There are four Gitksan and four Wet'suwet'en clans, which are subdivided into Houses. Each House has one or more Hereditary Chief as its titular head, selected by the elders of their House, as well as possibly the Head Chief of the other Houses of the clan. There is no head chief for the clans, but there is a ranking order of precedence within communities or villages, where one House or clan may be more prominent than others.

At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. The trial judge held that these are marked, in some cases, by physical and tangible indicators of their association with the territories. He cited as examples totem poles with the Houses' crests carved, or distinctive regalia. In addition, the Gitksan Houses have an "adaawk" which is a collection of sacred oral tradition about their ancestors, histories and territories. The Wet'suwet'en each have a "kungax" which is a spiritual song or dance or performance which ties them to their land. Both of these were entered as evidence on behalf of the appellants (see my discussion of the trial judge's view of this evidence, *infra*).

The most significant evidence of spiritual connection between the Houses and their territory is a

du commerçant William Brown et la fusion de la Baie d'Hudson et de la Compagnie du Nord-Ouest.

(4) L'organisation sociale actuelle

Le juge en chef McEachern a décrit l'organisation sociale actuelle des appelants. À son avis, il était nécessaire de le faire parce que [TRADUCTION] «l'un des éléments des revendications territoriales des autochtones est qu'elles reposent sur une longue utilisation ou possession collective — plutôt qu'individuelle — du territoire» (à la p. 147). La caractéristique fondamentale de l'organisation sociale des Gitksan et des Wet'suwet'en est qu'ils sont divisés en clans et en maisons. Toute personne dont la mère est Gitksan ou Wet'suwet'en est d'office membre de la maison et du clan de sa mère. Il y a quatre clans Gitksan et quatre clans Wet'suwet'en, clans qui sont subdivisés en maisons. Chaque maison compte un ou plusieurs chefs héréditaires qui agissent à titre de chef titulaire et sont choisis par les aînés de leur maison, et aussi, parfois, par le grand chef des autres maisons du clan. Le clan n'a pas de grand chef, mais il y a un ordre de préséance au sein des collectivités ou des villages où une maison ou un clan prédomine.

Au procès, les appelants ont fondé leur revendication sur la «propriété» et l'utilisation historiques d'un ou de plusieurs des territoires. Le juge de première instance a conclu que, dans certains cas, ces faits sont marqués par des indices physiques et tangibles de l'association des individus avec les territoires visés. Il a donné comme exemples les mâts totémiques sculptés aux emblèmes ou insignes distinctifs des maisons. En outre, les maisons Gitksan ont un «adaawk», c'est-à-dire un ensemble de traditions orales sacrées au sujet de leurs ancêtres, de leur histoire et de leurs territoires. Chaque maison Wet'suwet'en possède un «kungax», c'est-à-dire un chant, une danse ou une représentation spirituelle qui les rattache à leur territoire. Ces deux éléments ont été déposés en preuve au nom des appelants (voir, plus loin, mon analyse de l'opinion du juge de première instance sur ces éléments de preuve).

Le signe le plus important du lien spirituel entre les différentes maisons et leur territoire est la salle

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feast hall. This is where the Gitksan and Wet'suwet'en peoples tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose, but is also used for making important decisions. The trial judge also noted the *Criminal Code* prohibition on aboriginal feast ceremonies, which existed until 1951.

des célébrations. C'est là que les Wet'suwet'en et les Gitksan disent et redisent leurs récits et identifient leurs territoires afin de se rappeler le lien sacré qu'ils entretiennent avec leurs terres. Ces célébrations ont une fin rituelle, mais elles sont aussi l'occasion de prise de décisions importantes. Le juge de première instance a également souligné que, jusqu'en 1951, le *Code criminel* interdisait les cérémonies rituelles autochtones.

III. Judgments Below

A. *Supreme Court of British Columbia*

(1) General Principles

15 The trial judge began his analysis by considering the significant cases in this area: *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.), *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *R. v. Sioui*, [1990] 1 S.C.R. 1025, and *Sparrow*, *supra*. On the basis of this jurisprudence, he set out four propositions of law. First, aboriginal interests arise out of occupation or use of specific land for aboriginal purposes for an indefinite or long, long time before the assertion of sovereignty. Second, aboriginal interests are communal, consisting of subsistence activities and are not proprietary. Third, at common law, aboriginal rights exist at the pleasure of the Crown and may be extinguished when the intention of the Crown is clear and plain. This power reposed with the Imperial Crown during the colonial period. Upon Confederation the province obtained title to all Crown land in the province subject to the "interests" of the Indians. Finally, unextinguished aboriginal rights are not absolute. Crown action and aboriginal rights may, in proper circumstances, be reconciled. Generally speaking, aboriginal rights may be regulated by the Crown only when such regulation operates to interfere with aboriginal rights pursuant to legitimate Crown objectives which can honourably be justified, without undue interference with such rights. Moreover, when regulating, government must be mindful of the appropriate level

III. Les juridictions inférieures

A. *Cour suprême de la Colombie-Britannique*

(1) Principes généraux

Le juge de première instance a commencé son analyse par l'examen des décisions importantes dans le domaine: *St. Catharines Milling and Lumber Co. c. The Queen* (1887), 13 R.C.S. 577, *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313, *Baker Lake c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518 (1^{re} inst.), *Guerin c. La Reine*, [1984] 2 R.C.S. 335, *R. c. Sioui*, [1990] 1 R.C.S. 1025, et *Sparrow*, précité. Se fondant sur cette jurisprudence, il a énoncé quatre propositions de droit. Premièrement, les droits ancestraux découlent de l'occupation ou de l'utilisation, à des fins autochtones, d'un territoire précis pendant une période indéfinie ou très longue avant l'affirmation de la souveraineté. Deuxièmement, les droits ancestraux sont des droits collectifs, qui consistent en des activités de subsistance et non en des droits de propriété. Troisièmement, en common law, les droits ancestraux existent selon le bon plaisir de la Couronne et ils peuvent être éteints lorsque l'intention de la Couronne de le faire est claire et expresse. C'est la Couronne impériale qui détenait ce pouvoir au cours de la période coloniale. À la Confédération, la province a obtenu le titre relatif à toutes les terres publiques situées dans la province sous réserve de tout «intérêt» des Indiens. Finalement, les droits ancestraux non éteints ne sont pas absolus. Dans les circonstances appropriées, il est possible de concilier les actes de la Couronne et les droits ancestraux. De façon générale, les droits ancestraux peuvent être réglementés par l'État,

of priority which aboriginal rights have over competing, inconsistent activities.

With respect to the appellants' claims, McEachern C.J. divided his analysis into three parts: (1) jurisdiction over the territory; (2) ownership of the territory; and (in the alternative) (3) particular aboriginal rights over the territory. In the ownership claim, the appellants asserted they were "absolutely entitled to occupy and possess the individual territories" claimed (at p. 126). The claim to jurisdiction was understood by the trial judge as comprising jurisdiction over land and people in the territory, and amounted to aboriginal sovereignty, a right to "govern the territory free of provincial control in all matters where their aboriginal laws conflict with the general law" (at p. 128). Although the claim advanced at trial was advanced by individual chiefs on behalf of themselves or their House members, the trial judge held that since aboriginal rights are communal in nature, any judgment must be for the benefit of the Gitksan and Wet'suwet'en peoples generally.

(2) Aboriginal Ownership

McEachern C.J. started from the proposition, for which he cited *St. Catharines Milling*, that aboriginal rights are not proprietary in nature, but rather "personal and usufructuary", and dependent upon the good will of the Sovereign. He was satisfied that at the date of British sovereignty, the appellants' ancestors were living in their villages on the great rivers, in a form of communal society. He was satisfied that they were occupying or possessing fishing sites and the adjacent lands, as their ancestors had done for the purpose of hunting and

mais seulement si cette réglementation ne porte pas atteinte de manière excessive à ces droits et qu'elle vise la poursuite par l'État d'objectifs légitimes qui peuvent être honorablement justifiés. En outre, lorsqu'il réglemente des activités, le gouvernement doit tenir compte du degré de priorité approprié qui doit être accordé à l'exercice de droits ancestraux sur l'exercice d'autres activités concurrentes et incompatibles.

Le juge en chef McEachern a divisé son analyse des revendications des appelants en trois parties: (1) la compétence sur le territoire; (2) la propriété du territoire; (3) (subsidiairement) les droits ancestraux particuliers visant le territoire. Dans leur revendication de la propriété, les appelants ont affirmé qu'ils avaient [TRADUCTION] «le droit absolu à la possession et à l'occupation des différents territoires» revendiqués (à la p. 126). Le juge de première instance a considéré que la revendication relative à la compétence visait la compétence sur le territoire et sur les personnes l'habitant, et qu'elle équivalait à la souveraineté autochtone, c'est-à-dire au droit de [TRADUCTION] «gouverner le territoire, libre de tout contrôle provincial sur les diverses questions où leurs règles de droit entrent en conflit avec le droit d'application générale» (à la p. 128). Bien que, en première instance, la revendication ait été présentée par chacun des chefs, en son propre nom et au nom des membres de sa maison, le juge de première instance a conclu que, vu la nature collective des droits ancestraux, tout jugement doit être prononcé au bénéfice des Gitksan et des Wet'suwet'en en général.

(2) La propriété autochtone

Le juge en chef McEachern est parti de la proposition — au soutien de laquelle il a cité l'arrêt *St. Catharines Milling* — que les droits ancestraux ne sont pas, par nature, des droits de propriété, mais plutôt des droits «personnels et usufructuaires», tributaires du bon vouloir du souverain. Il était convaincu que, au moment de l'affirmation de la souveraineté par les Britanniques, les ancêtres des appelants vivaient dans leurs villages en bordure des grandes rivières, dans une forme de société communautaire. Il était convaincu qu'ils

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gathering that which they required for sustenance. However, he was not satisfied that they owned the territory in its entirety in any sense that would be recognized by the law.

occupaient et possédaient des sites de pêche et les terres adjacentes, comme leurs ancêtres l'avaient fait pour y chasser et y cueillir ce dont ils avaient besoin pour assurer leur subsistance. Cependant, il n'était pas convaincu qu'ils étaient propriétaires de l'ensemble du territoire, dans quelque sens qui serait reconnu par le droit.

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There were several specific claims of the plaintiffs as to their uses of the land before the assertion of sovereignty. He concluded that the appellants' ancestors lived within the territory, but predominantly at the village sites. He accepted, at p. 372, that they harvested the resources of the lands, but that there was only evidence of "commonsense subsistence practices . . . entirely compatible with bare occupation for the purposes of subsistence". He was not persuaded that there was any system of governance or uniform custom relating to land outside the villages. He refused to accept that the spiritual beliefs exercised within the territory were necessarily common to all the people or that they were universal practices. He was not persuaded that the present institutions of the plaintiffs' society were recognized by their ancestors. Rather, he found, at p. 373, that "they more likely acted as they did because of survival instincts". He stated that the maintenance and protection of the boundaries were unproven because of the numerous intrusions into the territory by other peoples. The oral histories, totem poles and crests were not sufficiently reliable or site specific to discharge the plaintiff's burden of proof. Although McEachern C.J. recognized the social importance of the feast system and the fact that it evolved from earlier practices, he did not accept its role in the management and allocation of lands, particularly after the fur trade. McEachern C.J. concluded, at p. 383, that "I cannot infer from the evidence that the Indians possessed or controlled any part of the territory, other than for village sites and for aboriginal

Les demandeurs ont fait valoir plusieurs revendications particulières visant des utilisations qu'ils faisaient du territoire avant l'affirmation de la souveraineté. Le juge de première instance a conclu que les ancêtres des appelants vivaient à l'intérieur du territoire, mais principalement dans le site des villages. Il a accepté, à la p. 372, qu'ils récoltaient les ressources du territoire, mais que la preuve étayait seulement l'existence de [TRADUCTION] «pratiques rationnelles de subsistance [. . .] tout à fait compatibles avec une simple occupation à des fins de subsistance». Il n'était pas convaincu qu'il existait quelque système de gestion ou de coutume uniforme visant les terres situées à l'extérieur des villages. Il a refusé de reconnaître que les croyances spirituelles respectées au sein du territoire étaient nécessairement communes à tous les autochtones et qu'elles constituaient des pratiques universelles. Il n'était pas convaincu que les institutions actuelles de la société des demandeurs étaient celles de leurs ancêtres. Il a plutôt conclu, à la p. 373, qu'[TRADUCTION] «il est plus vraisemblable qu'ils agissaient ainsi par instinct de survie». Il a affirmé que, compte tenu des nombreuses intrusions d'autres peuples dans le territoire, on n'avait pas fait la preuve du maintien et de la protection de frontières. Les récits oraux, les mâts totémiques et les emblèmes n'étaient pas des éléments suffisamment fiables ou spécifiques à un site pour permettre aux demandeurs de s'acquitter de la charge de la preuve qui leur incombait. Même si le juge en chef McEachern a reconnu l'importance sociale de la pratique des célébrations et son évolution depuis ses premières manifestations, il n'a pas accepté le rôle qu'on lui attribuait dans la gestion et l'attribution des terres, particulièrement après le début du commerce des fourrures. Le juge en chef McEachern a conclu ainsi, à la p. 383: [TRADUCTION] «je ne peux inférer de la preuve que les Indiens possédaient ou contrôlaient

use in a way that would justify a declaration equivalent to ownership”.

Although he was of the opinion that the status of the villages and their immediate surrounding area may be different from the territory as a whole, they were already predominantly reserve lands. Hence, the question of the Gitksan and Wet’suwet’en peoples’ rights to these particular lands did not need to be dealt with. Moreover, to the extent that there were hunting grounds not included on those lands, McEachern C.J. believed he had no jurisdiction to extend their boundaries.

(3) Aboriginal Sovereignty

McEachern C.J. interpreted the appellants’ claim for “jurisdiction” as a claim to govern the territories in question. This would include the right to enforce existing aboriginal law, as well as make and enforce new laws, as required for the governance of the people and their land. Most notably, this would also include a right to supersede the laws of British Columbia if the two were in conflict. McEachern C.J. rejected the appellants’ claim for a right of self-government, relying on both the sovereignty of the Crown at common law, and what he considered to be the relative paucity of evidence regarding an established governance structure. First, he stated, at p. 386, that when British Columbia was united with Canada, “all legislative jurisdiction was divided between Canada and the province, and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts”. Second, he characterized the Gitksan and Wet’suwet’en legal system, at p. 379, as a “most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves”. He continued, at pp. 379-80, stating:

une partie quelconque du territoire, à l’exception du site des villages, et qu’ils l’utilisaient d’une manière qui justifierait une déclaration équivalente au droit de propriété».

Même s’il était d’avis que les villages et leurs environs immédiats avait pu avoir un statut différent de celui du territoire pris dans son ensemble, ils étaient déjà constitués principalement de terres de réserve. Par conséquent, il n’était pas nécessaire d’examiner la question des droits des Gitksan et des Wet’suwet’en sur ces terres. De plus, s’il y avait des territoires de chasse qui n’étaient pas compris dans les limites de ces terres, le juge en chef McEachern était d’avis qu’il n’avait pas compétence pour élargir leurs limites.

(3) La souveraineté autochtone

Le juge en chef McEachern a considéré la revendication des appelants relative à la «compétence» comme étant la revendication du pouvoir de gouverner les territoires en question, notamment le droit d’appliquer les règles de droit autochtones existantes ainsi que le droit d’en adopter de nouvelles et de les faire respecter, selon ce qui est requis pour la gouverne des individus et leur territoire. De façon plus particulière, cela emporterait le droit d’écarter l’application des lois de la Colombie-Britannique en cas de conflit. Le juge en chef a rejeté la revendication par les appelants du droit à l’autonomie gouvernementale, fondant sa décision à la fois sur la souveraineté de la Couronne en common law et sur la rareté relative, selon lui, de preuves de l’existence d’une structure gouvernementale établie. Il a d’abord affirmé, à la p. 386, que, lorsque la Colombie-Britannique a été unie au Canada, [TRADUCTION] «toutes les compétences législatives ont été réparties entre le Canada et la province, et il n’y avait aucune place pour quelque compétence ou souveraineté autochtone qui serait reconnue par le droit ou les tribunaux». Deuxièmement, il a qualifié le système juridique des Gitksan et des Wet’suwet’en, à la p. 379, d’[TRADUCTION] «ensemble de coutumes des plus incertaines et extrêmement souples qui, fréquemment, ne sont pas suivies par les Indiens eux-mêmes». Il a ajouté ceci, aux pp. 379 et 380:

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I heard many instances of prominent Chiefs conducting themselves other than in accordance with these rules, such as logging or trapping on another chief's territory, although there always seemed to be an aboriginal exception which made almost any departure from aboriginal rules permissible. In my judgment, these rules are so flexible and uncertain that they cannot be classified as laws.

As a result of the flexibility and uncertainty of the customs and rules, McEachern C.J. rejected the appellants' claim to jurisdiction or sovereignty over the territories.

(4) Aboriginal Rights

21 After rejecting the appellants' claim for ownership of and jurisdiction over the disputed territories, McEachern C.J. turned to the possibility that the appellants nevertheless have aboriginal rights exercisable therein. He set out, at p. 388, the four part test from *Baker Lake* for an aboriginal right:

1. That they (the plaintiffs) and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.

McEachern C.J. noted that the requirement for an organized society had been satisfied, even though he did not believe the appellants' ancestors had institutions and governed themselves. However, he held that no specific level of sophistication ought to be required in satisfying this requirement. He then stated that there was evidence that the ancestors of the plaintiffs occupied specific locations in the territory (the villages) and they used surrounding lands. Although there was evidence that the Gitksan and Wet'suwet'en would not have been able to keep invaders or traders out of their terri-

[TRADUCTION] On m'a fait état de nombreux cas où des chefs en vue ne se sont pas conformés à ces règles, par exemple en faisant du piégeage ou en coupant du bois sur le territoire d'un autre chef, quoiqu'il semblait toujours y avoir une exception autochtone qui rendait licite presque toute dérogation aux règles autochtones. Selon moi, ces règles sont si souples et incertaines qu'elles ne peuvent être qualifiées de règles de droit.

En raison de la souplesse et de l'incertitude des coutumes et des règles, le juge en chef McEachern a rejeté la revendication de compétence ou de souveraineté sur les territoires visés qu'ont présentée les appelants.

(4) Les droits ancestraux

Après avoir rejeté la revendication des appelants relative à la propriété des territoires en cause et à la compétence sur ceux-ci, le juge en chef McEachern a ensuite examiné la possibilité que les appelants possèdent néanmoins des droits ancestraux pouvant y être exercés. Il a énoncé, à la p. 388, les quatre parties du critère établi dans *Baker Lake*, précité, pour la reconnaissance d'un droit ancestral:

- [TRADUCTION] 1. Il faut que (les demandeurs) et leurs ancêtres aient été membres d'une société organisée;
2. que cette société organisée ait occupé le territoire particulier à l'égard duquel ses membres revendiquent un titre aborigène;
 3. que cette occupation ait été à l'exclusion d'autres sociétés organisées;
 4. que l'occupation ait été un fait établi au moment de l'affirmation de la souveraineté par l'Angleterre.

Le juge en chef McEachern a souligné qu'on avait satisfait à l'exigence concernant l'existence d'une société organisée, même s'il ne croyait pas que les ancêtres des appelants avaient des institutions et se gouvernaient eux-mêmes. Cependant, il a statué qu'aucun degré particulier de raffinement ne devrait être requis pour satisfaire à cette exigence. Il a ensuite affirmé qu'il y avait des éléments de preuve indiquant que les ancêtres des demandeurs avaient occupé des lieux précis dans le territoire (les villages) et qu'ils avaient utilisé les terres environnantes. Même si la preuve indiquait que les

tory, no other organized societies had established themselves in the core areas on any permanent basis. Moreover, he noted at the outset of his reasons on this point that he was uncertain about the requirement for exclusivity.

The activities that were to be protected were only those carried on at the time of contact or European influence and that were still carried on at the time of sovereignty. This included “all those sustenance practices and the gathering of all those products of the land and waters of the territory I shall define which they practised and used before exposure to European civilization (or sovereignty) for subsistence or survival” (at p. 391). This did not include trapping for the fur trade, or other land-based commercial enterprise. McEachern C.J. ultimately concluded, at p. 395 that “the plaintiffs have established, as of the date of British sovereignty, the requirements for continued residence in their villages, and for non-exclusive aboriginal sustenance rights within [certain] portions of the territory”.

(5) Extinguishment and Fiduciary Duties

McEachern C.J. started with the proposition, at pp. 396-97, that the law “never recognized that the settlement of new lands depended upon the consent of the Indians”. All aboriginal rights existed at the pleasure of the Crown, and could be extinguished by unilateral act. He accepted the “clear and plain” intention test for extinguishment, but took the view that it need not be express or even mention aboriginal rights, if the intention can be identified by necessary implication. An example of such implied extinguishment might be a fee simple

Gitksan et les Wet’suwet’en n’auraient pas été capables d’interdire leur territoire aux envahisseurs ou aux commerçants, aucune autre société organisée ne s’était établie avec quelque permanence que ce soit dans les principaux emplacements. De plus, au début de la partie de ses motifs sur ce point, le juge a souligné qu’il était incertain en ce qui concerne cette exigence d’exclusivité.

Les activités qui devaient être protégées se limitaient à celles qui étaient exercées au moment du contact avec les Européens ou au moment où l’influence de ceux-ci s’est fait sentir et qui étaient encore exercées au moment de l’affirmation de la souveraineté. Ces activités comprenaient effectivement: [TRADUCTION] «toutes les pratiques de subsistance ainsi que les activités de récolte des produits des terres et des eaux du territoire que je vais définir, qu’ils suivaient et exerçaient — avant d’être exposés à la civilisation européenne (ou avant l’affirmation de la souveraineté) — à des fins de subsistance ou de survie» (à la p. 391). Ceci ne comprenait pas le trappage en vue du commerce des fourrures ou d’autres entreprises commerciales fondées sur l’exploitation du territoire. Le juge en chef McEachern a finalement conclu, à la p. 395, que [TRADUCTION] «les demandeurs ont établi qu’il était satisfait, à la date de l’affirmation de la souveraineté britannique, aux exigences relatives à la résidence continue dans leurs villages et à l’existence de droits ancestraux d’exploitation à des fins de subsistance non exclusifs sur [certaines] parties du territoire».

(5) L’extinction des droits et les obligations de fiduciaire

Le juge en chef McEachern a commencé en énonçant, aux pp. 396 et 397, la proposition suivante laquelle le droit [TRADUCTION] «n’a jamais reconnu que la colonisation de nouvelles terres était subordonnée au consentement des Indiens». L’existence de tous les droits ancestraux dépendait du bon plaisir de la Couronne et ces droits pouvaient être éteints par un acte unilatéral de cette dernière. Il a accepté l’application du critère de l’intention «claire et expresse» pour statuer sur la question de l’extinction, mais il s’est dit d’avis

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grant to a third party, or a grant of a lease, licence, permit or other tenure inconsistent with continuing aboriginal interest.

qu'il n'est pas nécessaire que l'intention ait été expresse ni même qu'on mentionne les droits ancestraux, si cette intention peut être dégagée par implication nécessaire. Un exemple d'une telle extinction implicite serait un acte de concession en fief simple au bénéfice d'un tiers ou l'octroi d'un bail, d'une licence, d'un permis ou de quelque autre forme de tenure incompatible avec le maintien d'un droit ancestral.

24 McEachern C.J. held that any aboriginal rights to the land had been extinguished. The extinguishment arose out of certain colonial enactments which demonstrated an intention to manage Crown lands in a way that was inconsistent with continuing aboriginal rights. He stated, at p. 411, that "the Crown with full knowledge of the local situation fully intended to settle the colony and to grant titles and tenures unburdened by any aboriginal interests". Crown grantees who received land in colonial times were clearly intended to receive the land free from any aboriginal encumbrances. Moreover, this intention to extinguish did not only apply to lands that had actually been granted to third parties, but rather all Crown land in British Columbia. However, it should be noted that he was careful to distinguish between land and fishing rights. Since McEachern C.J. was of the view that all aboriginal title to the territories in question had been extinguished during colonial times, it was not necessary to consider whether the province had the power to extinguish aboriginal rights after Confederation.

Le juge en chef McEachern a conclu que tout droit ancestral au territoire avait été éteint. Cette extinction était le résultat de certains textes de loi coloniaux qui démontraient l'intention de gérer les terres publiques d'une façon incompatible avec le maintien des droits ancestraux. Il a déclaré, à la p. 411, que [TRADUCTION] «la Couronne, pleinement consciente de la situation locale, avait pleinement eu l'intention d'établir une colonie et d'accorder des titres et tenures qui ne soient grevés d'aucun droit ancestral». On entendait clairement que ceux qui se voyaient accorder des concessions par l'État à l'époque coloniale les reçoivent libres de toute charge dont seraient titulaires les autochtones. En outre, cette intention d'extinction s'appliquait non seulement aux terres qui, de fait, avaient été cédées à des tiers, mais également à toutes les terres publiques en Colombie-Britannique. Cependant, il convient de souligner que le juge a pris soin de distinguer entre les droits fonciers et les droits de pêche. Étant donné que le juge en chef McEachern était d'avis que tout titre aborigène sur les territoires en question avait été éteint pendant l'époque coloniale, il ne lui était pas nécessaire de se demander si la province avait le pouvoir d'éteindre des droits ancestraux après la Confédération.

25 Notwithstanding the complete extinguishment of all aboriginal rights in land, McEachern C.J. held, at p. 417, that the Crown was under a fiduciary obligation to continue to allow native persons to use vacant crown lands for lawful purposes until the land "is dedicated to another purpose". This is not an aboriginal "right", to which s. 35 can be applied, since any such "rights" over the land had been extinguished. However, he held that where the Crown extinguishes an aboriginal right, and

Nonobstant l'extinction complète de tous les droits ancestraux sur le territoire, le juge en chef McEachern a conclu, à la p. 417, que la Couronne avait l'obligation de fiduciaire de continuer de permettre aux autochtones d'utiliser, à des fins licites, les terres publiques inoccupées jusqu'à ce que le territoire en question [TRADUCTION] «soit affecté à une autre fin». Il ne s'agit pas d'un «droit» ancestral auquel l'art. 35 peut être appliqué, puisque tous ces «droits» au territoire ont été éteints. Tou-

makes a promise regarding use of Crown land at the same time, this creates the same fiduciary obligation as if the aboriginal people had surrendered the land to the Crown. In articulating guidelines for the application of the Crown's fiduciary obligation, McEachern C.J. made it clear that the Crown must be free to direct resource management in the province in the best interests of both the aboriginal and non-aboriginal persons in the province. However, Crown authorities should always keep the "aboriginal interests of the plaintiffs very much in mind" (at p. 423) in developing policies for the territory, and should ensure that aboriginal activities on the land are not unduly impaired.

(6) Damages

Since the plaintiffs failed to establish that existing ownership, jurisdiction, or aboriginal rights had been breached, the claim for damages for wrongful appropriation of their territory was dismissed by McEachern C.J.

(7) Lands Subject to Aboriginal Rights at Sovereignty

McEachern C.J. felt it necessary to delineate the boundaries of the lands that were subject to aboriginal rights at the time of sovereignty in case he was wrong that these rights had been extinguished. He considered the evidence regarding the external boundary of the territory, and the internal boundaries therein. He found numerous inconsistencies, and generally did not find it to be reliable. He rejected the boundaries as put forth by the appellants.

Nevertheless, since he had held that the Gitksan and Wet'suwet'en had aboriginal sustenance rights over part of the land, he had to delineate their

tefois, le juge en chef a statué que, dans les cas où la Couronne éteint un droit ancestral, et fait en même temps une promesse au sujet de l'utilisation de terres publiques, cela a pour effet de créer une obligation de fiduciaire au même titre que si les autochtones concernés avaient cédé le territoire à la Couronne. Dans la formulation de lignes directrices concernant l'application de l'obligation de fiduciaire de la Couronne, le juge en chef McEachern a clairement indiqué que celle-ci doit être libre de gérer les ressources de la province au mieux des intérêts tant des autochtones que des non-autochtones de la province. Cependant, les autorités étatiques devraient toujours avoir [TRA-DUCTION] «bien à l'esprit les droits ancestraux des demandeurs» (à la p. 423) lorsqu'elles élaborent des politiques relatives au territoire, en plus de veiller à ce que les activités exercées par les autochtones sur le territoire ne soient pas trop perturbées.

(6) Les dommages-intérêts

Comme les demandeurs n'ont pas réussi à établir la violation de droits existants — propriété, compétence ou droits ancestraux — le juge en chef McEachern a rejeté leur demande en dommages-intérêts fondée sur l'appropriation illicite de leur territoire.

(7) Les terres visées par des droits ancestraux au moment de l'affirmation de la souveraineté

Le juge en chef McEachern a estimé nécessaire de tracer les limites des terres qui étaient visées par des droits ancestraux au moment de l'affirmation de la souveraineté, au cas où il aurait tort de conclure à l'extinction de ces droits. Il a examiné la preuve déposée au sujet des limites externes et internes du territoire. Il y a constaté de nombreuses incohérences et, de façon générale, ne l'a pas jugée fiable. Il a rejeté les limites tracées par les appelants.

Néanmoins comme il avait statué que les Gitksan et les Wet'suwet'en possédaient des droits ancestraux les autorisant à exploiter à des fins de

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boundaries. He put forth three alternatives, and ultimately chose "Map 5" (at p. 400). This area recognized that the plaintiffs' ancestors likely used more distant areas in the territory. However, McEachern C.J. was not persuaded of such use in either the northernmost or southernmost portions of the territory. The northern boundary was drawn through the centre of the Skeena River, with 20 miles on the north side of the river being added. The southern boundary was drawn following some of the internal boundaries, but excluding several of the southern Wet'suwet'en individual territories. He selected this alternative because it worked less injustice for the Wet'suwet'en who lived more spread out and less concentrated near the rivers. However, he cut off the north and south portions of the claimed territory because he did not have confidence in the presence of the Gitksan or Wet'suwet'en in the areas north or south of the boundaries he drew.

(8) Other Matters

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McEachern C.J. concluded his reasons by rejecting the province's argument that the plaintiffs' aboriginal rights to some of the lands had been abandoned. He did not think courts should be quick to treat aboriginal lands as abandoned. He could not say with confidence which lands should be abandoned, and which should not, even though there was clearly declining aboriginal use of some of the lands. He also stressed that the onus of demonstrating abandonment rested with the province and that they had not discharged that onus. He also rejected the argument that the plaintiffs had waived their rights by accepting and using reserves and by conforming to the general law of the province. The honour of the Crown precluded the province from relying on this defence.

subsistance certaines parties du territoire, il se devait d'en tracer les limites. Après avoir exposé trois possibilités, il a finalement retenu la [TRADUCTION] «carte 5» (à la p. 400). Ce tracé reconnaissait que les ancêtres des demandeurs utilisaient vraisemblablement des régions plus éloignées dans le territoire. Toutefois, le juge en chef McEachern n'était pas convaincu qu'une telle utilisation avait été faite dans les parties situées à l'extrême nord et à l'extrême sud du territoire. Le tracé de la limite nord passait par le centre de la rivière Skeena, et ajoutait une aire de 20 milles du côté nord de la rivière. Le tracé de la limite sud suivait certaines limites internes, mais excluait plusieurs territoires Wet'suwet'en au sud. Le juge en chef McEachern a retenu cette solution parce qu'il en résultait une moins grande injustice pour les Wet'suwet'en, qui vivaient de façon plus dispersée et en moins grande concentration près des rivières. Il a cependant éliminé les parties nord et sud du territoire revendiqué parce qu'il n'était pas certain de la présence des Gitksan ou des Wet'suwet'en dans les parties situées au nord ou au sud des limites qu'il avait tracées.

(8) Les autres questions

Le juge en chef McEachern a conclu ses motifs en rejetant l'argument avancé par la province que les droits ancestraux des demandeurs à l'égard de certaines terres avaient été abandonnés. Il était d'avis que les tribunaux ne devaient pas s'empres- ser de conclure à l'abandon de terres par les autochtones. Il ne pouvait pas dire avec certitude quelles terres devraient être considérées comme abandonnées, et lesquelles ne devraient pas l'être, même s'il y avait clairement un déclin dans l'utili- sation de certaines terres par les autochtones. Il a aussi souligné qu'il incombait à la province de prouver l'abandon et qu'elle ne s'était pas acquit- tée de cette charge. Il a aussi rejeté l'argument que les demandeurs avaient renoncé à leurs droits en acceptant et en utilisant les réserves, et en se con- formant aux lois générales de la province. L'obli- gation de la Couronne d'agir honorablement inter- disait à la province de s'appuyer sur ce moyen de défense.

(9) Final Order

In result, therefore, McEachern C.J. dismissed the action against Canada, dismissed the plaintiffs' claims for ownership and jurisdiction and for aboriginal rights in the territory, granted a declaration that the plaintiffs were entitled to use unoccupied or vacant land subject to the general law of the province, dismissed the claim for damages and dismissed the province's counterclaim. No order for costs was made.

B. *British Columbia Court of Appeal*(1) Judgment of Macfarlane J.A. (Taggart J.A. concurring)

Macfarlane J.A. set out the following propositions of law which he indicated were the starting points for analysing aboriginal rights in land, which he garnered from *Baker Lake*, *Calder*, *Guerin*, *Sparrow*, and *Mabo v. Queensland* (1992), 107 A.L.R. 1 (H.C.). First, such rights arise from historic occupation and possession of the aboriginal peoples' tribal lands. Second, they arise by operation of law and do not depend on a grant from the Crown. Third, they are not absolute, but they are subject to regulation and extinguishment. Fourth, they are *sui generis* communal rights. Fifth, they cannot be alienated other than to the Crown. Finally, they are related to aboriginal activities which formed an integral part of traditional Indian life prior to sovereignty.

(a) *Ownership Rights*

Examining the appellants' ownership claim, Macfarlane J.A. agreed that an exclusive right to occupy land is required to support a claim akin to ownership. He noted that the use of the term "ownership" (which was used in the plaintiffs in their pleadings) was unfortunate, since *Guerin* specifically held that the aboriginal interest does not

(9) L'ordonnance finale

En définitive, le juge en chef McEachern a rejeté l'action contre le Canada, il a rejeté les revendications, par les demandeurs, de la propriété du territoire, de la compétence sur celui-ci ou de droits ancestraux à son égard, il a accordé une déclaration portant que les demandeurs avaient le droit d'utiliser toute terre inoccupée ou vacante, sous réserve du respect des lois d'application générales de la province, il a rejeté la demande de dommages-intérêts et, enfin, il a rejeté la demande reconventionnelle de la province. Il n'a rendu aucune ordonnance concernant les dépens.

B. *Cour d'appel de la Colombie-Britannique*(1) La décision du juge Macfarlane (à laquelle le juge Taggart a souscrit)

Le juge Macfarlane a énoncé les propositions de droit suivantes qui, a-t-il indiqué, étaient les éléments de départ qu'il avait dégagés des arrêts *Baker Lake*, *Calder*, *Guerin*, *Sparrow* et *Mabo c. Queensland* (1992), 107 A.L.R. 1 (H.C.), en vue de l'analyse des droits fonciers ancestraux. Premièrement, ces droits découlent de la possession et de l'occupation historiques par les peuples autochtones de terres tribales. Deuxièmement, ils découlent de l'application de la common law et ne dépendent pas d'une concession de la Couronne. Troisièmement, ils ne sont pas absolus mais sujets à réglementation et à extinction. Quatrièmement, ce sont des droits collectifs *sui generis*. Cinquièmement, ils ne peuvent être aliénés qu'en faveur de la Couronne. Finalement, ils sont liés à des activités autochtones qui faisaient partie intégrante de la vie traditionnelle indienne avant l'affirmation de la souveraineté.

a) *Les droits de propriété*

Examinant la revendication par les appelants de la propriété du territoire, le juge Macfarlane a convenu qu'un droit d'occupation exclusif du territoire est requis pour étayer la revendication d'un droit analogue à la propriété. Il a souligné que l'utilisation du terme «propriété» (que les demandeurs ont utilisé dans leurs actes de procédure) était malheu-

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amount to beneficial ownership. In his view, the trial judge properly applied the law to the plaintiffs' claim of ownership. Similarly, he found no merit in the appellants' challenge to the trial judge's findings of fact on a number of points. Although some of the areas of the evidence were cause for concern, he concluded that the issues required an interpretation of the evidence as a whole and that it would be inappropriate for this court to intervene and substitute its opinions for that of the trial judge. Hence, he did not disturb the judge's conclusion with regard to ownership of the territory, nor his conclusion that any interest which the appellants have in the land is not proprietary.

reux, étant donné que l'arrêt *Guerin* avait précisément établi que le droit des autochtones n'équivait pas au droit de propriété à titre bénéficiaire. À son avis, le juge de première instance a bien appliqué le droit en ce qui concerne la revendication par les demandeurs de la propriété du territoire. De même, il n'a trouvé aucun fondement à la contestation par les appelants des conclusions de fait tirées par le juge de première instance sur un certain nombre de points. Même si certains éléments de preuve soulevaient des interrogations, il a conclu que les questions en litige nécessitaient une interprétation globale de la preuve et qu'il ne convenait pas que la cour intervienne et substitue ses opinions à celles du juge de première instance. En conséquence, il n'a pas modifié la conclusion de ce dernier quant à la propriété du territoire, ni sa conclusion que tout intérêt que possèdent les appelants dans le territoire n'est pas un droit de propriété.

(b) *Aboriginal Sustenance Rights*

b) *Le droit des autochtones d'assurer leur subsistance*

33 Macfarlane J.A. canvassed the trial judge's findings regarding aboriginal sustenance rights. He noted that McEachern C.J.'s error in requiring a "time-depth" of a long time prior to contact in order to establish the rights did not affect his view of the territorial limits of the right. He agreed with the trial judge's application of the *Baker Lake* test. In particular, he viewed the significant question to be whether the practices were integral to aboriginal society or had only resulted from European influences. Macfarlane J.A. concluded that it would be inappropriate to intervene and substitute his view for that of the trial judge with respect to the weight of the evidence. Hence, if the appellants succeeded on the appeal with respect to extinguishment, they were entitled to sustenance rights in the area as identified by McEachern C.J. on Map 5.

Le juge Macfarlane a examiné les conclusions du juge de première instance quant au droit des autochtones d'assurer leur subsistance. Il a souligné que l'erreur que le juge en chef McEachern a commise en exigeant la preuve d'une [TRADUCTION] «durée» — savoir une longue période avant le contact avec les Européens — pour établir l'existence des droits n'avait pas d'effet sur son opinion quant aux limites territoriales du droit. Il était d'accord avec la façon dont le juge de première instance avait appliqué le critère énoncé dans *Baker Lake*. En particulier, il était d'avis que la question importante était de savoir si les pratiques faisaient partie intégrante de la vie sociale des autochtones ou si elles étaient seulement le résultat des influences européennes. Le juge Macfarlane a conclu qu'il ne convenait pas qu'il intervienne et substitue son point de vue à celui du juge de première instance quant au poids à accorder à la preuve. Par conséquent, si les appelants obtenaient gain de cause en appel sur la question de l'extinction, ils avaient le droit d'assurer leur subsistance dans le territoire délimité par le juge en chef McEachern sur la carte 5.

(c) *Jurisdiction*

Macfarlane J.A. essentially agreed with the trial judge with respect to his analysis of the jurisdiction, or sovereignty issue. He characterized the claim as the right to control and manage the use of lands and resources in the territory, as well as the right to govern the people within the territory, to the possible exclusion of laws of general application within the province. He stated that the Gitksan and Wet'suwet'en peoples do not need a court declaration to permit internal self-regulation, if they consent to be governed. However, the rights of self-government encompassing a power to make general laws governing the land, resources, and people in the territory are legislative powers which cannot be awarded by the courts. Such jurisdiction is inconsistent with the *Constitution Act, 1867* and its division of powers. When the Crown imposed English law on all the inhabitants of the colony and when British Columbia entered Confederation, the aboriginal people became subject to Canadian (and provincial) legislative authority. For this reason, the claim to jurisdiction failed.

(d) *Extinguishment*

Macfarlane J.A. began by noting that treaty-making is the most desirable way to resolve aboriginal land issues. However, he noted that prior to 1982, the rights of aboriginal people could be extinguished by the unilateral act of the sovereign, without the consent of the aboriginal people. Intention to extinguish must be clear and plain. Although express language is not strictly necessary, the honour of the Crown requires its intentions to be either express or manifested by unavoidable implication. Unavoidable implication should not be easily found — it occurs only where the interpretation of the instrument permits no other result. This, in turn, depends on the nature of the aboriginal interest and of the impugned grant.

c) *La compétence*

Le juge Macfarlane s'est dit essentiellement d'accord avec l'analyse du juge de première instance relativement à la question de la compétence ou souveraineté. Il a dit que l'on revendiquait le droit de contrôler et de gérer l'utilisation des terres et des ressources du territoire, ainsi que le droit de gouverner la population y habitant, d'une manière pouvant aller jusqu'à l'exclusion des lois d'application générale en vigueur dans la province. Il a affirmé que les Gitksan et les Wet'suwet'en n'ont pas besoin d'une déclaration de la cour autorisant l'autoréglementation interne, s'ils consentent à être gouvernés. Cependant, les droits relatifs à l'autonomie gouvernementale, y compris le pouvoir de faire des lois générales régissant les terres, les ressources et la population du territoire, sont des pouvoirs législatifs qui ne peuvent être accordés par les tribunaux. Une telle compétence est incompatible avec la *Loi constitutionnelle de 1867* et le partage des pouvoirs qu'elle établit. Lorsque la Couronne a imposé le droit anglais à tous les habitants de la colonie et lorsque la Colombie-Britannique est entrée dans la Confédération, les autochtones sont devenus assujettis aux pouvoirs législatifs du Canada (et de la province). Pour ce motif, la revendication relative à la compétence a été rejetée.

d) *L'extinction*

Le juge Macfarlane a d'abord indiqué que la conclusion de traités est la façon la plus souhaitable de résoudre les questions relatives aux terres autochtones. Cependant, il a souligné que, avant 1982, les droits des peuples autochtones pouvaient être éteints par acte unilatéral du souverain, sans leur consentement. L'intention d'éteindre un droit doit être claire et expresse. Bien qu'il ne soit pas strictement nécessaire que l'intention soit exprimée en termes exprès, l'honneur de la Couronne exige que ses intentions ressortent de façon expresse ou par implication inéluctable. Une implication inéluctable n'est pas facile à trouver — elle n'existe que lorsque l'interprétation de l'instrument ne permet aucun autre résultat. Ce résultat dépend pour sa part de la nature de l'intérêt autochtone en jeu et de la concession contestée.

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Macfarlane J.A. disagreed with the trial judge that the colonial instruments manifested the required clear and plain intention to extinguish all aboriginal interests in land. The purpose of the colonial instruments in question was to facilitate an orderly settlement of the province, and to give the Crown control over grants to third parties. It is not inevitable, upon a reading of the statutory scheme, that the aboriginal interest was to be disregarded. They did not foreclose the possibility of treaties or of co-existence of aboriginal and Crown interests. Similarly, even fee simple grants to third parties do not necessarily exclude aboriginal use. For example, uncultivated vacant land held in fee simple does not necessarily preclude the exercise of hunting rights. Moreover, it is clear that, at common law, two or more interests in land less than fee simple can co-exist. However, since the record was not sufficiently specific to permit the detailed analysis of such issues, Macfarlane J.A. suggested that these issues be dealt with in negotiation. He concluded that extinguishment by a particular grant needed to be determined on a case by case basis.

Le juge Macfarlane n'était pas d'accord avec le juge de première instance que les instruments coloniaux manifestaient l'intention claire et expresse requise pour éteindre tous les droits fonciers des autochtones. Les instruments coloniaux en question visaient à faciliter la colonisation ordonnée de la province et à donner à la Couronne le pouvoir d'octroyer des concessions aux tiers. La lecture des textes législatifs n'amène pas inévitablement à conclure qu'il ne fallait pas tenir compte des droits des autochtones. Ces textes ne faisaient pas obstacle à la possibilité de conclure des traités ou à la coexistence des droits des autochtones et de ceux de la Couronne. De la même façon, même un acte de concession en fief simple à un tiers n'écarter pas nécessairement l'utilisation par les autochtones du territoire visé. Par exemple, le fait qu'une terre non cultivée et inoccupée soit détenue en fief simple n'exclut pas nécessairement l'exercice de droits de chasse. En outre, il est clair que, en common law, deux intérêts ou plus qui sont inférieurs au fief simple peuvent coexister. Cependant, comme le dossier n'était pas suffisamment précis pour permettre l'analyse détaillée de ces questions, le juge Macfarlane a suggéré qu'elles fassent l'objet de négociations. Il a conclu que la question de savoir si une concession donnée entraînait l'extinction de certains droits devait être tranchée au cas par cas.

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Macfarlane J.A. considered the constitutional power of the province to extinguish aboriginal rights after 1871, and in particular, whether valid provincial legislation could extinguish aboriginal rights in land by incidental effect. After 1871, the exclusive power to legislate in relation to "Indians, and Lands reserved for the Indians" was given to the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. Valid provincial legislation may apply to Indians, so long as it is a law of general application and not one that affects their Indianness, their status, or their core values (*Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Dick v. The Queen*, [1985] 2 S.C.R. 309). However, the proposition that provincial laws could extinguish Indian title by incidental effect

Le juge Macfarlane a examiné le pouvoir constitutionnel de la province d'éteindre des droits ancestraux après 1871, et, en particulier, la question de savoir si une loi provinciale valide pouvait éteindre de façon incidente des droits fonciers ancestraux. Après 1871, la compétence exclusive de légiférer sur «les Indiens et les terres réservées aux Indiens» a été attribuée au gouvernement fédéral par le par. 91(24) de la *Loi constitutionnelle de 1867*. Une loi provinciale valide peut s'appliquer aux Indiens s'il s'agit d'une loi d'application générale et non d'une loi touchant leur quiddité indienne ou indianité, leur statut ou leurs valeurs fondamentales (*Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031; *Parents naturels c. Superintendent of Child Welfare*, [1976] 2 R.C.S. 751; *Dick c. La Reine*, [1985] 2 R.C.S. 309). Cepen-

must be examined in light of federal authority relating to Indians and of the aboriginal perspective. The traditional homelands of aboriginal people are integral to their traditional way of life and their self-concept. If the effect of provincial legislation were to strip the aboriginal people of the use and occupation of their traditional homelands, it would be an impermissible intrusion into federal jurisdiction, as such a law would “trench on the very core of the subject matter of s. 91(24)” (at p. 169). Hence, he concluded that provincial legislatures do not have the constitutional competence to extinguish common law aboriginal rights. Moreover, extinguishment by adverse dominion could only be accomplished by the federal government. Similarly, s. 88 of the *Indian Act* did not assist the province. Laws of general application which do not affect the “core of Indianness” apply by their own force. However, provincial laws which do affect that core rely on s. 88, which referentially incorporates them into federal law. For s. 88 of the *Indian Act* to give the province authority to extinguish aboriginal rights, it would have to show a clear and plain intention to do so. Since no such intention exists in s. 88 in particular or the *Indian Act* in general, it cannot authorize outright extinguishment. However, it may authorize provincial regulation of and interference with aboriginal rights. Of course, now the operation of such regulations are now subject to s. 35 of the *Constitution Act, 1982*.

(e) *Relief Allowed*

Macfarlane J.A. granted a declaration that the plaintiffs’ aboriginal rights were not all extinguished by the colonial instruments enacted prior to British Columbia’s entry into Confederation in

dant, la proposition suivant laquelle les lois provinciales pourraient éteindre un titre indien de manière incidente doit être examinée à la lumière de la compétence du fédéral sur les questions indiennes et en tenant compte du point de vue des autochtones. Les terres traditionnelles des Indiens font partie intégrante de leur mode de vie traditionnel et de la façon dont ils se définissent. Si une loi provinciale avait pour effet de dépouiller les autochtones du droit d’utiliser et d’occuper leurs terres traditionnelles, il s’agirait d’une intrusion inadmissible dans un champ de compétence fédéral, étant donné qu’une telle loi [TRADUCTION] «empiéterait sur l’essentiel de l’objet du par. 91(24)» (à la p. 169). Par conséquent, le juge Macfarlane a conclu que les législatures provinciales n’ont pas, en vertu de la Constitution, compétence pour éteindre les droits ancestraux reconnus par la common law. En outre, seul le gouvernement fédéral peut éteindre des droits par possession adversative. De même, l’art. 88 de la *Loi sur les Indiens* n’a été d’aucun secours pour la province. Les lois d’application générale qui ne touchent pas le «fondement même de la quiddité indienne» s’appliquent d’elles-mêmes. Au contraire, celles qui touchent à ce fondement s’appuient sur l’art. 88, qui les incorpore par renvoi au droit fédéral. Pour que l’art. 88 de la *Loi sur les Indiens* accorde à la province le pouvoir d’éteindre des droits ancestraux, il faudrait trouver dans son texte une intention claire et expresse à cet égard. Comme on ne trouve une telle intention ni dans l’art. 88 en particulier, ni dans la *Loi sur les Indiens* en général, cet article ne peut autoriser d’extinction pure et simple. Il peut cependant autoriser la réglementation par les provinces des droits ancestraux et des atteintes à ces droits. Évidemment, l’application d’une telle réglementation est maintenant assujettie à l’art. 35 de la *Loi constitutionnelle de 1982*.

e) *La réparation accordée*

Le juge Macfarlane a prononcé une déclaration portant que les droits ancestraux des demandeurs n’avaient pas tous été éteints par les instruments coloniaux édictés avant l’entrée de la Colombie-

1871. He also granted a declaration that the appellants have unextinguished, non-exclusive aboriginal rights, formerly protected at common law, and now protected under s. 35(1) of the *Constitution Act, 1982*. These rights are not ownership or property rights, and are located within the area indicated on Map 5. Their characteristics may vary depending on the particular context in which the rights are said to exist, and are dependent on the specific facts of each case.

Britannique dans la Confédération en 1871. Il a aussi prononcé une déclaration portant que les appelants possèdent des droits ancestraux non éteints et non exclusifs, auparavant protégés par la common law et qui le sont maintenant par le par. 35(1) de la *Loi constitutionnelle de 1982*. Ces droits, qui ne sont ni la propriété ni des droits de propriété, existent à l'intérieur du territoire délimité sur la carte 5. Leurs caractéristiques peuvent varier en fonction du contexte où ils sont invoqués, et ils dépendent des faits propres à chaque affaire.

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Macfarlane J.A. did not grant a declaration with respect to jurisdiction over land and resources or people within the territory, leaving this to negotiation. He also did not interfere with the decision of the trial judge that the claim for damages must be dismissed. He noted that the parties wished to negotiate the precise location, scope, content and consequences of the aboriginal rights which the trial judge has held may be exercised in that part of the territory, the approximate area of which is illustrated on Map 5. However, no order of the court was required to permit the parties to enter into such negotiations.

Le juge Macfarlane n'a pas prononcé de déclaration relativement à la compétence sur les terres, les ressources ou la population du territoire, laissant ces questions à la négociation. Il n'a pas modifié non plus la décision du juge de première instance rejetant la demande en dommages-intérêts. Il a souligné que les parties désiraient négocier l'emplacement, la portée, les conséquences et le contenu précis des droits ancestraux qui, de conclure le juge de première instance, peuvent être exercés dans cette partie du territoire dont les limites approximatives sont indiquées sur la carte 5. Cependant, aucune ordonnance de la cour n'était nécessaire pour permettre aux parties d'engager de telles négociations.

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Finally, Macfarlane J.A. stated that he would not give effect to the alternative declarations sought by the province relating to the alleged extinguishment of aboriginal rights by grants of fee simple and of lesser interests in the period from 1871-1982. The province did not have the power after 1871 to extinguish aboriginal rights. However, some provincial land and resource laws affecting aboriginal rights may be given force as federal laws through the operation of s. 88 of the *Indian Act*. The effect of fee simple and lesser grants on the particular aboriginal rights would require a detailed and complete analysis, which neither the record nor the

Finalement, le juge Macfarlane a affirmé qu'il ne donnerait pas effet aux déclarations subsidiaires demandées par la province quant à sa prétention que des droits ancestraux avaient été éteints par suite de la concession, de 1871 à 1982, de fiefs simples et d'intérêts inférieurs au fief simple. La province n'avait plus, après 1871, le pouvoir d'éteindre des droits ancestraux. Cependant, certaines lois provinciales relatives aux terres et aux ressources et affectant les droits ancestraux peuvent produire leurs effets à titre de lois fédérales par application de l'art. 88 de la *Loi sur les Indiens*. L'effet de la concession de fiefs simples ou d'intérêts inférieurs sur les droits ancestraux en cause aurait nécessité une analyse approfondie que ni le dossier, ni les observations présentées ne permettraient d'effectuer. Le juge Macfarlane n'a

submissions permitted. He made no order for costs, adopting the reasons of the trial judge.

(2) Wallace J.A. (concurring)

(a) *Scope of Appellate Review*

Wallace J.A. considered the appropriate principles for appellate review of a trial judge's findings of fact. An appellate court should find error on the part of the trial judge with respect to those aspects of the finding of facts which involve questions of credibility or weight to be given the evidence of a witness only if it is established that the trial judge made some "palpable and overriding error" which affected his assessment of the material facts. Such an error exists in three situations: firstly, when it can be demonstrated there was no evidence to support a material finding of fact of the trial judge; secondly, when the trial judge wrongly overlooked admissible evidence relevant and material to the issue before the court; or thirdly, where the trial judge's finding of fact cannot be supported as reasonable. In reversing the trial judge for "palpable and overriding error" the Court of Appeal must designate the specific error and state why the nature of the error justifies reversing the trial judge's finding of fact. Wallace J.A. held that these principles applied to the trial judge's determination of the nature and territorial scope of the aboriginal activities, the question of jurisdiction and control over the territory, and the weight to be attributed to the evidence of the various witnesses.

(b) *General Principles*

Wallace J.A. stated that aboriginal rights of occupation and use originate in the Indians' historic occupation and use of their tribal lands, and is recognized by the common law. Unlike the trial judge, he recognized that these rights may resem-

rendu aucune ordonnance concernant les dépens, adoptant les motifs du juge de première instance.

(2) Le juge Wallace (opinion concordante)

a) *La portée de l'examen en appel*

Le juge Wallace s'est penché sur les principes à suivre dans le cadre de l'examen, en appel, des conclusions de fait du juge de première instance. Une cour d'appel ne devrait pas conclure que le juge de première instance a fait erreur sur les aspects des conclusions de fait qui se rattachent à la question de la crédibilité ou de la valeur probante d'un témoignage que s'il est établi que le juge de première instance a commis une [TRADUCTION] «erreur manifeste et dominante» ayant influé sur son appréciation des faits substantiels. Une telle erreur existe dans les trois cas suivants: premièrement, lorsqu'il peut être démontré qu'une conclusion de fait importante tirée par le juge de première instance ne s'appuie sur aucune preuve; deuxièmement, lorsque le juge de première instance a omis à tort de tenir compte d'éléments de preuve admissibles qui étaient pertinents et substantiels relativement à la question dont était saisi le tribunal; troisièmement, lorsque la conclusion de fait du juge de première instance ne peut être qualifiée de raisonnable. La cour d'appel qui infirme la décision du juge de première instance en raison d'une «erreur manifeste et dominante» doit indiquer de façon précise l'erreur qui a été commise et dire pourquoi la nature de cette erreur justifie l'infirmer de la conclusion de fait du juge de première instance. Le juge Wallace a statué que ces principes s'appliquaient à la détermination par le juge de première instance de la nature et de la portée territoriale des activités autochtones, à la question du contrôle du territoire et de la compétence sur celui-ci et au poids à accorder aux divers témoignages.

b) *Les principes généraux*

Le juge Wallace a affirmé que les droits ancestraux d'occupation et d'utilisation tirent leur origine de l'occupation et de l'utilisation historiques par les Indiens de leurs terres tribales, et que ces droits sont reconnus par la common law. Contrai-

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ble a proprietary title, not unlike those in western property law systems, or they may be restricted to certain uses of the land. He set out the requirements for establishing aboriginal rights, varying from the *Baker Lake* test used by the trial judge. In Wallace J.A.'s formulation of the test, the practices supporting the rights in question had to be integral to the claimants' distinctive and traditional society or culture. Moreover, he resolved the trial judge's concerns about the requirement of exclusivity as follows: if the plaintiffs claim exclusive occupation and use, the traditional occupation had to be to the exclusion of other organized societies.

(c) *Aboriginal Ownership*

43 Wallace J.A. considered there to be reasonable support for the trial judge's conclusions regarding the nature and scope of the appellants' interest in the territory. The standard of occupation required to support the claim of ownership depended on the nature of the interest. The appellants' claim was to manage the lands and natural resources. This suggests exclusive control and possession of the territory, requiring the appellants to demonstrate exclusive possession. Since they could not do so, he concluded that the trial judge correctly dismissed their claim for ownership.

(d) *Aboriginal Rights of Occupation and Use of Traditional Lands*

44 Even if the appellants' claim were characterized as a claim for aboriginal title, rather than ownership, Wallace J.A. agreed with the criteria applied by the trial judge: the occupation of specific territory, the exclusion of other organized societies, occupation at the time of British sovereignty and long-time aboriginal practices. Applying these principles to the trial judge's findings of fact, Wallace J.A. concluded that the appellants had not

reusement au juge de première instance, il a reconnu que ces droits peuvent ressembler à un titre de propriété, qu'ils ne sont pas sans similitudes avec ceux reconnus dans les systèmes occidentaux de droit des biens et qu'ils peuvent se limiter à certaines utilisations du territoire. Il a énoncé les exigences à satisfaire pour démontrer l'existence de droits ancestraux, s'écarter du critère établi dans *Baker Lake* qu'avait utilisé le juge de première instance. Dans sa formulation du critère, le juge Wallace a indiqué que les pratiques sous-tendant les droits en question devaient faire partie intégrante de la société ou culture traditionnelle distinctive des demandeurs. Il a en outre dissipé de la façon suivante l'incertitude du juge de première instance quant à l'exigence d'exclusivité: si les demandeurs revendiquent une occupation et une utilisation exclusives, l'occupation traditionnelle doit avoir été à l'exclusion d'autres sociétés organisées.

c) *Droit de propriété ancestral*

Le juge Wallace a considéré que les conclusions du juge de première instance au sujet de la nature et de la portée de l'intérêt des appelants dans le territoire étaient raisonnablement étayées. La norme d'occupation exigée pour appuyer la revendication de la propriété dépendait de la nature de l'intérêt en cause. Les appelants revendiquaient la gestion des terres et des ressources naturelles. Cela suppose la possession et le contrôle exclusifs du territoire et exige que les appelants fassent la démonstration d'une possession exclusive. Comme ils n'y sont pas parvenus, il a conclu que le juge de première instance avait eu raison de rejeter leur revendication du droit de propriété.

d) *Droits ancestraux d'occupation et d'utilisation des terres traditionnelles*

Même si la revendication des appelants était qualifiée de revendication du titre aborigène, plutôt que de revendication du droit de propriété, le juge Wallace a souscrit aux critères appliqués par le juge de première instance: l'occupation d'un territoire précis, l'exclusion des autres sociétés organisées, l'occupation au moment de l'affirmation de la souveraineté des Britanniques et l'existence de pratiques autochtones de longue date. Appliquant

established a manifest or palpable error in concluding that the appellants' rights were non-exclusive, and confined to user rights. However, he was of the view that the court was not in a position to express an opinion on the specific territorial scope of these rights.

(e) *Aboriginal Jurisdiction or Self-Government*

Wallace J.A. agreed that the claim for "jurisdiction" was for an undefined form of government over land and people in the territory, which would be paramount as against provincial laws in the case of a conflict. Wallace J.A. held, at p. 225, that this claim was "incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846". Moreover, British Columbia's entry into Canada in 1871 exhaustively distributed legislative power between the province and the federal government. Section 35 of the *Constitution Act, 1982* could not revive and protect any sovereignty rights which the Gitksan and Wet'suwet'en may have had.

(f) *Extinction*

Wallace J.A. agreed with Macfarlane J.A. on this issue. He set out the test ("clear and plain intention") and decided that the rights of use and occupation discussed above had not been extinguished.

(g) *Miscellaneous*

Wallace J.A. agreed that the appellants' damages claim should be dismissed, without deciding whether damages might be payable for wrongful interference with the Gitksan's and Wet'suwet'en's non-exclusive aboriginal rights in the territory. He also considered the appellants' claim that the appeal be adjourned in part for two years, during

ces principes aux conclusions de fait du juge de première instance, le juge Wallace a statué que les appelants n'avaient pas établi que le juge avait commis une erreur manifeste ou dominante en concluant que les droits des appelants n'étaient pas exclusifs et qu'ils se limitaient à des droits d'utilisation. Toutefois, il était d'avis que la cour n'était pas en mesure d'exprimer une opinion quant à la portée territoriale précise de ces droits.

e) *Droit ancestral à la compétence ou l'autonomie gouvernementale*

Le juge Wallace a convenu que la revendication relative à la «compétence» visait une forme indéterminée de gouvernement sur les terres et la population du territoire, qui aurait prépondérance sur les lois provinciales en cas de conflit. Le juge Wallace a conclu, à la p. 225, que cette revendication était [TRADUCTION] «incompatible avec tous les principes touchant la souveraineté parlementaire dont était investi le parlement impérial en 1846». Qui plus est, à l'entrée de la Colombie-Britannique dans le Canada en 1871, le pouvoir législatif avait été réparti de manière exhaustive entre la province et le gouvernement fédéral. L'article 35 de la *Loi constitutionnelle de 1982* ne pouvait faire renaître et protéger quelque droit à la souveraineté qu'avaient pu avoir les Gitksan et les Wet'suwet'en.

f) *L'extinction*

Le juge Wallace a souscrit à la décision du juge Macfarlane sur cette question. Il a exposé le critère applicable (celui de l'«intention claire et expresse») et a décidé que les droits d'utilisation et d'occupation examinés précédemment n'avaient pas été éteints.

g) *Les autres questions*

Le juge Wallace a convenu que la demande en dommages-intérêts des appelants devait être rejetée, sans toutefois décider si des dommages-intérêts pourraient être payables pour atteinte fautive aux droits ancestraux non exclusifs des Gitksan et des Wet'suwet'en sur le territoire. Il a aussi examiné la demande des appelants que l'appel soit

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which time the parties would attempt to negotiate an agreement regarding the geographic parameters of the claimed territory. The court would retain jurisdiction to determine issues or refer them to the trial court if the parties failed to reach an agreement during the two-year period. However, he noted that the role of the Court of Appeal is not to tailor its judgment to facilitate negotiation. The Court of Appeal is restricted to declaring the legal status of rights claimed, on the basis of the trial record.

(3) Lambert J.A. (dissenting)

(a) *General Principles*

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Lambert J.A. considered at length the leading cases with regard to aboriginal rights in British Columbia. He set out a number of conclusions. He recognized that aboriginal title and aboriginal rights are *sui generis*, and not easily explicable in terms of ordinary western jurisprudential analysis or common law concepts. He noted that aboriginal title is a form of aboriginal rights, and is therefore protected by s. 35. All rights arise from the practices, customs and traditions which form an integral part of the distinctive culture of the aboriginal people, and were part of the social fabric of aboriginal society at the time of the arrival of the first Europeans. This co-existed with the settlers' common law rights from the time of contact until sovereignty. After that time, aboriginal rights that continued as part of the social fabric of the aboriginal society were protected by both their own internal institutions and the common law.

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Lambert J.A. believed that aboriginal rights were not frozen at the time of contact. Rather, they must be permitted to maintain contemporary relevance in relation to the needs of the holders of the rights as those needs change along with the changes in overall society. The rights may be individual, or they may be collective, depending on

ajourné en partie pendant deux ans, période au cours de laquelle les parties tenteraient de négocier un accord sur les paramètres géographiques du territoire revendiqué. La cour conserverait compétence pour trancher les questions en litige ou les renvoyer au tribunal de première instance si les parties ne parvenaient pas à s'entendre pendant ces deux ans. Toutefois, il a souligné que le rôle de la Cour d'appel n'est pas de façonner sa décision afin de faciliter les négociations. La Cour d'appel n'a d'autre rôle que celui de statuer sur l'existence juridique des droits revendiqués au vu du dossier de première instance.

(3) Le juge Lambert (dissident)

a) *Les principes généraux*

Le juge Lambert a longuement examiné les arrêts clés en matière de droits ancestraux en Colombie-Britannique. Il a énoncé un certain nombre de conclusions. Il a reconnu que le titre aborigène et les droits ancestraux avaient un caractère *sui generis* et que ces notions n'étaient pas faciles à expliquer par l'analyse juridique occidentale ordinaire ou par les concepts de common law. Il a souligné que le titre aborigène est une forme de droit ancestral et qu'il est donc protégé par l'art. 35. Tous ces droits découlent des coutumes, pratiques et traditions qui font partie intégrante de la culture distinctive des autochtones visés et qui faisaient partie du tissu social de la société autochtone au moment de l'arrivée des premiers Européens. À partir du moment du contact avec les Européens jusqu'à l'affirmation de la souveraineté, ces droits ont coexisté avec ceux reconnus aux colons par la common law. Par la suite, les droits ancestraux qui ont continué de faire partie du tissu social de la société autochtone étaient protégés par leurs propres institutions internes et par la common law.

Le juge Lambert a estimé que les droits ancestraux n'ont pas été figés au moment du contact avec les Européens, mais qu'il faut plutôt permettre à ces droits de garder leur pertinence dans le monde actuel eu égard aux besoins de leurs titulaires, besoins qui changent à mesure qu'évolue l'ensemble de la société. Ces droits peuvent être

how they were and are treated by aboriginal people. Moreover, they do not come from aboriginal practice dating from time immemorial. Rather, they come, under the doctrine of continuity, from the practices, customs and traditions of the aboriginal people.

Aboriginal rights are neither abrogated by the fact that similar rights may be held by non-aboriginal people nor because the holders of the rights participate in the wage or cash economy. A right to occupy, possess, use and enjoy land to the exclusion of all others does not mean that it must be confined to the activities carried on in 1846, or that its exercise requires a renunciation of the contemporary world.

(b) *Extinguishment*

Lambert J.A. considered the test for extinguishment from *Calder*, and expressly rejected Judson J.'s views. He derived the authority to do so from the way in which extinguishment was dealt with in *Sparrow*. In considering implicit extinguishment, he stated that it will only be held to occur where no other conclusion is possible from the particular instrument or conduct. It could not take place through adverse dominion. In the case of an inconsistency between a Crown grant of land and aboriginal title, the title should not necessarily give way in the absence of a clear and plain intention to extinguish. In any case, no grants or other interests were granted in the territory prior to 1871, and after that date, the British Columbia legislature had no power to legislate to extinguish, by adverse dominion, or otherwise. Lambert J.A. recognized, at p. 312, that because of s. 91(24) of the *Constitution Act, 1867*, and the doctrine of interjurisdictional immunity, provincial legislation could not affect "Indians in their Indianness". This included aboriginal rights, since they are an integral part of aboriginal culture. This is not affected by s. 88 of the *Indian Act*.

soit individuels soit collectifs, selon la façon dont les autochtones les ont traités et les traitent. En outre, ils ne découlent pas de pratiques autochtones immémoriales. Ils viennent plutôt, selon la doctrine de la continuité, des coutumes, pratiques et traditions des autochtones.

Des droits ancestraux ne sont pas abrogés parce qu'il est possible que des droits similaires soient détenus par des non-autochtones, ni parce que leurs titulaires participent à l'économie salariale ou monétaire. Le droit d'occuper, de posséder, d'utiliser un territoire et d'en jouir à l'exclusion d'autrui ne signifie pas que ce droit doive se limiter aux activités pratiquées en 1846, ou que son exercice requière la renonciation au monde contemporain.

(b) *L'extinction*

Le juge Lambert a examiné le critère établi dans l'arrêt *Calder* à l'égard de l'extinction et il a expressément rejeté l'opinion du juge Judson. Pour ce faire, il s'est appuyé sur la manière dont cette question a été traitée dans *Sparrow*. Relativement à l'extinction implicite, il a affirmé qu'on ne conclura à l'existence d'une telle situation que dans les cas où il est impossible de tirer quelque autre conclusion de l'instrument ou de la conduite en cause. Il ne peut y avoir extinction par possession adversative. En cas d'incompatibilité entre une concession accordée par l'État et un titre aborigène, le titre ne devrait pas nécessairement disparaître en l'absence d'une intention claire et expresse de l'éteindre. De toute façon, ni concession ni quelque autre intérêt visant le territoire en cause n'ont été accordés avant 1871 et, après cette date, la législature de la Colombie-Britannique n'avait pas le pouvoir de légiférer à des fins d'extinction, par possession adversative ou autrement. Le juge Lambert a reconnu à la p. 312 que, en raison du par. 91(24) de la *Loi constitutionnelle de 1867* et de la doctrine de l'exclusivité des compétences, la législation provinciale ne pouvait affecter les [TRADUCTION] «Indiens dans leur indianité», y compris leurs droits ancestraux, étant donné que ces droits font partie intégrante de la culture autochtone. L'article 88 de la *Loi sur les Indiens* ne change rien à cette situation.

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Lambert J.A. applied the same principles to a consideration of whether the right to self-government had been extinguished. Neither the assertion of sovereignty nor the colonial enactments mentioned by the trial judge were sufficient to extinguish aboriginal rights in the claimed territory. He saw no incompatibility between statements that the Crown owned the land of the province and the notion that aboriginal title was a burden on the Crown's radical title. Moreover, there was no "inescapable inference" that the colonial enactments were intended to extinguish aboriginal interests. If this were the case, aboriginal peoples would instantly become trespassers on any lands not reserved for them as soon as the Crown took title. Finally, the evidence that the aboriginal peoples of northern British Columbia surrendered their title under Treaty No. 8 also suggested that they had title interests to surrender.

(c) *Findings at Trial*

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Lambert J.A. considered the factual findings made by the trial judge and made a number of general observations. First, if a finding of fact is necessary to the decision in the case, it should be given more deference than a fact which is merely made in the course of the decision or for some incidental reason. Second, findings of historical fact based on historical or anthropological evidence given by historians and anthropologists should be given only the kind of weight that other historians or anthropologists might have given them. These social scientists do not always agree, circumstances change, and new material is discovered and interpreted. Third, the appellants' oral evidence should be weighed, like all evidence, against the weight of countervailing evidence and not against an absolute standard so long as it is enough to support an air of reality. Fourth, with the election of an NDP government in British Columbia in 1991, the province reconsidered its legal stance in this case. As such, it invited the court to confirm the existence of aboriginal rights of unspecified content over unspecified areas and to permit the parties to negotiate the precise content and the precise areas. In Lambert J.A.'s view, the

Le juge Lambert a appliqué les mêmes principes à la question de savoir si le droit à l'autonomie gouvernementale avait été éteint. Ni l'affirmation de la souveraineté ni les textes de loi coloniaux mentionnés par le juge de première instance n'ont suffi pour éteindre les droits ancestraux dans le territoire revendiqué. Il n'a vu aucune incompatibilité entre les affirmations selon lesquelles l'État est propriétaire des terres de la province et la notion que le titre aborigène constituait une charge grevant le titre absolu de l'État. En outre, il n'y avait aucune [TRADUCTION] «inférence inéluctable» que les textes de lois coloniaux visaient l'extinction des droits ancestraux. Si cela avait été le cas, les autochtones seraient automatiquement devenus des intrus sur toute terre qui ne leur était pas réservée dès que l'État en acquerrait le titre. Finalement, la preuve indiquant que les autochtones du nord de la Colombie-Britannique ont cédé leur titre aux termes du Traité n° 8 suggérerait également qu'ils avaient des droits de cette nature à céder.

c) *Les conclusions de fait en première instance*

Le juge Lambert a examiné les conclusions de fait tirées par le juge de première instance et a fait un certain nombre d'observations générales. Premièrement, si une conclusion de fait est nécessaire pour rendre décision dans une affaire, une plus grande retenue devrait être manifestée à son égard qu'à l'endroit de celles qui sont simplement tirées dans le cours de la décision ou pour quelque raison incidente. Deuxièmement, il ne devrait pas être accordé aux conclusions de fait d'ordre historique fondées sur les témoignages d'historiens et d'anthropologues une valeur probante plus grande que celle qu'ont pu leur accorder d'autres historiens ou anthropologues. Ces spécialistes des sciences sociales ne sont pas toujours d'accord, les circonstances changent et de nouveaux éléments sont découverts et interprétés. Troisièmement, le témoignage des appelants devrait, comme tout témoignage, être apprécié en regard de la valeur probante de la preuve contraire et non en regard d'une norme absolue, dans la mesure où il est suffisamment vraisemblable. Quatrièmement, à la suite de l'élection du gouvernement du parti néo-démocrate en Colombie-Britannique en 1991, la province a révisé sa position juridique dans cette

Crown, by adopting the position that it wished to negotiate the content and territorial scope of aboriginal rights, must be taken to have waived the argument that the findings of the trial judge must stand and that any aboriginal rights held by the Gitksan and Wet'suwet'en peoples must be confined to non-exclusive sustenance rights over the area covered by Map 5. In short, reliance on the findings of fact of the trial judge is entirely inconsistent with negotiation.

Nonetheless, Lambert J.A. was of the view that the findings of fact with respect to boundaries and with respect to the scope and content of aboriginal rights, including both rights in land and rights of self-government, cannot stand even in accordance with the usual principles governing the consideration of findings of fact, because they are flawed by errors of law.

With regard to the ownership claim, Lambert J.A. identified the following errors in the trial judge's reasons. In his view, the trial judge erred: (1) in not treating the ownership claim as a claim to aboriginal title and applied incorrect legal standards as a result; (2) in treating the claim to aboriginal title as a claim to a proprietary interest in land; (3) in applying a test of indefinite or long, long time use and occupation before the assertion of sovereignty; (4) in treating evidence of commercial interaction with the first Europeans as not being evidence of aboriginal practices; (5) in treating the rights to trap as being the exercise of rights other than aboriginal rights; (6) in rejecting evidence about commercial trapping and the evidence of Dr. Ray, a historical geographer who gave evidence at trial; (7) in rejecting possession, occupation, use, and enjoyment in a social sense as sufficient to establish aboriginal title; (8) in treating the test of possession and occupation as being whether

affaire. En conséquence, elle a invité la cour à confirmer l'existence de droits ancestraux de contenu indéterminé et visant des territoires non précisés, et à permettre aux parties de négocier ce contenu et ces territoires. Selon le juge Lambert, il faut considérer que, ayant décidé qu'il désirait négocier le contenu et la portée territoriale des droits ancestraux, l'État est réputé avoir renoncé à l'argument que les conclusions du juge de première instance doivent être maintenues et que tout droit ancestral dont sont titulaires les Gitksan et les Wet'suwet'en se limite à des droits d'exploitation à des fins de subsistance non exclusifs visant le territoire délimité par la carte 5. Bref, le fait de se fonder sur les conclusions de fait du juge de première instance est tout à fait incompatible avec la tenue de négociations.

Néanmoins, le juge Lambert était d'avis que les conclusions de fait relatives aux limites du territoire ainsi qu'à la portée et au contenu des droits ancestraux, y compris les droits fonciers et les droits relatifs à l'autonomie gouvernementale, ne sauraient être maintenues, même en regard des principes ordinaires régissant l'appréciation des conclusions de fait, étant donné qu'elles sont entachées d'erreurs de droit.

En ce qui concerne la revendication de la propriété, le juge Lambert a décelé les erreurs suivantes dans les motifs du juge de première instance. Selon lui, le juge de première instance a fait erreur (1) en ne traitant pas la revendication de la propriété comme la revendication du titre aborigène, et en appliquant, en conséquence, des normes juridiques incorrectes; (2) en traitant la revendication du titre aborigène comme la revendication d'un intérêt de propriété sur le territoire; (3) en appliquant le critère de l'utilisation et de l'occupation pendant une période indéfinie ou très longue avant l'affirmation de la souveraineté; (4) en considérant que la preuve relative aux échanges commerciaux avec les premiers Européens n'était pas une preuve des pratiques autochtones; (5) en considérant les droits de piégeage comme l'exercice de droits autres que des droits ancestraux; (6) en rejetant la preuve relative au piégeage commercial et le témoignage du professeur Ray, spécialiste

there was a law which would have required a trespasser to depart; (9) in considering that aboriginal rights cannot be held jointly by more than one people; (10) in not concluding that aboriginal title could rest on occupation, possession, use, and enjoyment of land even though that occupation may have diminished in the period after contact; (11) in his treatment of blanket extinguishment of aboriginal title; and (12) in concluding that all aboriginal rights had been extinguished by the colonial instruments. These errors of law led to an incorrect conclusion on the part of the trial judge about the existence of aboriginal title. His findings of fact can be reconsidered on appellate review.

de la géographie historique qui a témoigné au procès; (7) en rejetant les notions de possession, d'occupation, d'utilisation et de jouissance prises dans leur sens social comme des éléments suffisants pour établir l'existence d'un titre aborigène; (8) en considérant que le critère de la possession et de l'occupation revenait à se demander s'il existait une règle de droit qui aurait forcé un intrus à quitter les lieux; (9) en considérant que des droits ancestraux ne peuvent être détenus conjointement par différents peuples; (10) en ne concluant pas que le titre aborigène pouvait reposer sur l'occupation, la possession, l'utilisation et la jouissance du territoire, même si cette occupation a pu diminuer dans la période qui a suivi le contact avec les Européens; (11) en examinant comme il l'a fait la question de l'extinction générale du titre aborigène; (12) en concluant que tous les droits ancestraux avaient été éteints par les instruments coloniaux. Ces erreurs de droit ont entraîné une conclusion erronée de la part du juge de première instance quant à l'existence du titre aborigène. Ses conclusions de fait peuvent être réexaminées en appel.

56 With regard to the jurisdiction claim, Lambert J.A. stated that the trial judge erred: (1) in treating the claim to jurisdiction as a claim to govern territory and assert sovereignty over the territory; (2) in trying to define the appellants' claim in terms of the answers given by one witness in cross-examination; (3) in concluding that the claim to jurisdiction must fail because the nature of aboriginal self-government and self-regulation was such that it does not produce a set of binding and enforceable laws; and (4) in considering that the existence of a legislative institution is an essential part of the existence of an aboriginal right to self-government. Because of these errors of law, the trial judge's conclusions were wrong.

En ce qui a trait à la revendication relative à la compétence, le juge Lambert a affirmé que le juge de première instance avait fait erreur (1) en considérant cette revendication comme la revendication par les demandeurs du droit de gouverner le territoire et d'affirmer leur souveraineté sur celui-ci; (2) en essayant de définir la revendication des appelants au moyen des réponses données par un témoin en contre-interrogatoire; (3) en concluant que la revendication relative à la compétence doit être rejetée parce que l'autonomie gouvernementale et l'autoréglementation autochtones étaient de nature telle qu'elles ne constituent pas un ensemble de règles de droit applicables et obligatoires; (4) en considérant que l'existence d'une institution législative est un élément essentiel de l'existence d'un droit ancestral à l'autonomie gouvernementale. En raison de ces erreurs de droit, les conclusions du juge de première instance étaient erronées.

57 With regard to the claim to aboriginal rights, Lambert J.A. was of the view that the trial judge erred: (1) in not treating the evidence of occupa-

Relativement à la revendication de droits ancestraux, le juge Lambert était d'avis que le juge de première instance avait fait erreur (1) en ne consi-

tion, possession, use, and enjoyment of the territory in an organized way by the appellants for their purposes, but particularly for sustenance, as being sufficient to establish aboriginal title to much of the land within the territory; (2) in separating commercial practices of aboriginal people from other practices and saying that commercial practices were not aboriginal practices; (3) in not considering the evidence of trading practices with neighbouring peoples; (4) in his treatment of the question of exclusivity both in relation to aboriginal title and sustenance rights; and (5) in considering participation in the wage or cash economy in relation to the existence (or non-existence) of aboriginal title. Again, given these errors of law, Lambert J.A. asserted that an appellate court had jurisdiction to intervene and set aside the trial judge's findings.

(d) *Substituted Findings*

In light of these errors, Lambert J.A. substituted his own findings of fact for those of the trial judge. In his view, the evidence established that in 1846, the Gitksan and Wet'suwet'en peoples occupied, possessed, used and enjoyed their traditional ancestral lands in accordance with their own practices, customs and traditions which were an integral part of their distinctive culture. Those ancestral lands extend throughout the claimed territory, well beyond the area indicated in Map 5. In areas where there were no conflicting claims to user rights, the appellants' rights should be characterized as aboriginal title. In areas of shared occupancy and use, the appellants' title would be shared-exclusive aboriginal title. In areas where the Gitksan and Wet'suwet'en peoples did not occupy, possess or use the land as an integral part of their culture, they would not have title, but may have aboriginal sustenance rights. These rights were not extinguished through any blanket extinguishment in the colonial period. Precise legislation related to a specific area may have extinguished some rights. However, no such legislation was before the court. The geographic scope of the

dérant pas que la preuve de l'occupation, de la possession, de l'utilisation et de la jouissance du territoire par les appelants, d'une façon organisée et pour leurs propres fins, mais particulièrement à des fins de subsistance, était suffisante pour établir le titre aborigène sur une grande partie des terres du territoire; (2) en séparant les pratiques commerciales des autochtones des autres pratiques, et en disant que les pratiques commerciales n'étaient pas des pratiques autochtones; (3) en ne tenant pas compte de la preuve de pratiques commerciales avec les peuples voisins; (4) en examinant comme il l'a fait la question de l'exclusivité tant en rapport avec le titre aborigène qu'avec les droits d'exploitation à des fins de subsistance; (5) en tenant compte de la participation à l'économie salariale ou monétaire pour statuer sur l'existence (ou l'inexistence) du titre aborigène. À nouveau, compte tenu de ces erreurs de droit, le juge Lambert a affirmé qu'une cour d'appel a compétence pour intervenir et infirmer les conclusions du juge de première instance.

d) *La substitution des conclusions*

À la lumière de ces erreurs, le juge Lambert a substitué ses propres conclusions de fait à celles du juge de première instance. Selon lui, la preuve établissait que, en 1846, les Gitksan et les Wet'suwet'en occupaient, possédaient et utilisaient leurs terres ancestrales traditionnelles et en avaient la jouissance conformément à leurs propres coutumes, pratiques et traditions qui faisaient partie intégrante de leur culture distinctive. Ces terres ancestrales s'étendent sur l'ensemble du territoire revendiqué, bien au-delà du territoire délimité sur la carte 5. Dans les secteurs où il n'y avait pas de revendications conflictuelles de droits d'utilisation, les droits des appelants devraient être qualifiés de titre aborigène. Dans les secteurs où il y a occupation et utilisation partagées, le titre des appelants serait un titre aborigène exclusif-partagé. Dans les secteurs où les Gitksan et les Wet'suwet'en n'ont pas occupé, possédé ou utilisé les terres en tant que partie intégrante de leur culture, ils n'auraient pas de titre, mais ils pourraient y avoir des droits ancestraux d'exploitation à des fins de subsistance. Aucune mesure d'extinction générale n'a éteint ces droits pendant la période coloniale. Il est possible

rights was a matter to be negotiated between the parties, and failing negotiation, needed to be determined by a new trial.

qu'un texte de loi donné, visant un secteur particulier, ait éteint certains droits, mais aucun texte de ce genre n'a été présenté à la cour. La portée géographique des droits était une question devant faire l'objet de négociations entre les parties ou, à défaut de négociations, être tranchée dans le cadre d'un nouveau procès.

59 Lambert J.A. also concluded that in 1846, the appellants' ancestors had rights of self-government and self-regulation, which rested on the practices, customs and traditions of those people which formed an integral part of their distinctive cultures. It is true that the rights may have been diminished by the assertion of British sovereignty, but those rights that continue are protected by s. 35 of the *Constitution Act, 1982*.

Le juge Lambert a aussi conclu que, en 1846, les ancêtres des appelants possédaient des droits à l'autonomie gouvernementale et à l'autoréglementation qui reposaient sur leurs coutumes, pratiques et traditions faisant partie intégrante de leur culture distinctive. Il est vrai que ces droits ont pu être diminués par l'affirmation de la souveraineté des Britanniques, mais ceux qui existent encore sont protégés par l'art. 35 de la *Loi constitutionnelle de 1982*.

60 Turning to aboriginal sustenance rights, Lambert J.A. stated that they are entirely encompassed within aboriginal title in those areas where Gitksan and Wet'suwet'en aboriginal title exists. They also may exist in areas outside of title lands. In areas where such rights were shared by a number of peoples, the appellants' rights may be limited to specific sustenance activities as opposed to exclusive or shared-exclusive use and occupation.

Abordant ensuite la question des droits ancestraux d'exploitation à des fins de subsistance, le juge Lambert a affirmé qu'ils sont entièrement compris dans le titre aborigène visant les terres à l'égard desquelles les Gitksan et les Wet'suwet'en possèdent un tel titre. Ils peuvent également exister à l'égard de secteurs non compris dans des terres visées par un titre. Sur les terres où ces droits étaient partagés par un certain nombre de peuples, il est possible que les droits des appelants se limitent à certaines activités précises de subsistance, par opposition à une utilisation et à une occupation exclusives ou exclusives-partagées.

(e) *Other Issues*

e) *Les autres questions*

61 With regard to the *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No. 1, Lambert J.A. expressed no views on its application or effect in the claimed territory and its inhabitants. With regard to infringement or denial of the appellants' rights in the claimed territory, Lambert J.A. concluded that the evidence in the case did not permit a proper consideration of the issues. Each infringement or denial would have to be examined in relation to the specific circumstances.

En ce qui concerne la *Proclamation royale de 1763*, L.R.C. (1985), app. II, n° 1, le juge Lambert n'a exprimé aucune opinion quant à l'application ou à l'effet de ce texte sur le territoire revendiqué et sur ses habitants. Pour ce qui est de l'atteinte aux droits des appelants ou de la négation de ces droits, le juge Lambert a conclu que, en l'espèce, la preuve ne permettait pas de faire un examen adéquat de ces questions. Chaque atteinte ou négation devrait être examinée en fonction des circonstances particulières à chaque cas.

(f) *Disposition*

Lambert J.A. would have allowed the appeal, and made a number of declarations. First, he would declare that the Gitksan and Wet'suwet'en peoples had, at the time of the assertion of British sovereignty in 1846, aboriginal title to occupy, possess, use and enjoy all or some of the land within the claimed territory. The land covered by aboriginal title at that time extended far beyond village sites and the immediate areas surrounding. Second, he would declare that the Gitksan and Wet'suwet'en peoples may have had aboriginal sustenance rights, including hunting, fishing, gathering, and similar rights over any parts of the land within the claimed territory to which aboriginal title did not extend. He would also declare that the aboriginal title and the aboriginal sustenance rights described may have been exclusive to the Gitksan in certain areas and exclusive to the Wet'suwet'en in others, and in some they may have shared with each other, or other aboriginal peoples, or non-aboriginals.

Lambert J.A. would have also declared that the appellants' ancestors had, at the time of the assertion of British sovereignty in 1846, aboriginal rights of self-government and self-regulation relating to their own organized society, its members, its institutions and its sustenance rights. These rights were recognized by, incorporated into, and protected by the common law after 1846. They have not been extinguished by any form of blanket extinguishment. Hence, they exist in modern form, subject only to specific extinguishment of the specific title or specific sustenance right in a specific area. However, the right of aboriginal self-government did not include any rights that were inconsistent with British sovereignty, any rights that are repugnant to natural justice, equity and good conscience, and have not been modified to overcome that repugnancy, and any rights which are contrary to the part of the common law that applied to the

f) *Le dispositif*

Le juge Lambert aurait accueilli l'appel et prononcé certaines déclarations. Premièrement, il était d'avis de déclarer que les Wet'suwet'en et les Gitksan possédaient, à l'époque de l'affirmation de la souveraineté par les Britanniques en 1846, un titre aborigène fondant leur occupation, possession, utilisation et jouissance de tout ou partie des terres comprises dans le territoire revendiqué. Les terres visées par ce titre aborigène à l'époque s'étendaient bien au-delà du site des villages et de leurs environs. Deuxièmement, le juge Lambert aurait déclaré que les Gitksan et les Wet'suwet'en ont pu avoir des droits ancestraux d'exploitation à des fins de subsistance — y compris des droits de chasse, de pêche et de cueillette, ainsi que d'autres droits analogues — sur certaines parties du territoire revendiqué non visées par le titre aborigène. Il était aussi d'avis de déclarer que le titre aborigène et les droits ancestraux susmentionnés ont pu appartenir exclusivement aux Gitksan à certains endroits et exclusivement aux Wet'suwet'en à d'autres, et qu'à certains endroits les deux groupes ont pu les partager soit ensemble soit avec d'autres peuples autochtones ou avec des non-autochtones.

Le juge Lambert aurait aussi déclaré que les ancêtres des appelants possédaient, à l'époque de l'affirmation de la souveraineté par les Britanniques en 1846, des droits ancestraux à l'autonomie gouvernementale et à l'autoréglementation visant leur propre société organisée, ainsi que ses membres, ses institutions et ses droits d'exploitation à des fins de subsistance de cette société. Après 1846, ces droits ont été intégrés à la common law et protégés par celle-ci. Ils n'ont pas été éteints par quelque mesure d'extinction générale que ce soit. Par conséquent, ils existent sous une forme contemporaine, sous réserve seulement de l'extinction d'un titre particulier ou d'un droit d'exploitation à des fins de subsistance particulier visant un territoire précis. Cependant, le droit des autochtones à l'autonomie gouvernementale ne comportait ni droit inconciliable avec la souveraineté britannique, ni droit incompatible avec la justice naturelle, l'équité et la bonne conscience qui n'aurait pas été modifié pour éliminer cette incom-

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territory, the Gitksan and Wet'suwet'en peoples and their institutions.

patibilité, ni droit contraire à la partie de la common law qui s'appliquait au territoire, ainsi qu'aux Gitksan, aux Wet'suwet'en et à leurs institutions.

64 Lambert J.A. would also declare that these aboriginal title rights, aboriginal rights of self-government and self-regulation, and aboriginal sustenance rights may have been subject, after 1846 to specific extinguishment by the clear and plain extinguishing intention of the Sovereign Power, legislatively expressed by Parliament. Any specific extinguishment of specific rights might have been express or implicit, and, if implicit, it may have been brought about by the legislation itself (implied extinguishment) or by acts authorized by the legislation (extinguishment by adverse dominion), provided the intention to extinguish was contained within the legislative expression and was clear and plain. Instances of such specific extinguishment could not be decided on this appeal.

Le juge Lambert était aussi d'avis de déclarer que ces droits au titre aborigène, ainsi que ces droits ancestraux à l'autonomie gouvernementale, à l'autoréglementation et à l'exploitation à des fins de subsistance ont pu faire l'objet, après 1846, d'une extinction particulière par la manifestation de l'intention claire et expresse à cette fin du pouvoir du Souverain, exprimée législativement par le Parlement. Toute mesure d'extinction particulière de droits donnés aurait été expresse ou implicite et, dans ce dernier cas, aurait pu découler soit du texte de loi lui-même (extinction implicite) soit d'actes autorisés par ce texte (extinction par possession adversative), à la condition que cette intention d'extinction ait été présente dans la mesure législative et qu'elle ait été claire et expresse. Les cas d'extinction de ce genre ne pouvaient pas être tranchés dans le cadre de l'appel.

65 Lambert J.A. would declare that the present aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples, exercisable in relation to their aboriginal title, would include the specific rights claimed in this appeal by the plaintiffs in relation to aboriginal title. He would also declare that the present aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples would include rights of self-government and self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity.

Le juge Lambert aurait déclaré que seraient compris parmi les droits ancestraux actuels des Gitksan et des Wet'suwet'en à l'autonomie gouvernementale et à l'autoréglementation — droits pouvant être exercés relativement à leur titre aborigène — les droits précis revendiqués en appel par les demandeurs relativement à ce titre. Il était également d'avis de déclarer que ces droits à l'autonomie gouvernementale et à l'autoréglementation comprendraient aussi les droits à l'autonomie gouvernementale et à l'autoréglementation pouvant être exercés par l'entremise de leurs propres institutions pour préserver et renforcer leur identité sociale, politique, culturelle, linguistique et spirituelle.

66 Finally, Lambert J.A. would remit a number of questions back to trial. These include the question of the territorial boundaries for both title and sustenance rights; the degree of exclusivity or shared exclusivity which the appellants hold, on both the territories over which they have title and the territories over which they have sustenance rights; the scope and content of the sustenance rights; the scope and content of the rights to self-government and self-regulation; and all questions relating to

Finalement, le juge Lambert aurait renvoyé un certain nombre de questions au tribunal de première instance, dont celle des limites territoriales tant du titre aborigène que des droits d'exploitation à des fins de subsistance; le degré d'exclusivité ou d'exclusivité partagée dont sont titulaires les appelants, à la fois sur les territoires à l'égard desquels ils ont un titre et sur ceux où ils possèdent des droits d'exploitation à des fins de subsistance; la portée et le contenu de ces droits d'exploitation à

the plaintiffs' entitlement to damages and the quantum of damages. He would have also awarded the plaintiffs their costs, both in the Court of Appeal, and at trial.

(4) Hutcheon J.A. (dissenting in part)

(a) *Rights to Land*

Hutcheon J.A. agreed with the trial judge that the *Royal Proclamation, 1763* did not apply to the territory or its inhabitants. Nonetheless, the policy reflected in the *Proclamation* was, generally speaking, acceptance of aboriginal rights to land. Moreover, Hutcheon J.A. concluded on the basis of *Calder* and *Sparrow* that the colonial enactments did not extinguish the aboriginal rights in the claimed territory. He found it unnecessary to decide whether a grant in fee simple extinguishes aboriginal title or whether entitlement to compensation arises in such circumstances.

(b) *Nature of the Rights*

Hutcheon J.A. accepted that aboriginal rights to land existed prior to 1846 over the claimed territory. He found it sufficient to say, at p. 389, that aboriginal rights can "compete on an equal footing" with proprietary interests. Additionally, he noted that these rights are collective, inalienable except to the Crown, and extend to the traditional territory of the particular people.

(c) *Territory*

Hutcheon J.A. disagreed with the trial judge's conclusion that the appellants' ancestors occupied or controlled only the villages in the territory and the immediately surrounding areas. In Hutcheon J.A.'s view, the trial judge misapprehended the legal test for occupation and disregarded the independent evidence which showed that the territory occupied or controlled by the appellants extended far beyond the villages.

des fins de subsistance; la portée et le contenu des droits à l'autonomie gouvernementale et à l'autoréglementation; ainsi que toutes les questions relatives au droit des demandeurs à des dommages-intérêts et au montant de ceux-ci. Il était d'avis aussi d'accorder aux demandeurs leurs dépens, tant devant la Cour d'appel qu'en première instance.

(4) Le juge Hutcheon (dissident en partie)

a) *Les droits fonciers*

Le juge Hutcheon était d'accord avec le juge de première instance que la *Proclamation royale de 1763* ne s'appliquait pas au territoire ou à ses habitants. Néanmoins, la *Proclamation* reflétait, de façon générale, une politique d'acceptation des droits fonciers ancestraux. En outre, le juge Hutcheon a conclu, en se fondant sur les arrêts *Calder* et *Sparrow*, que les lois coloniales n'avaient pas éteint les droits ancestraux sur le territoire revendiqué. Il a jugé qu'il n'était pas nécessaire de décider si une concession en fief simple éteint le titre aborigène ou si le droit à une indemnité naît dans de telles circonstances.

b) *La nature des droits*

Le juge Hutcheon a accepté que des droits fonciers ancestraux existaient avant 1846 à l'égard du territoire revendiqué. Il a estimé suffisant de dire, à la p. 389, que les droits ancestraux peuvent [TRA-DUCTION] «concurrer sur un pied d'égalité» des droits de propriété. De plus, il a souligné que ces droits sont collectifs, qu'ils sont inaliénables sauf en faveur de l'État et qu'ils s'étendent au territoire traditionnel du peuple concerné.

c) *Le territoire*

Le juge Hutcheon a exprimé son désaccord avec la conclusion du juge de première instance que les ancêtres des appelants n'avaient occupé ou contrôlé que les villages se trouvant dans le territoire et leurs environs immédiats. Selon le juge Hutcheon, le juge de première instance a mal saisi le critère juridique relatif à l'occupation et il n'a pas tenu compte de la preuve indépendante qui démontrait que le territoire occupé ou contrôlé par les appelants s'étendait bien au-delà des villages.

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(d) *Self-Regulation*

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The traditions of the Gitksan and Wet'suwet'en peoples existed long before 1846 and continued thereafter. They included the right to names and titles, the use of masks and symbols in rituals, the use of ceremonial robes, and the right to occupy and control places of economic importance. The traditions also included the institution of the clans and the Houses in which membership descended through the mother and the feast system. They regulated marriage and relations with neighbouring societies. The right to practise these traditions was not lost, although the *Indian Act* and provincial laws have affected the appellants' right to self-regulation. Only negotiations will define with greater specificity the areas and terms under which the appellants and the federal and provincial governments will exercise jurisdiction in respect of the appellants, their institutions, and laws.

(e) *Disposition*

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Hutcheon J.A. would have allowed the appeal and have made a number of declarations. First, he would declare that all of the aboriginal rights of the appellants were not extinguished before 1871. Second, the appellants continue to have existing aboriginal rights to undefined portions of land within the claimed territory. Third, the appellants have rights of self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity. He would have remitted the outstanding matters to the Supreme Court of British Columbia, and stayed the proceedings for two years from the date of the judgment, or such shorter or longer period, in order for the parties to agree about the lands in respect of which the appellants have aboriginal rights, the scope of such rights on and to such lands, the scope of the right of self-regulation, and the appellants' entitlement to and quantum of

d) *L'autoréglementation*

Les traditions des Gitksan et des Wet'suwet'en existaient bien avant 1846 et elles ont continué d'exister par la suite. Elles comprenaient le droit de porter des noms et des titres, d'utiliser des masques et des symboles dans des rituels, d'utiliser des vêtements cérémoniels et d'occuper et de contrôler les lieux ayant une importance économique. Les traditions comprenaient aussi l'institution de clans et de maisons auxquels l'appartenance était régie par la filiation matrilineaire, et le système des célébrations. Ces traditions régissaient le mariage et les relations entre sociétés voisines. Le droit de pratiquer ces traditions n'a pas été perdu, bien que la *Loi sur les Indiens* et les lois provinciales aient affecté le droit des appelants à l'autoréglementation. Seules des négociations permettront de définir avec plus de précision les territoires où les appelants et les gouvernements fédéral et provinciaux exerceront leurs compétences sur les appelants, sur leurs institutions et sur leurs règles de droit, ainsi que les modalités d'exercices de ces compétences.

e) *Le dispositif*

Le juge Hutcheon était d'avis d'accueillir l'appel et de prononcer un certain nombre de déclarations. Premièrement, il aurait déclaré que tous les droits ancestraux des appelants n'ont pas été éteints avant 1871. Deuxièmement, les appelants continuent d'avoir des droits ancestraux existants sur des parties indéterminées du territoire revendiqué. Troisièmement, les appelants possèdent des droits à l'autoréglementation qu'ils peuvent exercer par l'entremise de leurs propres institutions pour préserver et renforcer leur identité sociale, politique, culturelle, linguistique et spirituelle. Il aurait renvoyé les questions non résolues à la Cour suprême de la Colombie-Britannique et suspendu les procédures pendant deux ans à compter de la date du jugement, ou pour une période plus courte ou plus longue, afin de permettre aux parties de s'entendre sur les terres à l'égard desquelles les appelants possèdent des droits ancestraux, sur la portée de tels droits à ces terres et sur celles-ci, sur la portée du droit à l'autoréglementation et sur le droit des appelants à des dommages-intérêts et sur

damages. Hutcheon J.A. would have awarded the appellants their costs throughout the proceedings.

IV. Issues

The following are the principal issues which must be addressed in this appeal. As will become apparent in my analysis, some of these issues in turn raise a number of sub-issues which I will address as well:

- A. Do the pleadings preclude the Court from entertaining claims for aboriginal title and self-government?
- B. What is the ability of this Court to interfere with the factual findings made by the trial judge?
- C. What is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof?
- D. Has a claim to self-government been made out by the appellants?
- E. Did the province have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*?

V. Analysis

- A. *Do the pleadings preclude the Court from entertaining claims for aboriginal title and self-government?*

In their pleadings, the appellants, 51 Chiefs representing most of the Houses of the Gitksan and Wet'suwet'en nations, originally advanced 51 individual claims on their own behalf and on behalf of their houses for "ownership" and "jurisdiction" over 133 distinct territories which together comprise 58,000 square kilometres of northwestern British Columbia. On appeal, that original claim was altered in two different ways. First, the claims for ownership and jurisdiction have been replaced with claims for aboriginal title and self-govern-

le montant de ceux-ci. Le juge Hutcheon aurait accordé aux appelants leurs dépens dans toutes les cours.

IV. Les questions en litige

Les principales questions qui doivent être tranchées dans le présent pourvoi sont énoncées ci-dessous. Comme il ressortira de mon analyse, certaines de ces questions soulèvent des sous-questions, que j'examinerai également:

- A. Les actes de procédure empêchent-ils la Cour d'examiner les revendications relatives au titre aborigène et à l'autonomie gouvernementale?
- B. Quel pouvoir notre Cour a-t-elle de modifier les conclusions de fait du juge de première instance?
- C. Quel est le contenu du titre aborigène, comment est-il protégé par le par. 35(1) de la *Loi constitutionnelle de 1982* et comment fait-on la preuve de son existence?
- D. Les appelants ont-ils établi le bien-fondé de leur revendication de l'autonomie gouvernementale?
- E. La province avait-elle, après 1871, le pouvoir d'éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la *Loi sur les Indiens*?

V. L'analyse

- A. *Les actes de procédure empêchent-ils la Cour d'examiner les revendications relatives au titre aborigène et à l'autonomie gouvernementale?*

Dans leurs actes de procédure, les appelants — 51 chefs représentant la plupart des maisons des nations Gitksan et Wet'suwet'en — ont initialement présenté, en leur propre nom et au nom de leurs maisons, 51 revendications individuelles sollicitant la «propriété» de 133 territoires distincts totalisant 58 000 kilomètres carrés dans la partie nord-ouest de la Colombie-Britannique, ainsi que la «compétence» sur ces territoires. En appel, cette revendication initiale a été modifiée de deux façons. Premièrement, les revendications relatives

ment, respectively. Second, the individual claims by each house have been amalgamated into two communal claims, one advanced on behalf of each nation. However, there were no formal amendments to the pleadings to this effect, and the respondents accordingly argue that claims which are central to this appeal are not properly before the Court. Furthermore, the respondents argue that they have suffered prejudice as a result because they might have conducted the defence quite differently had they known the case to meet.

à la propriété des territoires et à la compétence sur ceux-ci ont été remplacées respectivement par la revendication du titre aborigène et la revendication de l'autonomie gouvernementale. Deuxièmement, les revendications individuelles présentées par chaque maison ont été fusionnées en deux revendications collectives, une au nom de chaque nation. Toutefois, aucune modification en ce sens n'a été apportée formellement aux actes de procédure, et les intimés affirment par conséquent que la Cour n'est pas régulièrement saisie de revendications qui sont au centre du présent pourvoi. En outre, les intimés prétendent qu'ils ont en conséquence subi un préjudice, puisqu'ils auraient peut-être présenté leur défense d'une tout autre façon s'ils avaient su ce à quoi ils devaient répondre.

74 I reject the respondents' submission with respect to the substitution of aboriginal title and self-government for the original claims of ownership and jurisdiction. Although it is true that the pleadings were not formally amended, the trial judge, at p. 158, did allow a *de facto* amendment to permit "a claim for aboriginal rights other than ownership and jurisdiction". Had the respondents been concerned about the prejudice arising from this ruling, they could have appealed accordingly. However, they did not, and, as a result, the decision of the trial judge on this point must stand.

Je rejette l'argument des intimés en ce qui a trait à la substitution de la revendication du titre aborigène et de l'autonomie gouvernementale aux revendications initiales relatives à la propriété et à la compétence. Même s'il est vrai que les actes de procédure n'ont pas été formellement modifiés, le juge de première instance, à la p. 158, a bel et bien accepté une modification *de facto* pour permettre [TRADUCTION] «la revendication de droits ancestraux autres que la propriété et la compétence». Si les intimés avaient cru que cette décision pouvait leur porter préjudice, ils auraient pu en appeler. Cependant, ils ne l'ont pas fait et, par conséquent, la décision du juge de première instance sur ce point doit être maintenue.

75 Moreover, in my opinion, that ruling was correct because it was made against the background of considerable legal uncertainty surrounding the nature and content of aboriginal rights, under both the common law and s. 35(1). The content of common law aboriginal title, for example, has not been authoritatively determined by this Court and has been described by some as a form of "ownership". As well, this case was pleaded prior to this Court's decision in *Sparrow*, *supra*, which was the first statement from this Court on the types of rights that come within the scope of s. 35(1). The law has rapidly evolved since then. Accordingly, it was just and appropriate for the trial judge to allow for

En outre, je suis d'avis que cette décision était exacte, parce qu'elle a été prise dans un contexte d'incertitude juridique considérable quant à la nature et au contenu des droits ancestraux, tant en vertu de la common law qu'en vertu du par. 35(1). Par exemple, notre Cour n'a pas encore statué de façon définitive sur le contenu du titre aborigène en common law, que certains ont décrit comme une forme de «propriété». Par ailleurs, la présente affaire a été plaidée avant que notre Cour rende l'arrêt *Sparrow*, précité, où elle se prononçait pour la première fois sur le type de droits qui sont visés au par. 35(1). Le droit a évolué rapidement depuis. Par conséquent, il était juste et convenable que le

an amendment to pleadings which were framed when the jurisprudence was in its infancy.

However, no such amendment was made with respect to the amalgamation of the individual claims brought by the 51 Gitksan and Wet'suwet'en Houses into two collective claims, one by each nation, for aboriginal title and self-government. Given the absence of an amendment to the pleadings, I must reluctantly conclude that the respondents suffered some prejudice. The appellants argue that the respondents did not experience prejudice since the collective and individual claims are related to the extent that the territory claimed by each nation is merely the sum of the individual claims of each House; the external boundaries of the collective claims therefore represent the outer boundaries of the outer territories. Although that argument carries considerable weight, it does not address the basic point that the collective claims were simply not in issue at trial. To frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants' case.

This defect in the pleadings prevents the Court from considering the merits of this appeal. However, given the importance of this case and the fact that much of the evidence of individual territorial holdings is extremely relevant to the collective claims now advanced by each of the appellants, the correct remedy for the defect in pleadings is a new trial, where, to quote the trial judge at p. 368, "[i]t will be for the parties to consider whether any amendment is required in order to make the pleadings conform with the evidence". Moreover, as I will now explain, there are other reasons why a new trial should be ordered.

juge de première instance permette la modification d'actes de procédure qui ont été rédigés lorsque la jurisprudence en était encore à ses balbutiements.

Cependant, aucune modification de la sorte n'a été apportée en ce qui a trait à la fusion des revendications individuelles présentées par les 51 maisons Wet'suwet'en et Gitksan en deux revendications collectives, une pour chaque nation, sollicitant un titre aborigène et l'autonomie gouvernementale. Étant donné l'absence de modification des actes de procédure, je dois, avec réticence, conclure que les intimés ont subi un certain préjudice. Les appelants affirment que les intimés n'ont pas subi de préjudice puisque les revendications collectives et individuelles sont liées, dans la mesure où le territoire revendiqué par chaque nation est simplement la somme des revendications individuelles de chaque maison, les limites extrêmes des revendications collectives représentant donc les limites extérieures des territoires externes. Même si cet argument a un poids considérable, il ne répond pas au point fondamental que les revendications collectives n'étaient tout simplement pas en litige en première instance. Redéfinir le litige en appel aurait pour effet de nier rétroactivement aux intimés la possibilité de savoir quelle est la cause des appelants.

Ce vice dans les actes de procédure empêche notre Cour d'examiner le fond du présent pourvoi. Toutefois, vu l'importance de l'affaire et le fait qu'une grande partie de la preuve relative aux divers territoires possédés est extrêmement pertinente à l'égard des revendications collectives que présentent maintenant les appelants, la réparation convenable à l'égard du vice dont sont entachés les actes de procédure est la tenue d'un nouveau procès au cours duquel, comme l'a dit le juge de première instance, à la p. 368, [TRADUCTION] «[i]l reviendra aux parties de se demander si une modification est nécessaire pour rendre les actes de procédure conformes à la preuve». En outre, comme je vais maintenant l'expliquer, il y a d'autres raisons pour lesquelles un nouveau procès doit être ordonné.

B. *What is the ability of this Court to interfere with the factual findings made by the trial judge?*

(1) General Principles

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I recently reviewed the principles governing the appellate review of findings of fact in *Van der Peet*, *supra*. As a general rule, this Court has been extremely reluctant to interfere with the findings of fact made at trial, especially when those findings of fact are based on an assessment of the testimony and credibility of witnesses. Unless there is a “palpable and overriding error”, appellate courts should not substitute their own findings of fact for those of the trial judge. The leading statement of this principle can be found in *Stein v. The Ship “Kathy K”*, [1976] 2 S.C.R. 802, *per* Ritchie J., at p. 808:

These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

The same deference must be accorded to the trial judge’s assessment of the credibility of expert witnesses: see *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247.

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The policy reason underlying this rule is protection of “[t]he autonomy and integrity of the trial process” (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at p. 278), which recognizes that the trier of fact, who is in direct contact with the mass of the evidence, is in the best position to make findings of fact, particularly those which turn on credibility. Moreover, *Van der Peet* clarified that deference was owed to findings of fact even when the trial judge misapprehended the law which was applied to those facts, a problem which can arise in quickly

B. *Quel pouvoir notre Cour a-t-elle de modifier les conclusions de fait du juge de première instance?*

(1) Les principes généraux

Récemment, dans l’arrêt *Van der Peet*, précité, j’ai examiné les principes régissant la révision, en appel, des conclusions de fait. De façon générale, notre Cour s’est montrée extrêmement réticente à modifier des conclusions de fait tirées en première instance, particulièrement lorsque ces conclusions de fait sont fondées sur l’appréciation des témoignages et de la crédibilité des témoins. Sauf «erreur manifeste et dominante», les cours d’appel ne devraient pas substituer leurs propres conclusions de fait à celles du juge de première instance. L’énoncé jurisprudentiel de ce principe qui fait autorité a été exposé par le juge Ritchie dans *Stein c. Le navire «Kathy K»*, [1976] 2 R.C.S. 802, à la p. 808:

On ne doit pas considérer que ces arrêts signifient que les conclusions sur les faits tirées en première instance sont intangibles, mais plutôt qu’elles ne doivent pas être modifiées à moins qu’il ne soit établi que le juge du procès a commis une erreur manifeste et dominante qui a faussé son appréciation des faits. Bien que la Cour d’appel ait l’obligation de réexaminer la preuve afin de s’assurer qu’aucune erreur de ce genre n’a été commise, j’estime qu’il ne lui appartient pas de substituer son appréciation de la prépondérance des probabilités aux conclusions tirées par le juge qui a présidé le procès.

Il faut faire montre de la même retenue à l’égard de l’appréciation par le juge de première instance de la crédibilité des témoins experts: voir *N.V. Bocimar S.A. c. Century Insurance Co. of Canada*, [1987] 1 R.C.S. 1247.

La raison de principe qui sous-tend cette règle est la protection de «l’autonomie et [de] l’intégrité du procès» (*Schwartz c. Canada*, [1996] 1 R.C.S. 254, à la p. 278), qui reconnaît que le juge des faits — qui est en contact direct avec l’ensemble de la preuve — est le mieux placé pour tirer des conclusions de fait, particulièrement celles concernant la crédibilité. En outre, l’arrêt *Van der Peet* a précisé qu’il faut faire montre de retenue à l’égard des conclusions de fait, même lorsque le juge du procès a mal saisi le droit qu’il a appliqué aux faits en

evolving areas of law such as the jurisprudence surrounding s. 35(1).

I recently held, in *Van der Peet*, that these general principles apply to cases litigated under s. 35(1). On the other hand, while accepting the general principle of non-interference, this Court has also identified specific situations in which an appeal court can interfere with a finding of fact made at trial. For example, appellate intervention is warranted “where the courts below have misapprehended or overlooked material evidence”: see *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474, at p. 493. In cases involving the determination of aboriginal rights, appellate intervention is also warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, first, applying the rules of evidence and, second, interpreting the evidence before it. As I said in *Van der Peet*, at para. 68:

In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case. [Emphasis added.]

The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Van der Peet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that

question, problème susceptible de survenir dans les domaines du droit qui évoluent rapidement comme celui de la jurisprudence relative au par. 35(1).

J’ai récemment statué, dans *Van der Peet*, que ces principes généraux s’appliquent aux affaires plaidées en vertu du par. 35(1). Par contre, tout en acceptant le principe général de non-intervention, la Cour a aussi indiqué des situations précises où une cour d’appel peut modifier une conclusion de fait tirée en première instance. Ainsi, une cour d’appel est justifiée d’intervenir «dans le cas où les premiers juges se sont mépris sur une preuve importante ou l’ont méconnue»: voir *Chartier c. Procureur général du Québec*, [1979] 2 R.C.S. 474, à la p. 493. Dans les affaires de détermination de droits ancestraux, l’intervention de la cour d’appel est également justifiée dans les cas où le tribunal de première instance n’a pas tenu compte des difficultés de preuve inhérentes à l’examen des revendications de droits ancestraux, premièrement, lorsqu’il a appliqué les règles de preuve et, deuxièmement, lorsqu’il a interprété la preuve qui lui était présentée. Comme je l’ai dit dans *Van der Peet*, au par. 68:

Pour déterminer si un demandeur autochtone a produit une preuve suffisante pour établir que ses activités sont un aspect d’une coutume, pratique ou tradition qui fait partie intégrante d’une culture autochtone distinctive, le tribunal doit appliquer les règles de preuve et interpréter la preuve existante en étant conscient de la nature particulière des revendications des autochtones et des difficultés que soulève la preuve d’un droit qui remonte à une époque où les coutumes, pratiques et traditions n’étaient pas consignées par écrit. Les tribunaux doivent se garder d’accorder un poids insuffisant à la preuve présentée par les demandeurs autochtones simplement parce que cette preuve ne respecte pas de façon précise les normes qui seraient appliquées dans une affaire de responsabilité civile délictuelle par exemple. [Je souligne.]

La justification de cette approche spéciale découle de la nature même des droits ancestraux. Dans *Van der Peet*, j’ai expliqué que ces droits visent à concilier l’occupation antérieure de l’Amérique du Nord par des sociétés autochtones distinctives avec l’affirmation de la souveraineté britannique sur le territoire du Canada. Ils visent à

reconciliation by “their bridging of aboriginal and non-aboriginal cultures” (at para. 42). Accordingly, “a court must take into account the perspective of the aboriginal people claiming the right... while at the same time taking into account the perspective of the common law” such that “[t]rue reconciliation will, equally, place weight on each” (at paras. 49 and 50).

réaliser cette conciliation en établissant un «rapprochement entre les cultures autochtones et non autochtones» (au par. 42). Par conséquent, «le tribunal doit tenir compte du point de vue des autochtones qui revendiquent ce droit [...] [tout en tenant compte] de la common law» de sorte que «[l]a conciliation véritable accordée, également, de l'importance à chacun de ces éléments» (aux par. 49 et 50).

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In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain “the Canadian legal and constitutional structure” (at para. 49). Both the principles laid down in *Van der Peet* — first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit — must be understood against this background.

En d'autres termes, bien que la doctrine des droits ancestraux soit une doctrine de common law, les droits ancestraux sont véritablement des droits *sui generis* qui exigent, quant au traitement de la preuve, une approche unique, accordant le poids qu'il faut au point de vue des peuples autochtones. Toutefois, l'adaptation doit se faire d'une manière qui ne fasse pas entorse à «l'organisation juridique et constitutionnelle du Canada» (au par. 49). Les deux principes exposés dans *Van der Peet* — premièrement, le fait que les tribunaux de première instance doivent aborder les règles de preuve en tenant compte des difficultés de preuve inhérentes à l'examen des revendications de droits ancestraux, et, deuxièmement, le fait que les tribunaux de première instance doivent interpréter cette preuve dans le même esprit — doivent être compris dans ce contexte.

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A concrete application of the first principle can be found in *Van der Peet* itself, where I addressed the difficulties inherent in demonstrating a continuity between current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies. As I reiterate below, the requirement for continuity is one component of the definition of aboriginal rights (although, as I explain below, in the case of title, the issue is continuity from sovereignty, not contact). However, given that many aboriginal societies did not keep written records at the time of contact or sovereignty, it would be exceedingly difficult for them to produce (at para. 62) “conclusive evidence from pre-contact times about the practices, customs and

On peut trouver une application concrète du premier principe dans l'arrêt *Van der Peet* même, où je me suis penché sur les difficultés inhérentes à la démonstration de la continuité entre les activités autochtones actuelles et les coutumes, pratiques et traditions des sociétés autochtones qui existaient avant le contact avec les Européens. Comme je le réitère ci-dessous, l'exigence de continuité est un élément de la définition des droits ancestraux (quoique, comme je l'explique ci-après, dans le cas du titre, il s'agit de la continuité à partir de l'affirmation de la souveraineté, et non du contact avec les Européens). Toutefois, comme bon nombre de sociétés autochtones ne conservaient pas d'écrits à l'époque du contact avec les Européens, il leur serait excessivement difficile de produire (au par. 62), «relativement [à leurs] coutumes, pratiques et traditions [...], une preuve concluante, datant de l'époque antérieure au contact avec les

traditions of their community”. Accordingly, I held that (at para. 62):

The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. [Emphasis added.]

The same considerations apply when the time from which title is determined is sovereignty.

This appeal requires us to apply not only the first principle in *Van der Peet* but the second principle as well, and adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. Given that the aboriginal rights recognized and affirmed by s. 35(1) are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights.

A useful and informative description of aboriginal oral history is provided by the *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1 (*Looking Forward, Looking Back*), at p. 33:

The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human-centred in the same way as the western scientific tradition, for it does not assume that human beings are anything more than one — and not necessarily the most important — element of the

Européens». Par conséquent, j’ai statué ainsi (au par. 62):

La preuve sur laquelle s’appuient le demandeur et les tribunaux peut se rapporter aux coutumes, pratiques et traditions autochtones postérieures au contact avec les Européens. Il suffit que cette preuve tende à démontrer lesquels des aspects de la collectivité et de la société autochtones datent d’avant le contact avec les Européens. [Je souligne.]

Les mêmes facteurs s’appliquent lorsque l’affirmation de la souveraineté est le moment servant à statuer sur l’existence d’un titre.

Le présent pourvoi exige que nous appliquions non seulement le premier principe établi dans *Van der Peet* mais aussi le second, et que nous adaptions les règles du droit de la preuve de manière à ce que les tribunaux accordent le poids qui convient au point de vue des autochtones sur leurs coutumes, pratiques et traditions, de même que sur les rapports qu’ils entretiennent avec le territoire. En pratique, cela exige que les tribunaux acceptent les récits oraux des sociétés autochtones, récits qui, pour bon nombre de nations autochtones, sont les seuls témoignages de leur passé. Étant donné que les droits ancestraux reconnus et confirmés par le par. 35(1) sont définis en regard des pratiques antérieures au contact avec les Européens ou, comme je vais l’expliquer ci-après, dans le cas d’un titre, en regard de l’occupation antérieure à l’affirmation de la souveraineté, ces récits jouent un rôle crucial dans les litiges portant sur les droits ancestraux.

On trouve des explications utiles et instructives quant aux récits oraux autochtones dans le *Rapport de la Commission royale sur les peuples autochtones* (1996), vol. 1 (*Un passé, un avenir*), à la p. 35:

La tradition autochtone, pour ce qui est de l’enregistrement des faits historiques, n’est ni linéaire ni fondée sur les mêmes notions d’évolution et de progrès sociaux [comme dans la tradition non autochtone]. D’habitude, elle n’est pas non plus centrée au même degré sur l’humain et part du principe que celui-ci n’est qu’un élément parmi d’autres — et pas nécessairement le plus impor-

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natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.

In the Aboriginal tradition the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige. . . .

Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are “facts enmeshed in the stories of a lifetime”. They are also likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.

tant — de l’ordre naturel de l’univers. De plus, la tradition historique autochtone est une tradition orale, c’est-à-dire que les légendes, histoires et récits mythiques sont transmis de vive voix aux générations subséquentes. Elle vise moins à déterminer en quoi consiste la vérité objective, et suppose que le conteur de l’histoire est si directement concerné par l’événement en question que ce serait faire preuve d’arrogance que de vouloir classer celui-ci dans une catégorie précise et perpétuelle.

Dans la tradition autochtone, la transmission orale des récits poursuit un objectif qui dépasse le rôle de l’histoire écrite dans les sociétés occidentales. Cet objectif consiste peut-être à renseigner l’auditeur, à communiquer certains aspects de la culture, à socialiser la population en lui donnant une tradition culturelle, ou encore à valider l’autorité et le prestige que revendique telle ou telle famille . . .

Les récits oraux du passé reposent en grande partie sur des expériences subjectives. Ce ne sont pas de simples comptes rendus factuels, mais des «faits auxquels viennent se greffer les histoires de toute une vie». Il est également probable qu’ils soient associés à des lieux précis et qu’ils fassent allusion à des familles et à des collectivités précises. Tout cela donne l’impression d’une multitude d’histoires, dont chacune est influencée en partie par la façon dont un peuple se perçoit, se définit par rapport à l’environnement et exprime son unicité.

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Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only “as a repository of historical knowledge for a culture” but also as an expression of “the values and mores of [that] culture”: Clay McLeod, “The Oral Histories of Canada’s Northern People, Anglo-Canadian Evidence Law, and Canada’s Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past” (1992), 30 *Alta. L. Rev.* 1276, at p. 1279. Dickson J. (as he then was) recognized as much when he stated in *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109, that “[c]laims to aboriginal title are woven with history, legend, politics and moral obligations.” The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial — the determina-

Devant un tribunal qui adopterait une approche traditionnelle à l’égard des règles de preuve, un grand nombre des caractéristiques des récits oraux joueraient contre l’admissibilité de ces récits et la valeur probante qui doit leur être accordée en tant que preuve d’événements passés. La plus fondamentale de ces caractéristiques est le rôle social général qu’ils jouent, non seulement [TRADUCTION] «en tant que moyen de conservation du savoir historique d’une culture» mais aussi comme expression «des valeurs et des mœurs de [cette] culture»: Clay McLeod, «The Oral Histories of Canada’s Northern People, Anglo-Canadian Evidence Law, and Canada’s Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past» (1992), 30 *Alta. L. Rev.* 1276, à la p. 1279. Le juge Dickson (plus tard Juge en chef) a reconnu ce fait lorsqu’il a affirmé, dans l’arrêt *Kruger c. La Reine*, [1978] 1 R.C.S. 104, à la p. 109, que «[l]es revendications de titres aborigènes reposent aussi sur

tion of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.

l'histoire, les légendes, la politique et les obligations morales.» La difficulté que posent ces caractéristiques des récits oraux est qu'elles sont tangentielles à la finalité du processus de découverte des faits en première instance — savoir la découverte de la vérité historique. Une autre difficulté créée par les récits oraux est le fait qu'ils sont dans une large mesure constitués de déclarations extrajudiciaires, qui ont été transmises de façon ininterrompue jusqu'à nos jours, au fil des générations d'une nation autochtone. Ces déclarations extrajudiciaires sont admises pour leur véracité, et elles entrent donc en conflit avec la règle générale d'inadmissibilité du ouï-dire.

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 and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, *supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. 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 (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis. I will take this approach in my analysis of the trial judge's findings of fact.

Malgré les problèmes que crée l'utilisation des récits oraux comme preuve de faits historiques, le droit de la preuve doit être adapté afin que ce type de preuve puisse être placé sur un pied d'égalité avec les différents types d'éléments de preuve historique familiers aux tribunaux, le plus souvent des documents historiques. Il s'agit d'une pratique appliquée de longue date dans l'interprétation des traités entre l'État et les peuples autochtones: *Sioui*, précité, à la p. 1068; *R. c. Taylor* (1981), 62 C.C.C. (2d) 227 (C.A. Ont.), à la p. 232. Ainsi que l'a dit le juge en chef Dickson, comme la plupart des sociétés autochtones «ne tenaient aucun registre», le fait de ne pas suivre cette pratique «[imposerait un] fardeau de preuve impossible» aux peuples autochtones et «enlèverait [...] toute valeur» aux droits qu'ils ont (*Simon c. La Reine*, [1985] 2 R.C.S. 387, à la p. 408). Cette méthode doit être appliquée au cas par cas. Je vais appliquer cette approche dans mon analyse des conclusions de fait du juge de première instance.

On a final note, it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was “overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue” (*Schwartz*, *supra*, at p. 281).

En terminant, je tiens à souligner qu'il est important de comprendre que, même lorsque le juge de première instance a commis une erreur en tirant une conclusion de fait, il n'y a pas systématiquement intervention de la juridiction d'appel. L'erreur doit être suffisamment grave pour avoir constitué une erreur «dominant[e] et déterminant[e]» dans l'appréciation de la prépondérance des probabilités relativement à cette question de fait» (*Schwartz*, précité, à la p. 281).

(2) Application of General Principles(a) *General Comments*

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The general principle of appellate non-interference applies with particular force in this appeal. The trial was lengthy and very complex. There were 318 days of testimony. There were a large number of witnesses, lay and expert. The volume of evidence is enormous. To quote the trial judge at pp. 116-17:

A total of 61 witnesses gave evidence at trial, many using translators from their native Gitksan or Wet'suwet'en language; "word spellers" to assist the official reporters were required for many witnesses; a further 15 witnesses gave their evidence on commission; 53 territorial affidavits were filed; 30 deponents were cross-examined out of court; there are 23,503 pages of transcript evidence at trial; 5898 pages of transcript of argument; 3,039 pages of commission evidence and 2,553 pages of cross-examination on affidavits (all evidence and oral arguments are conveniently preserved in hard copy and on diskettes); about 9,200 exhibits were filed at trial comprising, I estimate, well over 50,000 pages; the plaintiffs' draft outline of argument comprises 3,250 pages, the province's 1,975 pages, and Canada's over 1,000 pages; there are 5,977 pages of transcript of argument in hard copy and on diskettes. All parties filed some excerpts from the exhibits they referred to in argument. The province alone submitted 28 huge binders of such documents. At least 15 binders of reply argument were left with me during that stage of the trial.

The result was a judgment of over 400 pages in length.

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It is not open to the appellants to challenge the trial judge's findings of fact merely because they disagree with them. I fear that a significant number of the appellants' objections fall into this category. Those objections are too numerous to list in their

(2) L'application des principes générauxa) *Observations générales*

Le principe général de la non-intervention des cours d'appel s'applique avec une force particulière dans le présent pourvoi. Le procès en première instance a été long et complexe. Il y a eu 318 jours de témoignages. Un grand nombre de témoins, tant experts que profanes, ont déposé. La quantité d'éléments de preuve est énorme. Comme l'a dit le juge de première instance aux pp. 116 et 117:

[TRADUCTION] Au total, 61 personnes ont témoigné au procès, bon nombre par l'entremise d'interprètes parce qu'ils s'exprimaient dans leur langue autochtone, le Gitksan ou le Wet'suwet'en; les sténographes officiels ont dû avoir recours à des «spécialistes de l'orthographe» pour de nombreux témoins; 15 autres témoins ont déposé dans le cadre d'une commission rogatoire; 53 affidavits territoriaux ont été déposés; 30 déposants ont été contre-interrogés à l'extérieur de la cour; la transcription des témoignages rendus au procès compte 23 503 pages; la transcription de l'argumentation 5 898 pages; les témoignages dans le cadre des commissions rogatoires 3 039 pages et la transcription des contre-interrogatoires sur les affidavits 2 553 pages (tous les témoignages et l'argumentation orale sont commodément conservés sur support papier et sur disquettes); ont été déposées au procès environ 9 200 pièces comptant, selon moi, bien au-delà de 50 000 pages; le document donnant les grandes lignes de l'argumentation des demandeurs comprend 3 250 pages, celui de la province 1 975 pages et celui du Canada plus de 1 000 pages; il y a 5 977 pages de transcription de l'argumentation, sur support papier et sur disquettes. Toutes les parties ont déposé des extraits des pièces auxquelles elles se sont référées au cours de leur argumentation. À elle seule, la province a déposé 28 énormes reliures contenant de tels documents. Au moins 15 reliures de la sorte contenant l'argumentation produite en réponse m'ont été remises au cours du procès.

Il en a résulté un jugement de plus de 400 pages.

Il n'est pas loisible aux appelants de contester les conclusions de fait du juge de première instance simplement parce qu'ils ne sont pas d'accord avec celles-ci. Je crains qu'un bon nombre des objections des appelants ne tombent dans cette

entirety. The bulk of these objections, at best, relate to alleged instances of misapprehension or oversight of material evidence by the trial judge. However, the respondents have established that, in most situations, there was some contradictory evidence that supported the trial judge's conclusion. The question, ultimately, was one of weight, and the appellants have failed to demonstrate that the trial judge erred in this respect.

One objection that I would like to mention specifically, albeit in passing, is the trial judge's refusal to accept the testimony of two anthropologists who were brought in as expert witnesses by the appellants. This aspect of the trial judge's reasons was hotly contested by the appellants in their written submissions. However, I need only reiterate what I have stated above, that findings of credibility, including the credibility of expert witnesses, are for the trial judge to make, and should warrant considerable deference from appellate courts.

On the other hand, the appellants have alleged that the trial judge made a number of serious errors relating to the treatment of the oral histories of the appellants. Those oral histories were expressed in three different forms: (i) the *adaawk* of the Gitksan, and the *kungax* of the Wet'suwet'en; (ii) the personal recollections of members of the appellant nations, and (iii) the territorial affidavits filed by the heads of the individual houses within each nation. The trial judge ruled on both the admissibility of, and the weight to be given to, these various forms of oral history without the benefit of my reasons in *Van der Peet*, as will become evident in the discussion that follows.

(b) *Adaawk and Kungax*

The *adaawk* and *kungax* of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. They were described by the

catégorie. Ces objections sont trop nombreuses pour en dresser la liste complète. Le gros de ces objections, au mieux, invoquent des erreurs de compréhension ou des oublis de la part du juge de première instance relativement à des éléments de preuve importants. Cependant, les intimés ont établi que, dans la plupart des cas, il y avait certaines éléments de preuve contradictoires pour appuyer la conclusion du juge de première instance. En dernière analyse, il s'agissait d'une question de valeur probante de la preuve, et les appelants n'ont pas démontré que le juge de première instance avait commis d'erreur sur ce point.

Il y a une objection que j'aimerais mentionner de façon plus particulière, quoiqu'en passant. C'est celle qui a trait au refus du juge de première instance d'accepter le témoignage de deux anthropologues assignés comme témoins experts par les appelants. Cet aspect des motifs du juge de première instance a été vivement contesté par les appelants dans leurs observations écrites. Toutefois, il me suffit de réitérer ce que j'ai dit plus tôt, savoir qu'il appartient au juge de première instance de tirer les conclusions ayant trait à la crédibilité, y compris la crédibilité des témoins experts, et les cours d'appel doivent faire montre d'une retenue considérable à l'égard de ces conclusions.

Par contre, les appelants ont affirmé que le juge de première instance a commis de nombreuses erreurs graves dans le traitement des récits oraux des appelants. Ces récits ont été exprimés sous trois formes différentes: (i) l'*adaawk* des Gitksan et le *kungax* des Wet'suwet'en; (ii) les souvenirs personnels de membres des nations appelantes; (iii) les affidavits territoriaux déposés par les chefs de chacune des maisons de chaque nation. Le juge de première instance a rendu une décision sur leur admissibilité et le poids à leur accorder sans avoir pu bénéficier des motifs que j'ai rédigés dans l'arrêt *Van der Peet*, comme il ressortira de l'analyse qui suit.

b) *L'adaawk et le kungax*

L'*adaawk* de la nation Gitksan et le *kungax* de la nation Wet'suwet'en sont des récits oraux d'un genre spécial. Le juge de première instance les a

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trial judge, at p. 164, as a “sacred ‘official’ litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House”. The content of these special oral histories includes its physical representation totem poles, crests and blankets. The importance of the adaawk and kungax is underlined by the fact that they are “repeated, performed and authenticated at important feasts” (at p. 164). At those feasts, dissenters have the opportunity to object if they question any detail and, in this way, help ensure the authenticity of the adaawk and kungax. Although they serve largely the same role, the trial judge found that there are some differences in both the form and content of the adaawk and the kungax. For example, the latter is “in the nature of a song . . . which is intended to represent the special authority and responsibilities of a chief” However, these differences are not legally relevant for the purposes of the issue at hand.

décrits, à la p. 164, comme étant la [TRADUCTION] «litanie, l'énumération ou l'histoire “officielle” et sacrée, selon le cas, des règles de droit, des traditions et des faits historiques les plus importants d'une maison, ainsi que de son territoire traditionnel». Le contenu de ces récits oraux spéciaux est notamment exprimé physiquement dans les mâts totémiques, les emblèmes et les couvertures. L'importance de l'adaawk et du kungax est soulignée par le fait qu'ils sont [TRADUCTION] «répétés, représentés et authentifiés lors de célébrations importantes» (à la p. 164). Lors de ces célébrations, les dissidents ont l'occasion d'opposer leur désaccord à l'égard d'un détail et, de cette façon, d'aider à assurer l'authenticité de l'adaawk et du kungax. Bien que l'adaawk et le kungax jouent dans une large mesure le même rôle, le juge de première instance a constaté certaines différences de forme et de contenu. Par exemple, le kungax est [TRADUCTION] «de la nature d'un chant [. . .] qui vise à décrire l'autorité et les responsabilités spéciales du chef» Cependant, ces différences n'ont aucune pertinence juridique relativement à la question qui nous intéresse.

94 It is apparent that the adaawk and kungax are of integral importance to the distinctive cultures of the appellant nations. At trial, they were relied on for two distinct purposes. First, the adaawk was relied on as a component of and, therefore, as proof of the existence of a system of land tenure law internal to the Gitksan, which covered the whole territory claimed by that appellant. In other words, it was offered as evidence of the Gitksan's historical use and occupation of that territory. For the Wet'suwet'en, the kungax was offered as proof of the central significance of the claimed lands to their distinctive culture. As I shall explain later in these reasons, both use and occupation, and the central significance of the lands occupied, are relevant to proof of aboriginal title.

Il est manifeste que l'adaawk et le kungax ont une importance fondamentale pour les cultures distinctives des nations appelantes. En première instance, ils ont été invoqués pour deux fins distinctes. Premièrement, l'adaawk a été invoqué en tant qu'élément — et, partant, en tant que preuve de l'existence — d'un régime juridique de tenure foncière propre aux Gitksan, qui s'appliquait à l'ensemble du territoire revendiqué par cette nation appelante. En d'autres termes, l'adaawk a été présenté en tant que preuve de l'utilisation et de l'occupation historiques de ce territoire par les Gitksan. En ce qui concerne les Wet'suwet'en, le kungax a été invoqué comme preuve de l'importance fondamentale des terres revendiquées dans leur culture distinctive. Comme je vais l'expliquer plus loin dans les présents motifs, tant l'utilisation et l'occupation des terres visées que l'importance fondamentale de celles-ci sont pertinentes pour la preuve du titre aborigène.

95 The admissibility of the adaawk and kungax was the subject of a general decision of the trial judge

Il a été statué sur l'admissibilité de l'adaawk et du kungax dans le cadre d'une décision générale

handed down during the course of the trial regarding the admissibility of all oral histories (incorrectly indexed as *Uukw v. R.*, [1987] 6 W.W.R. 155 (B.C.S.C.)). Although the trial judge recognized that the evidence at issue was a form of hearsay, he ruled it admissible on the basis of the recognized exception that declarations made by deceased persons could be given in evidence by witnesses as proof of public or general rights: see Michael N. Howard, Peter Crane and Daniel A. Hochberg, *Phipson on Evidence* (14th ed. 1990), at p. 736. He affirmed that earlier ruling in his trial judgment, correctly in my view, by stating, at p. 180, that the *adaawk* and *kungax* were admissible “out of necessity as exceptions to the hearsay rule” because there was no other way to prove the history of the Gitksan and Wet’suwet’en nations.

The trial judge, however, went on to give these oral histories no independent weight at all. He held, at p. 180, that they were only admissible as “direct evidence of facts in issue . . . in a few cases where they could constitute confirmatory proof of early presence in the territory”. His central concern that the *adaawk* and *kungax* could not serve “as evidence of detailed history, or land ownership, use or occupation”. I disagree with some of the reasons he relied on in support of this conclusion.

Although he had earlier recognized, when making his ruling on admissibility, that it was impossible to make an easy distinction between the mythological and “real” aspects of these oral histories, he discounted the *adaawk* and *kungax* because they were not “literally true”, confounded “what is fact and what is belief”, “included some material which might be classified as mythology”, and projected a “romantic view” of the history of the appellants. He also cast doubt on the authenticity of these special oral histories (at p. 181) because, *inter alia*, “the verifying group is so small that they cannot

rendue au cours du procès par le juge de première instance sur l’admissibilité des récits oraux (erronément répertoriée sous l’intitulé *Uukw c. R.*, [1987] 6 W.W.R. 155 (C.S.C.-B.)). Bien que le juge de première instance ait reconnu que la preuve en cause était une forme de ouï-dire, il a statué qu’elle était admissible en se fondant sur l’exception reconnue selon laquelle les déclarations de personnes décédées peuvent être versées en preuve par des témoins comme preuve de droits de nature publique ou générale; voir Michael N. Howard, Peter Crane et Daniel A. Hochberg, *Phipson on Evidence* (14^e éd. 1990), à la p. 736. Dans son jugement au terme du procès, il a, avec raison selon moi, confirmé cette première décision en affirmant, à la p. 180, que l’*adaawk* et le *kungax* étaient admissibles [TRADUCTION] «par nécessité, comme exceptions à la règle du ouï-dire», parce qu’il n’y avait aucune autre façon de faire la preuve de l’histoire des nations Gitksan et Wet’suwet’en.

Cependant, par la suite, le juge de première instance n’a donné à ces récits aucune valeur probante indépendante. Il a statué, à la p. 180, qu’ils étaient admissibles seulement à titre de [TRADUCTION] «preuve directe des faits en litige [. . .] pour les quelques cas où ils pourraient constituer la confirmation d’une présence ancienne dans le territoire». Sa principale réserve était que l’*adaawk* et le *kungax* ne pouvaient pas servir «de preuve du détail de l’histoire ou encore de la propriété, de l’utilisation ou de l’occupation du territoire». Je suis en désaccord avec certains des motifs qu’il a invoqués au soutien de cette conclusion.

Même si, plus tôt, dans sa décision sur l’admissibilité, il avait reconnu qu’il était impossible de séparer facilement les aspects mythologiques des aspects [TRADUCTION] «réels» de ces récits oraux, il a écarté l’*adaawk* et le *kungax* parce qu’ils n’étaient pas «littéralement vrais», qu’ils mélangaient «les faits et les croyances», qu’ils «comportaient des éléments qui pourraient être qualifiés de mythologiques» et qu’ils évoquaient une «vision romanesque» de l’histoire des appelants. Il a aussi dit douter de l’authenticité de ces récits oraux spéciaux (à la p. 181) parce que, entre

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safely be regarded as expressing the reputation of even the Indian community, let alone the larger community whose opportunity to dispute territorial claims would be essential to weight". Finally, he questioned (at p. 181) the utility of the adaawk and kungax to demonstrate use and occupation because they were "seriously lacking in detail about the specific lands to which they are said to relate".

autres, [TRADUCTION] «le groupe témoin est si restreint qu'on ne peut, sans risque, considérer même qu'il exprime la commune renommée au sein de la communauté indienne, encore moins au sein de la communauté plus large, dont la possibilité de contester les revendications territoriales serait essentielle du point de vue de la valeur probante». Finalement, il a mis en doute (à la p. 181) l'utilité de l'adaawk et du kungax pour faire la preuve de l'utilisation et de l'occupation des terres visées, parce qu'ils «manquaient sérieusement de détails au sujet des terres mêmes auxquelles ils sont censés se rapporter».

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Although he framed his ruling on weight in terms of the specific oral histories before him, in my respectful opinion, the trial judge in reality based his decision on some general concerns with the use of oral histories as evidence in aboriginal rights cases. In summary, the trial judge gave no independent weight to these special oral histories because they did not accurately convey historical truth, because knowledge about those oral histories was confined to the communities whose histories they were and because those oral histories were insufficiently detailed. However, as I mentioned earlier, these are features, to a greater or lesser extent, of all oral histories, not just the adaawk and kungax. The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in *Van der Peet* that trial courts interpret the evidence of aboriginal peoples in light of the difficulties inherent in adjudicating aboriginal claims.

Bien qu'il ait structuré sa décision concernant la valeur probante en fonction des récits oraux particuliers qui lui avaient été présentés, le juge de première instance a, à mon avis, fondé plutôt sa décision sur certaines réserves générales concernant l'utilisation des récits oraux en preuve dans les affaires de droits ancestraux. En résumé, le juge du procès n'a accordé aucune valeur probante indépendante à ces récits oraux particuliers parce qu'ils ne transmettaient pas avec exactitude la vérité historique, parce que la connaissance de ces récits oraux était limitée aux communautés dont ils reconstituaient l'histoire et parce que ces récits oraux n'étaient pas suffisamment détaillés. Cependant, comme je l'ai mentionné précédemment, il s'agit là de caractéristiques qui sont, dans une mesure plus ou moins grande, propres à tous les récits oraux, et non seulement aux adaawk et aux kungax. L'implication du raisonnement du juge de première instance est qu'il ne devrait jamais être accordé de valeur probante indépendante aux récits oraux et que, dans les litiges sur les droits ancestraux, ces récits ne sont utiles qu'à titre d'éléments de preuve tendant à en confirmer d'autres. Je crains que, si ce raisonnement était suivi, la valeur des récits oraux des peuples autochtones serait constamment et systématiquement sous-estimée par le système juridique canadien, en contravention des instructions expresses à l'effet contraire qui ont été données dans l'arrêt *Van der Peet*, précité, et suivant lesquelles les tribunaux doivent interpréter la preuve présentée par les peuples autochtones en tenant compte des difficultés inhérentes à l'examen des revendications autochtones.

(c) *Recollections of Aboriginal Life*

The trial judge also erred when he discounted the “recollections of aboriginal life” offered by various members of the appellant nations. I take that term to be a reference to testimony about personal and family history that is not part of an *adaawk* or a *kungax*. That evidence consisted of the personal knowledge of the witnesses and declarations of witnesses’ ancestors as to land use. This history had been adduced by the appellants in order to establish the requisite degree of use and occupation to make out a claim to ownership and, for the same reason as the *adaawk* and *kungax*, is material to the proof of aboriginal title.

The trial judge limited the uses to which the evidence could be put. He reasoned, at p. 177, that this evidence, at most, established “without question, that the plaintiff’s immediate ancestors, for the past 100 years or so” had used land in the claimed territory for aboriginal purposes. However, the evidence was insufficiently precise to demonstrate that the more distant ancestors of the witnesses had engaged in specific enough land use “far enough back in time to permit the plaintiffs to succeed on issues such as internal boundaries”. In the language of *Van der Peet*, the trial judge effectively held that this evidence did not demonstrate the requisite continuity between present occupation and past occupation in order to ground a claim for aboriginal title.

In my opinion, the trial judge expected too much of the oral history of the appellants, as expressed in the recollections of aboriginal life of members of the appellant nations. He expected that evidence to provide definitive and precise evidence of pre-contact aboriginal activities on the territory in question. However, as I held in *Van der Peet*, this will be almost an impossible burden to meet. Rather, if oral history cannot conclusively estab-

c) *Les souvenirs du mode de vie ancestral*

Le juge de première instance a aussi fait erreur en ne tenant pas compte des [TRADUCTION] «souvenirs du mode de vie ancestral» relatés par divers membres des nations appelantes. J’interprète cette expression comme une référence aux témoignages portant sur les antécédents personnels et familiaux qui ne font pas partie d’un *adaawk* ou d’un *kungax*. Cette preuve était constituée des connaissances personnelles des témoins et des déclarations de leurs ancêtres quant à l’utilisation du territoire. Ces récits ont été présentés en preuve par les appelants afin d’établir le degré d’occupation et d’utilisation requis pour fonder la revendication de propriété, et ils sont, pour le même motif que l’*adaawk* et le *kungax*, pertinents pour la preuve du titre aborigène.

Le juge de première instance a limité les utilisations qui pouvaient être faites de cette preuve. Il a raisonné, à la p. 177, que, au mieux, celle-ci établissait [TRADUCTION] «sans l’ombre d’un doute que, au cours des 100 dernières années environ, les ancêtres immédiats du demandeur» avaient utilisé à des fins autochtones des terres situées dans le territoire revendiqué. Cependant, la preuve n’était pas suffisamment précise pour démontrer que les ancêtres plus lointains des témoins avaient fait une utilisation suffisamment particulière des terres [TRADUCTION] «assez loin dans le temps pour permettre aux demandeurs d’avoir gain de cause sur des questions comme les limites internes». Pour reprendre les termes de l’arrêt *Van der Peet*, le juge de première instance a effectivement conclu que cette preuve ne démontrait pas la continuité requise entre l’occupation actuelle et l’occupation passée pour fonder la revendication d’un titre aborigène.

À mon avis, le juge de première instance attendait beaucoup trop des récits oraux des appelants, exprimés dans les souvenirs du mode de vie ancestral des membres des nations appelantes. Il attendait de ces témoignages qu’ils apportent la preuve définitive et précise d’activités autochtones sur le territoire en question avant le contact avec les Européens. Cependant, comme je l’ai dit dans *Van der Peet*, il s’agit là d’un fardeau de preuve dont il

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lish pre-sovereignty (after this decision) occupation of land, it may still be relevant to demonstrate that current occupation has its origins prior to sovereignty. This is exactly what the appellants sought to do.

(d) *Territorial Affidavits*

102 Finally, the trial judge also erred in his treatment of the territorial affidavits filed by the appellant chiefs. Those affidavits were declarations of the territorial holdings of each of the Gitksan and Wet'suwet'en houses and, at trial, were introduced for the purposes of establishing each House's ownership of its specific territory. Before this Court, the appellants tried to amalgamate these individual claims into collective claims on behalf of each nation and the relevance of the affidavits changed accordingly. I have already held that it is not open to the appellants to alter fundamentally the nature of their claim in this way on appeal. Nevertheless, the treatment of the affidavits is important because they will be relevant at a new trial to the existence and nature of the land tenure system within each nation and, therefore, material to the proof of title.

103 The affidavits rely heavily on the declarations of deceased persons of use or ownership of the lands, which are a form of oral history. But those declarations are a kind of hearsay and the appellants therefore argued that the affidavits should be admitted through the reputation exception to the hearsay rule. Although he recognized, at p. 438, that the territorial affidavits were "the best evidence [the appellants] could adduce on this question of internal boundaries", the trial judge held

est presque impossible de s'acquitter. Par contre, même si (après le prononcé du présent arrêt) les récits oraux ne permettent pas d'établir de façon concluante l'occupation du territoire avant l'affirmation de la souveraineté, ils peuvent néanmoins être pertinents pour démontrer que les origines de l'occupation actuelle remontent avant l'affirmation de la souveraineté. C'est exactement ce que les appelants ont tenté de faire.

d) *Les affidavits territoriaux*

Finalement, le juge de première instance a aussi fait erreur dans la façon dont il a traité les affidavits territoriaux déposés par les chefs appelants. Ces affidavits étaient des déclarations concernant les terres de chaque maison Gitksan et Wet'suwet'en et, au procès, ils ont été déposés pour établir le droit de propriété de chaque maison sur son territoire spécifique. Devant notre Cour, les appelants ont tenté de fusionner ces revendications individuelles en revendications collectives présentées au nom de chaque nation, et la pertinence des affidavits a changé en conséquence. J'ai déjà statué qu'il n'est pas loisible aux appelants de modifier fondamentalement la nature de leur revendication comme ils l'ont fait en appel. Néanmoins, le traitement accordé aux affidavits est important parce que, dans le cadre d'un nouveau procès, ils seront pertinents pour statuer sur l'existence et la nature du régime de tenure foncière au sein de chaque nation et, par conséquent, importants pour la preuve du titre.

Les affidavits reposent en très grande partie sur des déclarations faites par des personnes décédées relativement à l'utilisation des terres ou à leurs propriétaires, une forme de récits oraux. Toutefois, ces déclarations constituent une sorte de ouï-dire, et les appelants ont par conséquent plaidé que les affidavits devraient être admis sur le fondement de l'exception à la règle du ouï-dire relative à la réputation ou à la commune renommée. Bien qu'il ait reconnu, à la p. 438, que les affidavits territoriaux étaient [TRADUCTION] «la meilleure preuve [que les appelants] pouvaient produire sur la question des limites internes», le juge de première instance a conclu que cette exception ne s'appliquait pas et il

that this exception did not apply and refused to admit the declarations contained in the affidavits.

I am concerned by the specific reasons the trial judge gave for refusing to apply the reputation exception. He questioned the degree to which the declarations amounted to a reputation because they were largely confined to the appellants' communities. The trial judge asserted that neighbouring aboriginal groups whose territorial claims conflicted with those of the appellants, as well as non-aboriginals who potentially possessed a legal interest in the claimed territory, were unaware of the content of the alleged reputation at all. Furthermore, the trial judge reasoned that since the subject-matter of the affidavits was disputed, its reliability was doubtful. Finally, the trial judge questioned, at p. 441, "the independence and objectivity" of the information contained in the affidavits, because the appellants and their ancestors (at p. 440) "have been actively discussing land claims for many years".

Although he regretted this finding, the trial judge felt bound to apply the rules of evidence because it did not appear to him (at p. 442) "that the Supreme Court of Canada has decided that the ordinary rules of evidence do not apply to this kind of case". The trial judge arrived at this conclusion, however, without the benefit of *Van der Peet*, where I held that the ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.

Many of the reasons relied on by the trial judge for excluding the evidence contained in the territorial affidavits are problematic because they run against this fundamental principle. The requirement that a reputation be known in the general community, for example, ignores the fact that oral

a refusé d'admettre les déclarations contenues dans les affidavits.

Je suis préoccupé par les motifs particuliers invoqués par le juge de première instance pour refuser d'appliquer l'exception fondée sur la commune renommée. Il s'est demandé dans quelle mesure les déclarations exprimaient la commune renommée, étant donné qu'elles se confinaient largement aux communautés des appelants. Le juge de première instance a affirmé que les groupes autochtones voisins dont les revendications territoriales entraient en conflit avec celles des appelants, de même que les non-autochtones susceptibles d'avoir un intérêt juridique dans le territoire revendiqué, n'étaient absolument pas au courant du contenu du fait de commune renommée allégué. En outre, le juge de première instance a raisonné que, comme le contenu des affidavits était contesté, sa fiabilité était douteuse. Finalement, le juge de première instance a mis en doute, à la p. 441, [TRADUCTION] «l'indépendance et l'objectivité» de l'information contenue dans les affidavits, parce que les appelants et leurs ancêtres (à la p. 440) «discutent activement de revendications territoriales depuis de nombreuses années».

Bien qu'il ait dit regretter en arriver à cette conclusion, le juge de première instance s'est senti tenu d'appliquer les règles de preuve parce qu'il ne lui semblait pas (à la p. 442) [TRADUCTION] «que la Cour suprême du Canada ait décidé que les règles de preuve ordinaires ne s'appliquent pas dans ce genre d'affaires». Cependant, le juge de première instance a tiré cette conclusion avant le prononcé de l'arrêt *Van der Peet*, où j'ai statué que les règles de preuve ordinaires doivent être abordées et adaptées en tenant compte des difficultés de preuve inhérentes à l'examen des revendications autochtones.

Bon nombre des motifs invoqués par le juge de première instance pour écarter la preuve contenue dans les affidavits territoriaux sont problématiques parce qu'ils vont à l'encontre de ce principe fondamental. Par exemple, l'exigence qu'un fait de commune renommée soit connu dans la communauté

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histories, as noted by the Royal Commission on Aboriginal Peoples, generally relate to particular locations, and refer to particular families and communities and may, as a result, be unknown outside of that community, even to other aboriginal nations. Excluding the territorial affidavits because the claims to which they relate are disputed does not acknowledge that claims to aboriginal rights, and aboriginal title in particular, are almost always disputed and contested. Indeed, if those claims were uncontroversial, there would be no need to bring them to the courts for resolution. Casting doubt on the reliability of the territorial affidavits because land claims had been actively discussed for many years also fails to take account of the special context surrounding aboriginal claims, in two ways. First, those claims have been discussed for so long because of British Columbia's persistent refusal to acknowledge the existence of aboriginal title in that province until relatively recently, largely as a direct result of the decision of this Court in *Calder, supra*. It would be perverse, to say the least, to use the refusal of the province to acknowledge the rights of its aboriginal inhabitants as a reason for excluding evidence which may prove the existence of those rights. Second, this rationale for exclusion places aboriginal claimants whose societies record their past through oral history in a grave dilemma. In order for the oral history of a community to amount to a form of reputation, and to be admissible in court, it must remain alive through the discussions of members of that community; those discussions are the very basis of that reputation. But if those histories are discussed too much, and too close to the date of litigation, they may be discounted as being suspect, and may be held to be inadmissible. The net effect may be that a society with such an oral tradition would never be able to establish a historical claim through the use of oral history in court.

en général ne tient pas compte du fait que, comme l'a souligné la Commission royale sur les peuples autochtones, les récits oraux sont généralement associés à des lieux précis et font allusion à des familles et à des collectivités précises, et peuvent, par conséquent, ne pas être connus à l'extérieur de cette collectivité, même par d'autres nations autochtones. Écarter les affidavits territoriaux parce que les revendications auxquelles ils se rapportent sont contestées ne tient pas compte du fait que les revendications de droits ancestraux, et de titre aborigène en particulier, sont presque toujours contestées. De fait, si ces revendications ne soulevaient aucune controverse, il ne serait pas nécessaire de s'adresser aux tribunaux pour les faire trancher. Jeter le doute sur la fiabilité des affidavits territoriaux parce que les revendications territoriales ont été discutées activement pendant de nombreuses années ne tient pas compte non plus du contexte des revendications autochtones et ce, de deux façons. Premièrement, si ces revendications sont discutées depuis si longtemps, c'est en raison du refus constant de la Colombie-Britannique, jusqu'à une date relativement récente, de reconnaître l'existence du titre aborigène dans la province, refus qui était dans une large mesure une conséquence directe de l'arrêt *Calder*, précité, de notre Cour. Il serait pour le moins abusif d'utiliser le refus de la province de reconnaître les droits de ses habitants autochtones comme motif pour écarter la preuve qui pourrait établir l'existence de ces droits. Deuxièmement, ce motif d'exclusion place les revendicateurs autochtones — qui appartiennent à des sociétés préservant leur passé au moyen de récits oraux — devant un grave dilemme. Pour qu'un récit oral d'une communauté équivaille à une forme de commune renommée et soit admissible en cour, il doit se perpétuer dans les discussions des membres de cette communauté; ces discussions sont le fondement même de cette commune renommée. Toutefois, si ces récits font l'objet de trop de discussions, à une période trop rapprochée d'un litige, ils risquent d'être écartés parce qu'ils sont suspects, et ils peuvent ainsi être jugés inadmissibles. Cela pourrait avoir pour effet qu'une société possédant une telle tradition orale ne pourrait jamais faire la preuve d'une revendication historique en utilisant un récit oral en cour.

(e) *Conclusion*

The trial judge's treatment of the various kinds of oral histories did not satisfy the principles I laid down in *Van der Peet*. These errors are particularly worrisome because oral histories were of critical importance to the appellants' case. They used those histories in an attempt to establish their occupation and use of the disputed territory, an essential requirement for aboriginal title. The trial judge, after refusing to admit, or giving no independent weight to these oral histories, reached the conclusion that the appellants had not demonstrated the requisite degree of occupation for "ownership". Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different.

In the circumstances, the factual findings cannot stand. However, given the enormous complexity of the factual issues at hand, it would be impossible for the Court to do justice to the parties by sifting through the record itself and making new factual findings. A new trial is warranted, at which the evidence may be considered in light of the principles laid down in *Van der Peet* and elaborated upon here. In applying these principles, the new trial judge might well share some or all of the findings of fact of McEachern C.J.

C. *What is the content of aboriginal title, how is it protected by s. 35(1) of the Constitution Act, 1982, and what is required for its proof?*

(1) *Introduction*

The parties disagree over whether the appellants have established aboriginal title to the disputed area. However, since those factual issues require a new trial, we cannot resolve that dispute in this appeal. But factual issues aside, the parties also have a more fundamental disagreement over the content of aboriginal title itself, and its reception

e) *La conclusion*

Le traitement accordé aux divers types de récits oraux par le juge de première instance ne respecte pas les principes que j'ai établis dans *Van der Peet*. Ces erreurs sont particulièrement troublantes, étant donné que les récits oraux étaient d'une importance cruciale pour la cause des appelants. Ils ont invoqué ces récits, pour tenter d'établir leur occupation et leur utilisation du territoire contesté, condition essentielle à l'existence du titre aborigène. Après avoir refusé d'admettre ces récits oraux ou de leur accorder quelque valeur probante indépendante que ce soit, le juge de première instance est arrivé à la conclusion que les appelants n'avaient pas démontré l'existence du degré d'occupation requis du territoire pour fonder la «propriété» de celui-ci. Si le juge du procès avait apprécié correctement les récits oraux, ses conclusions sur ces questions de fait auraient pu être très différentes.

Dans les circonstances, les conclusions de fait ne peuvent pas être confirmées. Cependant, vu la complexité énorme des questions de fait en jeu, il serait impossible à la Cour de rendre justice aux parties en passant le dossier au crible et en tirant de nouvelles conclusions de fait. Un nouveau procès s'impose, au cours duquel on pourra examiner la preuve à la lumière des principes qui ont été exposés dans *Van der Peet* et précisés en l'espèce. Dans l'application de ces principes, le juge qui présidera le nouveau procès pourrait bien partager l'ensemble ou certaines des conclusions de fait du juge en chef McEachern.

C. *Quel est le contenu du titre aborigène, comment est-il protégé par le par. 35(1) de la Loi constitutionnelle de 1982 et comment fait-on la preuve de son existence?*

(1) *Introduction*

Les parties ne s'entendent pas sur la question de savoir si les appelants ont démontré l'existence d'un titre aborigène sur la région contestée. Cependant, comme un nouveau procès est nécessaire pour trancher ces questions de fait, nous ne pouvons pas régler ce différend dans le cadre du présent pourvoi. Outre ce différend d'ordre factuel,

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into the Constitution by s. 35(1). In order to give guidance to the judge at the new trial, it is to this issue that I will now turn.

les parties ont un désaccord plus fondamental à propos du contenu du titre aborigène lui-même, et de sa réception dans la Constitution par le par. 35(1). Afin d'éclairer le juge qui instruira le nouveau procès, je vais maintenant examiner cette question.

110 I set out these opposing positions by way of illustration and introduction because I believe that all of the parties have characterized the content of aboriginal title incorrectly. The appellants argue that aboriginal title is tantamount to an inalienable fee simple, which confers on aboriginal peoples the rights to use those lands as they choose and which has been constitutionalized by s. 35(1). The respondents offer two alternative formulations: first, that aboriginal title is no more than a bundle of rights to engage in activities which are themselves aboriginal rights recognized and affirmed by s. 35(1), and that the *Constitution Act, 1982*, merely constitutionalizes those individual rights, not the bundle itself, because the latter has no independent content; and second, that aboriginal title, at most, encompasses the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves, and that s. 35(1) constitutionalizes this notion of exclusivity.

Afin d'illustrer le problème, je vais, en guise d'introduction, exposer les thèses opposées des parties, car j'estime que toutes les parties ont décrit incorrectement le contenu du titre aborigène. Les appelants soutiennent que le titre aborigène équivaut à un fief simple inaliénable, qu'il confère aux peuples autochtones le droit d'utiliser les terres visées comme ils l'entendent et qu'il a été constitutionnalisé par le par. 35(1). Les intimés avancent deux définitions: premièrement, le titre aborigène n'est rien de plus qu'un faisceau de droits autorisant l'exercice d'activités qui sont elles-mêmes des droits ancestraux reconnus et confirmés par le par. 35(1), et la *Loi constitutionnelle de 1982* ne fait que constitutionnaliser ces droits individuels et non le faisceau lui-même, parce que celui-ci n'a aucun contenu indépendant; deuxièmement, le titre aborigène comprend, au plus, le droit exclusif d'utiliser et d'occuper des terres pour y exercer des activités qui sont elles-mêmes des droits ancestraux, et le par. 35(1) constitutionnalise cette notion d'exclusivité.

111 The content of aboriginal title, in fact, lies somewhere in between these positions. Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in

En fait, le contenu du titre aborigène se situe quelque part entre ces deux thèses. Le titre aborigène est un droit foncier et, en tant que tel, il est quelque chose de plus que le droit d'exercer certaines activités précises, qui peuvent elles-mêmes être des droits ancestraux. Il confère plutôt le droit d'utiliser des terres pour y exercer différentes activités qui ne doivent pas nécessairement toutes être des aspects de coutumes, pratiques et traditions faisant partie intégrante des cultures distinctives des sociétés autochtones. Ces activités ne constituent pas le droit en soi; elles sont plutôt des parasites du titre sous-jacent. Toutefois, ces différents usages sont subordonnés à la restriction suivante: ils ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour le territoire visé et qui constitue le fondement de son

land, and is one way in which aboriginal title is distinct from a fee simple.

(2) Aboriginal Title at Common Law

(a) *General Features*

The starting point of the Canadian jurisprudence on aboriginal title is the Privy Council's decision in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, which described aboriginal title as a "personal and usufructuary right" (at p. 54). The subsequent jurisprudence has attempted to grapple with this definition, and has in the process demonstrated that the Privy Council's choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title. What the Privy Council sought to capture is that aboriginal title is a *sui generis* interest in land. Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.

The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its *inalienability*. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only "personal" in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot

titre aborigène sur ce territoire. Cette limite intrinsèque, qui sera expliquée plus longuement ci-après, découle du fait que le titre aborigène est défini comme un droit foncier *sui generis*, et elle est un aspect qui différencie le titre aborigène du fief simple.

(2) Le titre aborigène en common law

a) *Caractéristiques générales*

Le point de départ de la jurisprudence canadienne sur le titre aborigène est la décision du Conseil privé dans l'affaire *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 A.C. 46, dans laquelle le titre aborigène a été décrit comme étant un [TRADUCTION] «droit personnel, de la nature d'un usufruit» (à la p. 54). Par la suite, les tribunaux ont tenté de s'accommoder de cette définition, mais il ressort de leurs décisions que les termes choisis par le Conseil privé ne sont pas particulièrement utiles pour expliquer les différentes dimensions du titre aborigène. Le Conseil privé a cherché à rendre l'idée que le titre aborigène est un intérêt foncier *sui generis*. On a qualifié le titre aborigène de droit *sui generis* afin de le différencier des intérêts de propriété «ordinaires» comme le fief simple. Toutefois, comme je vais maintenant l'explicitier, on le qualifie également de droit *sui generis*, dans la mesure où il est impossible d'expliquer entièrement ses caractéristiques en fonction soit des règles du droit des biens en common law soit des règles relatives à la propriété prévues par les régimes juridiques autochtones. Tout comme d'autres droits ancestraux, le titre aborigène doit être défini en tenant compte à la fois de la common law et du point de vue des autochtones.

L'idée que le titre aborigène a un caractère *sui generis* est le principe unificateur qui sous-tend les différentes dimensions de ce titre. L'une de ces dimensions est l'*inaliénabilité* du titre aborigène. Les terres détenues en vertu d'un titre aborigène ne peuvent être transférées, vendues ou cédées à personne d'autre que la Couronne, et elles sont par conséquent inaliénables. Notre Cour s'est efforcée de préciser que c'est uniquement dans ce sens que le titre aborigène est un droit «personnel», et que cela ne veut pas dire qu'il ne s'agit pas d'un intérêt

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compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 677.

de propriété, qui ne représente rien de plus qu'une autorisation d'utiliser et d'occuper les terres visées et qui ne peut pas concurrencer sur un pied d'égalité d'autres droits de propriété: *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654, à la p. 677.

114 Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine's Milling*. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, *Common Law Aboriginal Title* (1989), at p. 7. Thus, in *Guerin*, *supra*, Dickson J. described aboriginal title, at p. 376, as a "legal right derived from the Indians' historic occupation and possession of their tribal lands". What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (1997), 135, at p. 144. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty" (also see *Guerin*, at p. 378). What this suggests is a second source for aboriginal title — the relationship between common law and pre-existing systems of aboriginal law.

Une autre dimension du titre aborigène est son origine. On a d'abord cru que la source du titre aborigène au Canada était la *Proclamation royale de 1763*: voir *St. Catherine's Milling*. Cependant, il ne fait maintenant aucun doute que, même si le titre aborigène a été reconnu par la *Proclamation*, il découle de l'occupation antérieure du Canada par les peuples autochtones. Toutefois, cette occupation antérieure est pertinente à deux points de vue, qui illustrent tous deux le caractère *sui generis* du titre aborigène. Il y a d'abord le fait physique de l'occupation, qui découle du principe de common law selon lequel l'occupation prouve la possession en droit: voir Kent McNeil, *Common Law Aboriginal Title* (1989), à la p. 7. Ainsi, dans *Guerin*, précité, le juge Dickson a qualifié le titre aborigène, à la p. 376, de «droit, en *common law*, découlant de l'occupation et de la possession historiques par les Indiens de leurs terres tribales». Le titre aborigène a un caractère *sui generis* parce qu'il découle d'une possession antérieure à l'affirmation de la souveraineté britannique, tandis que les domaines ordinaires, comme le fief simple, ont pris naissance par la suite: voir Kent McNeil, «The Meaning of Aboriginal Title», dans Michael Asch, dir., *Aboriginal and Treaty Rights in Canada* (1997), 135, à la p. 144. Cette idée a été précisée dans *Roberts c. Canada*, [1989] 1 R.C.S. 322, où notre Cour a unanimement statué, à la p. 340, que le «titre aborigène existait avant la colonisation par les Britanniques et a continué d'exister après les revendications de souveraineté britanniques» (voir aussi *Guerin* à la p. 378). Ces affirmations indiquent que le titre aborigène a une autre origine — soit le rapport entre la common law et les régimes juridiques autochtones préexistants.

115 A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that

Une dimension supplémentaire du titre aborigène est le fait qu'il est détenu collectivement. Le titre aborigène ne peut pas être détenu par un autochtone en particulier; il est un droit foncier collectif, détenu par tous les membres d'une nation

land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

(b) *The Content of Aboriginal Title*

Although cases involving aboriginal title have come before this Court and Privy Council before, there has never been a definitive statement from either court on the content of aboriginal title. In *St. Catherine's Milling*, the Privy Council, as I have mentioned, described the aboriginal title as a "personal and usufructuary right", but declined to explain what that meant because it was not "necessary to express any opinion upon the point" (at p. 55). Similarly, in *Calder, Guerin, and Paul*, the issues were the extinguishment of, the fiduciary duty arising from the surrender of, and statutory easements over land held pursuant to, aboriginal title, respectively; the content of title was not at issue and was not directly addressed.

Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land. For the sake of clarity, I will discuss each of these propositions separately.

Aboriginal title encompasses the right to use the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, cultures and traditions

autochtone. Les décisions relatives aux terres visées sont également prises par cette collectivité. Il s'agit d'une autre caractéristique *sui generis* du titre aborigène, qui le différencie des intérêts de propriété ordinaires.

b) *Le contenu du titre aborigène*

Bien que notre Cour et le Conseil privé aient été saisis par le passé d'affaires relatives au titre aborigène, ni l'un ni l'autre ne se sont jamais prononcés d'une manière définitive sur le contenu du titre aborigène. Comme je l'ai indiqué, le Conseil privé, dans *St. Catherine's Milling*, a qualifié le titre aborigène de [TRADUCTION] «droit personnel, de la nature d'un usufruit», mais il a refusé d'expliquer ce que cela voulait dire, parce qu'il n'était pas «nécessaire d'exprimer une opinion sur ce point» (à la p. 55). De même, dans les arrêts *Calder, Guerin* et *Paul*, les questions litigieuses étaient respectivement l'extinction du titre aborigène, l'obligation de fiduciaire découlant de la cession de terres détenues en vertu d'un titre aborigène et les servitudes d'origine législative sur des terres ainsi détenues; le contenu du titre n'était pas en cause et n'a pas été abordé directement.

Même si les tribunaux n'ont pas été très explicites, je suis arrivé à la conclusion que le contenu du titre aborigène peut être résumé au moyen de deux énoncés: premièrement, le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour diverses fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante d'une culture autochtone distinctive; deuxièmement, ces utilisations protégées ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour ces terres. Pour plus de clarté, je vais examiner chacun de ces énoncés séparément.

Le titre aborigène comprend le droit d'utiliser le territoire détenu en vertu de ce titre pour diverses fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions

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which are integral to distinctive aboriginal cultures

autochtones faisant partie intégrante d'une culture autochtone distinctive

118 The respondents argue that aboriginal title merely encompasses the right to engage in activities which are aspects of aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures of the aboriginal group claiming the right and, at most, adds the notion of exclusivity; i.e., the exclusive right to use the land for those purposes. However, the uses to which lands held pursuant to aboriginal title can be put are not restricted in this way. This conclusion emerges from three sources: (i) the Canadian jurisprudence on aboriginal title, (ii) the relationship between reserve lands and lands held pursuant to aboriginal title, and (iii) the *Indian Oil and Gas Act*, R.S.C., 1985, c. I-7. As well, although this is not legally determinative, it is supported by the critical literature. In particular, I have profited greatly from Professor McNeil's article, "The Meaning of Aboriginal Title", *supra*.

(i) Canadian Jurisprudence on Aboriginal Title

119 Despite the fact that the jurisprudence on aboriginal title is somewhat underdeveloped, it is clear that the uses to which lands held pursuant to aboriginal title can be put is not restricted to the practices, customs and traditions of aboriginal peoples integral to distinctive aboriginal cultures. In *Guerin*, for example, Dickson J. described aboriginal title as an "interest in land" which encompassed "a legal right to occupy and possess certain lands" (at p. 382). The "right to occupy and possess" is framed in broad terms and, significantly, is not qualified by reference to traditional and customary uses of those lands. Any doubt that the right to occupancy and possession encompasses a broad variety of uses of land was put to rest in *Paul*, where the Court went even further and stated that aboriginal title was "more than the right to enjoyment and occupancy" (at p. 678). Once again, there is no reference to aboriginal practices, customs and traditions as a qualifier on that right. Moreover, I take the reference to "more" as

Les intimés soutiennent que le titre aborigène comprend simplement le droit d'exercer des activités qui sont des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit, et que, tout au plus, le titre ajoute l'idée d'exclusivité, c'est-à-dire le droit exclusif d'utiliser à ces fins les terres visées. Cependant, les utilisations qui peuvent être faites des terres détenues en vertu d'un titre aborigène ne sont pas limitées de la sorte. Cette conclusion découle de trois sources: (i) la jurisprudence canadienne sur le titre aborigène; (ii) le rapport entre les terres de réserve et les terres détenues en vertu d'un titre aborigène; (iii) la *Loi sur le pétrole et le gaz des terres indiennes*, L.R.C. (1985), ch. I-7. En outre, même si ce fait n'est pas déterminant sur le plan juridique, cette conclusion est étayée par littérature doctrinale. En particulier, l'article du professeur McNeil intitulé «The Meaning of Aboriginal Title», *op. cit.*, m'a été très utile.

(i) La jurisprudence canadienne sur le titre aborigène

En dépit du fait que la jurisprudence sur le titre aborigène est en quelque sorte en cours d'élaboration, il est clair que les utilisations qui peuvent être faites des terres détenues en vertu d'un titre aborigène ne se limitent pas aux coutumes, pratiques et traditions d'un peuple autochtone et qui font partie intégrante de sa culture distinctive. Dans l'arrêt *Guerin*, précité, par exemple, le juge Dickson a qualifié le titre aborigène de «droit [. . .] sur [d]es terres» comprenant «le droit, en *common law*, d'occuper et de posséder certaines terres» (à la p. 382). Le «droit [. . .] d'occuper et de posséder» est exprimé en termes généraux et, fait important, n'est pas assorti d'une réserve le limitant aux utilisations traditionnelles et habituelles faites de ces terres. Tous les doutes qui pouvaient exister relativement à la question de savoir si le droit d'occuper et d'utiliser des terres vise un large éventail d'utilisations ont été dissipés dans l'arrêt *Paul*, précité, où notre Cour est allée encore plus loin et a déclaré que le titre aborigène était «quelque chose de plus

emphasis of the broad notion of use and possession.

(ii) Reserve Land

Another source of support for the conclusion that the uses to which lands held under aboriginal title can be put are not restricted to those grounded in practices, customs and traditions integral to distinctive aboriginal cultures can be found in *Guerin*, where Dickson J. stated at p. 379 that the same legal principles governed the aboriginal interest in reserve lands and lands held pursuant to aboriginal title:

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases. . . . [Emphasis added.]

The nature of the Indian interest in reserve land is very broad, and can be found in s. 18 of the *Indian Act*, which I reproduce in full:

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed

qu'un droit de jouissance et d'occupation» (à la p. 678). Une fois de plus, il n'est fait aucune mention de coutumes, pratiques et traditions autochtones en tant que limites à ce droit. De plus, je considère que l'emploi de l'expression «quelque chose de plus» fait ressortir le caractère général de la notion d'utilisation et de possession.

(ii) Les terres des réserves

L'arrêt *Guerin* est une autre source étayant la conclusion que les utilisations qui peuvent être faites des terres détenues en vertu d'un titre aborigène ne se limitent pas à celles fondées sur des coutumes, pratiques et traditions faisant partie intégrante de cultures distinctives autochtones. Dans cet arrêt, le juge Dickson a déclaré, à la p. 379, que les droits des autochtones sur les terres des réserves et leurs droits sur les terres détenues en vertu d'un titre aborigène sont régis par les mêmes principes juridiques:

À mon avis, il est sans importance que la présente espèce concerne le droit d'une bande indienne sur une réserve plutôt qu'un titre aborigène non reconnu sur des terres tribales traditionnelles. Le droit des Indiens sur les terres est le même dans les deux cas . . . [Je souligne.]

La nature du droit des Indiens sur les terres des réserves est très générale, et elle peut être dégagée de l'art. 18 de la *Loi sur les Indiens*, que je reproduis au complet:

18. (1) Sous réserve des autres dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; sous réserve des autres dispositions de la présente loi et des stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

(2) Le ministre peut autoriser l'utilisation de terres dans une réserve aux fins des écoles indiennes, de l'administration d'affaires indiennes, de cimetières indiens, de projets relatifs à la santé des Indiens, ou, avec le consentement du conseil de la bande, pour tout autre objet concernant le bien-être général de la bande, et il peut prendre toutes terres dans une réserve, nécessaires à ces fins, mais lorsque, immédiatement avant cette prise, un Indien particulier avait droit à la possession de ces terres, il doit être versé à cet Indien, pour un semblable

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between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct. [Emphasis added.]

The principal provision is s. 18(1), which states that reserve lands are held “for the use and benefit” of the bands which occupy them; those uses and benefits, on the face of the *Indian Act*, do not appear to be restricted to practices, customs and traditions integral to distinctive aboriginal cultures. The breadth of those uses is reinforced by s. 18(2), which states that reserve lands may be used “for any other purpose for the general welfare of the band”. The general welfare of the band has not been defined in terms of aboriginal practices, customs and traditions, nor in terms of those activities which have their origin pre-contact; it is a concept, by definition, which incorporates a reference to the present-day needs of aboriginal communities. On the basis of *Guerin*, lands held pursuant to aboriginal title, like reserve lands, are also capable of being used for a broad variety of purposes.

(iii) *Indian Oil and Gas Act*

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The third source for the proposition that the content of aboriginal title is not restricted to practices, customs and traditions which are integral to distinctive aboriginal cultures is the *Indian Oil and Gas Act*. The overall purpose of the statute is to provide for the exploration of oil and gas on reserve lands through their surrender to the Crown. The statute presumes that the aboriginal interest in reserve land includes mineral rights, a point which this Court unanimously accepted with respect to the *Indian Act* in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344. On the basis of *Guerin*, aboriginal title also encompass mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use

usage, une indemnité d’un montant dont peuvent convenir l’Indien et le ministre, ou, à défaut d’accord, qui peut être fixé de la manière que détermine ce dernier. [Je souligne.]

La disposition principale est le par. 18(1), qui indique que les terres des réserves sont détenues «à l’usage et au profit» des bandes qui les occupent; à la lecture de la *Loi sur les Indiens*, il ne semble pas que les utilisations et les avantages se limitent aux coutumes, pratiques et traditions faisant partie intégrante des cultures autochtones distinctives. Cette pluralité d’utilisations est renforcée par le par. 18(2), qui prévoit que les terres des réserves peuvent être utilisées «pour tout autre objet concernant le bien-être général de la bande». Le bien-être général de la bande n’a pas été défini en fonction des coutumes, pratiques et traditions autochtones, ni en fonction des activités dont l’origine remonte avant le contact avec les Européens; il s’agit d’un concept qui, par définition, fait référence aux besoins actuels des collectivités autochtones. Sur le fondement de l’arrêt *Guerin*, les terres détenues en vertu d’un titre aborigène, tout comme les terres des réserves, peuvent servir à un grand nombre d’utilisations.

(iii) *La Loi sur le pétrole et le gaz des terres indiennes*

La troisième source sur laquelle s’appuie l’énoncé que le contenu du titre aborigène ne se limite pas aux coutumes, pratiques et traditions faisant partie intégrante des cultures autochtones distinctives est la *Loi sur le pétrole et le gaz des terres indiennes*. L’objet général de cette loi est de permettre l’exploitation pétrolière et gazière sur les terres des réserves par la cession de ces terres à la Couronne. Cette loi présume que le droit des autochtones sur les terres des réserves comprend les droits miniers, point que notre Cour a accepté à l’unanimité relativement à la *Loi sur les Indiens*, dans l’arrêt *Bande indienne de la rivière Blueberry c. Canada (Ministère des Affaires indiennes et du Nord canadien)*, [1995] 4 R.C.S. 344. Sur le fondement de l’arrêt *Guerin*, le titre aborigène comprend également les droits miniers, et les terres détenues en vertu d’un titre aborigène devraient pouvoir être exploitées de la même façon, ce qui n’est certaine-

for those lands. This conclusion is reinforced by s. 6(2) of the Act, which provides:

6. . . .

(2) Nothing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.

The areas referred to in s. 6(2), at the very least, must encompass lands held pursuant to aboriginal title, since those lands by definition have not been surrendered under land claims agreements. The presumption underlying s. 6(2) is that aboriginal title permits the development of oil and gas reserves.

Although this is not determinative, the conclusion that the content of aboriginal title is not restricted to those uses with their origins in the practices, customs and traditions integral to distinctive aboriginal societies has wide support in the critical literature: Jocelyn Gagne, “The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim” (1982-83), 47 *Sask. L. Rev.* 309 at pp. 336-37; Kent McNeil, *Common Law Aboriginal Title*, *supra*, at p. 242; Kent McNeil, “The Meaning of Aboriginal Title”, *supra*, at pp. 143-150; William Pentney, “The Rights of the Aboriginal Peoples of Canada in the *Constitution Act*, 1982 Part II — Section 35: The Substantive Guarantee” (1988), 22 *U.B.C. L. Rev.* 207, at p. 221; *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (*Restructuring the Relationship*), at p. 561; Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1982-83), 8 *Queen’s L.J.* 232, at pp. 268-9; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983), at p. 34; Brian Slattery, “Understanding Aboriginal Rights”, 66 *Can. Bar Rev.* 727, at pp. 746-48.

In conclusion, the content of aboriginal title is not restricted to those uses which are elements of a practice, custom or tradition integral to the distinc-

ment pas une utilisation traditionnelle de ces terres. Cette conclusion est étayée par le par. 6(2) de la Loi, qui dispose:

6. . . .

(2) La présente loi n’a pas pour effet d’abroger les droits du peuple indien ou de l’empêcher de négocier l’obtention d’avantages pour le pétrole et le gaz dans les régions où les revendications de terres n’ont pas été réglées.

Les régions visées au par. 6(2) doivent à tout le moins comprendre les terres détenues en vertu d’un titre aborigène, étant donné que, par définition, ces terres n’ont pas été cédées dans le cadre d’accords sur des revendications territoriales. La présomption qui sous-tend le par. 6(2) est que le titre aborigène permet l’exploitation de réserves pétrolières et gazières.

Même si ce fait n’est pas déterminant, la conclusion que le contenu du titre aborigène ne se limite pas aux utilisations dont les origines remontent aux coutumes, pratiques et traditions faisant partie intégrante de sociétés autochtones distinctives jouit d’un vaste appui dans la doctrine: Jocelyn Gagne, «The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim» (1982-83), 47 *Sask. L. Rev.* 309, aux pp. 336 et 337; Kent McNeil, *Common Law Aboriginal Title*, *op. cit.*, à la p. 242; Kent McNeil, «The Meaning of Aboriginal Title», *op. cit.*, aux pp. 143 à 150; William Pentney, «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act*, 1982 Part II — Section 35: The Substantive Guarantee» (1988), 22 *U.B.C. L. Rev.* 207, à la p. 221; *Rapport de la Commission royale sur les peuples autochtones*, vol. 2 (*Une relation à redéfinir*), à la p. 624; Brian Slattery, «The Constitutional Guarantee of Aboriginal and Treaty Rights» (1982-83), 8 *Queen’s L.J.* 232, aux pp. 268 et 269; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983), à la p. 34; Brian Slattery, «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727, aux pp. 746 à 748.

En conclusion, le contenu du titre aborigène ne se limite pas aux utilisations qui sont des éléments d’une coutume, pratique ou tradition faisant partie

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tive culture of the aboriginal group claiming the right. However, nor does aboriginal title amount to a form of inalienable fee simple, as I will now explain.

- (c) *Inherent Limit: Lands Held Pursuant to Aboriginal Title Cannot Be Used in a Manner that Is Irreconcilable with the Nature of the Attachment to the Land Which Forms the Basis of the Group's Claim to Aboriginal Title*

125 The content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands. This limit on the content of aboriginal title is a manifestation of the principle that underlies the various dimensions of that special interest in land — it is a *sui generis* interest that is distinct from “normal” proprietary interests, most notably fee simple.

126 I arrive at this conclusion by reference to the other dimensions of aboriginal title which are *sui generis* as well. I first consider the source of aboriginal title. As I discussed earlier, aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

intégrante de la culture distinctive du groupe autochtone qui revendique le droit en question. Toutefois, comme je vais maintenant l'expliquer, le titre aborigène n'équivaut pas non plus à une forme de fief simple inaliénable.

- c) *Limite intrinsèque: les terres détenues en vertu d'un titre aborigène ne peuvent pas être utilisées d'une manière incompatible avec la nature de l'attachement qu'a le groupe autochtone concerné pour le territoire et qui est à la base de sa revendication du titre aborigène*

Le contenu du titre aborigène comporte une limite intrinsèque, savoir que les terres détenues en vertu d'un titre aborigène ne peuvent pas être utilisées d'une manière incompatible avec la nature de l'attachement qu'ont les revendicateurs pour ces terres. Cette limite au contenu du titre aborigène est une manifestation du principe qui sous-tend les différentes dimensions de ce droit foncier spécial, il s'agit d'un droit *sui generis* qui est différent des intérêts de propriété «ordinaires», en particulier le fief simple.

J'arrive à cette conclusion en me référant aux autres dimensions du titre aborigène qui ont également un caractère *sui generis*. Je vais examiner d'abord l'origine du titre aborigène. Comme je l'ai indiqué plus haut, le titre aborigène découle du fait que le Canada a d'abord été occupé par les peuples autochtones. Cette occupation antérieure est pertinente à deux égards: premièrement en raison du fait physique de l'occupation, et deuxièmement pour le motif que le titre aborigène tire en partie son origine des régimes juridiques autochtones préexistants. Toutefois, le droit relatif au titre aborigène ne cherche pas seulement à définir les droits historiques des peuples autochtones sur le territoire; il vise aussi à accorder, de nos jours, une protection juridique à cette occupation antérieure. La reconnaissance de l'importance de la continuité du rapport qu'une collectivité autochtone entretient avec ses terres au fil des ans ressort implicitement de la protection des modalités historiques de l'occupation.

I develop this point below with respect to the test for aboriginal title. The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.

Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. As discussed below, one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).

Je vais expliciter ce point plus loin, dans l'examen du critère applicable pour faire la preuve du titre aborigène. En l'espèce, la pertinence de la continuité du rapport qu'entretient une collectivité autochtone avec ses terres réside dans le fait que ce rapport s'applique non seulement au passé mais aussi à l'avenir. Rien ne devrait empêcher ce rapport de continuer dans le futur. Il s'ensuit que les utilisations des terres qui menaceraient ce rapport futur sont, de par leur nature même, exclues du contenu du titre aborigène.

Par conséquent, les terres visées par un titre aborigène ne peuvent pas, selon moi, être utilisées à des fins incompatibles avec la nature de l'occupation de ces terres et avec le rapport que le groupe concerné entretient avec celles-ci, facteurs qui, ensemble, ont donné naissance au titre aborigène en premier lieu. Comme nous le verrons plus loin, l'un des éléments fondamentaux qui permettent de déterminer si un groupe autochtone donné possède un titre aborigène sur certaines terres est la question de l'occupation de celles-ci. L'occupation est définie en fonction des activités qui ont été exercées sur les terres et des utilisations qui ont été faites de celles-ci par le groupe en question. Si des terres font l'objet d'une telle occupation, il existera entre ce groupe et les terres visées un lien spécial tel que les terres feront partie intégrante de la définition de la culture distinctive du groupe. Il me semble que ces éléments du titre aborigène créent une limite intrinsèque aux utilisations qui peuvent être faites des terres visées par un tel titre. Par exemple, si on fait la preuve de l'occupation par référence à l'utilisation des terres comme territoire de chasse, alors le groupe qui a revendiqué avec succès le titre aborigène sur ces terres ne peut pas les utiliser d'une manière qui anéantisse leur valeur pour cette utilisation (p. ex. en les exploitant en tant que mine à ciel ouvert). De même, si un groupe affirme l'existence d'un lien spécial avec les terres visées en raison de leur importance culturelle ou rituelle, il ne peut pas les utiliser d'une manière qui anéantisse ce rapport (p. ex. en les exploitant d'une façon qui entraîne la destruction du lien, peut-être en les transformant en terrain de stationnement).

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It is for this reason also that lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. I have suggested above that the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy “to ensure that Indians are not dispossessed of their entitlements”: see *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 133. What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.

C’est également pour cette raison que les terres détenues en vertu d’un titre aborigène sont inaliénables. L’aliénation des terres en question éteindrait le droit des autochtones de les occuper et mettrait fin au rapport qu’ils entretiennent avec celles-ci. J’ai indiqué précédemment que l’inaliénabilité des terres indiennes découle, du moins en partie, du principe de common law selon lequel les personnes qui s’établissent dans une colonie doivent obtenir leur titre par voie de concession de la Couronne et que, par conséquent, elles ne peuvent pas l’acquérir en l’achetant à des autochtones. L’inaliénabilité découle également, une fois de plus en partie seulement, de la politique générale qui consiste à «veiller à ce que ceux-ci [les Indiens] ne soient pas dépouillés de leurs droits»: voir *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85, à la p. 133. L’inaliénabilité des terres détenues en vertu d’un titre aborigène indique que ces terres sont quelque chose de plus qu’un simple bien fungible. Le rapport qu’entretient une collectivité autochtone avec les terres sur lesquelles elle possède un titre aborigène comporte un aspect important de nature non économique. Les terres en elles-mêmes ont une valeur intrinsèque et unique dont jouit la collectivité qui possède le titre aborigène sur celles-ci. La collectivité ne peut pas faire de ces terres des utilisations qui détruiraient cette valeur.

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I am cognizant that the *sui generis* nature of aboriginal title precludes the application of “traditional real property rules” to elucidate the content of that title (*St. Mary’s Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at para. 14). Nevertheless, a useful analogy can be drawn between the limit on aboriginal title and the concept of equitable waste at common law. Under that doctrine, persons who hold a life estate in real property cannot commit “wanton or extravagant acts of destruction” (E. H. Burn, *Cheshire and Burn’s Modern Law of Real Property* (14th ed. 1988), at p. 264) or “ruin the property” (Robert E. Megarry and H. W. R. Wade, *The Law of Real Property* (4th ed. 1975), at p. 105). This description of the limits

Je suis conscient du fait que le caractère *sui generis* du titre aborigène ne permet pas d’appliquer les «règles traditionnelles du droit des biens» pour expliquer le contenu de ce titre (*Bande indienne de St. Mary’s c. Cranbrook (Ville)*, [1997] 2 R.C.S. 657, au par. 14). Malgré tout, il est possible de faire une analogie utile entre la limite applicable au titre aborigène et le concept de dégradation en *equity* que l’on retrouve en common law. Selon ce concept, les personnes qui sont titulaires d’un domaine viager ne peuvent pas y commettre d’[TRADUCTION] «actes de destruction injustifiés ou excessifs» (E. H. Burn, *Cheshire and Burn’s Modern Law of Real Property* (14^e éd. 1988), à la p. 264), ni [TRADUCTION] «ruiner le bien-fonds» (Robert E. Megarry et H. W. R. Wade, *The Law of Real Property* (4^e éd. 1975), à la p. 105). Cette description des limites imposées par le concept de

imposed by the doctrine of equitable waste capture the kind of limit I have in mind here.

Finally, what I have just said regarding the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited in the way I have described. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

The foregoing amounts to a general limitation on the use of lands held by virtue of aboriginal title. It arises from the particular physical and cultural relationship that a group may have with the land and is defined by the source of aboriginal title over it. This is not, I must emphasize, a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land.

(d) *Aboriginal Title under s. 35(1) of the Constitution Act, 1982*

Aboriginal title at common law is protected in its full form by s. 35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (emphasis added). On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were “existing” in 1982. The provision, at the very least, constitutionalized those rights which aborigi-

dégradation en *equity* illustre bien le genre de limites auxquelles je pense en l’espèce.

Enfin, les remarques que je viens de faire au sujet de l’importance de la continuité du rapport qu’entretient une collectivité autochtone avec ses terres, et la valeur non économique ou intrinsèque de celles-ci ne devraient pas être considérées comme faisant obstacle à la possibilité d’une cession à la Couronne moyennant contrepartie de valeur. Au contraire, l’idée de cession renforce la conclusion que le titre aborigène est limité de la manière que j’ai décrite. Si les autochtones désirent utiliser leurs terres d’une manière que ne permet pas le titre aborigène, ils doivent alors les céder et les convertir en terres non visées par un titre aborigène.

Ce qui précède équivaut à une limitation générale de l’utilisation des terres détenues en vertu d’un titre aborigène. Cette limite découle du rapport physique et culturel particulier qu’un groupe peut entretenir avec les terres, et elle est définie par la source du titre aborigène sur ces terres. Il ne s’agit pas, je dois le souligner, d’une limite qui restreint l’utilisation des terres aux activités qui y ont traditionnellement été exercées. Cela reviendrait, sur le plan juridique, à placer dans un carcan juridique les autochtones qui ont un droit légitime sur les terres. L’approche que je viens d’exposer permet un éventail complet d’utilisations des terres, sous réserve seulement d’une limite dominante, définie par la nature spéciale du titre aborigène sur les terres en question.

d) *Le titre aborigène visé au par. 35(1) de la Loi constitutionnelle de 1982*

Le titre aborigène en common law est protégé, dans sa forme complète, par le par. 35(1). Cette conclusion découle des termes exprès du par. 35(1) lui-même, dont le texte complet est ainsi rédigé: «[l]es droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés» (je souligne). Il ressort de la simple lecture du par. 35(1) que cette disposition n’a pas créé de droits ancestraux, mais qu’elle a plutôt constitutionnalisé ceux qui étaient «existants» en 1982. Cette disposition a, à tout le moins,

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nal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g., *Calder, supra*), s. 35(1) has constitutionalized it in its full form.

constitutionnalisés les droits que les peuples autochtones possédaient en common law, étant donné que ces droits existaient au moment de l'entrée en vigueur du par. 35(1). Comme le titre aborigène était un droit issu de la common law et dont l'existence a été reconnue bien avant 1982 (p. ex. dans *Calder*, précité), le par. 35(1) l'a constitutionnalisé dans sa forme complète.

134 I expressed this understanding of the relationship between common law aboriginal rights, including aboriginal title, and the aboriginal rights protected by s. 35(1) in *Van der Peet*. While explaining the purposes behind s. 35(1), I stated that "it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law" (at para. 28). Through the enactment of s. 35(1), "a pre-existing legal doctrine was elevated to constitutional status" (at para. 29), or in other words, s. 35(1) had achieved "the constitutionalization of those rights" (at para. 29).

J'ai exprimé cette conception du rapport qui existe entre les droits ancestraux reconnus en common law, y compris le titre aborigène, et les droits ancestraux protégés par le par. 35(1) dans l'arrêt *Van der Peet*. Pour expliquer l'objet du par. 35(1), j'ai dit qu'il ne faut pas oublier que le par. 35(1) n'a pas créé la doctrine juridique des droits ancestraux. En effet, ces droits existaient déjà et ils étaient reconnus en common law» (au par. 28). Par suite de l'édiction du par. 35(1), «une doctrine juridique préexistante s'est vue conférer un statut constitutionnel» (au par. 29); en d'autres termes, le par. 35(1) a réalisé «la constitutionnalisation de [ces droits]» (au par. 29).

135 Finally, this view of the effect of s. 35(1) on common law aboriginal title is supported by numerous commentators: Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 *McGill L.J.* 382, at pp. 447-48; Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *Sup. Ct. L. Rev.* 255, at pp. 256-57; James O'Reilly, "La Loi constitutionnelle de 1982, droit des autochtones" (1984), 25 *C. de D.* 125, at p. 137; William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II — Section 35: The Substantive Guarantee", *supra*, at pp. 220-21; Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314, at p. 329; Douglas Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada", in Gerald-A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 707, at pp. 731-32; Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", *supra*, at p. 254; Brian Slattery, *Ancestral Lands*,

En dernier lieu, de nombreux commentateurs souscrivent à cette façon de voir l'effet du par. 35(1) sur le titre aborigène reconnu en common law: Patrick Macklem, «First Nations Self-Government and the Borders of the Canadian Legal Imagination» (1991), 36 *R.D. McGill* 382, aux pp. 447 et 448; Kent McNeil, «The Constitutional Rights of the Aboriginal Peoples of Canada» (1982), 4 *Sup. Ct. L. Rev.* 255, aux pp. 256 et 257; James O'Reilly, «La Loi constitutionnelle de 1982, droit des autochtones» (1984), 25 *C. de D.* 125, à la p. 137; William Pentney, «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II — Section 35: The Substantive Guarantee», *loc. cit.*, aux pp. 220 et 221; Douglas Sanders, «The Rights of the Aboriginal Peoples of Canada» (1983), 61 *R. du B. can.* 314, à la p. 329; Douglas Sanders, «Les droits préexistants: les peuples autochtones du Canada», dans Gerald-A. Beaudoin et Ed Ratushny, dir., *Charte canadienne des droits et libertés* (2^e éd. 1989), 779, aux pp. 809 à 811; Brian Slattery, «The Constitutional Guarantee of Aboriginal and Treaty Rights», *loc.*

Alien Laws: Judicial Perspectives on Aboriginal Title, *supra*, at p. 45.

I hasten to add that the constitutionalization of common law aboriginal rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1). As I said in *Côté*, *supra*, at para. 52:

Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers.

I relied on this proposition in *Côté* to defeat the argument that the possible absence of aboriginal rights under French colonial law was a bar to the existence of aboriginal rights under s. 35(1) within the historic boundaries of New France. But it also follows that the existence of a particular aboriginal right at common law is not a *sine qua non* for the proof of an aboriginal right that is recognized and affirmed by s. 35(1). Indeed, none of the decisions of this Court handed down under s. 35(1) in which the existence of an aboriginal right has been demonstrated has relied on the existence of that right at common law. The existence of an aboriginal right at common law is therefore sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1).

The acknowledgement that s. 35(1) has accorded constitutional status to common law aboriginal title raises a further question — the relationship of aboriginal title to the “aboriginal rights” protected by s. 35(1). I addressed that question in *Adams*, *supra*, where the Court had been presented with two radically different conceptions of this relationship. The first conceived of aboriginal rights as being “inherently based in aboriginal title to the land” (at para. 25), or as fragments of a broader claim to aboriginal title. By implication, aboriginal rights must rest either in a claim to title or the unextinguished remnants of title. Taken to

cit., à la p. 254; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, *op. cit.*, à la p. 45.

Je m’empresse d’ajouter que la constitutionnalisation par le par. 35(1) des droits ancestraux reconnus en common law ne signifie pas que ces droits épuisent le contenu de cette disposition. Comme je l’ai dit dans *Côté*, précité, au par. 52:

Le noble objet visé par le par. 35(1), savoir la préservation des caractéristiques déterminantes qui font partie intégrante des sociétés autochtones distinctives, ne saurait être réalisé s’il ne protégeait que les caractéristiques déterminantes dont le sort a bien voulu qu’elles soient reconnues légalement par les colonisateurs européens.

Dans *Côté*, je me suis fondé sur cette affirmation pour réfuter l’argument selon lequel l’absence possible de droits ancestraux dans le droit colonial français faisait obstacle à l’existence de droits ancestraux au sens du par. 35(1) à l’intérieur des frontières historiques de la Nouvelle-France. Toutefois, il s’ensuit également que l’existence d’un droit ancestral particulier reconnu en common law n’est pas un préalable essentiel pour prouver l’existence d’un droit ancestral reconnu et confirmé par le par. 35(1). De fait, aucune des décisions qui ont été rendues par notre Cour relativement au par. 35(1) et dans lesquelles l’existence d’un droit ancestral a été démontrée n’a invoqué l’existence de ce droit en common law. L’existence d’un droit ancestral reconnu en common law est donc suffisante, mais pas nécessaire, pour la reconnaissance et la confirmation de ce droit par le par. 35(1).

La reconnaissance du fait que le par. 35(1) a constitutionnalisé le titre aborigène reconnu en common law soulève une autre question, celle du rapport qui existe entre le titre aborigène et les «droits ancestraux» protégés par le par. 35(1). J’ai examiné cette question dans l’arrêt *Adams*, précité, où deux conceptions diamétralement opposées de ce rapport avaient été soumises à notre Cour. La première présentait les droits ancestraux comme des droits qui «se rattachent intrinsèquement au titre aborigène sur le territoire visé» (au par. 25), ou comme des fragments d’une revendication plus large visant le titre aborigène. Par implication, les

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its logical extreme, this suggests that aboriginal title is merely the sum of a set of individual aboriginal rights, and that it therefore has no independent content. However, I rejected this position for another — that aboriginal title is “simply one manifestation of a broader-based conception of aboriginal rights” (at para. 25). Thus, although aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land “was of a central significance to their distinctive culture” (at para. 26).

droits ancestraux doivent reposer soit sur la revendication d’un titre, soit sur les restes non éteints d’un titre. Poussé à son extrême, ce raisonnement suggère que le titre aborigène est simplement la somme d’un ensemble de droits ancestraux individuels, et qu’il n’a donc aucun contenu indépendant. J’ai toutefois rejeté cette conception et retenu l’autre, savoir que le titre aborigène n’est «que la manifestation d’une conception plus large des droits ancestraux» (au par. 25). Par conséquent, bien que le titre aborigène soit un type de droit ancestral reconnu et confirmé par le par. 35(1), il est distinct des autres droits ancestraux parce qu’il naît lorsque le rapport entre un territoire et un groupe «avait, pour sa culture distinctive, une importance fondamentale» (au par. 26).

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The picture which emerges from *Adams* is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the “occupation and use of the land” where the activity is taking place is not “sufficient to support a claim of title to the land” (at para. 26 (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. I put the point this way in *Adams*, at para. 30:

Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to,

Il ressort de l’arrêt *Adams* que les droits ancestraux qui sont reconnus et confirmés par le par. 35(1) s’étalent le long d’un spectre, en fonction de leur degré de rattachement avec le territoire visé. À une extrémité du spectre, il y a les droits ancestraux qui sont des coutumes, pratiques et traditions faisant partie intégrante de la culture autochtone distinctive du groupe qui revendique le droit en question. Toutefois, le fait que le territoire sur lequel l’activité est pratiquée a été «occupé et utilisé» ne suffit pas «pour étayer la revendication du titre sur celui-ci» (au par. 26 (souligné dans l’original)). Néanmoins, ces activités bénéficient de la protection de la Constitution. Au milieu du spectre, on trouve les activités qui, par nécessité, sont pratiquées sur le territoire et, de fait, pourraient même être étroitement rattachées à une parcelle de terrain particulière. Bien qu’un groupe autochtone puisse être incapable de démontrer l’existence d’un titre sur le territoire, il peut quand même avoir le droit — spécifique à un site — de s’adonner à une activité particulière. J’ai présenté la chose de la façon suivante dans l’arrêt *Adams* (au par. 30):

En effet, même si un droit ancestral s’attache à une parcelle de terrain dont le titre n’appartient pas au peuple autochtone concerné, ce droit peut fort bien être spécifique à un site et, en conséquence, ne pouvoir être exercé que sur cette parcelle de terrain spécifique. Par exemple, si un peuple autochtone établit que la chasse sur une parcelle de terrain spécifique faisait partie intégrante de sa culture distinctive à l’époque, le droit de chasse ancestral — même s’il existe indépendamment

the right to hunt on the specific tract of land. [Emphasis added.]

At the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.

Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities. As I explained in *Adams*, this may occur in the case of nomadic peoples who varied “the location of their settlements with the season and changing circumstances” (at para. 27). The fact that aboriginal peoples were non-sedentary, however (at para. 27)

does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures.

(e) *Proof of Aboriginal Title*

(i) Introduction

In addition to differing in the degree of connection with the land, aboriginal title differs from other aboriginal rights in another way. To date, the Court has defined aboriginal rights in terms of activities. As I said in *Van der Peet* (at para. 46):

[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to

du titre sur cette parcelle de terrain — est néanmoins défini comme étant le droit de chasser sur cette parcelle spécifique, et il se limite à cela. [Je souligne.]

À l’autre extrémité du spectre, il y a le titre aborigène proprement dit. Ainsi qu’il ressort clairement de l’arrêt *Adams*, le titre aborigène confère quelque chose de plus que le droit d’exercer des activités spécifiques à un site qui sont des aspects de coutumes, pratiques et traditions de cultures autochtones distinctives. L’existence de droits spécifiques à un site peut être établie même si l’existence d’un titre ne peut pas l’être. Ce que le titre aborigène confère c’est le droit au territoire lui-même.

Étant donné que les droits ancestraux peuvent varier en fonction de leur degré de rattachement au territoire, il est possible que certains groupes autochtones soient incapables d’établir le bien-fondé de leur revendication d’un titre, mais qu’ils possèdent néanmoins des droits ancestraux reconnus et confirmés par le par. 35(1), notamment des droits — spécifiques à un site — d’exercer des activités particulières. Comme je l’ai expliqué dans *Adams*, cela peut se produire dans le cas de peuples nomades qui changeaient «l’emplacement de leurs établissements [...] en fonction des saisons et des circonstances» (au par. 27). Toutefois, le fait que des peuples autochtones n’étaient pas sédentaires (au par. 27)

ne change rien au fait que les peuples nomades ont survécu en exploitant le territoire avant le contact avec les Européens, et que bon nombre des coutumes, pratiques et traditions observées par ces peuples nomades sur le territoire en question faisaient partie intégrante de leur culture distinctive.

e) *La preuve de l’existence d’un titre aborigène*

(i) Introduction

En plus de différer des autres droits ancestraux quant au degré de rattachement avec le territoire, le titre aborigène se distingue de ceux-ci d’une autre façon. Jusqu’à maintenant, la Cour a défini les droits ancestraux par rapport à des activités. Comme je l’ai dit dans *Van der Peet* (au par. 46):

[P]our constituer un droit ancestral, une activité doit être un élément d’une coutume, pratique ou tradition faisant

the distinctive culture of the aboriginal group claiming the right. [Emphasis added.]

Aboriginal title, however, is a right to the land itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title.

141 This difference between aboriginal rights to engage in particular activities and aboriginal title requires that the test I laid down in *Van der Peet* be adapted accordingly. I anticipated this possibility in *Van der Peet* itself, where I stated that (at para. 74):

Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights. [Emphasis added; "and" emphasized in original.]

Since the purpose of s. 35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that s. 35(1) must recognize and affirm both aspects of that prior presence — first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land. To date the jurisprudence under s. 35(1) has given more emphasis to the second aspect. To a great extent, this has been a function of the types of cases which have come before this Court under s. 35(1) — prosecutions for regulatory offences that, by their very nature, proscribe discrete types of activity.

partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit en question. [Je souligne.]

Or le titre aborigène est le droit au territoire lui-même. Sous réserve des limites que j'ai exposées précédemment, ce territoire peut être utilisé pour diverses activités, dont aucune ne doit nécessairement être protégée individuellement en tant que droit ancestral prévu au par. 35(1). Ces activités sont des parasites du titre sous-jacent.

Cette différence entre les droits ancestraux autorisant l'exercice d'activités particulières et le titre aborigène exige l'adaptation, en conséquence, du critère que j'ai exposé dans *Van der Peet*. J'ai prévu cette possibilité dans cet arrêt, où j'ai déclaré (au par. 74):

Les droits ancestraux découlent non seulement de l'occupation antérieure du territoire, mais aussi de l'organisation sociale antérieure et des cultures distinctives des peuples autochtones habitant ce territoire. Pour déterminer si le bien-fondé de la revendication d'un droit ancestral a été établi, les tribunaux doivent considérer et les rapports qu'entretient le demandeur autochtone avec le territoire et les coutumes, pratiques et traditions de la société à laquelle il appartient et de la culture distinctive de cette société. Ils ne doivent pas se concentrer sur les rapports qu'entretiennent les peuples autochtones avec le territoire au point de négliger les autres facteurs pertinents pour l'identification et la définition des droits ancestraux. [Je souligne; «et» souligné dans l'original.]

Comme l'objet du par. 35(1) est de concilier la présence antérieure des peuples autochtones en Amérique du Nord avec l'affirmation de la souveraineté de la Couronne, il ressort clairement de cet énoncé que le par. 35(1) doit reconnaître et confirmer les deux aspects de cette préexistence, savoir l'occupation du territoire, d'une part, et l'organisation sociale antérieure et les cultures distinctives des peuples autochtones habitant ce territoire, d'autre part. Jusqu'à ce jour, la jurisprudence relative au par. 35(1) a surtout insisté sur le deuxième aspect. Cette situation est dans une large mesure attribuable aux genres d'affaires qui ont été soumises à notre Cour dans le contexte du par. 35(1), savoir des poursuites intentées relativement à des infractions réglementaires qui, de par leur nature même, interdisent divers types d'activités.

The adaptation of the test laid down in *Van der Peet* to suit claims to title must be understood as the recognition of the first aspect of that prior presence. However, as will now become apparent, the tests for the identification of aboriginal rights to engage in particular activities and for the identification of aboriginal title share broad similarities. The major distinctions are first, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy, and second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.

(ii) The Test for the Proof of Aboriginal Title

In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

The land must have been occupied prior to sovereignty

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. The relevant time period for the establishment of title is, therefore, different than for the establishment of aboriginal rights to engage in specific activities. In *Van der Peet*, I held, at para. 60 that “[t]he time period that

L’adaptation du critère établi dans l’arrêt *Van der Peet* en vue de son application aux revendications de titre doit également être considérée comme la reconnaissance du premier aspect de cette présence antérieure. Toutefois, comme il deviendra maintenant évident, le critère applicable pour déterminer l’existence de droits ancestraux autorisant l’exercice d’activités particulières et le critère applicable pour déterminer l’existence d’un titre aborigène comportent de grandes similitudes. Par ailleurs, voici quelles sont les principales distinctions: premièrement, dans le cadre du critère relatif au titre aborigène, l’exigence que le territoire fasse partie intégrante de la culture distincte des demandeurs est subsumée sous l’exigence d’occupation; deuxièmement, alors que c’est le moment du premier contact avec les Européens qui est le moment pertinent pour la détermination des droits ancestraux, dans le cas du titre aborigène, c’est le moment de l’affirmation par la Couronne de sa souveraineté sur le territoire.

(ii) Le critère applicable pour prouver l’existence d’un titre aborigène

Pour établir le bien-fondé de la revendication d’un titre aborigène, le groupe autochtone qui revendique ce titre doit satisfaire aux exigences suivantes: (i) il doit avoir occupé le territoire avant l’affirmation de la souveraineté; (ii) si l’occupation actuelle est invoquée comme preuve de l’occupation avant l’affirmation de la souveraineté, il doit exister une continuité entre l’occupation actuelle et l’occupation antérieure à l’affirmation de la souveraineté; (iii) au moment de l’affirmation de la souveraineté, cette occupation doit avoir été exclusive.

Le territoire doit avoir été occupé avant l’affirmation de la souveraineté

Pour établir le bien-fondé de la revendication d’un titre aborigène, le groupe autochtone qui revendique le titre doit démontrer qu’il occupait les terres en question au moment où la Couronne a affirmé sa souveraineté sur ces terres. La période pertinente pour établir l’existence du titre est donc différente de celle qui s’applique pour établir l’existence de droits ancestraux autorisant l’exercice d’activités précises. Dans *Van der Peet*, j’ai

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a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact . . .” This arises from the fact that in defining the central and distinctive attributes of pre-existing aboriginal societies it is necessary to look to a time prior to the arrival of Europeans. Practices, customs or traditions that arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights.

statué, au par. 60, que «[l]a période que doit prendre en considération le tribunal pour décider si le droit revendiqué satisfait au critère de la partie intégrante de la culture distinctive de la collectivité autochtone qui revendique le droit en cause est la période qui a précédé le contact . . .» Cela découle du fait que pour définir les attributs fondamentaux et distinctifs des sociétés autochtones préexistantes, il faut se reporter à une époque antérieure à l’arrivée des Européens. Les pratiques, coutumes et traditions qui ont pris naissance uniquement sous l’effet des influences européennes ne satisfont pas à la norme établie pour la reconnaissance des droits ancestraux.

¹⁴⁵ On the other hand, in the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown’s underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans. Finally, from a practical standpoint, it appears that the date of sovereignty is more certain than the date of first contact. It is often very difficult to determine the precise moment that each aboriginal group had first contact with European culture. I note that this is the approach has support in the academic literature: Brian Slattery, “Understanding Aboriginal Rights”, *supra*, at p. 742; Kent McNeil, *Common Law Aboriginal Title*, *supra*, at p. 196. For these reasons, I conclude that aboriginals must establish occupation of the land

Par contre, lorsqu’il est question de titre aborigène, la période de l’affirmation de la souveraineté est celle qui doit être prise en considération, et ce pour plusieurs raisons. Premièrement, d’un point de vue théorique, le titre aborigène découle de l’occupation antérieure du territoire par les peuples autochtones et du rapport entre la common law et les régimes juridiques autochtones préexistants. Le titre aborigène grève le titre sous-jacent de la Couronne. Cependant, celle-ci n’a acquis ce titre qu’à compter du moment où elle a affirmé sa souveraineté sur le territoire en question. Étant donné qu’il serait absurde de parler d’une charge grevant le titre sous-jacent avant que celui-ci ait existé, le titre aborigène s’est cristallisé au moment de l’affirmation de la souveraineté. Deuxièmement, le titre aborigène ne soulève pas le problème que pose la distinction entre les coutumes, pratiques et traditions distinctives faisant partie intégrante d’une société autochtone et celles qui ont été introduites par suite du contact avec les Européens ou influencées par celui-ci. En vertu de la common law, le fait de l’occupation ou de la possession suffit pour fonder un titre aborigène, et il n’est pas nécessaire de prouver que le territoire en question faisait partie intégrante de la société autochtone visée avant l’arrivée des Européens ou qu’il était un élément distinctif de celle-ci. Finalement, il semble, d’un point de vue pratique, que la date de l’affirmation de la souveraineté ait un caractère plus certain que celle du premier contact avec les Européens. Il est souvent très difficile de déterminer à quel moment précis chaque groupe autoch-

from the date of the assertion of sovereignty in order to sustain a claim for aboriginal title. McEachern C.J. found, at pp. 233-34, and the parties did not dispute on appeal, that British sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty of 1846. This is not to say that circumstances subsequent to sovereignty may never be relevant to title or compensation; this might be the case, for example, where native bands have been dispossessed of traditional lands after sovereignty.

There was a consensus among the parties on appeal that proof of historic occupation was required to make out a claim to aboriginal title. However, the parties disagreed on how that occupancy could be proved. The respondents assert that in order to establish aboriginal title, the occupation must be the physical occupation of the land in question. The appellant Gitksan nation argue, by contrast, that aboriginal title may be established, at least in part, by reference to aboriginal law.

This debate over the proof of occupancy reflects two divergent views of the source of aboriginal title. The respondents argue, in essence, that aboriginal title arises from the physical reality at the time of sovereignty, whereas the Gitksan effectively take the position that aboriginal title arises from and should reflect the pattern of land holdings under aboriginal law. However, as I have explained above, the source of aboriginal title appears to be grounded both in the common law

tone est pour la première fois entré en contact avec la culture européenne. Je note que cette approche trouve appui dans la doctrine: Brian Slattery, «Understanding Aboriginal Rights», *loc. cit.*, à la p. 742; Kent McNeil, *Common Law Aboriginal Title*, *op. cit.*, à la p. 196. Pour ces motifs, je conclus que les autochtones doivent prouver l'occupation du territoire à partir de l'affirmation de la souveraineté pour fonder la revendication d'un titre aborigène. Le juge en chef McEachern a conclu, aux pp. 233 et 234, que la date de l'affirmation de la souveraineté britannique sur la Colombie-Britannique avait été établie de façon concluante par le traité Oregon de 1846, conclusion que les parties n'ont pas contestée en appel. Cela ne veut pas dire que des circonstances ultérieures à l'affirmation de la souveraineté ne seront jamais pertinentes pour ce qui est du titre ou de l'indemnité. De telles circonstances pourraient l'être, par exemple dans le cas de bandes autochtones qui auraient été dépossédées de terres traditionnelles après l'affirmation de la souveraineté.

Il y avait un consensus entre les parties au présent pourvoi sur le fait que la preuve de l'occupation historique du territoire visé est requise pour établir le bien-fondé de la revendication d'un titre aborigène sur celui-ci. Toutefois, les parties ne se sont pas entendues sur la façon de prouver cette occupation. Les intimés soutiennent que, en ce qui concerne l'établissement de l'existence d'un titre aborigène, l'occupation s'entend nécessairement de l'occupation physique du territoire en question. À l'opposé, la nation Gitksan appelante prétend qu'il est possible, du moins en partie, d'établir l'existence d'un titre aborigène en se référant aux règles de droit autochtones.

Ce débat sur la preuve de l'occupation témoigne de l'existence de deux conceptions divergentes de l'origine du titre aborigène. Essentiellement, les intimés soutiennent que le titre aborigène découle de la réalité physique qu'ont rencontrée les Européens au moment de l'affirmation de la souveraineté, tandis que la nation Gitksan adopte en fait le point de vue que le titre aborigène découle des modes de possession foncière prévus par les règles de droit autochtones et qu'il devrait refléter ces

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and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy. Indeed, there is precedent for doing so. In *Baker Lake*, *supra*, Mahoney J. held that to prove aboriginal title, the claimants needed both to demonstrate their “physical presence on the land they occupied” (at p. 561) and the existence “among [that group of] . . . a recognition of the claimed rights. . . by the regime that prevailed before” (at p. 559).

modes de possession. Toutefois, comme je l’ai expliqué précédemment, l’origine du titre aborigène semble reposer tant sur la common law que sur le point de vue des autochtones à l’égard du territoire, point de vue qui tient compte notamment de leurs régimes juridiques. Il s’ensuit que ces deux éléments devraient être pris en compte dans la démonstration de l’occupation. De fait, il existe un précédent à cet égard. Dans l’affaire *Baker Lake*, précitée, le juge Mahoney a statué que, pour établir l’existence d’un titre aborigène, les requérants devaient prouver leur «présence physique [. . .] sur la terre qu’ils occupaient» (à la p. 561) et l’existence «chez [ce groupe] [d’]une perception des droits réclamés [. . .] [qui] recevai[t] effet au cours du régime qui prévalait antérieurement» (à la p. 559).

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This approach to the proof of occupancy at common law is also mandated in the context of s. 35(1) by *Van der Peet*. In that decision, as I stated above, I held at para. 50 that the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the “aboriginal perspective while at the same time taking into account the perspective of the common law” and that “[t]rue reconciliation will, equally, place weight on each”. I also held that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.

L’arrêt *Van der Peet* commande également cette approche relative à la preuve de l’occupation en common law dans le contexte du par. 35(1). Dans cette décision, comme je l’ai dit précédemment, j’ai statué, au par. 50 que, pour concilier l’occupation antérieure de l’Amérique du Nord par les peuples autochtones avec l’affirmation de la souveraineté de la Couronne, il fallait tenir compte à la fois du «point de vue des autochtones et de la common law», et j’ai également conclu que «[l]a conciliation véritable accorde, également, de l’importance à chacun de ces éléments». En outre, j’ai déclaré que le point de vue des autochtones sur l’occupation des terres peut être dégagé en partie, mais pas exclusivement, de leurs règles de droit traditionnelles parce que ces règles étaient des éléments des coutumes, pratiques et traditions des peuples autochtones: au par. 41. Il s’ensuit que si, au moment de l’affirmation de la souveraineté, une société autochtone avait des règles de droit concernant le territoire, ces règles seraient pertinentes pour prouver l’occupation des terres visées par la revendication d’un titre aborigène. Les règles de droit pertinentes pourraient notamment inclure un régime de tenure foncière ou des règles régissant l’utilisation des terres.

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However, the aboriginal perspective must be taken into account alongside the perspective of the common law. Professor McNeil has convincingly

Toutefois, le point de vue des autochtones doit être pris en considération en même temps que la common law. Le professeur McNeil a soutenu,

argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land: *Common Law Aboriginal Title*, *supra*, at p. 73; also see *Cheshire and Burn's Modern Law of Real Property*, *supra*, at p. 28; and Megarry and Wade, *The Law of Real Property*, *supra*, at p. 1006. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, *Common Law Aboriginal Title*, at pp. 201-2. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at p. 758.

In *Van der Peet*, I drew a distinction between those practices, customs and traditions of aboriginal peoples which were "an aspect of, or took place in" the society of the aboriginal group asserting the claim and those which were "a central and significant part of the society's distinctive culture" (at para. 55). The latter stood apart because they "made the culture of the society distinctive . . . it was one of the things that truly made the society what it was" (at para. 55, emphasis in original). The same requirement operates in the determination of the proof of aboriginal title. As I said in *Adams*, a claim to title is made out when a group can demonstrate "that their connection with the piece of land . . . was of a central significance to their distinctive culture" (at para. 26).

Although this remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actu-

d'une façon convaincante, qu'en common law l'occupation physique fait preuve de la possession en droit, fait qui à son tour fondera le droit au titre sur les terres visées: *Common Law Aboriginal Title*, *op. cit.*, à la p. 73; voir aussi *Cheshire and Burn's Modern Law of Real Property*, *op. cit.*, à la p. 28; et Megarry et Wade, *The Law of Real Property*, *op. cit.*, à la p. 1006. L'occupation physique peut être prouvée par différents faits, allant de la construction de bâtiments à l'utilisation régulière de secteurs bien définis du territoire pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation de ses ressources, en passant par la délimitation et la culture de champs: voir McNeil, *Common Law Aboriginal Title*, aux pp. 201 et 202. Dans l'examen de la question de savoir si on a fait la preuve d'une occupation suffisante pour fonder un titre aborigène, [TRADUCTION] «il faut tenir compte de la taille, du mode de vie, des ressources matérielles et des habiletés technologiques du groupe concerné, ainsi que de la nature des terres revendiquées»: Brian Slattery, «Understanding Aboriginal Rights», à la p. 758.

Dans *Van der Peet*, j'ai établi une distinction entre les coutumes, pratiques et traditions des peuples autochtones qui étaient «un aspect» de la société autochtone qui revendique le titre ou qui «y étai[ent] exercée[s]», et celles qui étaient «un élément fondamental et important de la culture distinctive de cette société» (au par. 55). Ces dernières coutumes, pratiques et traditions se démarquaient parce qu'elles «rendaient la culture de la société distinctive [. . .] c'était l'une des choses qui véritablement faisait de la société ce qu'elle était» (au par. 55, souligné dans l'original). La même exigence s'applique pour prouver l'existence d'un titre aborigène. Comme je l'ai dit dans *Adams*, le bien-fondé de la revendication d'un titre est établi lorsqu'un groupe peut démontrer «que le rapport qu'il entretient avec le territoire [. . .] avait, pour sa culture distinctive, une importance fondamentale» (au par. 26).

Bien que cela demeure un aspect fondamental du critère de détermination de l'existence des droits ancestraux, compte tenu de l'exigence d'occupation prévue par le critère applicable pour sta-

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ally serve to limit or preclude a title claim. The requirement exists for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.

tuer sur l'existence d'un titre aborigène, je ne peux imaginer de situation où cette exigence servirait en fait à limiter ou à empêcher la revendication de titre. L'exigence existe à l'égard des droits qui ne constituent pas des titres parce que, dans de tels cas, il est nécessaire de distinguer entre les pratiques qui étaient des éléments fondamentaux de la culture des demandeurs et celles qui étaient d'avantage accessoires. Toutefois, dans le cas d'un titre, il semble clair que tout territoire qui a été occupé antérieurement à l'affirmation de la souveraineté et avec lequel les parties ont depuis maintenu un rapport substantiel est suffisamment important pour avoir une importance fondamentale pour la culture des demandeurs. Par conséquent, je ne crois pas qu'il soit nécessaire d'inclure explicitement cet élément dans le critère relatif au titre aborigène.

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

Si l'occupation actuelle est invoquée comme preuve de l'occupation avant l'affirmation de la souveraineté, il doit y avoir continuité entre l'occupation actuelle et l'occupation antérieure à l'affirmation de la souveraineté

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In *Van der Peet*, I explained that it is the pre-contact practices, customs and traditions of aboriginal peoples which are recognized and affirmed as aboriginal rights by s. 35(1). But I also acknowledged it would be “next to impossible” (at para. 62) for an aboriginal group to provide conclusive evidence of its pre-contact practices, customs and traditions. What would suffice instead was evidence of post-contact practices, which was “directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact” (at para. 62). The same concern, and the same solution, arises with respect to the proof of occupation in claims for aboriginal title, although there is a difference in the time for determination of title. Conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a continuity between present and pre-sovereignty occupation, because the relevant time for the deter-

Dans *Van der Peet*, j'ai expliqué que ce sont les coutumes, pratiques et traditions des peuples autochtones qui existaient avant le contact avec les Européens qui sont reconnues et confirmées comme des droits ancestraux par le par. 35(1). Cependant, j'ai également reconnu qu'il serait «pratiquement impossible» (au par. 62) pour un groupe autochtone de produire une preuve concluante de ses coutumes, pratiques et traditions datant de l'époque antérieure au contact avec les Européens. Il suffirait plutôt de produire une preuve des pratiques postérieures au contact avec les Européens qui «tende à démontrer lesquels des aspects de la collectivité et de la société autochtones datent d'avant le contact avec les Européens» (au par. 62). La preuve de l'occupation dans le cadre de la revendication d'un titre aborigène pose le même problème et appelle la même solution. Il peut s'avérer difficile d'apporter des éléments de preuve concluants d'une occupation antérieure à l'affirmation de la souveraineté. Au lieu de cela, une collectivité autochtone peut produire, au soutien de la revendication d'un titre abo-

mination of aboriginal title is at the time before sovereignty.

rigène, des éléments de preuve de l'occupation actuelle comme preuve d'une occupation antérieure à l'affirmation de la souveraineté. Il faut en outre qu'il y ait une continuité entre l'occupation antérieure à l'affirmation de la souveraineté et l'occupation actuelle, parce que la période pertinente pour la détermination de l'existence d'un titre aborigène est celle qui a précédé l'affirmation de la souveraineté.

Needless to say, there is no need to establish "an unbroken chain of continuity" (*Van der Peet*, at para. 65) between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk "undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land (*Côté, supra*, at para. 53). In *Mabo, supra*, the High Court of Australia set down the requirement that there must be "substantial maintenance of the connection" between the people and the land. In my view, this test should be equally applicable to proof of title in Canada.

Il va sans dire qu'il n'est pas nécessaire de faire la preuve d'une «continuité parfaite» (*Van der Peet*, au par. 65) entre l'occupation actuelle et l'occupation antérieure au contact avec les Européens. Il est possible que l'occupation et l'utilisation des terres aient été interrompues pendant une certaine période, à cause peut-être de la réticence des colonisateurs européens à reconnaître le titre aborigène. Exiger la continuité d'une manière trop stricte pourrait «saper l'objet même du par. 35(1) en perpétuant l'injustice historique dont les peuples autochtones ont été victimes aux mains des colonisateurs, qui n'ont pas respecté» les droits fonciers des autochtones (*Côté, précité*, au par. 53). Dans l'arrêt *Mabo*, précité, la Haute Cour d'Australie a établi l'exigence selon laquelle il doit y avoir «un maintien substantiel du lien» entre le peuple et le territoire. Je suis d'avis que ce critère s'applique également au Canada pour statuer sur l'existence d'un titre.

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I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be the internal limits on uses which land that is subject to aboriginal title may be put, i.e., uses which are inconsistent with continued use by future generations of aboriginals.

Il me faut également souligner qu'il est fort possible que la nature précise de l'occupation ait changé entre l'époque de l'affirmation de la souveraineté et aujourd'hui. Je veux qu'il soit clair que le fait que la nature de l'occupation ait changé ne fera généralement pas obstacle à la revendication d'un titre aborigène, dans la mesure où un lien substantiel entre le peuple et le territoire en question a été maintenu. La seule restriction à ce principe pourrait être les limites intrinsèques aux utilisations qui peuvent être faites du territoire visé par un titre aborigène, c.-à-d. des utilisations incompatibles avec son usage continu par les générations autochtones futures.

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At sovereignty, occupation must have been exclusive

L'occupation doit avoir été exclusive au moment de l'affirmation de la souveraineté

155 Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right. Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.

Enfin, il faut que l'occupation ait été exclusive au moment de l'affirmation de la souveraineté. Cette exigence d'exclusivité découle de la définition même du titre aborigène, que j'ai défini comme étant le droit d'utiliser et d'occuper de façon exclusive les terres visées. L'exclusivité, en tant qu'aspect du titre aborigène, appartient à la collectivité autochtone qui possède la capacité d'exclure autrui des terres détenues en vertu de ce titre. La preuve du titre doit, à cet égard, refléter le contenu du droit. S'il était possible de prouver l'existence du titre sans démontrer l'existence d'une occupation exclusive, on parviendrait à un résultat absurde, car il serait alors possible à plus d'une nation autochtone de posséder le titre aborigène à l'égard d'un même territoire, et toutes ces nations pourraient alors tenter de faire valoir le droit d'utiliser et d'occuper de façon exclusive ce territoire.

156 As with the proof of occupation, proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each. At common law, a premium is placed on the factual reality of occupation, as encountered by the Europeans. However, as the common law concept of possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity. Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by "the intention and capacity to retain exclusive control" (McNeil, *Common Law Aboriginal Title*, *supra*, at p. 204). Thus, an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to

Comme pour la preuve de l'occupation, la preuve de l'exclusivité doit tenir compte tant de la common law que du point de vue des autochtones, et accorder une importance égale aux deux. En common law, l'accent est mis sur la réalité factuelle de l'occupation, telle qu'elle était constatée par les Européens. Cependant, comme le concept de possession en common law doit tenir compte des réalités de la société autochtone, il doit en être de même pour le concept d'exclusivité. L'exclusivité est un principe de common law qui est dérivé de la notion de propriété en fief simple et qui doit être intégré avec précaution au concept de titre aborigène. Par conséquent, le critère requis pour établir l'occupation exclusive doit prendre en compte le contexte de la société autochtone au moment de l'affirmation de la souveraineté. Par exemple, il est important de souligner qu'il est possible de prouver l'exclusivité de l'occupation même si d'autres groupes autochtones étaient présents ou se rendaient souvent sur les terres revendiquées. Dans de tels cas, l'exclusivité serait établie par la preuve de [TRADUCTION] «l'intention et de la capacité de garder le contrôle exclusif [du territoire visé]» (McNeil, *Common Law Aboriginal Title*, *op.*

enforce their exclusive occupation. Moreover, as Professor McNeil suggests, the presence of other aboriginal groups might actually reinforce a finding of exclusivity. For example, “[w]here others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group’s exclusive control” (at p. 204).

A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title. For example, the aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.

In their submissions, the appellants pressed the point that requiring proof of exclusive occupation might preclude a finding of joint title, which is shared between two or more aboriginal nations. The possibility of joint title has been recognized by American courts: *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941). I would suggest that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity. The meaning of shared

cit., à la p. 204). Par conséquent, une intrusion isolée ne ferait pas obstacle à une conclusion générale d’exclusivité si le groupe autochtone concerné avait l’intention de faire respecter son occupation exclusive et avait tenté de le faire. Qui plus est, comme l’indique le professeur McNeil, la présence d’autres groupes autochtones pourrait en fait renforcer une conclusion d’exclusivité. Par exemple, [TRADUCTION] «[L]orsque d’autres personnes demandaient l’accès au territoire et étaient autorisées à s’y rendre, le fait même qu’une permission était demandée et accordée constituerait une preuve supplémentaire du contrôle exclusif exercé sur le territoire par le groupe» (à la p. 204).

La prise en considération du point de vue des autochtones peut également amener à conclure qu’une intrusion par d’autres groupes autochtones ne fait pas obstacle à l’occupation exclusive du territoire visé par le groupe autochtone qui en revendique le titre, et que la présence autorisée de ces autres groupes peut renforcer cette occupation exclusive. À titre d’exemple, le groupe autochtone qui revendique le titre aborigène peut avoir, en matière d’intrusion, des règles de droit qui sont des preuves de l’occupation exclusive, de sorte que la présence d’intrus n’est pas considérée comme une preuve à l’encontre de l’exclusivité. De plus, l’existence de règles de droit autochtones en vertu desquelles d’autres groupes autochtones peuvent être autorisés à utiliser les terres ou même à y résider temporairement étayeraient la conclusion d’occupation exclusive. De fait, si cette permission a fait l’objet de traités entre les nations autochtones concernées, ces traités feraient également partie du point de vue des autochtones.

Dans leurs observations, les appelants ont insisté sur le fait que l’obligation de prouver l’occupation exclusive pourrait empêcher de conclure à l’existence d’un titre conjoint partagé par deux ou plusieurs nations autochtones. La possibilité de l’existence d’un titre conjoint a été reconnue par les tribunaux américains: *United States c. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941). Je suis d’avis qu’il est possible de concilier l’exigence d’occupation exclusive et l’existence possible d’un titre conjoint en reconnaissant qu’un titre conjoint

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exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's. However, since no claim to joint title has been asserted here, I leave it to another day to work out all the complexities and implications of joint title, as well as any limits that another band's title may have on the way in which one band uses its title lands.

peut découler d'une exclusivité partagée. Le sens de la notion d'exclusivité partagée est bien connue en common law. La possession exclusive est le droit d'exclure autrui. La possession exclusive partagée donne le droit d'exclure autrui, à l'exception des personnes avec qui la possession est partagée. Manifestement, il est possible que deux nations autochtones aient vécu sur un territoire particulier, et que chacune ait reconnu les droits de l'autre sur ce territoire, mais pas ceux de personne d'autre. Comme aucun titre conjoint n'a été revendiqué en l'espèce, je laisse à une autre occasion l'examen de toutes les difficultés et implications de la notion de titre conjoint, de même que les limites que le titre d'une autre bande pourrait imposer sur la façon dont une bande donnée utilise les terres sur lesquelles elle a un titre.

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I should also reiterate that if aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title. These rights will likely be intimately tied to the land and may permit a number of possible uses. However, unlike title, they are not a right to the land itself. Rather, as I have suggested, they are a right to do certain things in connection with that land. If, for example, it were established that the lands near those subject to a title claim were used for hunting by a number of bands, those shared lands would not be subject to a claim for aboriginal title, as they lack the crucial element of exclusivity. However, they may be subject to site-specific aboriginal rights by all of the bands who used it. This does not entitle anyone to the land itself, but it may entitle all of the bands who hunted on the land to hunting rights. Hence, in addition to shared title, it will be possible to have shared, non-exclusive, site-specific rights. In my opinion, this accords with the general principle that the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either *de facto* practice or by the aboriginal system of governance. It also allows sufficient

Je dois aussi rappeler que si des autochtones peuvent montrer qu'ils ont occupé un territoire particulier, mais que cette occupation n'était pas exclusive, il sera toujours possible d'établir l'existence de droits ancestraux ne constituant pas un titre. Il est vraisemblable que ces droits seront intimement liés au territoire, et qu'ils pourraient permettre de nombreuses utilisations. Cependant, contrairement au titre, ils ne constituent pas un droit au territoire lui-même, mais plutôt, comme je l'ai suggéré, il s'agit de droits permettant de faire certaines choses liées à ce territoire. Si, par exemple, il était établi que les terres situées à proximité de celles visées par la revendication d'un titre étaient utilisées pour la chasse par certaines bandes, ces terres partagées ne seraient pas l'objet d'un titre aborigène, car l'élément essentiel d'exclusivité serait absent. Cependant, toutes les bandes qui les ont utilisées pourraient avoir sur ces terres des droits ancestraux spécifiques à un site. Ce fait ne confère à personne le droit aux terres elles-mêmes, mais il pourrait avoir pour effet d'accorder des droits de chasse à toutes les bandes qui chassaient sur ces terres. Par conséquent, en plus d'un titre partagé, il sera possible d'avoir des droits partagés non exclusifs et spécifiques à certains sites. À mon avis, cette situation est conforme au principe général voulant que la common law doive évoluer pour reconnaître les droits ancestraux (et au besoin les titres aborigènes) qui étaient reconnus soit par une

flexibility to deal with this highly complex and rapidly evolving area of the law.

(f) *Infringements of Aboriginal Title: the Test of Justification*

(i) Introduction

The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments. However, s. 35(1) requires that those infringements satisfy the test of justification. In this section, I will review the Court's nascent jurisprudence on justification and explain how that test will apply in the context of infringements of aboriginal title.

(ii) General Principles

The test of justification has two parts, which I shall consider in turn. First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial. I explained in *Gladstone* that compelling and substantial objectives were those which were directed at either one of the purposes underlying the recognition and affirmation of aboriginal rights by s. 35(1), which are (at para. 72):

... the recognition of the prior occupation of North America by aboriginal peoples or ... the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.

I noted that the latter purpose will often "be most relevant" (at para. 72) at the stage of justification. I think it important to repeat why (at para. 73) that is so:

Because ... distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact

pratique *de facto*, soit par un régime de gestion autochtone. Cette approche accorde également toute la souplesse nécessaire à l'examen de ce domaine très complexe du droit qui évolue rapidement.

f) *Les atteintes au titre aborigène: le critère de justification*

(i) Introduction

Les droits ancestraux reconnus et confirmés par le par. 35(1), y compris le titre aborigène, ne sont pas absolus. Tant le gouvernement fédéral (p. ex. *Sparrow*) que les gouvernements provinciaux (p. ex. *Côté*) peuvent porter atteinte à ces droits. Toutefois, le par. 35(1) exige que ces atteintes satisfassent au critère de justification. Dans la présente section, je vais examiner la jurisprudence naissante de la Cour sur la justification et expliquer comment ce critère s'appliquera dans le contexte des atteintes au titre aborigène.

(ii) Principes généraux

Le critère de justification comporte deux volets que je vais examiner à tour de rôle. Premièrement, l'atteinte au droit ancestral visé doit se rapporter à la poursuite d'un objectif législatif impérieux et réel. Dans *Gladstone*, j'ai expliqué qu'un objectif impérieux et réel était un objectif visant l'un ou l'autre des objets qui sous-tendent la reconnaissance et la confirmation des droits ancestraux par le par. 35(1). Ces objets sont les suivants (au par. 72):

... soit la reconnaissance de l'occupation antérieure de l'Amérique du Nord par les peuples autochtones soit [...] la conciliation de cette occupation avec l'affirmation par Sa Majesté de sa souveraineté sur ce territoire.

J'ai souligné que le deuxième objet sera souvent «plus pertinent» (au par. 72) à l'étape de la justification. J'estime important de répéter pourquoi il en est ainsi (au par. 73):

[C]omme les sociétés autochtones distinctives existent au sein d'une communauté sociale, politique et économique plus large, communauté dont elles font partie et sur laquelle s'exerce la souveraineté de Sa Majesté, il existe des circonstances où, dans la poursuite d'objectifs importants ayant un caractère impérieux et réel pour

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that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. [Emphasis added; “equally” emphasized in original.]

The conservation of fisheries, which was accepted as a compelling and substantial objective in *Sparrow*, furthers both of these purposes, because it simultaneously recognizes that fishing is integral to many aboriginal cultures, and also seeks to reconcile aboriginal societies with the broader community by ensuring that there are fish enough for all. But legitimate government objectives also include “the pursuit of economic and regional fairness” and “the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups” (para. 75). By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component (*Adams, supra*) would fail this aspect of the test of justification.

l'ensemble de la communauté (compte tenu du fait que les sociétés autochtones font partie de celle-ci), certaines restrictions de ces droits sont justifiables. Les droits ancestraux sont un élément nécessaire de la conciliation de l'existence des sociétés autochtones avec la communauté politique plus large à laquelle ces dernières appartiennent. Les limites imposées à ces droits sont également un élément nécessaire de cette conciliation, si les objectifs qu'elles visent sont suffisamment importants pour la communauté dans son ensemble. [Je souligne; «également» souligné dans l'original.]

La conservation des ressources halieutiques, qui a été acceptée comme un objectif impérieux et réel dans *Sparrow*, est un objectif qui vise la poursuite de ces deux objets parce que, d'une part, il reconnaît que la pêche fait partie intégrante de nombreuses cultures autochtones et, d'autre part, parce qu'il tend également à concilier l'existence des sociétés autochtones avec la communauté plus large en veillant à ce qu'il y ait assez de poissons pour tous. Cependant, sont également des objectifs légitimes du gouvernement «la poursuite de l'équité sur les plans économique et régional» et «la reconnaissance du fait que, historiquement, des groupes non autochtones comptent sur ces ressources et participent à leur exploitation» (par. 75). À l'opposé, des mesures édictées pour des raisons relativement peu importantes, telles des activités de pêche sportive ne comportant aucun élément économique important (*Adams, précité*), ne satisferaient pas à ce volet du critère de justification.

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The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. What has become clear is that the requirements of the fiduciary duty are a function of the “legal and factual context” of each appeal (*Gladstone, supra*, at para. 56). *Sparrow* and *Gladstone*, for example, interpreted and applied the fiduciary duty in terms of the idea of priority. The theory underlying that principle is that the fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first. However, the fiduciary duty does not demand that aboriginal rights always be given

Le deuxième volet du critère de justification commande une appréciation de la question de savoir si l'atteinte est compatible avec les rapports spéciaux de fiduciaire qui existent entre la Couronne et les peuples autochtones. Il est devenu clair que les exigences de l'obligation de fiduciaire sont fonction du «contexte juridique et factuel» de chaque appel (*Gladstone, précité*, au par. 56). Dans les arrêts *Sparrow* et *Gladstone*, par exemple, la Cour a interprété et appliqué l'obligation de fiduciaire en fonction de l'idée de priorité. Selon la théorie qui sous-tend ce principe, les rapports de fiduciaire qui existent entre la Couronne et les peuples autochtones commandent que les intérêts des autochtones aient préséance. Toutefois, l'obligation de fiduciaire n'exige pas qu'on accorde toujours la priorité aux droits ancestraux. Comme il a

priority. As was said in *Sparrow*, *supra*, at pp. 1114-15:

The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. [Emphasis added.]

Other contexts permit, and may even require, that the fiduciary duty be articulated in other ways (at p. 1119):

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

Sparrow did not explain when the different articulations of the fiduciary duty should be used. Below, I suggest that the choice between them will in large part be a function of the nature of the aboriginal right at issue.

In addition to variation in the form which the fiduciary duty takes, there will also be variation in degree of scrutiny required by the fiduciary duty of the infringing measure or action. The degree of scrutiny is a function of the nature of the aboriginal right at issue. The distinction between *Sparrow* and *Gladstone*, for example, turned on whether the right amounted to the exclusive use of a resource, which in turn was a function of whether the right had an internal limit. In *Sparrow*, the right was internally limited, because it was a right to fish for food, ceremonial and social purposes, and as a result would only amount to an exclusive right to use the fishery in exceptional circumstances. Accordingly, the requirement of priority was applied strictly to mean that (at p. 1116) “any allocation of priorities after valid conservation

été dit dans *Sparrow*, précité, aux pp. 1114 et 1115:

La nature de la protection constitutionnelle qu’offre le par. 35(1) dans ce contexte commande l’existence d’un lien entre la question de la justification et l’établissement de priorités dans le domaine de la pêche. [Je souligne.]

D’autres contextes permettent, et peuvent même exiger, que l’obligation de fiduciaire soit formulée autrement (à la p. 1119):

Il y a, dans l’analyse de la justification, d’autres questions à aborder, selon les circonstances de l’enquête. Il s’agit notamment des questions de savoir si, en tentant d’obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation est prévue en cas d’expropriation et si le groupe d’autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre.

Dans *Sparrow*, la Cour n’a pas expliqué dans quels cas les différentes formulations de l’obligation de fiduciaire devraient être utilisées. Plus loin, j’indique que le choix de la formulation dépendra en grande partie de la nature du droit ancestral en cause.

Outre la variation de l’obligation de fiduciaire du point de vue de la forme, il y a aussi variation du degré d’examen — requis par cette obligation — de la mesure ou de l’acte qui porte atteinte au droit. Le degré d’examen est fonction de la nature du droit ancestral en cause. La distinction entre les arrêts *Sparrow* et *Gladstone*, par exemple, dépendait de la question de savoir si le droit en cause correspondait à l’utilisation exclusive d’une ressource, question qui dépendait à son tour de la réponse à la question de savoir si le droit était assorti d’une limite intrinsèque. Dans *Sparrow*, le droit en cause était assujéti à une telle limite parce qu’il s’agissait du droit de pêcher à des fins alimentaires, sociales et rituelles, droit qui, de ce fait, ne constituerait un droit exclusif à l’utilisation de la ressource que dans des circonstances exceptionnelles. Par conséquent, l’obligation d’accorder la priorité a été appliquée strictement, de sorte que (à la p. 1116), «dans l’établissement des priorités suite à la mise en œuvre de mesures de conserva-

measures have been implemented must give top priority to Indian food fishing”.

tion valides, il faut accorder la priorité absolue à la pêche par les Indiens à des fins de subsistance».

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In *Gladstone*, by contrast, the right to sell fish commercially was only limited by supply and demand. Had the test for justification been applied in a strict form in *Gladstone*, the aboriginal right would have amounted to an exclusive right to exploit the fishery on a commercial basis. This was not the intention of *Sparrow*, and I accordingly modified the test for justification, by altering the idea of priority in the following way (at para. 62):

Dans *Gladstone*, par contre, le droit de vendre commercialement du poisson était uniquement limité par l’offre et la demande. Si le critère de justification avait été appliqué strictement dans cet arrêt, le droit ancestral aurait correspondu au droit exclusif d’exploiter la ressource sur une base commerciale. L’arrêt *Sparrow* ne visait pas ce résultat, et j’ai modifié le critère de justification en conséquence, en modifiant l’idée de priorité de la manière suivante (au par. 62):

... the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

... cette doctrine [relative à l’ordre de priorité] commande que l’État démontre que, dans la répartition de la ressource, il a tenu compte de l’existence des droits ancestraux et réparti la ressource d’une manière qui respecte le fait que les titulaires de ces droits ont, en matière d’exploitation de la pêche, priorité sur les autres usagers. Il s’agit d’un droit à la fois substantiel et procédural. À l’étape de la justification, l’État doit démontrer que les modalités de répartition de la ressource ainsi que la répartition elle-même reflètent l’intérêt prioritaire des titulaires des droits ancestraux à l’égard de cette pêche.

After *Gladstone*, in the context of commercial activity, the priority of aboriginal rights is constitutionally satisfied if the government had taken those rights into account and has allocated a resource “in a manner respectful” (at para. 62) of that priority. A court must be satisfied that “the government has taken into account the existence and importance of [aboriginal] rights” (at para. 63) which it determines by asking the following questions (at para. 64):

Depuis *Gladstone*, en matière d’activités commerciales, la priorité des droits ancestraux est respectée sur le plan constitutionnel si le gouvernement a tenu compte de l’existence de ces droits et a réparti la ressource «d’une manière qui respecte» (au par. 62) cette priorité. Le tribunal doit être convaincu que «l’État a tenu compte de l’existence et de l’importance [des droits ancestraux]» (au par. 63), fait qu’il détermine en se posant les questions suivantes (au par. 64):

Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are ... questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government’s objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example), how important the fishery is to the economic and

Les questions pertinentes pour déterminer si l’État a donné la priorité aux titulaires de droits ancestraux sont [des] questions [...] telles que celle de savoir si l’État a facilité l’exercice du droit ancestral de participer à la pêche (en réduisant les droits payables pour les permis, par exemple), si les objectifs que poursuit l’État en établissant un régime de réglementation donné reflètent la nécessité de tenir compte du droit de priorité des titulaires de droits ancestraux, la mesure dans laquelle la participation à la pêche par les titulaires de droits ancestraux correspond au pourcentage que représente leur population par rapport à la population totale, la manière dont l’État a concilié les différents droits ancestraux visant une pêche donnée (par exemple le droit de pêcher

material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users.

(iii) Justification and Aboriginal Title

The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community” (at para. 73). In my opinion, 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, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

The manner in which the fiduciary duty operates with respect to the second stage of the justification test — both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take — will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the

à des fins alimentaires par opposition à celui de pêcher à des fins commerciales), l'importance de la pêche pour le bien-être économique et matériel de la bande en question, ainsi que les critères appliqués par l'État, par exemple, dans la répartition des permis de pêche commerciale entre les divers usagers.

(iii) Justification et titre aborigène

Les principes généraux régissant la justification, qui ont été exposés dans *Sparrow* et précisés dans *Gladstone*, s'appliquent à l'égard des atteintes au titre aborigène. Depuis *Gladstone*, l'éventail d'objectifs législatifs qui peuvent justifier une atteinte au titre aborigène est assez large. La plupart de ces objectifs peuvent être rattachés à la conciliation de l'occupation antérieure de l'Amérique du Nord par les peuples autochtones avec l'affirmation de la souveraineté de la Couronne, ce qui nécessite la reconnaissance du fait que les «sociétés autochtones distinctives existent au sein d'une communauté sociale, politique et économique plus large, communauté dont elles font partie» (au par. 73). À mon avis, l'extension de l'agriculture, de la foresterie, de l'exploitation minière et de l'énergie hydroélectrique, le développement économique général de l'intérieur de la Colombie-Britannique, la protection de l'environnement et des espèces menacées d'extinction, ainsi que la construction des infrastructures et l'implantation des populations requises par ces fins, sont des types d'objectifs compatibles avec cet objet et qui, en principe, peuvent justifier une atteinte à un titre aborigène. Toutefois, la question de savoir si une mesure ou un acte donné du gouvernement peut être expliqué par référence à l'un de ces objectifs est, en dernière analyse, une question de fait qui devra être examinée au cas par cas.

La façon dont l'obligation de fiduciaire s'applique relativement à la deuxième étape du critère de justification — du point de vue tant de la norme d'examen que de la forme particulière que prendra l'obligation de fiduciaire — est fonction de la nature du titre aborigène. Trois aspects du titre aborigène sont pertinents en l'espèce. Premièrement, le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres visées; deuxièmement, le titre aborigène comprend le droit

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ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.

de choisir les utilisations qui peuvent être faites de ces terres, sous réserve de la restriction ultime que ces usages ne sauraient détruire la capacité de ces terres d'assurer la subsistance des générations futures de peuples autochtones; troisièmement, les terres détenues en vertu d'un titre aborigène ont une composante économique inéluctable.

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The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply. What is required is that the government demonstrate (at para. 62) "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of aboriginal title in the land. By analogy with *Gladstone*, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive. This is an issue that may involve an assessment of the various interests at stake in the resources in question. No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here.

La nature exclusive du titre aborigène est pertinente pour ce qui est du degré d'examen auquel est soumis la mesure ou l'acte qui porte atteinte au titre. Par exemple, si l'obligation de fiduciaire de la Couronne exige de donner préséance au titre aborigène, alors c'est l'approche modifiée concernant l'ordre de priorité que j'ai exposée dans *Gladstone* qui devrait être appliquée. Il faut que le gouvernement démontre «que les modalités de répartition de la ressource ainsi que la répartition elle-même reflètent l'intérêt prioritaire» (au par. 62) des détenteurs du titre aborigène sur les terres visées. Par analogie avec l'arrêt *Gladstone*, cela pourrait vouloir dire, par exemple, que les gouvernements prennent en compte la participation des peuples autochtones à la mise en valeur des ressources de la Colombie-Britannique, que la concession de fiefs simples pour l'agriculture ainsi que de baux et permis à des fins d'exploitation forestière ou minière tiennent compte de l'occupation antérieure des terres visées par un titre aborigène, que les obstacles économiques à l'utilisation par les autochtones de leurs terres (p. ex. le paiement de droits pour l'obtention de permis) soient sensiblement réduits. Cette liste n'est pas complète et n'est donnée qu'à titre indicatif. Il s'agit d'une question qui pourrait obliger à soupeser les divers intérêts concernés par les ressources en cause. Il ne fait aucun doute qu'il sera difficile de déterminer la valeur exacte de l'intérêt des autochtones dans le territoire et des concessions, baux ou permis accordés en vue de l'exploitation de celui-ci. Il va de soi que ces difficiles questions d'ordre économique ne peuvent être tranchées en l'espèce.

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Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for

En outre, les autres aspects du titre aborigène tendent à indiquer que l'obligation de fiduciaire peut se manifester autrement que par l'idée de priorité. Ce point devient clair quand on compare le titre aborigène et le droit ancestral de pêcher à

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

Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches

des fins alimentaires qui était visé dans *Sparrow*. Premièrement, le titre aborigène comprend le droit de choisir les utilisations qui peuvent être faites d'une parcelle de territoire. À l'opposé, le droit ancestral de pêcher à des fins alimentaires ne comporte pas le même élément discrétionnaire. Cet aspect du titre aborigène indique qu'il est possible de respecter les rapports de fiduciaire entre la Couronne et les peuples autochtones en faisant participer les peuples autochtones à la prise des décisions concernant leurs terres. Il y a toujours obligation de consultation. La question de savoir si un groupe autochtone a été consulté est pertinente pour décider si l'atteinte au titre aborigène est justifiée, au même titre que le fait pour la Couronne de ne pas consulter un groupe autochtone au sujet des conditions auxquelles des terres d'une réserve sont cédées à bail peut constituer un manquement à l'obligation de fiduciaire de celle-ci en common law: *Guerin*. La nature et l'étendue de l'obligation de consultation dépendront des circonstances. Occasionnellement, lorsque le manquement est moins grave ou relativement mineur, il ne s'agira de rien de plus que la simple obligation de discuter des décisions importantes qui seront prises au sujet des terres détenues en vertu d'un titre aborigène. Évidemment, même dans les rares cas où la norme minimale acceptable est la consultation, celle-ci doit être menée de bonne foi, dans l'intention de tenir compte réellement des préoccupations des peuples autochtones dont les terres sont en jeu. Dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Certaines situations pourraient même exiger l'obtention du consentement d'une nation autochtone, particulièrement lorsque des provinces prennent des règlements de chasse et de pêche visant des territoires autochtones.

Deuxièmement, contrairement au droit ancestral de pêcher à des fins alimentaires, le titre aborigène a inévitablement une dimension économique, particulièrement quand on tient compte des utilisations qui peuvent être faites aujourd'hui des terres détenues en vertu d'un titre aborigène. La dimension économique du titre aborigène montre que l'indemnisation est également un facteur pertinent à l'égard de la question de la justification, possibilité

of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable 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. Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.

D. *Has a claim to self-government been made out by the appellants?*

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In the courts below, considerable attention was given to the question of whether s. 35(1) can protect a right to self-government, and if so, what the contours of that right are. The errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation. The parties seem to have acknowledged this point, perhaps implicitly, by giving the arguments on self-government much less weight on appeal. One source of the decreased emphasis on the right to self-government on appeal is this Court's judgment *Pamajewon*. There, I held that rights to self-government, if they existed, cannot be framed in excessively general terms. The appellants did not have the benefit of my judgment at trial. Unsurprisingly, as counsel for the Wet'suwet'en specifically concedes, the appellants advanced the right to self-government in very

évoquée dans l'arrêt *Sparrow* et que j'ai répétée dans *Gladstone*. De fait, l'indemnisation des manquements à l'obligation de fiduciaire est un aspect bien établi du domaine des droits ancestraux: *Guerin*. Conformément à l'obligation de la Couronne d'agir de bonne foi et honorablement, il sera généralement nécessaire de verser une juste indemnité en cas d'atteinte à un titre aborigène. Le montant de l'indemnité payable variera en fonction de la nature du titre aborigène touché, de la nature et de la gravité de l'atteinte et de la mesure dans laquelle les intérêts des autochtones ont été pris en compte. Comme la question des dommages-intérêts a été dissociée de l'action principale, aucune observation ne nous a été présentée relativement aux principes juridiques appropriés qui seraient pertinents pour déterminer l'indemnité qui devrait être versée pour les atteintes au titre aborigène. Dans les circonstances, il est préférable que nous attendions une autre occasion pour examiner ces questions complexes.

D. *Les appelants ont-ils établi le bien-fondé de leur revendication de l'autonomie gouvernementale?*

Devant les juridictions inférieures, on s'est longuement attardé à la question de savoir si le par. 35(1) peut protéger le droit à l'autonomie gouvernementale et, dans l'affirmative, quels sont les contours de ce droit. En raison des erreurs de fait commises par le juge de première instance, et de la nécessité de tenir un nouveau procès qui en a découlé, il est impossible pour notre Cour de décider si le bien-fondé de la revendication de l'autonomie gouvernementale a été établi. De plus, il ne s'agit pas d'un cas qui se prête à la formulation par la Cour des principes juridiques devant guider l'instruction d'autres affaires. Les parties semblent avoir reconnu ce point, peut-être implicitement, en accordant beaucoup moins d'importance en appel aux arguments relatifs à l'autonomie gouvernementale. L'arrêt *Pamajewon* de notre Cour est une raison pour laquelle une moins grande importance a été attachée au droit à l'autonomie gouvernementale en appel. Dans cet arrêt, j'ai conclu que les droits relatifs à l'autonomie gouvernementale, s'ils existent, ne peuvent pas être exprimés en termes excessivement généraux. Au moment du procès,

broad terms, and therefore in a manner not cognizable under s. 35(1).

The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial.

E. *Did the province have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the Indian Act?*

(1) Introduction

For aboriginal rights to be recognized and affirmed by s. 35(1), they must have existed in 1982. Rights which were extinguished by the sovereign before that time are not revived by the provision. In a federal system such as Canada's, the need to determine whether aboriginal rights have been extinguished raises the question of which level of government has jurisdiction to do so. In the context of this appeal, that general question becomes three specific ones. First, there is the question whether the province of British Columbia, from the time it joined Confederation in 1871, until the entrenchment of s. 35(1) in 1982, had the

les appelants n'avaient évidemment pas pris connaissance de mon jugement dans cet arrêt rendu ultérieurement. Il n'est donc pas étonnant, comme l'admet explicitement l'avocat des Wet'suwet'en, que les appelants aient plaidé le droit à l'autonomie gouvernementale en termes très généraux et, par conséquent, d'une manière incompatible avec le par. 35(1).

Le caractère général de la revendication présentée au procès a également fait en sorte que les parties n'ont pas abordé bon nombre des difficiles questions conceptuelles que soulève la reconnaissance de l'autonomie gouvernementale des autochtones. Le *Rapport de la Commission royale sur les peuples autochtones*, qui consacre 304 pages à cette question, donne une bonne idée de sa complexité. Ce rapport présente divers modèles d'autonomie gouvernementale, tous différents les uns des autres, notamment en ce qui concerne le territoire, la citoyenneté, la compétence et l'organisation gouvernementale interne. On nous a présenté peu d'observations propres à nous aider à résoudre ces questions fondamentales et difficiles. Sans l'aide des parties, il serait imprudent pour la Cour de s'avancer sur ce terrain. Dans ces circonstances, la question de l'autonomie gouvernementale sera tranchée au procès.

E. *La province avait-elle, après 1871, le pouvoir d'éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la Loi sur les Indiens?*

(1) Introduction

Pour qu'un droit ancestral soit reconnu et confirmé par le par. 35(1), il devait exister en 1982. Cette disposition ne fait pas revivre des droits qui avaient été éteints par le souverain avant cette date. Dans un régime fédéral comme celui qui existe au Canada, la nécessité de déterminer si des droits ancestraux ont été éteints oblige à se demander lequel des niveaux de gouvernement a compétence pour le faire. Dans le contexte du présent pourvoi, cette question générale se subdivise en trois questions particulières. Premièrement, il y a la question de savoir si la province de la Colombie-Britannique, depuis son entrée dans la fédération

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jurisdiction to extinguish the rights of aboriginal peoples, including aboriginal title, in that province. Second, if the province was without such jurisdiction, another question arises — whether provincial laws which were not in pith and substance aimed at the extinguishment of aboriginal rights could have done so nevertheless if they were laws of general application. The third and final question is whether a provincial law, which could otherwise not extinguish aboriginal rights, be given that effect through referential incorporation by s. 88 of the *Indian Act*.

(2) Primary Jurisdiction

¹⁷³ Since 1871, the exclusive power to legislate in relation to “Indians, and Lands reserved for the Indians” has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head of jurisdiction, in my opinion, encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title.

“Lands reserved for the Indians”

¹⁷⁴ I consider the second part of this provision first, which confers jurisdiction to the federal government over “Lands reserved for the Indians”. The debate between the parties centred on whether that part of s. 91(24) confers jurisdiction to legislate with respect to aboriginal title. The province’s principal submission is that “Lands reserved for the Indians” are lands which have been specifically set aside or designated for Indian occupation, such as reserves. However, I must reject that submission, because it flies in the face of the judgment of the Privy Council in *St. Catherine’s Milling*. One of the issues in that appeal was the federal jurisdiction to accept the surrender of lands held pursuant to aboriginal title. It was argued that the federal government, at most, had jurisdiction over “Indian Reserves”. Lord Watson, speaking for the Privy Council, rejected this argument, stating that had the intention been to restrict s. 91(24) in this way,

en 1871 jusqu’à la constitutionnalisation du par. 35(1) en 1982, avait compétence pour éteindre, dans la province, les droits des peuples autochtones, y compris le titre aborigène. Deuxièmement, si elle n’avait pas compétence pour le faire, il faut alors se demander si les lois provinciales qui ne visaient pas, de par leur essence même, à éteindre des droits ancestraux ont quand même pu le faire si elles étaient des lois d’application générale. La troisième et dernière question consiste à décider si une loi provinciale qui ne pourrait par ailleurs pas éteindre des droits ancestraux pourrait se voir reconnaître cet effet par incorporation par renvoi en application de l’art. 88 de la *Loi sur les Indiens*.

(2) Compétence principale

Depuis 1871, le pouvoir exclusif de légiférer sur «les Indiens et les terres réservées aux Indiens» appartient au gouvernement fédéral en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*. Ce chef de compétence comprend, selon moi, le pouvoir exclusif d’éteindre les droits ancestraux, y compris le titre aborigène.

«Les terres réservées aux Indiens»

Je vais d’abord examiner la deuxième partie de cette disposition, c’est-à-dire celle qui attribue au gouvernement fédéral compétence sur les «terres réservées aux Indiens». Le débat entre les parties a porté sur la question de savoir si cette partie du par. 91(24) confère le pouvoir de légiférer relativement au titre aborigène. Le principal argument invoqué par la province est que les «terres réservées aux Indiens» sont des terres qui ont été expressément mises de côté ou désignées pour être occupées par les Indiens, par exemple les réserves. Je dois toutefois rejeter cet argument parce qu’il va à l’encontre du jugement rendu par le Conseil privé dans l’affaire *St. Catherine’s Milling*. L’une des questions en litige dans ce pourvoi concernait le pouvoir du gouvernement fédéral d’accepter la cession de terres détenues en vertu d’un titre aborigène. On prétendait que le gouvernement fédéral avait tout au plus compétence sur les «réserves

specific language to this effect would have been used. He accordingly held that (at p. 59):

... the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation.

Lord Watson's reference to "all lands" encompasses not only reserve lands, but lands held pursuant to aboriginal title as well. Section 91(24), in other words, carries with it the jurisdiction to legislate in relation to aboriginal title. It follows, by implication, that it also confers the jurisdiction to extinguish that title.

The province responds by pointing to the fact that underlying title to lands held pursuant to aboriginal title vested with the provincial Crown pursuant to s. 109 of the *Constitution Act, 1867*. In its submission, this right of ownership carried with it the right to grant fee simples which, by implication, extinguish aboriginal title, and so by negative implication excludes aboriginal title from the scope of s. 91(24). The difficulty with the province's submission is that it fails to take account of the language of s. 109, which states in part that:

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces . . . subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Although that provision vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to the "any Interest other than that of the Province in the same". In *St. Catherine's Milling*, the Privy Council held that aboriginal title was such an interest, and rejected the argument that provincial ownership operated as a limit on federal jurisdiction. The net effect of that decision, therefore, was to separate the ownership of lands held pursuant to aboriginal title from jurisdiction over those lands. Thus, although on surrender of aboriginal title the province would

indiennes». S'exprimant au nom du Conseil privé, Lord Watson a rejeté cet argument, déclarant que si le législateur avait voulu limiter le par. 91(24) de cette façon, il l'aurait dit en termes exprès. Lord Watson a donc statué ainsi (à la p. 59):

[TRADUCTION] . . . les mots employés dans les faits sont, d'après leur sens naturel, suffisants pour englober toutes les terres qui sont réservées, à quelque condition que ce soit, pour être occupées par les Indiens.

L'expression «toutes les terres» utilisée par lord Watson englobe non seulement les terres des réserves, mais aussi celles détenues en vertu d'un titre aborigène. En d'autres termes, le par. 91(24) accorde le pouvoir de légiférer relativement au titre aborigène. Il s'ensuit, par implication, qu'il accorde également le pouvoir d'éteindre ce titre.

La province a répondu en faisant remarquer que le titre sous-jacent sur les terres détenues en vertu d'un titre aborigène a été attribué à la Couronne provinciale par l'art. 109 de la *Loi constitutionnelle de 1867*. Selon la province, ce droit de propriété emportait le droit d'accorder des fiefs simples éteignant par implication le titre aborigène, et il a donc pour conséquence d'exclure le titre aborigène de la portée du par. 91(24). Le problème que pose cet argument de la province est qu'il ne tient pas compte du texte de l'art. 109, qui dit en partie ce qui suit:

109. Les terres, mines, minéraux et redevances appartenant aux différentes provinces du Canada [. . .] lors de l'Union [. . .] appartiendront aux différentes provinces [. . .] sous réserve des fiducies existantes et de tout intérêt autre que celui de la province à cet égard.

Même si cette disposition accorde aux couronnes provinciales le titre sous-jacent, elle limite ce droit de propriété provincial en le subordonnant à «tout intérêt autre que celui de la province à cet égard». Dans l'arrêt *St. Catherine's Milling*, le Conseil privé a statué que le titre aborigène constituait un tel intérêt et a rejeté l'argument selon lequel le droit de propriété des provinces avait pour effet de limiter la compétence du gouvernement fédéral. Concrètement, cet arrêt a donc eu pour effet de dissocier le droit de propriété relatif aux terres détenues en vertu d'un titre aborigène de la compé-

take absolute title, jurisdiction to accept surrenders lies with the federal government. The same can be said of extinguishment — although on extinguishment of aboriginal title, the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government.

tence exercée à l'égard de ces terres. Par conséquent, même si la province obtient un titre absolu en cas de cession d'un titre aborigène, le pouvoir d'accepter les cessions appartient au gouvernement fédéral. La même affirmation peut être faite au sujet de l'extinction: même si la province obtient un titre absolu sur les terres visées au moment de l'extinction d'un titre aborigène, le pouvoir d'éteindre ce titre appartient au gouvernement fédéral.

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I conclude with two remarks. First, even if the point were not settled, I would have come to the same conclusion. The judges in the court below noted that separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result — the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests — their interest in their lands. Second, although the submissions of the parties and my analysis have focussed on the question of jurisdiction over aboriginal title, in my opinion, the same reasoning applies to jurisdiction over any aboriginal right which relates to land. As I explained earlier, *Adams* clearly establishes that aboriginal rights may be tied to land but nevertheless fall short of title. Those relationships with the land, however, may be equally fundamental to aboriginal peoples and, for the same reason that jurisdiction over aboriginal title must vest with the federal government, so too must the power to legislate in relation to other aboriginal rights in relation to land.

Je termine par deux remarques. Premièrement, même si ce point n'avait pas été tranché, je serais parvenu à la même conclusion. Les juges de la juridiction inférieure ont souligné que le fait de dissocier la compétence du gouvernement fédéral à l'égard des Indiens et sa compétence à l'égard des terres indiennes produirait un résultat très regrettable: en effet, comme le gouvernement fédéral est investi par la Constitution de la responsabilité principale de garantir le bien-être des peuples autochtones du Canada, il se verrait dans l'impossibilité de protéger l'un des droits les plus fondamentaux des autochtones — savoir leur droit à leurs terres. Deuxièmement, même si les observations des parties et mon analyse étaient axés sur la question de la compétence à l'égard du titre aborigène, je suis d'avis que le même raisonnement s'applique à la compétence à l'égard de tout droit ancestral se rapportant à des terres. Comme je l'ai expliqué précédemment, l'arrêt *Adams* a clairement établi que des droits ancestraux peuvent être rattachés à un territoire sans constituer un titre. Cependant, ces divers rapports avec un territoire peuvent être tout aussi fondamentaux pour les peuples autochtones et, pour la même raison il doit être investi de la compétence à l'égard du titre aborigène, le gouvernement fédéral doit être investi du pouvoir de légiférer sur les autres droits ancestraux se rapportant au territoire.

“Indians”

«Les Indiens»

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The extent of federal jurisdiction over Indians has not been definitively addressed by this Court. We have not needed to do so because the *vires* of federal legislation with respect to Indians, under the division of powers, has never been at issue. The cases which have come before the Court under

Notre Cour ne s'est pas prononcée définitivement sur l'étendue de la compétence du gouvernement fédéral à l'égard des Indiens. Elle n'a pas eu besoin de le faire parce que la validité des dispositions fédérales concernant les Indiens, dans le contexte du partage des pouvoirs, n'a jamais été en

s. 91(24) have implicated the question of jurisdiction over Indians from the other direction — whether provincial laws which on their face apply to Indians intrude on federal jurisdiction and are inapplicable to Indians to the extent of that intrusion. As I explain below, the Court has held that s. 91(24) protects a “core” of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.

It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians. That core, for reasons I will develop, encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1). Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)’s reference to “Lands reserved for the Indians”. But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over “Indians”. Provincial governments are prevented from legislating in relation to both types of aboriginal rights.

(3) Provincial Laws of General Application

The vesting of exclusive jurisdiction with the federal government over Indians and Indian lands under s. 91(24), operates to preclude provincial laws in relation to those matters. Thus, provincial laws which single out Indians for special treatment are *ultra vires*, because they are in relation to Indians and therefore invade federal jurisdiction: see *R. v. Sutherland*, [1980] 2 S.C.R. 451. However, it

cause. Les affaires qui ont été soumises à la Cour relativement au par. 91(24) ont plutôt soulevé la question de la compétence à l’égard des Indiens du point de vue opposé: c’est-à-dire en posant la question de savoir si des lois provinciales qui, à première vue, s’appliquent aux Indiens, empiètent sur la compétence du gouvernement fédéral, et si ces lois sont inapplicables aux Indiens dans la mesure de cet empiètement. Comme je l’explique plus loin, la Cour a statué que, par le principe de l’exclusivité des compétences, le par. 91(24) protège l’«essentiel» de la quiddité indienne, ou indianité, contre les empiètements provinciaux.

Il s’ensuit, à tout le moins, que l’essentiel de l’indianité relève de la compétence du fédéral sur les Indiens. Pour des raisons que je vais exposer, l’essentiel de l’indianité englobe les droits ancestraux, y compris les droits reconnus et confirmés par le par. 35(1). Les lois censées éteindre ces droits portent donc atteinte à l’essentiel de l’indianité qui est au cœur du par. 91(24), et elles outrepassent la compétence législative des provinces. L’essentiel de l’indianité englobe toute la gamme des droits ancestraux protégés par le par. 35(1). Ces droits comprennent les droits se rapportant à un territoire; cette partie de l’essentiel de l’indianité découle de la référence aux «terres réservées aux Indiens» au par. 91(24). Cependant, ces droits comprennent également les coutumes, pratiques et traditions qui ne se rattachent pas à un territoire; cette partie de l’essentiel de l’indianité découle de la compétence du fédéral à l’égard des «Indiens». Il est interdit aux gouvernements provinciaux de faire des lois portant sur ces deux types de droits ancestraux.

(3) Lois provinciales d’application générale

Le fait que le gouvernement fédéral soit investi, en vertu du par. 91(24), de la compétence exclusive à l’égard des Indiens et des terres réservées aux Indiens a pour effet d’empêcher l’édiction de lois provinciales sur ces questions. Par conséquent, les lois provinciales qui visent à imposer un traitement spécial aux Indiens sont inconstitutionnelles parce qu’elles se rapportent aux Indiens et empiètent donc sur la compétence du fédéral: voir *R. c. Sutherland*, [1980] 2 R.C.S. 451. Toutefois, il

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is a well-established principle that (*Four B Manufacturing Ltd.*, *supra*, at p. 1048):

The conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of these persons' rights and duties comes under primary federal competence to the exclusion of provincial laws of general application.

In other words, notwithstanding s. 91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands. Thus, this Court has held that provincial labour relations legislation (*Four B*) and motor vehicle laws (*R. v. Francis*, [1988] 1 S.C.R. 1025), which purport to apply to all persons in the province, also apply to Indians living on reserves.

existe un principe bien établi selon lequel (*Four B Manufacturing Ltd.*, précité, à la p. 1048):

L'attribution au Parlement de la compétence législative exclusive de faire des lois relatives à certaines catégories de personnes ne signifie pas que la totalité des droits et obligations de ces personnes relève de la compétence fédérale principale à l'exclusion des lois provinciales d'application générale.

En d'autres termes, malgré le par. 91(24), les lois provinciales d'application générale s'appliquent *proprio vigore* (d'elles-mêmes) aux Indiens et aux terres indiennes. Ainsi, notre Cour a statué que les lois provinciales sur les relations de travail (*Four B*) et les lois sur les véhicules à moteur (*R. c. Francis*, [1988] 1 R.C.S. 1025), qui sont censées s'appliquer à toutes les personnes dans la province, s'appliquent également aux Indiens qui vivent dans des réserves.

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What must be answered, however, is whether the same principle allows provincial laws of general application to extinguish aboriginal rights. I have come to the conclusion that a provincial law of general application could not have this effect, for two reasons. First, a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being *ultra vires* the province. That standard was laid down in *Sparrow*, *supra*, at p. 1099, as one of "clear and plain" intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been "necessarily inconsistent" with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown "use language which refers expressly to its extinguishment of aboriginal rights" (*Gladstone*, *supra*, at para. 34), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal

Il faut toutefois répondre à la question de savoir si ce même principe autorise l'extinction de droits ancestraux par des lois provinciales d'application générale. Je suis arrivé à la conclusion qu'une loi provinciale d'application générale ne peut pas avoir cet effet, et ce pour deux raisons. Première-ment, par définition, une loi provinciale d'application générale ne peut pas, sans être *ultra vires*, respecter la norme qui a été établie par notre Cour à l'égard de l'extinction des droits ancestraux. Cette norme, qui a été énoncée dans *Sparrow*, précité, à la p. 1099, est celle de l'intention «claire et expresse». Dans cet arrêt, la Cour a établi une distinction entre les règles de droit qui éteignent des droits ancestraux et celles qui se bornent à les réglementer. Quoique des règles de droit appartenant à cette deuxième catégorie aient pu être «nécessairement incompatibles» avec l'exercice continu de droits ancestraux, elles ne pouvaient pas éteindre ces droits. Même si l'obligation de manifester une intention claire et expresse n'exige peut-être pas que le gouvernement «utilise des mots faisant explicitement état de l'extinction de droits ancestraux» (*Gladstone*, précité, au par. 34), la norme est néanmoins très élevée. Le problème que je vois est que les seules règles de droit capables d'exprimer une intention suffisamment claire et expresse d'éteindre des droits ancestraux seraient des règles de droit ayant trait aux Indiens et aux

rights, because the intention to do so would take the law outside provincial jurisdiction.

Second, as I mentioned earlier, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on “Indianness” or the “core of Indian-ness” (*Dick*, *supra*, at pp. 326 and 315; also see *Four B*, *supra*, at p. 1047 and *Francis*, *supra*, at pp. 1028-29). The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not include labour relations (*Four B*) and the driving of motor vehicles (*Francis*). The only positive formulation of Indianness was offered in *Dick*. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt and because those activities were “at the centre of what they do and what they are” (at p. 320). But in *Van der Peet*, I described and defined the aboriginal rights that are recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application.

(4) Section 88 of the Indian Act

Provincial laws which would otherwise not apply to Indians *proprio vigore*, however, are allowed to do so by s. 88 of the *Indian Act*, which incorporates by reference provincial laws of gen-

terres indiennes. En conséquence, une règle de droit provinciale ne pourrait jamais éteindre d'elle-même des droits ancestraux, puisque l'existence de cette intention aurait pour effet d'exclure cette règle de la compétence de la province.

Deuxièmement, comme je l'ai mentionné plus tôt, le par. 91(24) protège l'essentiel de la compétence du fédéral, même contre les lois provinciales d'application générale, par l'application du principe de l'exclusivité des compétences. Il a été dit que ces éléments essentiels se rapportent à des questions touchant à la «quiddité indienne» ou au «fondement même de la quiddité indienne» (*Dick*, précité, aux pp. 326 et 315; voir aussi *Four B*, précité, à la p. 1047 et *Francis*, précité, aux pp. 1028 et 1029). On a défini l'essentiel de l'indianité qui est au cœur du par. 91(24) en disant ce qu'il est et en disant ce qu'il n'est pas. Dans des exemples de cette dernière situation, on a statué que l'essentiel de l'indianité ne comprenait pas les relations de travail (*Four B*) ni la conduite de véhicules à moteur (*Francis*). Le seul exemple concret d'indianité a été donné dans l'arrêt *Dick*. S'exprimant au nom de la Cour, le juge Beetz a tenu pour acquis, sans toutefois se prononcer sur la question, qu'une loi provinciale en matière de chasse ne s'appliquait pas d'elle-même aux membres d'une bande indienne lorsqu'ils chassent parce que ces activités étaient «au cœur même de leur existence et de leur être» (à la p. 320). Dans *Van der Peet*, toutefois, j'ai décrit et défini les droits ancestraux reconnus et confirmés par le par. 35(1) d'une manière analogue, c'est-à-dire comme des droits protégeant l'occupation des terres et les activités qui font partie intégrante de la culture distinctive autochtone du groupe qui revendique le droit. Il s'ensuit que les droits ancestraux font partie de l'essentiel de l'indianité qui est au cœur du par. 91(24). Par conséquent, avant 1982, ces droits ne pouvaient pas être éteints par des lois provinciales d'application générale.

(4) L'article 88 de la Loi sur les Indiens

Cependant, des règles de droit provinciales qui autrement ne s'appliqueraient pas d'elles-mêmes aux Indiens peuvent le faire par l'effet de l'art. 88 de la *Loi sur les Indiens*, qui incorpore par renvoi

eral application: *Dick, supra*, at pp. 326-27; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at p. 297; *Francis, supra*, at pp. 1030-31. However, it is important to note, in Professor Hogg's words, that s. 88 does not "invigorate" provincial laws which are invalid because they are in relation to Indians and Indian lands (*Constitutional Law of Canada* (3rd ed. 1992), at p. 676; also see *Dick, supra*, at p. 322). What this means is that s. 88 extends the effect of provincial laws of general application which cannot apply to Indians and Indian lands because they touch on the Indianness at the core of s. 91(24). For example, a provincial law which regulated hunting may very well touch on this core. Although such a law would not apply to aboriginal people *proprio vigore*, it would still apply through s. 88 of the *Indian Act*, being a law of general application. Such laws are enacted to conserve game and for the safety of all.

les lois provinciales d'application générale: *Dick*, précité, aux pp. 326 et 327; *Derrickson c. Derrickson*, [1986] 1 R.C.S. 285, à la p. 297; *Francis*, précité, aux pp. 1030 et 1031. Toutefois, il est important de souligner, dans les mots du professeur Hogg, que l'art. 88 ne [TRADUCTION] «revigore» pas des règles de droit provinciales qui sont invalides parce qu'elles se rapportent aux Indiens et aux terres indiennes (*Constitutional Law of Canada* (3^e éd. 1992), à la p. 676; voir aussi *Dick*, précité, à la p. 322). Ce que cela veut dire, c'est que l'art. 88 étend l'effet des lois provinciales d'application générale qui ne sauraient autrement s'appliquer aux Indiens et aux terres indiennes parce qu'elles touchent à la quiddité indienne qui est au cœur du par. 91(24). Par exemple, une règle de droit provinciale réglementant la chasse peut très bien affecter ce fondement. Même si une telle loi ne s'appliquait pas d'elle-même aux peuples autochtones, elle le ferait néanmoins sous l'effet de l'art. 88 de la *Loi sur les Indiens*, en tant que loi d'application générale. De telles lois sont adoptées pour la conservation du gibier et pour assurer la sécurité de tous.

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The respondent B.C. Crown argues that since such laws are *intra vires* the province, and applicable to aboriginal persons, s. 88 could allow provincial laws to extinguish aboriginal rights. I reject this submission, for the simple reason that s. 88 does not evince the requisite clear and plain intent to extinguish aboriginal rights. The provision states in full:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

I see nothing in the language of the provision which even suggests the intention to extinguish aboriginal rights. Indeed, the explicit reference to treaty rights in s. 88 suggests that the provision

La province intimée prétend que, comme les provinces ont le pouvoir d'adopter de telles lois et que celles-ci sont applicables aux autochtones, l'art. 88 pourrait autoriser l'extinction de droits ancestraux par des règles de droit provinciales. Je rejette cet argument pour la simple raison que l'intention claire et expresse requise pour l'extinction de droits ancestraux ne ressort pas de l'art. 88. Cette disposition est rédigée ainsi:

88. Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou règlement administratif pris sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou sous son régime.

Selon moi, il n'y a rien dans le texte de cette disposition qui suggère même l'intention d'éteindre des droits ancestraux. De fait, l'allusion explicite aux droits issus de traités à l'art. 88 indique que cette

was clearly not intended to undermine aboriginal rights.

VI. Conclusion and Disposition

For the reasons I have given above, I would allow the appeal in part, and dismiss the cross-appeal. Reluctantly, I would also order a new trial.

I conclude with two observations. The first is that many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet'suwet'en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation.

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) — "the reconciliation of the pre-existence

disposition n'est manifestement pas censée porter atteinte aux droits ancestraux.

VI. Conclusion et dispositif

Pour les motifs que je viens d'exposer, je suis d'avis d'accueillir le pourvoi en partie et de rejeter le pourvoi incident. À regret, j'ordonnerais également la tenue d'un nouveau procès.

Je vais conclure par deux observations. En premier lieu, de nombreuses nations autochtones dont les revendications territoriales chevauchent celles des appelants ne sont pas intervenues dans le présent pourvoi et ne paraissent pas l'avoir fait en première instance. Cette situation est malheureuse parce que les décisions relatives au titre aborigène des Gitksan et des Wet'suwet'en auront indubitablement un effet sur les revendications de ces autres nations autochtones, particulièrement en raison du fait que le titre aborigène comprend le droit exclusif d'utiliser et d'occuper des terres, c'est-à-dire de le faire à l'exclusion des non-autochtones et des membres d'autres nations autochtones. Par conséquent, peut-être serait-il souhaitable que ces autres nations autochtones interviennent dans une nouvelle instance.

En second lieu, la présente affaire a été longue et coûteuse, non seulement sur le plan financier mais aussi sur le plan humain. En ordonnant la tenue d'un nouveau procès, je n'encourage pas nécessairement les parties à introduire une instance et à régler leur différend devant les tribunaux. Comme il a été dit dans *Sparrow*, à la p. 1105, le par. 35(1) «procure [...] un fondement constitutionnel solide à partir duquel des négociations ultérieures peuvent être entreprises». Devraient également participer à ces négociations les autres nations autochtones qui ont un intérêt dans le territoire revendiqué. En outre, la Couronne a l'obligation morale, sinon légale, d'entamer et de mener ces négociations de bonne foi. En fin de compte, c'est au moyen de règlements négociés — toutes les parties négociant de bonne foi et faisant les compromis qui s'imposent — processus renforcé par les arrêts de notre Cour, que nous pourrions réaliser ce que, dans *Van der Peet*, précité, au par. 31, j'ai déclaré être l'objet fondamental du par. 35(1),

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of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.

The reasons of *La Forest* and *L’Heureux-Dubé JJ.* were delivered by

187 LA FOREST J. — I have read the reasons of the Chief Justice, and while I agree with his conclusion, I disagree with various aspects of his reasons and in particular, with the methodology he uses to prove that aboriginal peoples have a general right of occupation of certain lands (often referred to as “aboriginal title”).

188 I begin by considering why a new trial is necessary in this case. It is true, as the Chief Justice points out, that the amalgamation of the appellants’ individual claims represents a defect in the pleadings and, technically speaking, this prevents us from considering the merits of the case. However, in my view, there is a more substantive problem with the pleadings in this case. Before this Court, the appellants sought a declaration of “aboriginal title” but attempted, in essence, to prove that they had complete control over the territory in question. The appellants effectively argued on appeal, as they did at trial, that by virtue of their social and land tenure systems — consisting of Chief authority, Houses, feasts, crests, and totem poles — they acquired an absolute interest in the claimed territory, including ownership of and jurisdiction over the land. The problem with this approach is that it requires proof of governance and control as opposed to proof of general occupation of the affected land. Only the latter is the *sine qua non* of “aboriginal title”. It follows that what the appellants sought by way of declaration from this Court and what they set out to prove by way of the evidence were two different matters. In light of this substantive defect in the pleadings, a new trial

c’est-à-dire «concilier la préexistence des sociétés autochtones et la souveraineté de Sa Majesté». Il faut se rendre à l’évidence, nous sommes tous ici pour y rester.

Version française des motifs des juges *La Forest* et *L’Heureux-Dubé* rendus par

LE JUGE LA FOREST — J’ai lu les motifs du Juge en chef et, bien que je souscrive à sa conclusion, je suis en désaccord avec divers aspects de ses motifs et en particulier avec la méthode dont il se sert pour établir que les peuples autochtones ont un droit général d’occupation de certaines terres (souvent appelé «titre aborigène»).

Je vais d’abord examiner les raisons pour lesquelles la tenue d’un nouveau procès est nécessaire en l’espèce. Il est vrai, comme le souligne le Juge en chef, que la fusion des revendications individuelles des appelants constitue un vice affectant les actes de procédure et que, sur le plan de la forme, cela nous empêche d’examiner le fond de l’affaire. Cependant, à mon avis, les actes de procédure en l’espèce posent un problème encore plus substantiel. En effet, même si, devant notre Cour, les appelants ont sollicité un jugement déclarant l’existence d’un «titre aborigène», ils ont essentiellement tenté d’établir qu’ils exerçaient un contrôle complet sur le territoire en question. En appel, les appelants ont effectivement prétendu, comme ils l’avaient fait en première instance, qu’en vertu de leur régime de tenure foncière et de leur organisation sociale — constituée de l’autorité des chefs, de maisons, de célébrations, d’armoiries et de mâts totémiques — ils ont acquis un intérêt absolu sur le territoire revendiqué, y compris la propriété des terres visées et la compétence sur celles-ci. Le problème que pose cette approche est qu’elle exige qu’on prouve la gestion et le contrôle des terres visées, plutôt que l’occupation générale de celles-ci. Or, seule la preuve du deuxième fait est la condition *sine qua non* de l’existence du «titre aborigène». Il s’ensuit que ce que les appelants ont demandé à notre Cour de leur reconnaître, par voie de jugement déclaratoire, et ce qu’ils se sont efforcés d’établir par la preuve, étaient deux choses différentes. Étant donné ce vice substantiel entachant les actes de procédure, la tenue d’un

should be ordered to permit a reassessment of the matter on the basis of these reasons.

In my view, the foundation of “aboriginal title” was succinctly described by Judson J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, where, at p. 328, he stated: “the 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” Relying in part on Judson J.’s remarks, Dickson J. (as he then was) wrote in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 382, that aboriginal peoples have a “legal right to occupy and possess certain lands, the ultimate title to which is in the Crown”. As well, in *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, this Court stated, at p. 678: “The inescapable conclusion from the Court’s analysis of Indian title up to this point is that the Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy although . . . it is difficult to describe what more in traditional property law terminology”. More recently, Judson J.’s views were reiterated in *R. v. Van der Peet*, [1996] 2 S.C.R. 507. There Lamer C.J. wrote for the majority, at para. 30, that the doctrine of aboriginal rights (one aspect of which is “aboriginal title”) arises from “one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries” (emphasis in original).

It follows from these cases that the aboriginal right of possession is derived from the historic occupation and use of ancestral lands by aboriginal peoples. Put another way, “aboriginal title” is based on the continued occupation and use of the

nouveau procès doit être ordonnée pour permettre le réexamen de la question, sur le fondement des présents motifs.

À mon avis, le fondement du «titre aborigène» a été décrit de façon succincte par le juge Judson, dans *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313, où il a dit, à la p. 328: «mais il reste que lorsque les colons sont arrivés, les Indiens étaient déjà là, ils étaient organisés en sociétés et occupaient les terres comme leurs ancêtres l’avaient fait depuis des siècles. C’est ce que signifie le titre indien» S’appuyant en partie sur les commentaires du juge Judson, le juge Dickson (plus tard juge en chef) a écrit, dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335, à la p. 382, que les peuples autochtones ont le «droit, en *common law*, d’occuper et de posséder certaines terres dont le titre de propriété est finalement détenu par Sa Majesté». En outre, dans *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654, notre Cour a dit ceci, à la p. 678: «La conclusion inéluctable qui se dégage jusqu’à maintenant de l’analyse que la Cour a faite du titre indien est que les Indiens ont un véritable droit *sui generis* sur leurs terres. Il s’agit de quelque chose de plus qu’un droit de jouissance et d’occupation bien [. . .] [qu’]il soit difficile de décrire ce en quoi consiste ce quelque chose de plus au moyen de la terminologie traditionnelle du droit des biens». Plus récemment, les vues du juge Judson ont été réitérées dans *R. c. Van der Peet*, [1996] 2 R.C.S. 507. Dans cet arrêt, le juge en chef Lamer a écrit, au nom des juges majoritaires, au par. 30, que la doctrine des droits ancestraux (dont un aspect est le «titre aborigène») découle d’«un fait bien simple: quand les Européens sont arrivés en Amérique du Nord, les peuples autochtones s’y trouvaient déjà, ils vivaient en collectivités sur ce territoire et participaient à des cultures distinctives, comme ils l’avaient fait pendant des siècles» (souligné dans l’original).

Il ressort de ces arrêts que le droit de possession ancestral d’un peuple autochtone découle de l’occupation et de l’utilisation historiques par celui-ci de ses terres ancestrales. Autrement dit, le «titre aborigène» se fonde sur l’occupation et l’utilisa-

land as part of the aboriginal peoples' traditional way of life. This *sui generis* interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. The best description of "aboriginal title", as set out above, is a broad and general one derived from Judson J.'s pronouncements in *Calder*, *supra*. Adopting the same approach, Dickson J. wrote in *Guerin*, *supra*, that the aboriginal right of occupancy is further characterized by two principal features. First, this *sui generis* interest in the land is personal in that it is generally inalienable except to the Crown. Second, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat aboriginal peoples fairly. Dickson J. went on to conclude, at p. 382, that "[a]ny description of Indian title which goes beyond these two features is both unnecessary and potentially misleading". I share his views and am therefore reluctant to define more precisely the "right [of aboriginal peoples] to continue to live on their lands as their forefathers had lived"; see *Calder*, at p. 328.

tion ininterrompues des terres visées par le peuple autochtone dans le cadre de son mode de vie traditionnel. Ce droit *sui generis* n'équivaut pas à la propriété en fief simple et il ne peut pas non plus être décrit au moyen des concepts traditionnels du droit des biens. Comme il a été expliqué plus tôt, la meilleure façon de décrire le «titre aborigène» consiste à le décrire en termes larges et généraux, à partir des déclarations du juge Judson dans *Calder*, précité. Adoptant la même approche, le juge Dickson a écrit, dans *Guerin*, précité, que le droit d'occupation ancestral comportait en outre deux caractéristiques principales. Premièrement, ce droit *sui generis* est personnel en ce sens qu'il est généralement inaliénable, sauf en faveur de la Couronne. Deuxièmement, dans ses opérations concernant ce droit, la Couronne est assujettie à une obligation de fiduciaire, savoir celle de traiter équitablement les peuples autochtones. Le juge Dickson poursuit en concluant, à la p. 382, que «[t]oute description du titre indien qui va plus loin que ces deux éléments est superflue et risque d'induire en erreur». Je partage les vues exprimées par le juge Dickson et je suis en conséquence réticent à définir avec plus de précision le «droit [des peuples autochtones] de continuer à vivre sur leurs terres comme l'avaient fait leurs ancêtres»; *Calder*, à la p. 328.

191 The approach I adopt, in defining the aboriginal right of occupancy, is also a highly contextual one. More specifically, I find it necessary to make a distinction between: (1) the recognition of a general right to occupy and possess ancestral lands; and (2) the recognition of a discrete right to engage in an aboriginal activity in a particular area. I defined the latter in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 97, as "the traditional use, by a tribe of Indians, that has continued from pre-contact times of a particular area for a particular purpose". The issue in *Côté*, as in *Van der Peet*, was whether the use of a particular fishing spot was really an aspect of the aboriginal peoples' way of life in pre-contact times; see also in the *Van der Peet* trilogy *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672. In all those cases, the fishing rights asserted by the aboriginal claimants were not associated with a

Le point de vue que j'adopte pour définir le droit d'occupation ancestral est, de plus, éminemment contextuel. Plus précisément, j'estime qu'il est nécessaire de faire la distinction entre les deux aspects suivants: (1) la reconnaissance d'un droit général d'occuper et de posséder des terres ancestrales; (2) la reconnaissance d'un droit distinct d'exercer une activité autochtone dans une région particulière. J'ai défini ce dernier aspect dans *R. c. Côté*, [1996] 3 R.C.S. 139, au par. 97, comme étant «l'utilisation traditionnelle — remontant avant l'arrivée des Européens — que fait une tribu indienne d'un territoire donné, à une fin particulière». La question qui était en litige dans *Côté*, tout comme dans *Van der Peet*, était de savoir si l'utilisation d'un site de pêche particulier constituait véritablement un aspect du mode de vie des peuples autochtones avant le contact avec les Européens; voir également les autres arrêts de la

more general occupancy of the affected land. By contrast, the present case deals with a general claim to occupy and possess vast tracts of territory (58,000 square kilometres). This type of generalized land claim is not merely a bundle of discrete aboriginal rights to engage in specific activities. Rather, it is, as the Chief Justice states, at para. 111, the “right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies”. These land-based activities are, of course, related to the aboriginal society’s habits and mode of life.

trilogie *Van der Peet*, soit *R. c. Gladstone*, [1996] 2 R.C.S. 723, et *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672. Dans toutes ces affaires, les droits de pêche revendiqués par les autochtones n’étaient pas liés à une occupation plus générale des terres visées. À l’opposé, le présent cas concerne une revendication générale visant le droit d’occuper et de posséder de vastes étendues de territoire (58 000 kilomètres carrés). Ce type de revendication territoriale générale n’est pas qu’un simple faisceau de droits ancestraux distincts autorisant l’exercice d’activités particulières. Il s’agit plutôt, comme le dit le Juge en chef, au par. 111, du «droit d’utiliser des terres pour y exercer différentes activités qui ne doivent pas nécessairement toutes être des aspects de coutumes, pratiques et traditions faisant partie intégrante des cultures distinctives des sociétés autochtones». Il va de soi que ces activités — qui se rattachent au territoire — sont liées aux habitudes et au mode de vie de la société autochtone.

I note, as well, that in defining the nature of “aboriginal title”, one should generally not be concerned with statutory provisions and regulations dealing with reserve lands. In *Guerin*, *supra*, this Court held that the interest of an Indian band in a reserve is derived from, and is of the same nature as, the interest of an aboriginal society in its traditional tribal lands. Accordingly, the Court treated the aboriginal interest in reserve lands as one of occupation and possession while recognizing that the underlying title to those lands was in the Crown. It was not decided in *Guerin*, *supra*, and it by no means follows, that specific statutory provisions governing reserve lands should automatically apply to traditional tribal lands. For this reason, I am unable to assume that specific “reserve” provisions of the *Indian Act*, R.S.C., 1985, c. I-5, and the *Indian Oil and Gas Act*, R.S.C., 1985, c. I-7, apply to huge tracts of land which are subject to an aboriginal right of occupancy.

En outre, je souligne qu’en définissant la nature du «titre aborigène» il faut généralement faire abstraction des dispositions législatives et réglementaires concernant les terres des réserves. Dans *Guerin*, précité, notre Cour a statué que le droit que possède une bande indienne sur une réserve découle du droit de la société autochtone sur ses terres tribales traditionnelles, et qu’il est de la même nature que celui-ci. Par conséquent, notre Cour a considéré que le droit des autochtones sur les terres des réserves était un droit d’occupation et de possession, tout en reconnaissant que le titre de propriété sous-jacent de ces terres appartenait à la Couronne. Il n’a pas été décidé, dans *Guerin*, précité, et il ne s’ensuit pas que les dispositions législatives particulières régissant les terres des réserves s’appliquent automatiquement aux terres tribales traditionnelles. Pour cette raison, je ne peux pas présumer que les dispositions particulières concernant les «réserves» prévues par la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5, et par la *Loi sur le pétrole et le gaz des terres indiennes*, L.R.C. (1985), ch. I-7, s’appliquent à d’énormes étendues de territoire faisant l’objet d’un droit d’occupation ancestral.

193 I turn next to this Court's decision in *Van der Peet*, *supra*, where the Chief Justice identified a number of factors essential to the recognition of aboriginal rights under s. 35(1) of the *Constitution Act, 1982*. As I have already indicated, the *Van der Peet* trilogy dealt with activity-based discrete rights and, more specifically, with fishing activities that were carried out in the face of statutory prohibitions. By contrast, the present case deals with a generalized claim over vast tracts of territory, a claim which is itself the foundation for particular rights and activities. Moreover, I agree with the appellants that this generalized claim should not be defined as merely a compendium of aboriginal rights, each of which must meet the test set out in *Van der Peet*. Nonetheless, I am of the view that the "key" factors identified in *Van der Peet*, namely precision, specificity, continuity, and centrality are still met by my approach in the present case.

Je vais maintenant examiner l'arrêt de notre Cour *Van der Peet*, précité, dans lequel le Juge en chef a fait état d'un certain nombre de facteurs essentiels à la reconnaissance des droits ancestraux visés au par. 35(1) de la *Loi constitutionnelle de 1982*. Comme je l'ai déjà indiqué, la trilogie *Van der Peet* concernait des droits distincts liés à certaines activités et, plus précisément, des activités de pêche exercées en dépit d'interdictions prévues par la loi. À l'opposé, le présent cas porte sur une revendication générale visant de vastes étendues de territoire, revendication qui constitue elle-même le fondement de droits et d'activités de nature particulière. En outre, je suis d'accord avec les appelants que cette revendication générale ne doit pas être définie comme un simple ensemble de droits ancestraux, dont chacun doit satisfaire au critère énoncé dans *Van der Peet*. Néanmoins, je suis d'avis que l'approche que je retiens en l'espèce satisfait quand même aux facteurs «clés» mentionnés dans *Van der Peet*, savoir la précision, la spécificité, la continuité et le caractère fondamental.

194 First, it is clear that the nature of an aboriginal claim must be identified precisely with regard to particular practices, customs and traditions. As already mentioned, when dealing with a claim of "aboriginal title", the court will focus on the occupation and use of the land as part of the aboriginal society's traditional way of life. In pragmatic terms, this means looking at the manner in which the society used the land to live, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. These uses, although limited to the aboriginal society's traditional way of life, may be exercised in a contemporary manner; see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1099.

Premièrement, il est clair que la nature d'une revendication autochtone doit être rattachée précisément à des coutumes, pratiques et traditions particulières. Comme il a été mentionné plus tôt, le tribunal qui examine la revendication d'un «titre aborigène» se demande principalement si l'occupation et l'utilisation des terres visées faisaient partie du mode de vie traditionnel de la société autochtone concernée. En pratique, cela veut dire qu'il doit se demander de quelle manière les membres de la société utilisaient les terres visées pour vivre, c'est-à-dire pour y établir des villages, pour y travailler, pour se rendre à leur travail, pour y chasser, pour se rendre à leurs territoires de chasse, pour y pêcher, pour se rendre à leurs sites de pêche, pour y accomplir des cérémonies religieuses et pour d'autres fins. Ces utilisations, quoiqu'elles se limitent au mode de vie traditionnel de la société autochtone, peuvent être exercées de manière contemporaine; voir *R. c. Sparrow*, [1990] 1 R.C.S. 1075, à la p. 1099.

195 Second, it is self-evident that an aboriginal society asserting the right to live on its ancestral lands

Deuxièmement, il est évident que la société autochtone qui revendique le droit de vivre sur ses

must specify the area which has been continuously used and occupied. That is, the general boundaries of the occupied territory should be identified. I recognize, however, that when dealing with vast tracts of territory it may be impossible to identify geographical limits with scientific precision. Nonetheless, this should not preclude the recognition of a general right of occupation of the affected land. Rather, the drawing of exact territorial limits can be settled by subsequent negotiations between the aboriginal claimants and the government.

Some would also argue that specificity requires exclusive occupation and use of the land by the aboriginal group in question. The way I see it, exclusivity means that an aboriginal group must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected aboriginal society. On the other hand, I recognize the possibility that two or more aboriginal groups may have occupied the same territory and used the land communally as part of their traditional way of life. In cases where two or more groups have accommodated each other in this way, I would not preclude a finding of joint occupancy. The result may be different, however, in cases where one dominant aboriginal group has merely permitted other groups to use the territory or where definite boundaries were established and maintained between two aboriginal groups in the same territory.

Third, as indicated above, the aboriginal right of possession is based on the continued occupation and use of traditional tribal lands. The Chief Justice concludes that the relevant time period for the establishment of “aboriginal title” is the time at which the Crown asserted sovereignty over the affected land. I agree that in the context of generalized land claims, it is more appropriate, from a practical and theoretical standpoint, to consider the time of sovereignty as opposed to the time of first contact between an aboriginal society and Europeans. However, I am also of the view that the date

terres ancestrales doit spécifier le territoire qui a été utilisé et occupé de façon ininterrompue. En d’autres mots, les limites générales du territoire occupé doivent être indiquées. Cependant, je conviens que, lorsqu’il est question de vastes étendues de territoire, il peut se révéler impossible de déterminer les limites géographiques avec une précision scientifique. Néanmoins, cela ne doit pas faire obstacle à la reconnaissance d’un droit général d’occupation des terres visées. En effet, le tracé de limites territoriales précises peut être établi dans le cadre de négociations subséquentes entre les revendicateurs autochtones et le gouvernement.

Certains pourraient également prétendre que la notion de spécificité exige l’occupation et l’utilisation exclusives des terres visées par le groupe autochtone concerné. À mon avis, l’exclusivité signifie que le groupe autochtone doit établir que le territoire qu’il revendique est, en fait, son territoire ancestral et non celui d’une autre société autochtone avec laquelle il n’a aucun lien. Par ailleurs, je reconnais que deux groupes autochtones ou plus peuvent avoir occupé le même territoire et l’avoir utilisé en commun dans le cadre de leur mode de vie traditionnel. Dans les cas où deux groupes ou plus auraient convenu de tels arrangements, je n’écarterais pas la possibilité de conclure à l’existence d’une occupation conjointe. Toutefois, il est possible que le résultat soit différent dans les cas où un groupe autochtone dominant aurait simplement permis à d’autres groupes d’utiliser le territoire en cause ou lorsque deux groupes autochtones ont établi et maintenu entre eux des limites précises au sein du même territoire.

Troisièmement, comme il a été indiqué précédemment, le droit de possession ancestral se fonde sur l’occupation et l’utilisation ininterrompues de terres tribales traditionnelles. Le Juge en chef conclut que le moment pertinent pour établir l’existence du «titre aborigène» est celui de l’affirmation par la Couronne de sa souveraineté sur le territoire visé. Je suis d’accord avec le fait que, dans le contexte de revendications territoriales générales, il convient d’avantage, aussi bien d’un point de vue pratique que théorique, de tenir compte du moment de l’affirmation de la souveraineté plutôt que du

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of sovereignty may not be the only relevant moment to consider. For instance, there may have been aboriginal settlements in one area of the province but, after the assertion of sovereignty, the aboriginal peoples may have all moved to another area where they remained from the date of sovereignty until the present. This relocation may have been due to natural causes, such as the flooding of villages, or to clashes with European settlers. In these circumstances, I would not deny the existence of “aboriginal title” in that area merely because the relocation occurred post-sovereignty. In other words, continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area.

moment du premier contact entre la société autochtone et des Européens. Cependant, je suis également d’avis qu’il est possible que la date de l’affirmation de la souveraineté ne soit pas le seul moment pertinent dont il faille tenir compte. Par exemple, il est possible que des peuples autochtones se soient établis dans une partie de la province, mais que, après l’affirmation de la souveraineté, ils aient tous migré vers une autre région, où ils se trouvent toujours depuis cette date. Il se peut que cette migration ait été provoquée par des causes naturelles telle l’inondation des villages ou par des affrontements avec des colons européens. Dans de telles circonstances, je n’écarterais pas l’existence d’un «titre aborigène» sur cette région pour la seule raison que la migration s’est produite après l’affirmation de la souveraineté. Autrement dit, il peut encore y avoir continuité lorsque l’occupation actuelle d’une région est liée à l’occupation d’une autre région avant l’affirmation de la souveraineté.

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Also, on the view I take of continuity, I agree with the Chief Justice that it is not necessary for courts to have conclusive evidence of pre-sovereignty occupation. Rather, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation. Further, I agree that there is no need to establish an unbroken chain of continuity and that interruptions in occupancy or use do not necessarily preclude a finding of “title”. I would go further, however, and suggest that the presence of two or more aboriginal groups in a territory may also have an impact on continuity of use. For instance, one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected to the occupancy of another society by conquest or exchange. In these circumstances, continuity of use and occupation, extending back to the relevant time, may very well be established;

En outre, compte tenu du point de vue que j’adopte à l’égard de la continuité, je suis d’accord avec le Juge en chef qu’il n’est pas nécessaire que les tribunaux disposent d’éléments de preuve concluants d’une occupation antérieure à l’affirmation de la souveraineté. En effet, les peuples autochtones qui revendiquent un droit de possession peuvent présenter des éléments de preuve de l’occupation actuelle du territoire visé pour établir son occupation antérieure. De plus, je conviens qu’il n’est pas nécessaire de faire la preuve d’une continuité parfaite et que le fait que l’occupation ou l’utilisation ait été marquée par des interruptions n’empêche pas de conclure à l’existence d’un «titre». Cependant, j’irais encore plus loin et suggérerais que la présence de deux groupes autochtones ou plus dans un territoire donné peut aussi avoir une incidence sur la continuité de l’utilisation. Par exemple, il est possible qu’un groupe autochtone ait cédé la possession de territoire à des occupants ultérieurs ou encore qu’il ait fusionné ce territoire avec celui d’une autre société autochtone. De même, l’occupation du territoire par une société autochtone peut être liée à l’occupation d’une autre société par voie de conquête ou d’échange. Dans de telles circonstances, la continuité de l’utilisation et de l’occupation du territoire

see Brian Slattey, “Understanding Aboriginal Rights” (1987), 66 *Can. Bar Rev.* 727, at p. 759.

Fourth, if aboriginal peoples continue to occupy and use the land as part of their traditional way of life, it necessarily follows that the land is of central significance to them. As already suggested, aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas. Rather, the use of adjacent lands and even remote territories to pursue a traditional mode of life is also related to the notion of occupancy. Viewed in this light, occupancy is part of aboriginal culture in a broad sense and is, therefore, absorbed in the notion of distinctiveness. To use the language of *Van der Peet*, proof of occupancy is proof of centrality.

I would also add that my approach regarding the nature of aboriginal occupancy is supported by the terms of the *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No. 1. Although the *Proclamation* is not the sole source of “aboriginal title” in this country, it bears witness to the British policy towards aboriginal peoples which was based on respect for their right to occupy their ancestral lands; see *Sparrow*, *supra*, at p. 1103. Specifically, the *Proclamation* provides:

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson’s Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

In clear terms vast tracts of territory (including large portions of the area now comprising Ontario,

visé depuis la période pertinente peut très bien être établie; voir Brian Slattey, «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727, à la p. 759.

Quatrièmement, si des peuples autochtones continuent d’occuper et d’utiliser le territoire visé dans le cadre de leur mode de vie traditionnel, il s’ensuit nécessairement que ce territoire a une importance fondamentale pour eux. Comme il a été suggéré plus tôt, la notion d’occupation d’un territoire par des autochtones ne s’entend pas seulement de la présence de peuples autochtones dans des villages ou des établissements permanents. Est également visée par cette notion l’utilisation de terres adjacentes et même de territoires éloignés dans le cadre d’un mode de vie traditionnel. Vue sous cet angle, l’occupation constitue un aspect de la culture autochtone prise dans un sens large et s’intègre, par conséquent, à la notion de caractère distinctif. Pour reprendre le vocabulaire employé dans *Van der Peet*, la preuve de l’occupation est la preuve du caractère fondamental.

J’ajouterais également que l’approche que j’adopte relativement à la nature de l’occupation du territoire par des autochtones est étayée par le libellé de la *Proclamation royale de 1763*, L.R.C. (1985), app. II, n° 1. Bien que la *Proclamation* ne soit pas l’unique source du «titre aborigène» au pays, elle témoigne de la politique britannique envers les peuples autochtones, laquelle était fondée sur le respect de leur droit d’occuper leurs terres ancestrales; voir *Sparrow*, précité, à la p. 1103. Plus précisément, la *Proclamation* prévoit ce qui suit:

Nous déclarons de plus que c’est Notre plaisir royal ainsi que Notre volonté de réserver pour le présent, sous Notre souveraineté, Notre protection et Notre autorité, pour l’usage desdits sauvages, toutes les terres et tous les territoires non compris dans les limites de Nos trois gouvernements ni dans les limites du territoire concédé à la Compagnie de la baie d’Hudson, ainsi que toutes les terres et tous les territoires situés à l’ouest des sources des rivières qui de l’ouest et du nord-ouest vont se jeter dans la mer.

En termes clairs, de vastes étendues de territoire (y compris de larges portions du territoire qui

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Quebec, and the prairie provinces) were reserved for aboriginal peoples. These huge tracts of land were by no means limited to villages or permanent settlements but were reserved more generally as “Hunting Grounds” and “for the use of the said Indians”. Aboriginal peoples had the right to possess the lands reserved for them and “not be molested or disturbed in the Possession” of such territory. In essence, the rights set out in the *Proclamation* — which were applied in principle to aboriginal peoples across the country — underlie the view I have taken of aboriginal occupancy; see *R. v. Wesley*, [1932] 4 D.L.R. 774 (Alta. S.C., App. Div.), at p. 787, and *R. v. Sikyea* (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), *aff’d Sikyea v. The Queen*, [1964] S.C.R. 642.

comprend aujourd’hui l’Ontario, le Québec et les provinces des Prairies) ont été réservées pour l’usage des peuples autochtones. Ces vastes étendues de territoire n’étaient aucunement limitées aux villages ou aux établissements permanents, mais elles étaient plutôt réservées, de façon plus générale, comme «territoires de chasse» «pour l’usage desdits sauvages». Les peuples autochtones avaient le droit à la «possession entière et paisible» de ces territoires. Essentiellement, les droits énoncés dans la *Proclamation* — qui ont été appliqués en principe aux peuples autochtones dans l’ensemble du pays — sous-tendent le point de vue que j’ai adopté en ce qui concerne l’occupation du territoire par des autochtones; voir *R. c. Wesley*, [1932] 4 D.L.R. 774 (C.S. Alb., Div. app.), à la p. 787, et *R. c. Sikyea* (1964), 43 D.L.R. (2d) 150 (C.A.T.N.-O.), *conf. par Sikyea c. The Queen*, [1964] R.C.S. 642.

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The analysis thus far has focussed on the nature of the aboriginal right to occupy and possess certain lands — a right recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*. Nonetheless, as Dickson C.J. and I wrote in *Sparrow*, *supra*, at p. 1109: “Rights that are recognized and affirmed are not absolute”. Thus, government regulation can infringe upon aboriginal rights if it meets the test of justification under s. 35(1). It is important to emphasize as well that the approach adopted under s. 35(1) is a highly contextual one. This is also clear from the reasons I wrote jointly with Dickson C.J. in *Sparrow*, at p. 1111:

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

Jusqu’à présent, l’analyse a porté principalement sur la nature du droit ancestral d’occuper et de posséder certaines terres — droit reconnu et confirmé au par. 35(1) de la *Loi constitutionnelle de 1982*. Néanmoins, comme le juge en chef Dickson et moi-même l’avons écrit dans *Sparrow*, précité, à la p. 1109: «Les droits qui sont reconnus et confirmés ne sont pas absolus». Par conséquent, des mesures de réglementation prises par le gouvernement peuvent porter atteinte aux droits ancestraux s’ils satisfont au critère de justification des atteintes aux droits visés au par. 35(1). Il est également important de souligner que la méthode adoptée à l’égard du par. 35(1) est éminemment contextuelle. Cela ressort d’ailleurs clairement des motifs que j’ai écrits conjointement avec le juge en chef Dickson dans l’arrêt *Sparrow*, à la p. 1111:

Nous tenons à souligner relativement au par. 35(1) l’importance du contexte et d’un examen cas par cas. Étant donné la généralité du texte de la disposition constitutionnelle en cause et compte tenu surtout des complexités que présentent l’histoire, la société et les droits des autochtones, les limites d’une norme justificative doivent être fixées dans le contexte factuel particulier de chaque cas.

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In the context of the present case, I agree with the Chief Justice that the general economic development of the interior of British Columbia,

Dans le contexte de la présente affaire, je suis d’accord avec le Juge en chef que le développement économique général de l’intérieur de la

through agriculture, mining, forestry, and hydroelectric power, as well as the related building of infrastructure and settlement of foreign populations are valid legislative objectives that, in principle, satisfy the first part of the justification analysis.

Under the second part of the justification test, these legislative objectives are subject to accommodation of the aboriginal peoples' interests. This accommodation must always be in accordance with the honour and good faith of the Crown. Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of "aboriginal title" is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect of accommodation is fair compensation. More specifically, in a situation of expropriation, one asks whether fair compensation is available to the aboriginal peoples; see *Sparrow, supra*, at p. 1119. Indeed, the treatment of "aboriginal title" as a compensable right can be traced back to the *Royal Proclamation, 1763*. The relevant portions of the *Proclamation* are as follows:

... such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them [aboriginal peoples] or any of them, as their Hunting Grounds. . . .

We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians . . . but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name. . . . [Emphasis added.]

Clearly, the *Proclamation* contemplated that aboriginal peoples would be compensated for the

Colombie-Britannique par l'agriculture, l'exploitation minière, la foresterie et l'énergie hydroélectrique, ainsi que la construction des infrastructures et l'implantation des populations requises par ce développement, sont des objectifs législatifs réguliers qui, en principe, satisfont au premier volet du critère de justification.

Dans le cadre du second volet de ce critère, ces objectifs législatifs doivent tenir compte des intérêts des peuples autochtones. Cette prise en compte doit toujours être faite conformément à l'obligation de la Couronne d'agir honorablement et de bonne foi. En outre, dans l'examen d'une revendication générale visant de vastes étendues de territoire, cette prise en compte ne consiste pas simplement à s'enquérir si des permis ont été délivrés de manière équitable dans un secteur d'activité donné ou si des mesures de conservation ont été régulièrement mises en œuvre à l'égard d'une ressource particulière. En effet, la question de la prise en compte du «titre aborigène» a une portée beaucoup plus large. L'un des aspects de cette prise en compte, dans un tel contexte, consiste certainement à informer et à consulter les peuples autochtones relativement au développement du territoire visé. Un autre aspect de la prise en compte est la question de la juste indemnisation. Plus précisément, en cas d'expropriation, il faut se demander si une juste indemnité est prévue pour les peuples autochtones; voir *Sparrow*, précité, à la p. 1119. De fait, l'idée que le «titre aborigène» est un droit donnant ouverture à indemnisation remonte à la *Proclamation royale de 1763*. Voici les passages pertinents de la *Proclamation*:

... des parties de Nos possessions et territoires qui ont été ni concédées ni achetées et ont été réservées pour ces tribus [les peuples autochtones] ou quelques-unes d'entre elles comme territoires de chasse . . .

Nous déclarons de l'avis de Notre Conseil privé, qu'il est strictement défendu à qui que ce soit d'acheter aux sauvages des terres qui leur sont réservées [. . .] cependant si quelques-uns des sauvages, un jour ou l'autre, devenaient enclins à se départir desdites terres, elles ne pourront être achetées que pour Nous, en Notre nom . . . [Je souligne.]

De toute évidence, la *Proclamation* prévoyait que les peuples autochtones seraient indemnisés pour

surrender of their lands; see also Slattery, "Understanding Aboriginal Rights", *supra*, at pp. 751-52. It must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus, generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a remotely visited area. I add that account must be taken of the interdependence of traditional uses to which the land was put.

la cession de leurs terres; voir également l'ouvrage de Slattery, «Understanding Aboriginal Rights», *loc. cit.*, aux pp. 751 et 752. Néanmoins, il convient de souligner que, dans le présent contexte, la juste indemnité ne peut être assimilée à la valeur d'un fief simple. L'indemnité doit plutôt être considérée en fonction du droit en cause et être propre à sauvegarder l'honneur de la Couronne. Ainsi, de façon générale, l'indemnité peut être plus importante lorsque l'expropriation touche un village et ses environs par opposition à une région peu fréquentée. J'ajoute qu'il faut tenir compte de l'interdépendance des utilisations traditionnelles faites du territoire visé.

204 In summary, in developing vast tracts of land, the government is expected to consider the economic well being of all Canadians. But the aboriginal peoples must not be forgotten in this equation. Their legal right to occupy and possess certain lands, as confirmed by s. 35(1) of the *Constitution Act, 1982*, mandates basic fairness commensurate with the honour and good faith of the Crown.

En résumé, on s'attend à ce que le gouvernement, dans le cadre du développement de vastes étendues de territoire, prenne en compte le bien-être économique de tous les Canadiens. Les peuples autochtones ne doivent cependant pas être oubliés dans cette prise en compte. Le droit que leur reconnaît la loi d'occuper et de posséder certaines terres, droit qui est confirmé par le par. 35(1) de la *Loi constitutionnelle de 1982*, commande que l'on fasse montre envers eux d'équité fondamentale, d'une manière qui soit compatible avec l'obligation de la Couronne d'agir honorablement et de bonne foi.

205 With regard to the issue of self-government, I conclude, as does the Chief Justice, that there was insufficient evidence before this Court to make any determination regarding this aspect of the appellants' claim.

En ce qui concerne la question de l'autonomie gouvernementale, je conclus, à l'instar du Juge en chef, que notre Cour ne dispose pas de suffisamment d'éléments de preuve pour statuer sur cet aspect de la demande des appelants.

206 As for the issue raised on the cross-appeal, I agree with the Chief Justice's conclusion. The respondent province had no authority to extinguish aboriginal rights either under the *Constitution Act, 1867* or by virtue of s. 88 of the *Indian Act*.

Quant à la question soulevée dans le pourvoi incident, je souscris à la conclusion du Juge en chef à cet égard. La province intimée n'avait pas le pouvoir d'éteindre des droits ancestraux en vertu de la *Loi constitutionnelle de 1867* ni par l'effet de l'art. 88 de la *Loi sur les Indiens*.

207 On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake. This point was made by Lambert J.A. in the Court of Appeal, [1993] 5 W.W.R. 97, at pp. 379-80:

Enfin, je tiens à souligner que la meilleure approche dans ce genre d'affaires est un processus de négociation et de réconciliation qui prenne dûment en compte les intérêts complexes et opposés en jeu. Cette observation a été faite par le juge Lambert de la Cour d'appel, [1993] 5 W.W.R. 97, aux pp. 379 et 380:

So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. The legal rights of the Gitksan and Wet'suwet'en peoples, to which this law suit is confined, and which allow no room for any approach other than the application of the law itself, and the legal rights of all aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years ahead. [Emphasis added.]

(See also *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 2 (*Restructuring the Relationship*), Part 2, at pp. 561-62.)

Accordingly, I would allow the appeal in part and order a new trial on the basis of the principles set out in these reasons. I would also dismiss the cross-appeal.

The following are the reasons delivered by

MCLACHLIN J. — I concur with the Chief Justice. I add that I am also in substantial agreement with the comments of Justice La Forest.

* * *

SCHEDULE 1

Appellants

DELGAMUUKW, also known as Earl Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Delgamuukw and Haaxw

GISDAY WA, also known as Alfred Joseph, suing on his own behalf and on behalf of all the members of the House of Gisday Wa

NII KYAP, also known as Gerald Gunanoot, suing on his own behalf and on behalf of all the members of the House of Nii Kyap

[TRADUCTION] En fin de compte, il faudra donc tenir compte des droits reconnus par la loi aux Indiens au sein de l'ensemble de la société, au moyen de compromis politiques et de mesures d'adaptation qui seront fondés, au départ, sur la négociation d'accords, et qui devront, en dernière analyse, être conformes à la volonté souveraine de la collectivité toute entière. Les droits reconnus par la loi aux Gitksan et aux Wet'suwet'en, sur lesquels la présente action porte exclusivement et qui ne laissent de place à aucune autre approche que l'application de la loi elle-même, de même que les droits reconnus par la loi à tous les peuples autochtones de la Colombie-Britannique, ne constituent qu'un seul des facteurs qui détermineront, en définitive, quelle genre de collectivité nous aurons dans les années à venir, non seulement en Colombie-Britannique, mais partout au Canada. [Je souligne.]

(Voir également le *Rapport de la Commission royale sur les peuples autochtones* (1996), vol. 2 (*Une relation à redéfinir*), partie 2, aux pp. 561 et 562.)

En conséquence, je suis d'avis d'accueillir le pourvoi en partie et d'ordonner la tenue d'un nouveau procès sur le fondement des principes énoncés dans les présents motifs. Je suis également d'avis de rejeter le pourvoi incident.

Version française des motifs rendus par

LE JUGE MCLACHLIN — Je souscris aux motifs du Juge en chef. J'ajoute que je suis en outre largement en accord avec les commentaires du juge La Forest.

* * *

ANNEXE 1

Appelants

DELGAMUUKW, connu également sous le nom d'Earl Muldoe, en son propre nom et au nom de tous les autres membres des maisons Delgamuukw et Haaxw

GISDAY WA, connu également sous le nom d'Alfred Joseph, en son propre nom et au nom de tous les autres membres de la maison Gisday Wa

NII KYAP, connu également sous le nom de Gerald Gunanoot, en son propre nom et au nom de tous les autres membres de la maison Nii Kyap

LELT, also known as Lloyd Ryan, suing on his own behalf and on behalf of all the members of the Houses of Lelt and Haak'w

ANTGULILBIX, also known as Mary Johnson, suing on her own behalf and on behalf of all the members of the House of Antgulilbix

TENIMGYET, also known as Arthur Matthews, Jr., suing on his own behalf and on behalf of all the members of the House of Tenimgyet

GOOHLAHT, also known as Lucy Namox, suing on her own behalf and on behalf of all the members of the Houses of Gooхлаht and Samooh

KLIYEM LAX HAA, also known as Eva Sampson, suing on her own behalf and on behalf of all the members of the Houses of Kliiyem Lax Haa and Wii'mugulxw

GWIS GYEN, also known as Stanley Williams, suing on his own behalf and on behalf of all the members of the House of Gwis Gyen

KWEESE, also known as Florence Hall, suing on her own behalf and on behalf of all the members of the House of Kweese

DJOGASLEE, also known as Walter Wilson, suing on his own behalf and on behalf of all the members of the House of Djogaslee

GWAGL'LO, also known as Ernest Hyzims, suing on his own behalf and on behalf of all the members of the Houses of Gwagl'lo and Duubisxw

GYOLUGYET, also known as Mary McKenzie, suing on her own behalf and on behalf of all the members of the House of Gyolugyet

GYETM GALDOO, also known as Sylvester Green, suing on his own behalf and on behalf of all the members of the Houses of Gyetm Galdoo and Wii'Goob'l

HAAK ASXW, also known as Larry Wright, suing on his own behalf and on behalf of all the members of the House of Haak Asxw

LELT, connu également sous le nom de Lloyd Ryan, en son propre nom et au nom de tous les autres membres des maisons Lelt et Haak'w

ANTGULILBIX, connue également sous le nom de Mary Johnson, en son propre nom et au nom de tous les autres membres de la maison Antgulilbix

TENIMGYET, connu également sous le nom d'Arthur Matthews, fils, en son propre nom et au nom de tous les autres membres de la maison Tenimgyet

GOOHLAHT, connue également sous le nom de Lucy Namox, en son propre nom et au nom de tous les autres membres des maisons Gooхлаht et Samooh

KLIYEM LAX HAA, connue également sous le nom d'Eva Sampson, en son propre nom et au nom de tous les autres membres des maisons Kliiyem Lax Haa et Wii'mugulxw

GWIS GYEN, connu également sous le nom de Stanley Williams, en son propre nom et au nom de tous les autres membres de la maison Gwis Gyen

KWEESE, connue également sous le nom de Florence Hall, en son propre nom et au nom de tous les autres membres de la maison Kweese

DJOGASLEE, connu également sous le nom de Walter Wilson, en son propre nom et au nom de tous les autres membres de la maison Djogaslee

GWAGL'LO, connu également sous le nom d'Ernest Hyzims, en son propre nom et au nom de tous les autres membres des maisons Gwagl'lo et Duubisxw

GYOLUGYET, connue également sous le nom de Mary McKenzie, en son propre nom et au nom de tous les autres membres de la maison Gyolugyet

GYETM GALDOO, connu également sous le nom de Sylvester Green, en son propre nom et au nom de tous les autres membres des maisons Gyetm Galdoo et Wii'Goob'l

HAAK ASXW, connu également sous le nom de Larry Wright, en son propre nom et au nom de tous les autres membres de la maison Haak Asxw

GEEL, also known as Walter Harris, suing on his own behalf and on behalf of all the members of the House of Geel

HAALUS, also known as Billy Morrison, suing on his own behalf and on behalf of all the members of the House of Haalus

WII HLENGWAX, also known as Herbert Burke, suing on his own behalf and on behalf of all the members of the House of Wii Hlengwax

LUUTKUDZIIWUS, also known as Ben McKenzie, Sr., suing on his own behalf and on behalf of all the members of the House of Luutkudziiwus

MA'UUS, also known as Jeffrey Harris, Jr., suing on his own behalf and on behalf of all the members of the House of Ma'uus

MILUU LAK, also known as Alice Jeffery, suing on her own behalf and on behalf of all the members of the Houses of Miluu Lak and Haiwas

NIKA TEEN, also known as James Woods, suing on his own behalf and on behalf of all the members of the House of Nika Teen

SKIIK'M LAX HA, also known as John Wilson, suing on his own behalf and on behalf of all the members of the House of Skiik'm Lax Ha

WII MINOSIK, also known as Robert Stevens, suing on his own behalf and on behalf of all the members of the House of Wii Minosik

GWININ NITXW, also known as Solomon Jack, suing on his own behalf and on behalf of all the members of the House of Gwinin Nitxw

GWOIMT, also known as Kathleen Wale, suing on her own behalf and on behalf of all the members of the Houses of Gwoimt and Tsabux

LUUS, also known as Jeffrey Harris, suing on his own behalf and on behalf of all the members of the House of Luus

GEEL, connu également sous le nom de Walter Harris, en son propre nom et au nom de tous les autres membres de la maison Geel

HAALUS, connu également sous le nom de Billy Morrison, en son propre nom et au nom de tous les autres membres de la maison Haalus

WII HLENGWAX, connu également sous le nom d'Herbert Burke, en son propre nom et au nom de tous les autres membres de la maison Wii Hlengwax

LUUTKUDZIIWUS, connu également sous le nom de Ben McKenzie, père, en son propre nom et au nom de tous les autres membres de la maison Luutkudziiwus

MA'UUS, connu également sous le nom de Jeffrey Harris, fils, en son propre nom et au nom de tous les autres membres de la maison Ma'uus

MILUU LAK, connue également sous le nom d'Alice Jeffery, en son propre nom et au nom de tous les autres membres des maisons Miluu Lak et Haiwas

NIKA TEEN, connu également sous le nom de James Woods, en son propre nom et au nom de tous les autres membres de la maison Nika Teen

SKIIK'M LAX HA, connu également sous le nom de John Wilson, en son propre nom et au nom de tous les autres membres de la maison Skiik'm Lax Ha

WII MINOSIK, connu également sous le nom de Robert Stevens, en son propre nom et au nom de tous les autres membres de la maison Wii Minosik

GWININ NITXW, connu également sous le nom de Solomon Jack, en son propre nom et au nom de tous les autres membres de la maison Gwinin Nitxw

GWOIMT, connue également sous le nom de Kathleen Wale, en son propre nom et au nom de tous les autres membres des maisons Gwoimt et Tsabux

LUUS, connu également sous le nom de Jeffrey Harris, en son propre nom et au nom de tous les autres membres de la maison Luus

NIIST, also known as David Blackwater, suing on his own behalf and on behalf of all the members of the Houses of Niist and Baskyelaxha

SPOOKW, also known as Steven Robinson, suing on his own behalf and on behalf of all the members of the Houses of Spookw and Yagosip

WII GAAK, also known as Neil Sterritt, Sr., suing on his own behalf and on behalf of all the members of the House of Wii Gaak

DAWAMUXW, also known as Charlie Clifford, suing on his own behalf and on behalf of all the members of the House of Dawamuxw

GITLUDAH, also known as Peter Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Gitludahl and Wiigyet

GUXSAN, also known as Herbert Wesley, suing on his own behalf and on behalf of all the members of the House of Guksan

HANAMUXW, also known as Joan Ryan, suing on her own behalf and on behalf of all the members of the House of Hanamuxw

YAL, also known as George Turner, suing on his own behalf and on behalf of all the members of the House of Yal

GWIIYEEHL, also known as Chris Skulsh, suing on his own behalf and on behalf of all the members of the House of Gwiiyeehl

SAKXUM HIGOOKX, also known as Vernon Smith, suing on his own behalf and on behalf of all the members of the House of Sakxum Higookx

MA DEEK, also known as James Brown, suing on his own behalf and on behalf of all the members of the House of Ma Deek

WOOS, also known as Roy Morris, suing on his own behalf and on behalf of all the members of the House of Woos

NIIST, connu également sous le nom de David Blackwater, en son propre nom et au nom de tous les autres membres des maisons Niist et Baskyelaxha

SPOOKW, connu également sous le nom de Steven Robinson, en son propre nom et au nom de tous les autres membres des maisons Spookw et Yagosip

WII GAAK, connu également sous le nom de Neil Sterritt, fils, en son propre nom et au nom de tous les autres membres de la maison Wii Gaak

DAWAMUXW, connu également sous le nom de Charlie Clifford, en son propre nom et au nom de tous les autres membres de la maison Dawamuxw

GITLUDAH, connu également sous le nom de Peter Muldoe, en son propre nom et au nom de tous les autres membres des maisons Gitludahl et Wiigyet

GUXSAN, connu également sous le nom d'Herbert Wesley, en son propre nom et au nom de tous les autres membres de la maison Guksan

HANAMUXW, connue également sous le nom de Joan Ryan, en son propre nom et au nom de tous les autres membres de la maison Hanamuxw

YAL, connu également sous le nom de George Turner, en son propre nom et au nom de tous les autres membres de la maison Yal

GWIIYEEHL, connu également sous le nom de Chris Skulsh, en son propre nom et au nom de tous les autres membres de la maison Gwiiyeehl

SAKXUM HIGOOKX, connu également sous le nom de Vernon Smith, en son propre nom et au nom de tous les autres membres de la maison Sakxum Higookx

MA DEEK, connu également sous le nom de James Brown, en son propre nom et au nom de tous les autres membres de la maison Ma Deek

WOOS, connu également sous le nom de Roy Morris, en son propre nom et au nom de tous les autres membres de la maison Woos

KNEDEBEAS, also known as Sarah Layton, suing on her own behalf and on behalf of all the members of the House of Knebebas

SMOGELEGEM, also known as Leonard George, suing on his own behalf and on behalf of all the members of the House of Smogelgem

KLO UM KHUN, also known as Patrick Pierre, suing on his own behalf and on behalf of all the members of the House of Klo Um Khun

HAG WIL NEG, also known as Ron Mitchell, suing on his own behalf and on behalf of all the members of the House of Hag Wil Neg

WAH TAH KEG'HT, also known as Henry Alfred, suing on his own behalf and on behalf of all the members of the House of Wah Tah Keg'ht

WAH TAH KWETS, also known as John Namox, suing on his own behalf and on behalf of all the members of the House of Wah Tah Kwets

WOOSIMLAXHA, also known as Victor Mowatt, suing on his own behalf and on behalf of all the members of the House of Gutginuxw

XSGOGIMLAXHA, also known as Vernon Milton, suing on his own behalf and on behalf of all the members of the House of Xsgogimlaxha

WIIGYET, also known as Roy Wesley, suing on his own behalf and on behalf of all the members of the House of Wiigyet

WII ELAAS, also known as Jim Angus, Jr., suing on his own behalf and on behalf of all the members of the Houses of WII Elaas and Amagyet

GAXSBGABAXS, also known as Gertie Watson, suing on her own behalf and on behalf of all the members of the House of Gaxsbgabaxs

WIGETIMSCHOL, also known as Dan Michell, suing on his own behalf and on behalf of all the members of the House of Namox

KNEDEBEAS, connue également sous le nom de Sarah Layton, en son propre nom et au nom de tous les autres membres de la maison Knebebas

SMOGELEGEM, connu également sous le nom de Leonard George, en son propre nom et au nom de tous les autres membres de la maison Smogelgem

KLO UM KHUN, connu également sous le nom de Patrick Pierre, en son propre nom et au nom de tous les autres membres de la maison Klo Um Khun

HAG WIL NEG, connu également sous le nom de Ron Mitchell, en son propre nom et au nom de tous les autres membres de la maison Hag Wil Neg

WAH TAH KEG'HT, connu également sous le nom d'Henry Alfred, en son propre nom et au nom de tous les autres membres de la maison Wah Tah Keg'ht

WAH TAH KWETS, connu également sous le nom de John Namox, en son propre nom et au nom de tous les autres membres de la maison Wah Tah Kwets

WOOSIMLAXHA, connu également sous le nom de Victor Mowatt, en son propre nom et au nom de tous les autres membres de la maison Gutginuxw

XSGOGIMLAXHA, connu également sous le nom de Vernon Milton, en son propre nom et au nom de tous les autres membres de la maison Xsgogimlaxha

WIIGYET, connu également sous le nom de Roy Wesley, en son propre nom et au nom de tous les autres membres de la maison Wiigyet

WII ELAAS, connu également sous le nom de Jim Angus, fils, en son propre nom et au nom de tous les autres membres des maisons WII Elaas et Amagyet

GAXSBGABAXS, connue également sous le nom de Gertie Watson, en son propre nom et au nom de tous les autres membres de la maison Gaxsbgabaxs

WIGETIMSCHOL, connu également sous le nom de Dan Michell, en son propre nom et au nom de tous les autres membres de la maison Namox

SCHEDULE 2**Those Intervening with the Musqueam Nation**

Delbert Guerin
 Gail Y. Sparrow
 Jim Kew
 Larry Grant
 Leona M. Sparrow
 Mary Charles
 Myrtle McKay
 Nolan Charles
 Susan A. Point
 Chief George Guerin

SCHEDULE 3**Those Intervening with the B.C. Cattlemen's Association**

B.C. Chamber of Commerce
 B.C. Wildlife Federation
 Business Council of British Columbia
 Council of Tourist Associations
 Fisheries Council of British Columbia
 Guideoutfitters Association of British Columbia
 Mining Association of British Columbia
 Pacific Fishermen's Defence Alliance

Appeal allowed in part; cross-appeal dismissed.

Solicitors for the appellants and respondents on the cross-appeal, the Gitksan Hereditary Chiefs et al.: Rush, Crane, Guenther & Adams, Vancouver.

Solicitors for the appellants and respondents on the cross-appeal, the Wet'suwet'en Hereditary Chiefs et al.: Blake, Cassels & Graydon, Vancouver.

ANNEXE 2**Intervenant avec la Nation Musqueam**

Delbert Guerin
 Gail Y. Sparrow
 Jim Kew
 Larry Grant
 Leona M. Sparrow
 Mary Charles
 Myrtle McKay
 Nolan Charles
 Susan A. Point
 Chef George Guerin

ANNEXE 3**Intervenant avec la B.C. Cattlemen's Association**

B.C. Chamber of Commerce
 B.C. Wildlife Federation
 Business Council of British Columbia
 Council of Tourist Associations
 Fisheries Council of British Columbia
 Guideoutfitters Association of British Columbia
 Mining Association of British Columbia
 Pacific Fishermen's Defence Alliance

Pourvoi accueilli en partie; pourvoi incident rejeté.

Procureurs des appelants et intimés dans le pourvoi incident, les chefs héréditaires Gitksan et autres: Rush, Crane, Guenther & Adams, Vancouver.

Procureurs des appelants et intimés dans le pourvoi incident, les chefs héréditaires Wet'suwet'en et autres: Blake, Cassels & Graydon, Vancouver.

Solicitors for the respondent and appellant on the cross-appeal, Her Majesty the Queen in Right of the Province of British Columbia: Arvay, Finlay, Victoria.

Solicitor for the respondent the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitors for the intervener the First Nations Summit: Ratcliff & Company, North Vancouver.

Solicitors for the intervener the Westbank First Nation: Woodward and Company, Victoria.

Solicitors for the interveners the Musqueam Nation et al.: Blake, Cassels & Graydon, Vancouver.

Solicitor for the interveners the B.C. Cattlemen's Association, et al.: J. Keith Lowes, Vancouver.

Solicitors for the intervener Skeena Cellulose Inc.: Russell & DuMoulin, Vancouver.

Solicitors for the intervener Alcan Aluminum Ltd.: Lawson, Lundell, Lawson & McIntosh, Vancouver.

Procureurs de l'intimée et appelante dans le pourvoi incident, Sa Majesté la Reine du chef de la Province de la Colombie-Britannique: Arvay, Finlay, Victoria.

Procureur de l'intimé le procureur général du Canada: Le procureur général du Canada, Ottawa.

Procureurs de l'intervenant le First Nations Summit: Ratcliff & Company, North Vancouver.

Procureurs de l'intervenante la Première nation de Westbank: Woodward and Company, Victoria.

Procureurs des intervenants la Nation Musqueam et autres: Blake, Cassels & Graydon, Vancouver.

Procureur des intervenants la B.C. Cattlemen's Association et autres: J. Keith Lowes, Vancouver.

Procureurs de l'intervenante Skeena Cellulose Inc.: Russell & DuMoulin, Vancouver.

Procureurs de l'intervenante Alcan Aluminium Ltée: Lawson, Lundell, Lawson & McIntosh, Vancouver.

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

v.

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

and between

Weyerhaeuser Company Limited *Appellant*

v.

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

and

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

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

c.

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

et entre

Weyerhaeuser Company Limited *Appelante*

c.

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

et

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

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

**INDEXED AS: HAIDA NATION v. BRITISH COLUMBIA
(MINISTER OF FORESTS)**

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

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

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

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

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

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

**RÉPERTORIÉ : NATION HAÏDA c. COLOMBIE-
BRITANNIQUE (MINISTRE DES FORÊTS)**

Référence neutre : 2004 CSC 73.

N° du greffe : 29419.

2004 : 24 mars; 2004 : 18 novembre.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

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

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

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

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

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

Jurisprudence

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

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

Statutes and Regulations Cited

Constitution Act, 1867, s. 109.
Constitution Act, 1982, s. 35.
Forest Act, R.S.B.C. 1996, c. 157.
Forestry Revitalization Act, S.B.C. 2003, c. 17.

Authors Cited

Concise Oxford Dictionary of Current English, 9th ed. Oxford: Clarendon Press, 1995, "accommodate", "accommodation".
 Hunter, John J. L. "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction". Continuing Legal Education Conference on Litigating Aboriginal Title, June 2000.
 Isaac, Thomas, and Anthony Knox. "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49.
 Lawrence, Sonia, and Patrick Macklem. "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252.
 New Zealand. Ministry of Justice. *A Guide for Consultation with Māori*. Wellington: The Ministry, 1997.

APPEALS from a judgment of the British Columbia Court of Appeal, [2002] 6 W.W.R. 243, 164 B.C.A.C. 217, 268 W.A.C. 217, 99 B.C.L.R. (3d) 209, 44 C.E.L.R. (N.S.) 1, [2002] 2 C.N.L.R. 121, [2002] B.C.J. No. 378 (QL), 2002 BCCA 147,

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

Lois et règlements cités

Forest Act, R.S.B.C. 1996, ch. 157.
Forestry Revitalization Act, S.B.C. 2003, ch. 17.
Loi constitutionnelle de 1867, art. 109.
Loi constitutionnelle de 1982, art. 35.

Doctrine citée

Hunter, John J. L. « Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction ». Continuing Legal Education Conference on Litigating Aboriginal Title, June 2000.
 Imbs, Paul, dir. *Trésor de la langue française, dictionnaire de la langue du XIX^e et du XX^e siècle (1789-1960)*, t. 1. Paris : Centre national de la recherche scientifique, 1971, « accommodement », « accommoder ».
 Isaac, Thomas, and Anthony Knox. « The Crown's Duty to Consult Aboriginal People » (2003), 41 *Alta. L. Rev.* 49.
 Lawrence, Sonia, and Patrick Macklem. « From Consultation to Reconciliation : Aboriginal Rights and the Crown's Duty to Consult » (2000), 79 *R. du B. can.* 252.
 Nouvelle-Zélande. Ministry of Justice. *A Guide for Consultation with Māori*. Wellington : The Ministry, 1997.

POURVOIS contre un arrêt de la Cour d'appel de la Colombie-Britannique, [2002] 6 W.W.R. 243, 164 B.C.A.C. 217, 268 W.A.C. 217, 99 B.C.L.R. (3d) 209, 44 C.E.L.R. (N.S.) 1, [2002] 2 C.N.L.R. 121, [2002] B.C.J. No. 378 (QL), 2002 BCCA 147, avec motifs

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

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

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

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

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

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

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

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

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

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

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

Allan Donovan, for the intervener the Haisla Nation.

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

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

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

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

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

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

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

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

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

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

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

Allan Donovan, pour l'intervenante la Nation haisla.

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

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

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

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

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

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

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

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

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

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

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

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

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

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10

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

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

11

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

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

II. Analysis

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

II. Analyse

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

12

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

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

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

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

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

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

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

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

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

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

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

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

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed

[TRADUCTION] La consultation n'est pas seulement un simple mécanisme d'échange de renseignements. Elle comporte également des mises à l'épreuve et la modification éventuelle des énoncés de politique compte tenu des renseignements obtenus ainsi que la rétroaction. Elle devient donc un processus grâce auquel les deux parties sont mieux informées . . .

. . . .

. . . .

... genuine consultation means a process that involves . . . :

... de véritables consultations s'entendent d'un processus qui consiste . . . :

- gathering information to test policy proposals
- putting forward proposals that are not yet finalised
- seeking Māori opinion on those proposals
- informing Māori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Māori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

- à recueillir des renseignements pour mettre à l'épreuve les énoncés de politique;
- à proposer des énoncés qui ne sont pas encore arrêtés définitivement;
- à chercher à obtenir l'opinion des Māoris sur ces énoncés;
- à informer les Māoris de tous les renseignements pertinents sur lesquels reposent ces énoncés;
- à écouter avec un esprit ouvert ce que les Māoris ont à dire sans avoir à en faire la promotion;
- à être prêt à modifier l'énoncé original;
- à fournir une rétroaction tant au cours de la consultation qu'après la prise de décision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. *The Province’s Duty*

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

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

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

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

F. *L’obligation de la province*

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

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

so, it argues, would “undermine the balance of federalism” (Crown’s factum, at para. 96).

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

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

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

G. Administrative Review

G. L’examen administratif

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

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

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

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

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

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

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

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

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

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

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

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

H. *Application to the Facts*

H. *L'application aux faits*

(1) Existence of the Duty

(1) L'existence de l'obligation

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

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

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

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

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

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

(2) Scope of the Duty

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

(i) *Strength of the Case*

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

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

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

(2) L'étendue de l'obligation

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

(i) *Solidité de la preuve*

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

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

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

(1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;

(2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

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

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

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

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

(1) il existe une [TRADUCTION] « probabilité raisonnable » que les Haïda réussissent à établir l'existence d'un titre sur [TRADUCTION] « au moins quelques parties » des régions côtières et intérieures des îles Haïda Gwaii, notamment les régions côtières du Bloc 6; il semble exister une [TRADUCTION] « possibilité raisonnable » que ces régions comprennent les régions intérieures du Bloc 6;

(2) il existe une [TRADUCTION] « forte probabilité » que les Haïda réussissent à établir l'existence d'un droit ancestral de récolter le cèdre rouge provenant des vieilles forêts des régions côtières et intérieures du Bloc 6.

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

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

(ii) *Seriousness of the Potential Impact*

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

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

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

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

(ii) *Gravité des conséquences potentielles*

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

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

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

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

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

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

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

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

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

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

(3) Did the Crown Fulfill its Duty?

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

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

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

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

III. Conclusion

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

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

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

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

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

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

III. Conclusion

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

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2004 SCC 73 (CanLII)

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

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

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

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

Solicitors for the respondents: EAGLE, Surrey.

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

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

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

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

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

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

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

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

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

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

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

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

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

Procureurs des intimés : EAGLE, Surrey.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Federal Court



Cour fédérale

Date: 20150828

Docket: T-2292-14

Citation: 2015 FC 1030

Ottawa, Ontario, August 28, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**PROPHET RIVER FIRST NATION, WEST
MOBERLY FIRST NATIONS**

Applicants

and

**ATTORNEY GENERAL OF CANADA,
MINISTER OF THE ENVIRONMENT,
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF TRANSPORT, AND BRITISH
COLUMBIA HYDRO AND POWER
AUTHORITY**

Respondents

JUDGMENT AND REASONS

[1] This application for judicial review is based upon the decision of the Governor in Council [GIC] that the significant adverse environmental effects the Joint Review Panel of the British Columbia and Federal Governments [the JRP or Panel] and the Minister of the Environment [the Minister] determined would likely result from the construction of the Site C Clean Energy

Project [the Project] on the Peace River in British Columbia were “justified in the circumstances.” The GIC is charged under section 52(4) of the *Canadian Environmental Assessment Act* [CEAA 2012], to make such a determination after the Minister decides that a project will likely cause significant adverse environmental effects under section 52(1) of the CEAA 2012.

[2] This application was heard consecutively with Federal Court Action T-2300-14, *Peace Valley Landowner Association v Attorney General of Canada et al*, for which a separate decision will be issued.

I. Background

[3] The Project is a proposed dam and 1,100-megawatt hydroelectric generating station on the Peace River, near Fort St. John, British Columbia, which if constructed would flood the Peace River Valley. The Project would be the third in a series of dams constructed on the Peace River in British Columbia. The Project components would consist of an earthfill dam 1,050 metres long and 60 metres high, a 1,100-megawatt generating station and associated structures, a 83-kilometre long reservoir, realignment of four sections of Highway 29, and two 77-kilometre transmission lines along an existing transmission line right-of-way connecting the Project to the Peace Canyon Dam, one of the existing dams on the Peace River. The Project is expected to generate an average of 5,100 gigawatts hours of electricity per year for more than 100 years.

[4] The Project had an estimated cost of 7.9 billion dollars at the time of its environmental assessment and an estimated eight year construction period. In oral argument, this estimated cost was increased to about 9 billion dollars in the interim and could continue to increase.

II. The parties

[5] The Applicants are British Columbia Treaty 8 First Nations (the Treaty 8 First Nations) whose members exercise their constitutionally protected treaty rights within the Project and surrounding area.

[6] The Respondent Attorney General of Canada is named as a Respondent in place of the Governor in Council, the decision-maker of the Justification Decision.

[7] The Respondent Minister of Environment is the Minister required to make the Significant Adverse Environmental Effects Decisions, pursuant to subsections 5(1) and 5(2) of CEAA 2012 and is the Minister who issued the Decision Statement containing the Justification Decision.

[8] The Respondent Minister of Fisheries and Oceans is the Responsible Authority that may issue authorizations under subsection 35(2)(b) of the *Fisheries Act*, RSC 1985, c F-14, in relation to the Project.

[9] The Respondent Minister of Transport is the Responsible Authority that may approve the Project and ancillary works under subsection 6(1) of the *Navigation Protection Act*, RSC 1985, c N-22, and may permit ancillary works under subsection 9(1) of that same act.

[10] The Respondent BC Hydro [BC Hydro] is a provincial Crown corporation and the Project proponent (collectively “the Respondents”).

III. The Process

[11] On May 18, 2011, BC Hydro submitted a Project Description Report for the Project to the British Columbia Environmental Assessment Office [EAO] and the Canadian Environmental Assessment Agency [the Agency], initiating the environmental assessment processes of both entities.

[12] On September 30, 2011, the above authorities announced they would conduct a cooperative environmental assessment [EA], which would include the JRP. As well, a draft agreement for the process and draft Terms of Reference were released that same day. The Terms of Reference listed thirteen factors the Panel must consider in its assessment. Of particular note are paragraphs 2.2 and 3.14; the first provides the list of factors and the second provides the Panel’s mandate with respect to information related to the justifiability of any significant adverse effects the project may cause.

[13] Prior to constituting the JRP, the Agency and EAO oversaw the production of the environmental impact statement guidelines [EIS Guidelines], which set out the scope of the factors listed in the Terms of Reference and information to be submitted by BC Hydro in the form of an environmental impact statement [EIS].

[14] The first draft of the EIS Guidelines was produced by BC Hydro and was subject to review by a Working Group who oversaw amendments. On September 7, 2012, the Minister and the Executive Director of the EAO determined the EIS Guidelines were adequate and issued them to BC Hydro. They were then incorporated into the Terms of Reference pursuant to paragraph 2.8.

[15] On January 25, 2013, BC Hydro submitted the EIS to the Agency and the EAO. It was then subject to review by the Working Group, government agencies and the public. Each comment received was responded to and 29 technical memos were written to address common themes within those comments.

[16] In June and July of 2013, the Agency and EAO directed BC Hydro to amend the EIS on the basis of the comments and responses received, and on August 1, 2013, they determined it was satisfactory and ready for review by the Panel.

[17] Between September and November of 2013, the JRP requested information from BC Hydro three times, along with follow-up requests. On November 7, 2013, the Panel decided that the amended EIS, along with the additional information received, was sufficient to proceed to public hearing.

[18] Public hearings were held over 26 days in December of 2013 and January of 2014. During this period, sessions on December 9 and 10, 2013, as well as on January 23, 2014, addressed the topics “Need, Purpose and Alternatives.”

[19] After the public hearings had completed, on May 1, 2014, the JRP produced the Panel Report to the Minister and Executive Director of the EAO.

[20] The JRP made a number of findings in the JRP Report, including:

- a) The Project would likely cause a significant adverse effect on fishing opportunities and practices for the First Nations represented by the Treaty 8 Tribal Association (“T8TA”) (Doig River First Nation, Halfway River First Nation, Prophet River First Nation and West Moberly First Nations), Saulteau First Nations and Blueberry River First Nations, the effects of which could not be mitigated;
- b) The Project would likely cause a significant adverse effect on hunting and non-tenured trapping for the First Nations represented by T8TA and Saulteau First Nations, and that these effects could not be mitigated;
- c) The Project would likely cause a significant adverse effect on other traditional uses of the land for the First Nations represented by T8TA, Saulteau First Nations and Blueberry River First Nations, and that some of these effects could not be mitigated;
- d) The Project would likely cause significant adverse cumulative effects on the current use of lands and resources for traditional purposes;
- e) There would be significant cumulative adverse effects on cultural heritage resources for both Aboriginal and non-Aboriginal people;
- f) The Project would result in significant adverse cumulative effects on fish and fish habitat, vegetation and ecological communities, birds and migratory birds, large mammals and visual resources;
- g) The JRP questioned the maximization of the hydraulic potential of the Peace River, which limited the consideration of alternatives.

[21] The JRP also made findings on the unique qualities of the Peace River Valley that support the exercise of Treaty 8 rights such as fishing and concluded that an alternative comparable natural setting could not be found nearby. The Panel found on the evidence that First Nations, including some of the Applicant First Nations, have a strong cultural attachment to the Peace River environment and that the area was highly valued for the sustenance of their Aboriginal lifestyle.

[22] On May 9, 2014, the JRP was made aware by BC Hydro of an error in Chapter 15, Tables 16 and 18: the JRP had failed to include low liquid natural gas [LNG] load in the load forecast (which was their stated intention), which affects the Energy Load Resource Balance of the Project. In response, the JRP issued an errata on June 10, 2014, to rectify the issue and stated that they would modify the tables to include the omitted information, but that the stated “conclusions remain as noted” without further explanation.

[23] In August of 2014, the Applicants were invited to make a two page written submission to the Minister outlining their concerns with the project. They stated they believed their treaty rights would be infringed by the Project and that such an infringement required justification under the *Sparrow* test. The Minister did not respond to these submissions (*R v Sparrow*, [1990] 1 SCR 1075).

[24] On September 8, 2014, a memo was sent to the Minister, which, once signed and dated by her, constituted the Minister’s decision under section 52 of the CEAA 2012. She signed the memo and concurred with the statement that significant adverse environmental effects were likely to occur if the project proceeded.

[25] The GIC released Order-in-Council 2014-1105 on October 14, 2014, which set out its decision that the potential significant adverse environmental effects likely to ensue should the Project be built were “justified in the circumstances.”

[26] Also on October 14, 2014, the Minister issued a decision statement under the CEAA 2012 (re-issued with minor corrections on November 25, 2014), allowing the project to proceed.

[27] The Order in Council which forms the impugned decision reads as follows:

Whereas BC Hydro has proposed the development of the Site C Clean Energy Project (the “Project”), near Fort St. John, British Columbia;

Whereas, after having considered the Report of the Joint Review Panel – Site C Clean Energy Project and taking into account the implementation of mitigation measures that the Minister of the Environment considered appropriate, the Minister has decided that the Project is likely to cause significant adverse environmental effects;

Whereas, after having made this decision, the Minister has, in accordance with subsection 52(2) of the Canadian Environmental Assessment Act, 2012 (the “Act”), referred to the Governor in Council for its consideration and decision the matter of whether those effects are justified in the circumstances;

Whereas the Government of Canada has undertaken a reasonable and responsive consultation process with Aboriginal groups potentially affected by the project;

Whereas the consultation process has provided the opportunity for dialogue and for the exchange of information to ensure that the concerns and interests of the Aboriginal groups have been considered in the decision-making process;

Whereas the consultation process has included opportunities for the Aboriginal groups to review and comment on conditions for inclusion in a decision statement to be issued by the Minister under the Act that could mitigate environmental effects and potential impacts on the Aboriginal groups;

Whereas the Minister will consider the views and information provided by the Aboriginal groups when the Minister determines the conditions to be imposed on the proponent in the decision statement;

Whereas the consultation process undertaken is consistent with the honour of the Crown;

And whereas the concerns and interests of Aboriginal groups have been reasonably balanced with other societal interests including social, economic, policy and the broader public interest;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to subsection 52(4) of the Canadian Environmental Assessment Act, 2012, decides that the significant adverse environmental effects that Site C Clean Energy project proposed by BC Hydro in British Columbia is likely to cause are justified in the circumstances.

IV. Issues

[28] The issues are:

- A. Did the GIC have the jurisdiction under section 52(4) of the CEAA 2012 to decide whether the project would constitute an infringement of the Applicants' treaty rights, and should the GIC have considered this issue in determining that the Project was justified?
- B. Did the Applicants have a legitimate expectation that the issue of infringement would be addressed by the GIC, based on representations that had been made to them by the Agency?
- C. Has the duty to consult and accommodate the Respondent First Nations been met in this case?
- D. Was the GIC's decision and Order in Council under section 52(4) of the CEAA 2012, that the significant adverse environmental effects the Project is likely to cause are justified, within the range of reasonable outcomes?

V. Standard of Review

[29] The Applicants submit that the appropriate standard of review to be applied is correctness. They base their submissions on the idea that the GIC violated procedural fairness in not taking into account all relevant information or considerations. They further base their submissions on the engagement of constitutional issues, the application of an incorrect legal test, as well as the failure of the CEAA 2012 to explicitly shield the GIC from review on a correctness standard, in its interpretation of the CEAA 2012 (*Georgia Strait Alliance v Canada (Minister of*

Fisheries and Oceans), 2012 FCA 40 at paras 101, 102 [*Georgia Strait*]; *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at para 47).

[30] The Applicants also submit that pursuant to the decision in *Council of the Innu of Ekuanitshit v Canada (Attorney General) et al*, 2013 FC 418 at para 76, aff'd 2014 FCA 189 at paras 40-42, 44 [*Innu*], the GIC's decision is only owed deference in situations that fall outside of the three exceptions, outlined at paragraph 76 of the trial decision, namely "(1) whether the CEAA statutory process was not properly followed before the decision was made; (2) the Governor in Council decision was taken without regard for the purpose of the CEAA; or (3) the Governor in Council decision had no reasonable basis in fact." They argue that since at least the second of these exceptions was engaged, the GIC is not owed deference in their decision.

[31] Moreover, the existence and extent of the duty to consult are legal questions, reviewable on the standard of correctness. The adequacy of the Minister's, as well as the GIC's, consultation is reviewable on the reasonableness standard (*Yellowknives Dene First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148 at para 46 [*Yellowknives Dene*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 61, 62 [*Haida*]; *Adam v Canada (Minister of the Environment)*, 2014 FC 1185 at para 65).

[32] The Respondents submit that the appropriate standard of review to be applied to the GIC's statutory interpretation of its role under the CEAA 2012 is reasonableness, given its central legislated role in the EA process and determining whether significant adverse environmental effects can be justified in the circumstances. The CEAA 2012 is clearly a statute

with which the GIC is particularly familiar (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 53-54).

[33] The Respondents further submit that the GIC's determination was highly discretionary, policy based and fact driven, to which a standard of considerable deference should apply (*Innu*, above, at para 40; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 74).

[34] In addition, the Respondents argue that the Applicants' reliance on the *Georgia Straight* case, above, to advocate for a correctness standard is misplaced, as more recent authority confirms that reasonableness applies when the decision under review intertwines discretion and policy with questions of fact and an interpretation of the decision maker's own statute, or those closely connected to its function with which it would have particular familiarity (*Agraira v Canada (Public Safety and Emergency Preparedness) et al*, 2013 SCC 36 at para 50; *Celgene Corp v Canada (Attorney general)*, 2011 SCC 1 at paras 33-34).

[35] The polycentric decision of the GIC, itself an elected body, assigned under legislation with which it is familiar, further supports the application of a reasonableness standard.

[36] The issues of procedural fairness and the existence of the duty to consult and the extent of that duty (which are legal questions) attract a standard of review of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Yellowknives Dene*, above, at para 46). Reasonableness is the

appropriate standard for all other issues, as the consultation process and adequacy of consultation is a question of mixed fact and law (*Haida*, above, at paras 61-62; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 64 [*Rio*]).

VI. Analysis

[37] The relevant statutory provisions are attached as Annex A hereto.

A. *Preliminary Evidentiary Objections*

[38] Given that the Applicants have withdrawn Exhibits 10, 11 and paragraphs 21 and 22 of the Raphael affidavit which were objected to, the Respondents have agreed that there is no need for Exhibits D to M of the Savident affidavit, effectively negating the parties' evidentiary objections.

B. *Did the GIC have jurisdiction under section 52(4) of the CEAA 2012 to decide whether the project would constitute an infringement of the Applicants' treaty rights, and should the GIC have considered this issue in determining that the Project was justified?*

[39] The Applicants argue that an action would not be an appropriate forum to pursue a determination on infringement. Counsel stated in oral argument that an action could only provide the after-the-fact remedy of damages and would take so long that the immitigable environmental effects the Project will cause would have already been suffered. As such, it is an inappropriate and ineffective course of action for the Applicants.

[40] Moreover, as the Applicants' rights are established in a treaty and are not asserted rights, the Applicants argue that the Crown's obligations to them are more clearly delineated and established than in a situation where a First Nation has yet to have their rights affirmed and recognized.

[41] The Applicants' position is that the taking up clause in Treaty No. 8 allows the Government to take up lands from time to time and it should be interpreted in line with *R v Badger*, [1996] 1 SCR 771. *Badger* speaks to the need to interpret the treaty by applying the "visible and incompatible use" test to taking up land, and that there was a belief among the parties to the treaty that most of the land covered by it would remain unoccupied, despite the provision for taking up.

[42] The Applicants also argue that their treaty rights will be infringed by the construction of the Project and that such an infringement must be justified under the *Sparrow* test. The Government's taking up of the land exceeds what was contemplated by Treaty No. 8, in that they are taking up too much, too often. While the infringement might well be justified under *Sparrow*, there was no determination of infringement made and the JRP specifically acknowledged infringement of treaty rights was not part of their mandate. Even if the GIC had the benefit of the JRP, the GIC was required to act in accordance with the Constitution, and failing to deal with infringement in making the impugned decision was an error (*R v Sparrow*, [1990] 1 SCR 1075). This failure to deal with infringement of treaty rights is the kernel of the Applicant's position that the GIC's decision is both incorrect and unreasonable.

[43] Accordingly, the Applicants insist that the GIC's failure to determine infringement of their treaty rights makes this a decision that cannot stand, despite the fact that the intent of this application is not to attempt to pursue a particular outcome. It is the failure to deal with the infringement issue at all, not the outcome itself, which the Applicants say is both wrong and unreasonable.

[44] Finally, the Applicants argue they had a legitimate expectation that the issue of infringement would be dealt with by the GIC. They base this argument largely on the distribution of a "schematic" at different points throughout the consultation process, which showed that the Federal Government would be dealing with infringement.

[45] The Applicants rely on the decisions in *West Moberly* and *Beckman* for the assertion that a judicial review application in the Federal Court is capable of dealing with the issue of infringement of treaty rights (*West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at paras 92-97; *Beckman v Little Salmon/Carmacks First Nations*, 2010 SCC 53 at para 47).

[46] However, the GIC is not a tribunal, nor is it a Minister. It exercises its discretion to decide on a different platform, based on polycentric considerations and a balancing of individual and public interests, including Aboriginal interests and concerns. It is properly afforded considerable deference under review.

[47] Parliament was clear in its intention to put the decision as to whether significant adverse environmental effects are justified in the hands of the GIC, knowing the considerable deference owed to their determinations and their entitlement to privilege.

[48] The case law shows that decisions of the GIC are owed such considerable deference, as they are inherently polycentric and take into account not only scientific facts and figures, but political and social considerations as well. The GIC is made up of elected officials, each of which is accountable to the Canadian public as represented by their constituencies and in this case included the Ministers named as Respondents (*Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463 at paras 232-236, 280-281).

[49] I agree with the Respondents that judicial review is not the appropriate course of action to determine whether Treaty No. 8 rights have been infringed. In oral argument, Applicants' Counsel stated that she believed that an action would not be able to award the Applicants what they request and could only result in a monetary award of damages and costs should they be successful. Further, she argued that the length of time it would take for the action to be heard would give ample time for the Respondents to pursue the Project and render the Applicants' requests meaningless.

[50] However, pursuit of an action may provide a variety of remedies for the Applicants, including a summary trial, an interlocutory injunction, or an expedited trial on the merits of the infringement question, which if applied for, may properly and definitively, on a full evidentiary record, deal with this issue.

[51] Furthermore, as pointed out by the Respondents, taking up of land under Treaty 8 is exclusively within the power of British Columbia and not every taking up of lands under a treaty will constitute an infringement of treaty rights, provided the taking up of that land does so in a manner that respects the requirements set out in *Mikisew (Mikisew Cree First Nation v Canada (Minister of Canadian Heritage))*, 2005 SCC 69 at paras 54-59, 64-66 [*Mikisew*]; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at paras 30, 52-53.

[52] In my view, the evidentiary record developed for an action is the appropriate basis for a Court to make a determination on the issue of infringement of the Applicants' treaty rights. While in *Beckman v Little Salmon/Carmacks First Nations*, above, at para 47, the Supreme Court made it clear that the judicial review process is a flexible one, capable of dealing with an array of issues presented in that context, it cannot reasonably be construed as saying that it is flexible enough to deal with all issues, in all contexts and, as here, not for a determination of infringement of Treaty No. 8 rights.

[53] Where consultation is required at the deep end of the spectrum and a specific determination on infringement on established treaty rights is at issue, the Court is ill-equipped to make a determination with an incomplete record or an informal evidentiary process before it on judicial review. The infringement of those important and fundamental treaty rights require a complete evidentiary record, that has reached the standard of admissibility at trial, to be reasonably and fairly determined. Nevertheless, it is without question that consideration of the issue of infringement of those treaty rights, short of making an ultimate decision or determination, needs to be part of the consultation process, as discussed below.

C. *Legitimate Expectations*

[54] The Applicants have failed to establish that they had a legitimate expectation that the issue of treaty infringement would be dealt with by the GIC. The doctrine is meant to deal only with the clearest of cases and this is not one of them. The inclusion of a flowchart in a handful of communications and one that was later altered during the process and redistributed to the Applicants, without specifically referring to infringement of treaty rights, is not sufficient to reach the high threshold required for the Court to invoke the doctrine of legitimate expectation that this issue would be determined, and not merely considered, as part of the consultation and accommodation process.

D. *Has the duty to consult and accommodate the Respondent First Nations been met in this case and was the GIC justification decision reasonable?*

[55] The Supreme Court of Canada summarized the framework governing the duty to consult in *Rio*, above, at para 51:

51 As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

[56] As stated in *Ktunaxa Nation v British Columbia (Minister of Forests Lands and Natural Resource Operations)*, 2015 BCCA 352 at paras 77-79:

77 The scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the

existence of the asserted rights, and to the seriousness of the potentially adverse effect upon the right claimed (*Haida*, at para 39). Fundamentally, the Crown is not under a duty to reach an agreement; the commitment is to a meaningful process of consultation in good faith (*Haida*, at para 41). Good faith is central, as the Court explains in *Haida* at para 42:

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

78 The duty to accommodate requires a balancing of interests. The Court in *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, explained at para 2:

...Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process.

79 The applicable standard of review was set out at para 62 of *Haida* as reasonableness. The focus is not on the outcome, but on the process of consultation and accommodation (*Haida*, at para 63). The Court explained as follows at para 62:

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

[57] The parties agree that the consultation required was at the deep end of the spectrum (*Haida*, above, at paras 47-50).

[58] However, while there is no dispute that consideration of possible infringement of treaty rights should form part of the Crown's duty of consultation and accommodation, the Respondents argue that consideration does not extend to a determination of infringement of those rights. While the Applicants' Treaty No. 8 rights have been established and it is clear that significant adverse environmental effects will result from the Project, the parties do not agree as to whether the consultation and accommodations that took place were adequate (*Haida*, above).

[59] As stated above, it is the Applicants' position that the consultation process never did reach the deep consultation threshold, as it failed to consider infringement of their Treaty No. 8 rights. It is not the quantity but the quality of consultation that determines the substance of the depth of consultation (*Kwikwetlem First Nation v British Columbia (Utilities Commission)*, 2009 BCCA 68 at paras 66-70).

[60] However, the JRP's Panel Report, considered by the Minister and implicitly by the GIC, entailed information gathering and reporting, which necessarily does not encompass the wide array of viewpoints and factors additionally considered by the Minister and the GIC.

[61] Based on the record before me, and contrary to the assertions made by the Applicants, the Crown did not need to determine infringement of the Applicant's treaty rights; they did consider those rights, did not ignore the impact of the Project on those treaty rights or find that the negative impact could be mitigated, and did assess the cumulative effects of the prior existing two dams on the historical rights of the Applicants (EIS Guidelines, clauses 8.5.3 and 9-1).

[62] Consultation by BC Hydro with the Applicants began in November 2007. It is summarized in the EIS, at Volume 5, Appendix A06 Parts 2 and 2(a) and outlined in Affidavit #1 of Seanna McConnell. In my view, BC Hydro's consultation has been extensive and conducted in good faith. The Applicants, however, expressed their strong opposition to the Project, signing a declaration "vow[ing] to use all lawful means to stop the Site C Dam from proceeding" (EIS Volume 5, Appendix A06 Part 5, pp. 16-30 (Applicants' Record, Tab 7C); Willson Affidavit, Exhibit 14 (Applicants' Record, Tab 3); McConnell Affidavit #1, para 123 (BC Hydro's Record, Tab11)).

[63] In the seven year period from November 2007 to December 2014, BC Hydro met with the interested Treaty 8 First Nations 177 times and provided them with \$5,879,039.78 in capacity funding to, *inter alia*, conduct their own traditional land use and community baseline studies; retain consultants; participate in the environmental assessment process including the Panel

hearings; attend meetings with BC Hydro; review material; and prepare reports and comments from BC Hydro, the Agency, EAO, and the Panel. This amount is in addition to funding provided by the provincial and federal governments.

[64] This funding was provided pursuant to several agreements with the Treaty 8 First Nations:

- *Stage 2 Consultation Agreement* (December 1, 2008 to March 31, 2010), for consultation prior to the environmental assessment;
- *Agreement to Negotiate a Traditional Land Use Study Agreement* (December 18, 2009), established a process for negotiating a Traditional Land Use Study Agreement;
- *Traditional Land Use Study Agreement* (December 16, 2010), to conduct a traditional land use study related to the Project on October 4, 2011, at the request of several First Nations, the agreement was amended to drastically reduce the size of the study area;
- *Environmental Assessment Participating Agreement* (April 21, 2011 to October 14, 2014), established a process for consultation during the environmental assessment;
- Letter of Understanding (March 6, 2012), established terms of reference for the collection and reporting of socio-economic baseline information by the First Nations;
- Various Letters of Understanding drafted pursuant to the *Environmental Assessment Participation Agreement* for specific consultation activities, including, e.g., with respect to alternative dam sites;
- *Discussion Framework* (October 2, 2014), established a framework for post-Panel consultation on the need for and alternatives to the Project.

[65] Pursuant to these agreements, BC Hydro consulted with the Treaty 8 First Nations prior to preparing the first draft of the EIS Guidelines, prior to designing and implementing its field studies, finalizing the design of the Project, and preparing the EIS, including the technical reports and proposed mitigation measures contained therein, and prior to the Province's decision as to whether to proceed with the Project.

[66] In March 2012, BC Hydro offered to enter negotiations toward concluding impact benefit agreements with the Applicants. In April 2014, Doig River advised BC Hydro they were

interested in pursuing impact benefit agreement negotiations. In their comments on the EIS, the Treaty 8 First Nations stated that they would consider negotiation of a benefit sharing agreement in relation to alternatives to the proposed Project, with the proviso that the Proponent first abandon plans to develop the proposed Project.

[67] As well, alternatives to the Project as a source of energy were also considered (EIS, clause 4.1.2, pages 291, 294, 304 and page 431 of the JRP).

[68] From the beginning of the environmental assessment process in May 2011, until its conclusion in October 2014, a number of steps were built into the process so that the Minister and Cabinet were provided with the information they reasonably required in order to make their decisions. This information included a review of the BC/Canada Agreement and the Terms of Reference, and a multi-staged review of the EIS Guidelines and the EIS, after which the Agency and EAO determined the EIS was satisfactory. The Minister and Cabinet reached their decisions after extensive input from the public, government agencies and Aboriginal groups, including the Applicants. At the Panel Stage, the Panel reviewed the EIS and requested additional information from BC Hydro until it was satisfied the EIS was sufficient. The Panel then held public hearings, received further submissions and at the end of the process, produced a lengthy report in which it noted that it conducted its assessment in accordance with the Terms of Reference.

[69] The depth of consultation is also evident from the three consultation plans initiated during the JRP process and the post-panel stage consultation meetings. As set out in the affidavit of Seanna McConnell, BC Hydro's consultation with the Applicants was a lengthy process, was

in good faith and was extensive both qualitatively and quantitatively. It is also apparent from the Record that while the Crown engaged with the Applicants to address mitigation and measures to be taken after issuance of the JRP, the Applicants refused to engage in such a dialogue once it was decided by the Applicants that the Project not proceeding was the only viable solution for the Applicants, as the end result of the process.

[70] A commitment to the process does not require a duty to agree – what is required is good faith efforts to understand the concerns of the Applicants and the Respondents made such efforts, which the Minister and GIC reasonably considered.

VII. Submissions of the Intervener

[71] While I appreciate the submissions of Amnesty International, the crux of this judicial review involves whether or not the Applicants should pursue a determination on infringement of their treaty rights in the form of an action and whether judicial review is the proper approach. Amnesty International presented interesting information regarding the value of international law, in the form of both ratified and non-ratified treaties, in interpreting the requirements of a body like the GIC in making determinations on justification. It was informative; however I give their submissions little weight, as they are not relevant to the central issues of this application.

[72] For the reasons above, I would dismiss the application for judicial review.

[73] Given the public interest concerns, including particularly the Treaty 8 First Nations' concerns with the unmitigable significant adverse environmental effects of the Project, which are legitimate, I would have each of the parties bear their own costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. Given the significant, legitimate public interest concerns and unmitigable significant adverse environment effects of the Project as raised by the Applicants, I would have the parties bear their own costs.

"Michael D. Manson"

Judge

ANNEX A

Canadian Environmental Assessment Act, 2012 (S.C. 2012, c. 19, s. 52)

Environmental effects

5. (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are

- (a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:
 - (i) fish and fish habitat as defined in subsection 2(1) of the Fisheries Act,
 - (ii) aquatic species as defined in subsection 2(1) of the Species at Risk Act,
 - (iii) migratory birds as defined in subsection 2(1) of the Migratory Birds Convention Act, 1994, and
 - (iv) any other component of the environment that is set out in Schedule 2;
- (b) a change that may be caused to the environment that would occur
 - (i) on federal lands,
 - (ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or
 - (iii) outside Canada; and
- (c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on
 - (i) health and socio-economic conditions,
 - (ii) physical and cultural heritage,
 - (iii) the current use of lands and resources for traditional purposes, or
 - (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Exercise of power or performance of duty or function by federal authority

(2) However, if the carrying out of the physical

Effets environnementaux

5. (1) Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un projet désigné ou d'un projet sont les suivants :

- a) les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement :
 - (i) les poissons et leur habitat, au sens du paragraphe 2(1) de la Loi sur les pêches,
 - (ii) les espèces aquatiques au sens du paragraphe 2(1) de la Loi sur les espèces en péril,
 - (iii) les oiseaux migrateurs au sens du paragraphe 2(1) de la Loi de 1994 sur la convention concernant les oiseaux migrateurs,
 - (iv) toute autre composante de l'environnement mentionnée à l'annexe 2;
- b) les changements qui risquent d'être causés à l'environnement, selon le cas :
 - (i) sur le territoire domaniale,
 - (ii) dans une province autre que celle dans laquelle la mesure est prise, l'activité est exercée ou le projet désigné ou le projet est réalisé,
 - (iii) à l'étranger;
- c) s'agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d'être causés à l'environnement, selon le cas :
 - (i) en matière sanitaire et socio-économique,
 - (ii) sur le patrimoine naturel et le patrimoine culturel,
 - (iii) sur l'usage courant de terres et de ressources à des fins traditionnelles,
 - (iv) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

Exercice d'attributions par une autorité fédérale

(2) Toutefois, si l'exercice de l'activité ou la réalisation du projet désigné ou du projet exige

activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:

(a) a change, other than those referred to in paragraphs (1)(a) and (b), that may be caused to the environment and that is directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project; and

(b) an effect, other than those referred to in paragraph (1)(c), of any change referred to in paragraph (a) on

- (i) health and socio-economic conditions,
- (ii) physical and cultural heritage, or
- (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Decisions of decision maker

52. (1) For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project

(a) is likely to cause significant adverse environmental effects referred to in subsection 5(1); and

(b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).

Referral if significant adverse environmental effects

(2) If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must

l'exercice, par une autorité fédérale, d'attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi, les effets environnementaux comprennent en outre :

a) les changements — autres que ceux visés aux alinéas (1)a) et b) — qui risquent d'être causés à l'environnement et qui sont directement liés ou nécessairement accessoires aux attributions que l'autorité fédérale doit exercer pour permettre l'exercice en tout ou en partie de l'activité ou la réalisation en tout ou en partie du projet désigné ou du projet;

b) les répercussions — autres que celles visées à l'alinéa (1)c) — des changements visés à l'alinéa a), selon le cas :

- (i) sur les plans sanitaire et socio-économique,
- (ii) sur le patrimoine naturel et le patrimoine culturel,
- (iii) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

Décisions du décideur

52. (1) Pour l'application des articles 27, 36, 47 et 51, le décideur visé à ces articles décide si, compte tenu de l'application des mesures d'atténuation qu'il estime indiquées, la réalisation du projet désigné est susceptible:

a) d'une part, d'entraîner des effets environnementaux visés au paragraphe 5(1) qui sont négatifs et importants;

b) d'autre part, d'entraîner des effets environnementaux visés au paragraphe 5(2) qui sont négatifs et importants.

Renvoi en cas d'effets environnementaux négatifs importants

(2) S'il décide que la réalisation du projet est susceptible d'entraîner des effets environnementaux visés aux paragraphes 5(1) ou (2) qui sont négatifs et importants, le décideur renvoie au gouverneur en conseil la question de savoir si ces effets sont

refer to the Governor in Council the matter of whether those effects are justified in the circumstances.

Referral through Minister

(3) If the decision maker is a responsible authority referred to in any of paragraphs 15(a) to (c), the referral to the Governor in Council is made through the Minister responsible before Parliament for the responsible authority.

Governor in Council's decision

(4) When a matter has been referred to the Governor in Council, the Governor in Council may decide

- (a) that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances; or
- (b) that the significant adverse environmental effects that the designated project is likely to cause are not justified in the circumstances.

justifiables dans les circonstances.

Renvoi par l'entremise du ministre

(3) Si le décideur est une autorité responsable visée à l'un des alinéas 15a) à c), le renvoi se fait par l'entremise du ministre responsable de l'autorité devant le Parlement.

Décision du gouverneur en conseil

(4) Saisi d'une question au titre du paragraphe (2), le gouverneur en conseil peut décider :

- a) soit que les effets environnementaux négatifs importants sont justifiables dans les circonstances;
- b) soit que ceux-ci ne sont pas justifiables dans les circonstances.

Fisheries Act (R.S.C., 1985, c. F-14)

Serious harm to fish

35. (1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.

Exception

(2) A person may carry on a work, undertaking or activity without contravening subsection (1) if

(b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;

Dommages sérieux aux poissons

35. (1) Il est interdit d'exploiter un ouvrage ou une entreprise ou d'exercer une activité entraînant des dommages sérieux à tout poisson visé par une pêche commerciale, récréative ou autochtone, ou à tout poisson dont dépend une telle pêche.

Exception

(2) Il est permis d'exploiter un ouvrage ou une entreprise ou d'exercer une activité sans contrevenir au paragraphe (1) dans les cas suivants :

b) l'exploitation de l'ouvrage ou de l'entreprise ou l'exercice de l'activité est autorisé par le ministre et est conforme aux conditions que celui-ci établit;

Navigation Protection Act (R.S.C., 1985, c. N-22)

Approval

6. (1) An owner may construct, place, alter, repair, rebuild, remove or decommission a work in, on, over, under, through or across any navigable water that is listed in the schedule that the Minister has determined under section 5 is likely to substantially interfere with navigation only if the Minister has issued an approval for the work, which may be issued only if an application for the approval is submitted and the application is accompanied by the applicable fee.

Permitted works

9. (1) An owner may construct, place, alter, repair, rebuild, remove or decommission a work in, on, over, under, through or across any navigable water that is listed in the schedule that the Minister has determined under section 5 is not likely to substantially interfere with navigation only if the construction, placement, alteration, repair, rebuilding, removal or decommissioning is in accordance with the requirements under this Act.

Approbation

6. (1) Le propriétaire peut, avec l'approbation du ministre seulement, construire, mettre en place, modifier, réparer, reconstruire, enlever ou déclasser, dans des eaux navigables mentionnées à l'annexe ou sur, sous, au-dessus ou à travers celles-ci, un ouvrage qui, selon la décision du ministre prise au titre de l'article 5, risque de gêner sérieusement la navigation; l'approbation ne peut toutefois être délivrée que si la demande est accompagnée des droits applicables.

Ouvrages permis

9. (1) Le propriétaire peut construire, mettre en place, modifier, réparer, reconstruire, enlever ou déclasser, dans des eaux navigables mentionnées à l'annexe ou sur, sous, au-dessus ou à travers celles-ci, un ouvrage qui, selon la décision du ministre prise au titre de l'article 5, ne risque pas de gêner sérieusement la navigation, s'il le fait conformément aux exigences prévues sous le régime de la présente loi.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2292-14

STYLE OF CAUSE: DOIG RIVER FIRST NATION, PROPHET RIVER
FIRST NATION, WEST MOBERLY FIRST NATIONS
AND MCLEOD LAKE INDIAN BAND v ATTORNEY
GENERAL OF CANADA, MINISTER OF THE
ENVIRONMENT, MINISTER OF FISHERIES AND
OCEANS, MINISTER OF TRANSPORT, AND BRITISH
COLUMBIA HYDRO AND POWER AUTHORITY

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JULY 22, 2015

JUDGMENT AND REASONS: MANSON J.

DATED: AUGUST 28, 2015

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FOR THE INTERVENER
AMNESTY INTERNATIONAL

Donald Gladstone and William Gladstone *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of British Columbia, the Attorney General for Alberta, the Fisheries Council of British Columbia, the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation, the First Nations Summit, Delgamuukw et al., Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner *Intervenors*

INDEXED AS: R. v. GLADSTONE

File No.: 23801.

1995: November 27, 28, 29; 1996: August 21.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Aboriginal rights — Natives approaching buyer with sample of fish product to determine if "interested" in buying — Regulations requiring specific licence for harvesting and sale of fish product — Natives not having proper licence to sell fish product — Evidence indicating large scale trade in fish product prior to contact with Europeans — Whether an aboriginal right to harvest and trade in fish product — Whether the aboriginal right extinguished — Whether aboriginal right infringed by regulations — Whether any infringement justified — Constitution Act, 1982, ss. 35(1), 52 — Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1) — Pacific Herring Fishery Regulations, SOR/84-324, s. (3).

Donald Gladstone et William Gladstone *Appelants*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général de la Colombie-Britannique, le procureur général de l'Alberta, le Fisheries Council of British Columbia, la British Columbia Fisheries Survival Coalition et la British Columbia Wildlife Federation, le First Nations Summit, Delgamuukw et autres, Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese et Allan Gardner *Intervenants*

RÉPERTORIÉ: R. c. GLADSTONE

N° du greffe: 23801.

1995: 27, 28, 29 novembre; 1996: 21 août.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Droit constitutionnel — Droits ancestraux — Autochtones ayant offert à un acheteur un échantillon de produit du poisson pour savoir s'il était «intéressé» à s'en procurer — Règlement exigeant un permis particulier pour la récolte et la vente du produit du poisson — Autochtones n'ayant pas le permis requis pour vendre le produit du poisson — Éléments de preuve indiquant que des échanges du produit du poisson avaient lieu sur une grande échelle avant le contact avec les Européens — Existe-t-il un droit ancestral de récolter et de vendre le produit du poisson? — Le droit ancestral est-il éteint? — Le règlement porte-t-il atteinte à un droit ancestral? — Une telle atteinte serait-elle justifiée? — Loi constitutionnelle de 1982, art. 35(1), 52 — Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 61(1) — Règlement de pêche du hareng du Pacifique, DORS/84-324, art. (3).

Commercial law — Attempt to sell — Natives approaching buyer with sample of fish product to determine if “interested” in buying — Whether conduct amounting to attempt to sell.

The accused were charged under s. 61(1) of the *Fisheries Act* with attempting to sell herring spawn on kelp caught without the proper licence contrary to s. 20(3) of the *Pacific Herring Fishery Regulations*. They had shipped a large quantity to the Vancouver area and approached a fish dealer with a sample to see if he was “interested”. One of the accused, on arrest, produced an Indian food fish licence permitting him to harvest 500 pounds. The Supreme Court of British Columbia and the Court of Appeal upheld the convictions. The constitutional question before this Court questioned whether s. 20(3) of the *Pacific Herring Fishery Regulations* was of no force or effect in the circumstances, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35(1) of the *Constitution Act, 1982*. Also raised was the sufficiency of their actions to constitute an attempt to sell in law.

Held (La Forest J. dissenting): The appeal should be allowed.

Whether an Attempt to Sell

Per Lamer C.J. and La Forest, L’Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The accused attempted to sell herring spawn on kelp. Shipping it to the Vancouver area, taking a sample to the fish merchant and specifically asking him if he was “interested” had sufficient proximity to the acts necessary to complete the offence of selling herring spawn on kelp to move those actions beyond mere preparation to an actual attempt.

The Aboriginal Right

Per Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: To be recognized as an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming that right. The first step is the determination of the precise nature of the claim

Droit commercial — Tentative de vente — Autochtones ayant offert à un acheteur un échantillon de produit du poisson pour savoir s’il était «intéressé» à s’en procurer — Ce comportement équivaut-il à une tentative de vente?

Les appelants ont été accusés, aux termes du par. 61(1) de la *Loi sur les pêcheries*, d’avoir tenté de vendre de la rogue de hareng sur varech qui avait été récoltée sans le permis approprié, contrairement au par. 20(3) du *Règlement de pêche du hareng du Pacifique*. Ils en avaient expédié une grande quantité dans la région de Vancouver et en avaient offert un échantillon à un marchand de poisson pour voir s’il était «intéressé» à s’en procurer. Au moment de son arrestation, l’un des accusés a exhibé un permis de pêche de subsistance des Indiens l’autorisant à récolter 500 livres de rogue de hareng sur varech. La Cour suprême de la Colombie-Britannique et la Cour d’appel de cette province ont maintenu les déclarations de culpabilité. La question constitutionnelle dont notre Cour a été saisie était de savoir si le par. 20(3) du *Règlement de pêche du hareng du Pacifique* était inopérant dans les circonstances, en vertu de l’art. 52 de la *Loi constitutionnelle de 1982*, en raison de l’existence de droits ancestraux au sens du par. 35(1) de la *Loi constitutionnelle de 1982*. Ils ont en outre soutenu que leurs actes étaient insuffisants pour constituer, en droit, une tentative de vente.

Arrêt (le juge La Forest est dissident): Le pourvoi est accueilli.

Y a-t-il eu tentative de vente?

Le juge en chef Lamer et les juges La Forest, L’Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major: Les accusés ont tenté de vendre de la rogue de hareng sur varech. Le fait d’avoir expédié le produit dans la région de Vancouver, le fait d’en avoir apporté un échantillon au marchand de poisson et le fait de lui avoir expressément demandé s’il était «intéressé» à s’en procurer étaient des faits suffisamment proches des actes requis pour qu’il y ait perpétration de l’infraction de vente de rogue de hareng sur varech, de sorte qu’ils dépassaient la simple préparation et constituaient une tentative véritable.

Le droit ancestral

Le juge en chef Lamer et les juges Sopinka, Gonthier, Cory, Iacobucci et Major: Pour être reconnue comme un droit ancestral, une activité doit être un élément d’une coutume, pratique ou tradition faisant partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit en question. La première étape consiste à

being made, taking into account such factors as the nature of the action allegedly taken pursuant to an aboriginal right, the government regulation allegedly infringing the right, and the practice, custom or tradition allegedly establishing the right.

The regulations under which the accused were charged prohibited all sale or trade in herring spawn on kelp without a particular licence. The exchange of herring spawn on kelp for money or other goods was to an extent a central, significant and defining feature of the culture of the Heiltsuk prior to contact and best characterized as commercial. This exchange and trade was an integral part of the distinctive culture of the Heiltsuk prior to contact.

To merit constitutional protection, a practice, custom or tradition which is integral to the aboriginal community must be shown to have continuity with the practices, customs or traditions which existed prior to contact. The evidence satisfied this requirement. The commercial trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk prior to contact and was not incidental to social or ceremonial activities. An aboriginal right to trade herring spawn on kelp on a commercial basis was established.

Per L'Heureux-Dubé J.: Section 35(1) must be given a generous, large and liberal interpretation and uncertainties, ambiguities or doubts should be resolved in favour of the natives. Further, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people. Finally, but most significantly, aboriginal rights protected under s. 35(1) have to be viewed in the context of the specific history and culture of the native society and with regard to native perspective on the meaning of the rights asserted.

The "frozen right" approach focusing on aboriginal practices should not be adopted. Instead, the definition of aboriginal rights should refer to the notion of "integral part of distinctive aboriginal culture" and should "permit the evolution of aboriginal rights over time". Case law on treaty and aboriginal rights relating to trade

déterminer la nature précise de la revendication des appelants, compte tenu de facteurs tels que la nature de l'acte qui aurait été accompli en vertu d'un droit ancestral, le règlement gouvernemental qui violerait ce droit, et la coutume, pratique ou tradition invoquée pour établir l'existence du droit revendiqué.

Le règlement en vertu duquel les accusés ont été poursuivis interdit complètement la vente ou l'échange de rogue de hareng sur varech sans un permis particulier. L'échange de la rogue de hareng sur varech contre de l'argent ou d'autres biens était, dans une certaine mesure, une caractéristique fondamentale, importante et déterminante de la culture distinctive des Heiltsuk avant le contact avec les Européens, et qu'il convient de qualifier de commerciale. Ces échanges faisaient partie intégrante de la culture distinctive des Heiltsuk avant le contact avec les Européens.

Pour qu'elle soit protégée sur le plan constitutionnel, il faut démontrer qu'une coutume, pratique ou tradition faisant partie intégrante de la culture distinctive de la collectivité autochtone marque une continuité avec des coutumes, pratiques ou traditions qui existaient avant le contact avec les Européens. La preuve satisfait à cette exigence. Les échanges commerciaux de rogue de hareng sur varech faisaient partie intégrante de la culture distinctive des Heiltsuk avant le contact avec les Européens et n'étaient pas une activité accessoire des activités sociales et rituelles de la collectivité. L'existence d'un droit ancestral d'échanger de la rogue de hareng sur varech sur une échelle commerciale a été établie.

Le juge L'Heureux-Dubé: Le paragraphe 35(1) doit recevoir une interprétation généreuse, large et libérale, et les ambiguïtés, doutes ou incertitudes doivent être résolus en faveur des autochtones. En outre, les droits ancestraux doivent être interprétés à la lumière des rapports spéciaux de fiduciaire et de la responsabilité de Sa Majesté vis-à-vis des peuples autochtones. Finalement, le dernier principe — mais aussi le plus important — est que les droits ancestraux protégés par le par. 35(1) doivent être interprétés dans le contexte de l'histoire et de la culture particulières de la société autochtone concernée, et en tenant compte du point de vue des autochtones eux-mêmes quant à la signification des droits revendiqués.

Il n'y avait pas lieu d'adopter la méthode fondée sur les «droits figés», qui s'attache aux pratiques autochtones. Au contraire, la définition des droits ancestraux devrait être axée sur la notion de «partie intégrante d'une culture autochtone distinctive» et devrait «permettre à ces droits d'évoluer avec le temps». La juris-

supports the making of a distinction between the sale, trade and barter of fish for, on the one hand, livelihood, support and sustenance purposes and for, on the other, purely commercial purposes. The delineation of aboriginal rights must be viewed on a continuum.

The aboriginal right at issue falls on the part of the spectrum relating to the sale, trade and barter of fish for commercial purposes, not on the part dealing with livelihood, support and sustenance purposes. The legislative provision under constitutional challenge was aimed at both commercial and non-commercial sale, trade and barter of herring spawn on kelp. The sale, trade and barter of fish for commercial purposes was sufficiently significant and fundamental to the culture and social organization of the Heiltsuk for a substantial continuous period of time to have formed an integral part of their culture. Consequently, the criteria regarding the characterization of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* are met in this case.

Per McLachlin J.: Evidence of an established trading network was clear in this case. The Heiltsuk derived their sustenance from trade derived from herring spawn on kelp; they relied on trade to supply them with the necessities of life, principally other food products. An aboriginal right therefore existed.

Per La Forest J. (dissenting): The trial judge's findings of fact are to the effect that the Heiltsuk had been engaged in the bartering and trading of herring spawn on kelp prior to contact and that these activities, at times, involved very large quantities of fish. These activities had special significance to the Heiltsuk in that the Heiltsuk engaged in such trading activities on the basis that they valued sharing resources with other bands who did not have access to that resource. That special significance made bartering and trading in herring spawn on kelp a part of their distinctive culture. Therefore, the Heiltsuk did have an aboriginal right to barter and trade herring spawn on kelp to a certain degree. Without that special significance to the Heiltsuk, it cannot be said, based on the trial judge's findings of fact, that such activity constitutes an integral part of their distinctive culture and thus any trading and bartering not done in that context cannot in any way be said to form an integral part of the distinctive culture of the Heiltsuk society. The appellants' activities, which, the trial judge found, were done in a completely different

prudence sur les droits ancestraux ou issus de traités concernant les échanges appuie l'établissement d'une distinction entre, d'une part, la vente et l'échange de poisson à des fins de subsistance, et, d'autre part, la vente et l'échange de poisson à des fins purement commerciales. Les droits ancestraux doivent être considérés comme formant les divers éléments d'un spectre.

Le droit ancestral en cause correspond à la partie du spectre qui concerne la vente et l'échange de poisson à des fins commerciales, plutôt qu'à celle touchant les activités exercées à des fins de subsistance. La disposition législative faisant l'objet de la présente contestation constitutionnelle visait la vente et l'échange de rogue de hareng sur varech à des fins commerciales et non commerciales. Les activités de vente et d'échange de poisson à des fins commerciales ont été suffisamment importantes et fondamentales pour l'organisation sociale et la culture des Heiltsuk pendant une période considérable et ininterrompue pour avoir fait partie intégrante de leur culture. En conséquence, le critère applicable afin de caractériser les droits ancestraux protégés par le par. 35(1) de la *Loi constitutionnelle de 1982* est satisfait en l'espèce.

Le juge McLachlin: En l'espèce, la preuve a démontré clairement l'existence d'un réseau d'échanges établi. Les Heiltsuk tiraient leur subsistance d'échanges fondés sur l'exploitation de la rogue de hareng sur varech. Ils comptaient sur ces échanges pour se procurer les biens nécessaires à la vie, principalement d'autres produits alimentaires. Il existait donc un droit ancestral.

Le juge La Forest (dissident): Les conclusions de fait du juge du procès indiquent que les Heiltsuk échangeaient de la rogue de hareng sur varech déjà avant le contact avec les Européens et que ces activités portaient parfois sur de très importantes quantités de poisson. Ces activités avaient une importance spéciale pour les Heiltsuk en ce sens qu'ils pratiquaient ce genre d'activités d'échange parce qu'il était important pour eux de partager des ressources avec d'autres bandes n'ayant pas accès à celles-ci. Cette importance spéciale faisait des échanges de rogue de hareng sur varech une partie de la culture distinctive de la bande. Par conséquent, les Heiltsuk possédaient, dans une certaine mesure, un droit ancestral d'échanger de la rogue de hareng sur varech. En dehors de ce contexte, on ne peut pas dire, en se fondant sur les conclusions de fait du juge du procès, que ces activités font partie intégrante de la culture distinctive des Heiltsuk et, en conséquence, il est impossible d'affirmer que les échanges qui ne sont pas effectués dans ce contexte font partie intégrante de la culture distinctive de la société heiltsuk. Les activités des appe-

context, accordingly did not form an integral part of the distinctive culture of the Heiltsuk and the aboriginal rights of the Heiltsuk were therefore not infringed.

Extinguishment

Per Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major J.J.: The intention to extinguish an aboriginal right must be clear and plain. The varying regulatory schemes affecting the herring spawn on kelp harvest did not express a clear and plain intention to eliminate the aboriginal right. The regulations may have failed to recognize the aboriginal right and to give it special protection but they never prohibited aboriginal people from obtaining licences to fish commercially. More importantly, the government has, at various times, given preferences to aboriginal commercial fishing. Finally, the Regulation relied upon in arguing for extinguishment was of an entirely different nature than the document relied on for a finding of extinguishment in *R. v. Horseman*.

Per L'Heureux-Dubé J.: As regards the issues of extinguishment and *prima facie* infringement, the reasons and conclusions of Lamer C.J. were agreed with for the most part. The Heiltsuk's aboriginal right to sale, trade and barter herring spawn on kelp for commercial purposes has not been extinguished by a "clear and plain intention" of the Sovereign. The approach where the aboriginal right is considered extinguished when it and the activities contemplated by the legislation cannot co-exist is irreconcilable with the "clear and plain intention" test favoured in Canada. The legislation was not sufficient to extinguish the aboriginal right to sell, trade and barter fish for commercial purposes. It merely regulates aboriginal activities and does not amount to extinguishment.

Per McLachlin J.: Order in Council P.C. 2539 did not extinguish the aboriginal right of the Heiltsuk people to use herring spawn on kelp as a source of sustenance. It did not manifest the necessary "clear and plain" intention. Their most likely purpose was to conserve. A measure aimed at conservation of a resource is not inconsistent with a recognition of an aboriginal right to make use of that resource. Indeed, there was no evidence that

lants, qui, selon le juge du procès, ont été accomplies dans un contexte complètement différent, ne faisaient pas partie intégrante, par conséquent, de la culture distinctive des Heiltsuk et il n'y a donc pas eu atteinte aux droits ancestraux des Heiltsuk.

Extinction

Le juge en chef Lamer et les juges Sopinka, Gonthier, Cory, Iacobucci et Major: L'intention d'éteindre un droit ancestral doit être claire et expresse. Les régimes de réglementation changeants qui régissaient la récolte de la rogue de hareng sur varech n'exprimaient pas une intention claire et expresse d'abolir les droits ancestraux. Le règlement n'a peut-être pas reconnu à ce droit la qualité de droit ancestral et ne lui a peut-être pas accordé une protection spéciale, mais il n'a jamais interdit aux peuples autochtones d'obtenir des permis de pêche commerciale. Fait encore plus important, le gouvernement a, à divers moments, pris des mesures préférentielles en faveur de la pêche commerciale autochtone. Enfin, la nature du règlement invoqué à l'appui de l'extinction du droit est tout à fait différente de celle du document invoqué pour conclure à l'extinction dans les arrêts *R. c. Horseman*.

Le juge L'Heureux-Dubé: En ce qui concerne les questions de l'extinction et de l'atteinte *prima facie*, les motifs et les conclusions du juge en chef Lamer sont acceptés pour l'essentiel. Le droit ancestral des Heiltsuk de vendre et d'échanger de la rogue de hareng sur varech à des fins commerciales n'a pas été éteint par suite de la manifestation d'une «intention claire et expresse» du Souverain. La position selon laquelle le droit ancestral est considéré comme éteint dans les cas où il ne peut pas coexister avec les activités visées par les mesures législatives est inconciliable avec le test de «l'intention claire et expresse» privilégié au Canada. Les mesures législatives étaient insuffisantes pour éteindre le droit ancestral de vendre et d'échanger du poisson à des fins commerciales. Elles ne font que réglementer les activités autochtones et n'entraînent pas l'extinction du droit de les exercer.

Le juge McLachlin: Le décret C.P. 2539 n'a pas éteint le droit ancestral des Heiltsuk d'utiliser la rogue de hareng sur varech comme moyen de subsistance. Il n'exprimait pas l'intention «claire et expresse» requise. L'objet le plus vraisemblable de ces mesures de réglementation était d'assurer la conservation du fretin de ce poisson. Une mesure ayant pour but la conservation d'une ressource n'est pas incompatible avec la recon-

the measure was intended to relate to the aboriginal right at all.

Per La Forest J. (dissenting): The *Sparrow* decision only stands for the proposition that the Crown had not expressed a clear and plain intention to extinguish aboriginal rights regarding fishing for food, including social and ceremonial purposes. Order-in-Council P.C. 2539, which put in place restrictions on the native exploitation of this fishery, evinced a clear and plain intention on the part of the Crown to extinguish aboriginal rights relating to commercial fisheries in British Columbia — should they ever have existed. The Crown specifically chose to translate aboriginal practices into statutory rights and expressly decided to limit the scope of these rights. Aboriginal rights relating to practices that were specifically excluded were thereby extinguished.

Prima Facie Infringement

Per Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: The *Sparrow* test for determining whether the government has infringed aboriginal rights involves (1) asking whether the legislation has the effect of interfering with an existing aboriginal right and (2) determining whether the limitation (i) was unreasonable, (ii) imposed undue hardship, (iii) denied the right holders their preferred means of exercising that right. The test is partly determined by the factual context; in this case, the test must be applied not simply to s. 20(3) of the *Pacific Herring Fishery Regulations* but also to the other aspects of the regulatory scheme. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

The government's scheme for regulating the herring spawn on kelp fishery can be divided into four constituent parts: (1) the government determines the amount of the herring stock that will be harvested in a given year; (2) the government allots the herring stock to the different herring fisheries (herring roe, herring spawn on kelp and other herring fisheries); (3) the government allots the herring spawn on kelp fishery to various user groups (commercial users and the Indian food fishery); and (4) the government allots the commercial herring spawn on

naissance d'un droit ancestral d'utiliser cette ressource. De fait, il n'y a eu aucune preuve que ces mesures visaient d'aucune façon le droit ancestral.

Le juge La Forest (dissident): L'arrêt *Sparrow* permet seulement d'affirmer que l'État n'avait pas exprimé l'intention claire et expresse d'éteindre les droits ancestraux en ce qui concerne la pêche pratiquée à des fins alimentaires, y compris à des fins sociales et rituelles. Le décret C.P. 2539, qui a mis en place des restrictions à l'exploitation de cette pêche par les autochtones, indiquait une intention claire et expresse de la part de l'État d'éteindre les droits ancestraux relatifs à la pêche commerciale en Colombie-Britannique — si ces droits ont jamais existé. L'État a spécifiquement choisi de convertir des pratiques autochtones en droits prévus par la loi et a expressément décidé de limiter la portée de ces droits. Les droits ancestraux touchant des pratiques qui ont été spécifiquement exclues ont, de ce fait, été éteints.

Atteinte prima facie

Le juge en chef Lamer et les juges Sopinka, Gonthier, Cory, Iacobucci et Major: Le critère énoncé dans l'arrêt *Sparrow* et permettant de déterminer si l'État a porté atteinte aux droits ancestraux comporte (1) la question de savoir si la loi en question a pour effet de porter atteinte à un droit ancestral existant et (2) celle de déterminer (i) si la restriction était déraisonnable, (ii) si le règlement était indûment rigoureux et (iii) s'il refusait aux titulaires du droit le recours à leur moyen préféré de l'exercer. Le critère est, dans une certaine mesure, fonction du contexte factuel dans lequel il a été formulé; en l'espèce, le critère doit être appliqué non seulement au par. 20(3) du *Règlement de pêche du hareng du Pacifique* mais également aux autres aspects du régime de réglementation. Le simple fait qu'on réponde par la négative à l'une de ces questions n'empêche pas le tribunal de conclure à l'existence d'une atteinte à première vue. Cette réponse négative n'est qu'un des facteurs que le tribunal doit prendre en considération pour déterminer s'il y a eu atteinte à première vue.

Le régime gouvernemental de réglementation de la récolte de la roque de hareng sur varech peut être divisé en quatre éléments constitutifs: (1) l'État détermine la proportion des stocks de hareng qui sera récoltée au cours d'une année donnée; (2) il répartit les stocks de hareng entre les divers secteurs de la pêche de ce poisson (hareng prêt à frayer, roque de hareng sur varech et autres types de pêche); (3) il répartit la part attribuée à la récolte de la roque de hareng sur varech entre les divers groupes d'utilisateurs (utilisateurs commerciaux et Indiens pra-

kelp licences. The appellants demonstrated a *prima facie* interference with their aboriginal rights. Prior to contact, the Heiltsuk could harvest herring spawn on kelp to the extent they themselves desired. Under the regulatory scheme they can harvest for commercial purposes only to the limited extent allowed by the government.

Per L'Heureux-Dubé J.: Section 20(3) of the *Pacific Herring Fishery Regulations* directly conflicts, both by its object and by its effects, with native sale, trade and barter of herring spawn on kelp on a commercial basis and so violates the aboriginal right. This right has never been extinguished by a clear and plain intention of the Sovereign. Although in agreement with Lamer C.J. on the issue, the relatively low burden on the claimant of the right to demonstrate infringement on the face of the legislation was emphasized. Here, the appellants overwhelmingly discharged their burden in that regard.

Per McLachlin J.: An aboriginal person must establish a *prima facie* right to engage in the prohibited conduct at issue. The Crown may rebut the inference of infringement if it can demonstrate that the regulatory scheme, viewed as a whole, accommodates the collective aboriginal right in question. The Heiltsuk have a right to harvest and sell herring spawn on kelp for the purpose of sustenance and this right was evidently denied by the regulation under which the appellants stand charged. Thus, the first requirement of the test is met.

The evidence did not disclose whether the licence issued to the Heiltsuk was sufficient to satisfy their aboriginal right to sell herring spawn on kelp for sustenance. The case should be referred for a new trial so that this case can be resolved.

Justification

Per Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: Justification of infringements of aboriginal rights involves a two-part test. The government must demonstrate that: (1) it was acting pursuant to a valid legislative objective; and (2) its actions were consistent with its fiduciary duty towards aboriginal peoples.

tiquant la pêche de subsistance); (4) il répartit les permis de pêche commerciale de la rogue de hareng sur varech. Les appelants ont démontré une atteinte à première vue à leurs droits ancestraux. Avant l'arrivée des Européens en Amérique du Nord, les Heiltsuk pouvaient récolter autant de rogue de hareng sur varech qu'ils le désiraient. Par suite de l'établissement du régime de réglementation, ils ne peuvent récolter que la quantité limitée de rogue de hareng sur varech à des fins commerciales autorisée par l'État.

Le juge L'Heureux-Dubé: Le paragraphe 20(3) du *Règlement de pêche du hareng du Pacifique* entre directement en conflit, tant de par son objet que de par ses effets, avec la vente et l'échange de rogue de hareng sur varech par les autochtones sur une base commerciale et viole un tel droit ancestral. Ce droit n'a jamais été éteint par suite de la manifestation d'une intention claire et expresse du Souverain. Bien que l'analyse du juge en chef Lamer sur cette question soit acceptée, il y est souligné le caractère assez peu exigeant du fardeau qu'a la personne qui revendique un tel droit d'établir qu'une mesure législative porte atteinte à un droit ancestral existant. Dans le présent pourvoi, les appelants se sont nettement acquittés du fardeau qui leur incombait à cet égard.

Le juge McLachlin: Un autochtone doit établir l'existence à première vue d'un droit d'accomplir l'acte prohibé en cause. Le ministère public peut repousser l'inférence qu'il y a atteinte en démontrant que, considéré dans son ensemble, le régime de réglementation respecte le droit ancestral collectif en question. Les Heiltsuk ont le droit de récolter et de vendre la rogue de hareng sur varech à des fins de subsistance, droit dont ils ont apparemment été privés par la disposition réglementaire en vertu de laquelle les appelants ont été accusés. Par conséquent, la première condition du critère est remplie.

La preuve n'a pas indiqué si le permis délivré aux Heiltsuk respectait suffisamment leur droit ancestral de vendre de la rogue de hareng sur varech à des fins de subsistance. Il faudrait renvoyer l'affaire en vue de la tenue d'un nouveau procès afin de trancher cette question.

Justification

Le juge en chef Lamer et les juges Sopinka, Gonthier, Cory, Iacobucci et Major: La justification des atteintes aux droits ancestraux emporte l'application d'un critère à deux volets. L'État doit démontrer (1) qu'il a agi en vertu d'un objectif législatif régulier; et (2) que ses actions sont compatibles avec son obligation de fiduciaire envers les peuples autochtones.

Where the aboriginal right is internally limited, so that it is clear when that right has been satisfied and other users can be allowed to participate in the fishery, the notion of priority, as articulated in *Sparrow*, makes sense. *Sparrow* did not contemplate situations other than that where the aboriginal right was internally limited. Where the aboriginal right has no internal limitation, however, the notion of priority, as articulated in *Sparrow*, would mean that an aboriginal right would become an exclusive one. Where the aboriginal right has no internal limitation, the doctrine of priority requires that the government demonstrate that it has taken the existence of aboriginal rights into account in allocating the resource and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource, and the actual allocation of the resource which results from that process, reflect the prior interest of aboriginal rights holders in the fishery. The content of this priority — something less than exclusivity but which nonetheless gives priority to the aboriginal right — must remain somewhat vague pending consideration of the government's actions in specific cases.

Unlike *Sparrow*, which considered only the justifiability of conservation objectives, this case raises the question of whether other government objectives will justify limitations on aboriginal rights. The regulatory scheme at issue in this case — the allocation of herring spawn on kelp — does not involve conservation concerns: it makes no difference in terms of conservation who is allowed to catch the fish.

The purposes underlying aboriginal rights must inform not only the definition of the rights but also the identification of those limits on the rights which are justifiable. Because distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those

Dans une situation où le droit ancestral est intrinsèquement limité, et où il est, de ce fait, facile de déterminer s'il a été respecté et si les autres usagers peuvent être autorisés à pêcher, l'application de la notion de priorité formulée dans *Sparrow* est logique. L'arrêt *Sparrow* n'envisage pas de situations autres que celles où le droit ancestral est intrinsèquement limité. Toutefois, quand le droit ancestral ne comporte pas de limite intrinsèque, l'application de la notion de priorité formulée dans *Sparrow* signifierait qu'un droit ancestral deviendrait exclusif. Lorsque le droit ancestral en cause n'est pas assorti de limite intrinsèque, la doctrine relative à l'ordre de priorité commande que l'État démontre que, dans la répartition de la ressource, il a tenu compte de l'existence des droits ancestraux et réparti la ressource d'une manière qui respecte le fait que les titulaires de ces droits ont, en matière d'exploitation de la pêche, priorité sur les autres usagers. Il s'agit d'un droit à la fois substantiel et procédural. À l'étape de la justification, l'État doit démontrer que les modalités de répartition de la ressource ainsi que la répartition elle-même reflètent l'intérêt prioritaire des titulaires des droits ancestraux à l'égard de cette pêche. Le contenu de ce droit de priorité — qui, sans aller jusqu'à l'exclusivité, donne néanmoins préséance au droit ancestral — doit rester assez vague tant que les actions de l'État n'ont pas été examinées dans des cas précis.

Contrairement à l'arrêt *Sparrow*, où l'on a examiné le caractère justifiable des objectifs de conservation, le présent pourvoi soulève la question de savoir si d'autres objectifs gouvernementaux justifieront l'existence de restrictions aux droits ancestraux. Le régime de réglementation en cause — la répartition de la récolte de la roque de hareng sur varech — ne concerne pas des questions de conservation: le fait que ce soit un groupe ou un autre qui soit autorisé à prendre le poisson ne change rien du point de vue de la conservation.

Les objets qui sous-tendent les droits ancestraux doivent non seulement servir à la définition de ces droits, mais également à la détermination des limites apportées à ceux-ci et qui sont justifiables. Comme les sociétés autochtones distinctives existent au sein d'une communauté sociale, politique et économique plus large, communauté dont elles font partie et sur laquelle s'exerce la souveraineté de Sa Majesté, il existe des circonstances où, dans la poursuite d'objectifs importants ayant un caractère impérieux et réel pour l'ensemble de la communauté (compte tenu du fait que les sociétés autochtones font partie de celle-ci), certaines restrictions de ces droits sont justifiables. Les droits ancestraux sont un élément nécessaire de la conciliation de l'existence des sociétés autochtones avec la communauté politique plus

limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. With regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.

The evidence and testimony presented in this case was insufficient for the Court to determine whether the government's regulatory scheme was justified.

Per L'Heureux-Dubé J.: There was insufficient evidence to rule on the question of justification. Lamer C.J.'s comments on this issue, and particularly as regards the doctrine of priority and the decision in *Jack v. The Queen* were agreed with.

Per McLachlin J.: It was not necessary to reach the issue of justification. The question of whether such an infringement were justified should be decided at a new trial.

Cases Cited

By Lamer C.J.

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Deutsch*, [1986] 2 S.C.R. 2; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; **considered:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; **distinguished:** *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Badger*, [1996] 1 S.C.R. 771; **referred to:** *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75; *R. v. N.T.C. Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158; *Jack v. The Queen*, [1980] 1 S.C.R. 294; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Attorney-*

large à laquelle ces dernières appartiennent. Les limites imposées à ces droits sont également un élément nécessaire de cette conciliation, si les objectifs qu'elles visent sont suffisamment importants pour la communauté dans son ensemble. En ce qui concerne la répartition de ressources halieutiques données, une fois que les objectifs de conservation ont été respectés, des objectifs tels que la poursuite de l'équité sur les plans économique et régional ainsi que la reconnaissance du fait que, historiquement, des groupes non autochtones comptent sur ces ressources et participent à leur exploitation, sont le genre d'objectifs susceptibles (du moins dans les circonstances appropriées) de satisfaire à cette norme. Dans les circonstances appropriées, de tels objectifs sont dans l'intérêt de tous les Canadiens et, facteur plus important encore, la conciliation de l'existence des sociétés autochtones avec le reste de la société canadienne pourrait bien dépendre de leur réalisation.

La preuve documentaire et testimoniale produite dans la présente affaire était insuffisante pour permettre à notre Cour de déterminer si ce régime est justifié.

Le juge L'Heureux-Dubé: La preuve était insuffisante pour permettre de trancher la question de la justification. Il est souscrit aux observations du juge en chef Lamer sur cette question, particulièrement en ce qui concerne la doctrine relative à l'ordre de priorité ainsi qu'à la décision de notre Cour dans *Jack c. La Reine*.

Le juge McLachlin: Il n'était pas nécessaire d'examiner la question de la justification. La question de savoir si une telle atteinte était justifiée devrait être tranchée lors d'un nouveau procès.

Jurisprudence

Citée par le juge en chef Lamer

Arrêts appliqués: *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Deutsch*, [1986] 2 R.C.S. 2; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; **arrêt examiné:** *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; **distinction d'avec les arrêts:** *R. c. Horseman*, [1990] 1 R.C.S. 901; *R. c. Badger*, [1996] 1 R.C.S. 771; **arrêts mentionnés:** *R. c. Nikal*, [1996] 1 R.C.S. 1013; *R. c. Van der Peet* (1993), 80 B.C.L.R. (2d) 75; *R. c. N.T.C. Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158; *Jack c. La Reine*, [1980] 1 R.C.S. 294; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Stoffman c. Vancouver General Hospital*, [1990] 3 R.C.S. 483; *McKinney c. University of Guelph*, [1990] 3 R.C.S. 229; *R. c. Butler*, [1992] 1 R.C.S. 452; *R. c.*

General of British Columbia v. Attorney-General of Canada, [1914] A.C. 153.

By L'Heureux-Dubé J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Jones* (1993), 14 O.R. (3d) 421; *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *Jack v. The Queen*, [1980] 1 S.C.R. 294.

By McLachlin J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **referred to:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672.

By La Forest J. (dissenting)

R. v. Van der Peet, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Heiltsuk Indian Band v. Canada* (1993), 59 F.T.R. 308; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Jack v. The Queen*, [1980] 1 S.C.R. 294; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Badger*, [1996] 1 S.C.R. 771.

Statutes and Regulations Cited

British Columbia Fishery Regulations, SOR/54-659, s. 21A [ad. SOR/55-260, s. 3] (1) [repl. SOR/74-50, s. 9], (2) [repl. SOR/72-417, s. 7], s. 32.
British Columbia Fishery (General) Regulations, SOR/77-716, s. 29.
British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5) [ad. SOR/85-290, s. 5].
Canadian Charter of Rights and Freedoms, s. 1.
Constitution Act, 1982, ss. 35(1), 52.
Fisheries Act, R.S.C. 1970, c. F-14, ss. 34, 61(1).
Fisheries Act, R.S.C. 1927, c. 73, s. 39.
Fisheries Act, S.C. 1868, c. 60, s. 13(9).
Fisheries Act, 1932, S.C. 1932, c. 42, s. 30.
Fisheries Act, S.C. 1952, c. 119, s. 30.
Fishery Regulations for the Province of British Columbia, March 8, 1894, P.C. 650, s. 1.
Natural Resources Transfer Agreement, s. 12 (confirmed by the *Constitution Act, 1930*, R.S.C., 1985, App. II, No. 26, Schedule 2).
Order in Council, P.C. 2539, September 11, 1917.

Oakes, [1986] 1 R.C.S. 103; *Attorney-General of British Columbia c. Attorney-General of Canada*, [1914] A.C. 153.

Citée par le juge L'Heureux-Dubé

Arrêts appliqués: *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; **arrêts mentionnés:** *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; *R. c. Horseman*, [1990] 1 R.C.S. 901; *R. c. Jones* (1993), 14 O.R. (3d) 421; *United States c. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *Jack c. La Reine*, [1980] 1 R.C.S. 294.

Citée par le juge McLachlin

Arrêt appliqué: *R. c. Van der Peet*, [1996] 2 R.C.S. 507; **arrêt mentionné:** *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672.

Citée par le juge La Forest (dissident)

R. c. Van der Peet, [1996] 2 R.C.S. 507; *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Bande indienne des Heiltsuk c. Canada* (1993), 59 F.T.R. 308; *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *Jack c. La Reine*, [1980] 1 R.C.S. 294; *R. c. Horseman*, [1990] 1 R.C.S. 901; *R. c. Badger*, [1996] 1 R.C.S. 771.

Lois et règlements cités

Acte des pêcheries, S.C. 1868, ch. 60, art. 13(9).
Charte canadienne des droits et libertés, art. 1.
Convention sur le transfert des ressources naturelles, art. 12 (confirmée par la *Loi constitutionnelle de 1930*, L.R.C. (1985), app. II, n° 26, annexe 2).
Décret, C.P. 2539, 11 septembre 1917.
Loi constitutionnelle de 1982, art. 35(1), 52.
Loi sur les pêcheries, S.C. 1952, ch. 119, art. 30.
Loi sur les pêcheries, S.R.C. 1927, ch. 73, art. 39.
Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 34, 61(1).
Loi sur les pêcheries de 1932, S.C. 1932, ch. 42, art. 30.
Règlement de pêche de la Colombie-Britannique, 8 mars 1894, C.P. 650, art. 1.
Règlement de pêche de la Colombie-Britannique, DORS/54-659, art. 21A [aj. DORS/55-260, art. 3] (1) [abr. DORS/74-50, art. 9], (2) [abr. DORS/72-417, art. 7], art. 32.
Règlement de pêche du hareng du Pacifique, C.R.C., ch. 825, art. 17 (abr. & remp. DORS/80-876, art. 8).

Pacific Fishery Registration and Licensing Regulations. Pacific Herring Fishery Regulations, C.R.C., c. 825, s. 17 (rep. & sub. SOR/80-876, s. 8).

Pacific Herring Fishery Regulations, SOR/84-324, ss. 17(1)(a), (b), 20(2), (3).

Special Fisheries Regulations for the Province of British Columbia, 1915, P.C. 297, s. 8(2).

Special Fishery Regulations for the Province of British Columbia, 1922, P.C. 1918, s. 13(2).

Special Fishery Regulations for the Province of British Columbia, 1925, P.C. 483, s. 15.

Special Fishery Regulations for the Province of British Columbia, 1930, P.C. 512, s. 11(2).

Special Fishery Regulations for the Province of British Columbia, 1938, P.C. 899, s. 10(2).

Règlement de pêche du hareng du Pacifique, DORS/84-324, art. 17(1)a), b), 20(2), (3).

Règlement de pêche général de la Colombie-Britannique, DORS/77-716, art. 29.

Règlement de pêche général de la Colombie-Britannique, DORS/84-248, art. 27(5) [aj. DORS/85-290, art. 5].

Règlements de pêche particuliers à la Colombie-Britannique de 1915, C.P. 297, art. 8(2).

Règlements de pêche particuliers à la Colombie-Britannique de 1922, C.P. 1918, art. 13(2).

Règlements de pêche particuliers à la Colombie-Britannique de 1925, C.P. 483, art. 15.

Règlements de pêche particuliers à la Colombie-Britannique de 1930, C.P. 512, art. 11(2).

Règlements de pêche particuliers à la Colombie-Britannique de 1938, C.P. 899, art. 10(2).

Règlement sur l'immatriculation et la délivrance de permis pour la pêche dans le Pacifique.

Authors Cited

Black's Law Dictionary, 6th ed. St. Paul, Minn.: West Publishing Co., 1990, "prima facie".

APPEAL from a judgment of the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 133, 29 B.C.A.C. 253, 48 W.A.C. 253, [1993] 5 W.W.R. 517, [1993] 4 C.N.L.R. 75, dismissing an appeal from a judgment of Anderson J. (1991), 13 W.C.B. (2d) 601, dismissing an appeal from conviction by Lemiski Prov. Ct. J. for violating s. 20(3) of the *Pacific Herring Fishery Regulations*. Appeal allowed, La Forest J. dissenting.

Marvin R. V. Storrow, Q.C., and Maria A. Morellato, for the appellants.

S. David Frankel, Q.C., and Cheryl J. Tobias, for the respondent.

Paul J. Pearlman, for the intervener the Attorney General of British Columbia.

Robert J. Normey, for the intervener the Attorney General for Alberta.

J. Keith Lowes, for the intervener the Fisheries Council of British Columbia.

Doctrine citée

Black's Law Dictionary, 6th ed. St. Paul, Minn.: West Publishing Co., 1990, «prima facie».

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1993), 80 B.C.L.R. (2d) 133, 29 B.C.A.C. 253, 48 W.A.C. 253, [1993] 5 W.W.R. 517, [1993] 4 C.N.L.R. 75, qui a rejeté un appel interjeté contre la décision du juge Anderson (1991), 13 W.C.B. (2d) 601, rejetant un appel interjeté contre une déclaration de culpabilité prononcée par le juge Lemiski de la Cour provinciale pour infraction au par. 20(3) du *Règlement de pêche du hareng du Pacifique*. Pourvoi accueilli, le juge La Forest est dissident.

Marvin R. V. Storrow, c.r., et Maria A. Morellato, pour les appellants.

S. David Frankel, c.r., et Cheryl J. Tobias, pour l'intimée.

Paul J. Pearlman, pour l'intervenant le procureur général de la Colombie-Britannique.

Robert J. Normey, pour l'intervenant le procureur général de l'Alberta.

J. Keith Lowes, pour l'intervenant le Fisheries Council of British Columbia.

1996 CanLII 160 (SCC)

Christopher Harvey, Q.C., and Robert Lonergan, for the interveners the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation.

Harry A. Slade, Arthur C. Pape and Robert C. Freedman, for the intervener the First Nations Summit.

Stuart Rush, Q.C., and Michael Jackson, for the interveners Delgamuukw, et al.

Arthur C. Pape and Clayton C. Ruby, for the interveners Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner.

The judgment of Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major J.J. was delivered by

THE CHIEF JUSTICE —

I. Facts

Donald and William Gladstone, the appellants, are members of the Heiltsuk Band. The appellants were charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offences of offering to sell herring spawn on kelp caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248 and of attempting to sell herring spawn on kelp not caught under the authority of a Category J herring spawn on kelp licence, contrary to s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324. Only the charges arising under s. 20(3) of the *Pacific Herring Fishery Regulations* are still at issue in this appeal.

The charges arose out of events taking place in April of 1988. On approximately April 27, 1988 the appellants shipped 4,200 pounds of herring spawn on kelp from Bella Bella to Richmond, a suburb of Vancouver. On April 28, 1988 the appellants took a pail containing approximately 35 pounds of herring spawn on kelp to Seaborn Enter-

Christopher Harvey, c.r., et Robert Lonergan, pour les intervenantes la British Columbia Fisheries Survival Coalition et la British Columbia Wildlife Federation.

Harry A. Slade, Arthur C. Pape et Robert C. Freedman, pour l'intervenant le First Nations Summit.

Stuart Rush, c.r., et Michael Jackson, pour les intervenants Delgamuukw et autres.

Arthur C. Pape et Clayton C. Ruby, pour les intervenants Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese et Allan Gardner.

Version française du jugement du juge en chef Lamer et des juges Sopinka, Gonthier, Cory, Iacobucci et Major rendu par

LE JUGE EN CHEF —

I. Les faits

Les appelants, Donald et William Gladstone, sont membres de la bande des Heiltsuk. Ils ont été accusés, aux termes du par. 61(1) de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14, d'avoir offert de vendre de la rogue de hareng sur varech récoltée en vertu d'un permis de pêche de subsistance des Indiens, infraction prévue au par. 27(5) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248, et d'avoir tenté de vendre de la rogue de hareng sur varech qui n'avait pas été récoltée en vertu d'un permis de catégorie J, infraction prévue au par. 20(3) du *Règlement de pêche du hareng du Pacifique*, DORS/84-324. Seules les accusations fondées sur le par. 20(3) du *Règlement de pêche du hareng du Pacifique* sont encore en litige dans le présent pourvoi.

Les faits ayant donné lieu aux accusations remontent au mois d'avril 1988. Vers le 27 avril 1988, les appelants ont expédié de Bella Bella jusqu'à Richmond, banlieue de Vancouver, 4 200 livres de rogue de hareng sur varech. Le 28 avril 1988, ils ont apporté un seau contenant 35 livres de ce produit à la poissonnerie Seaborn Enterprises

prises Ltd., a fish store in Vancouver. At Seaborn Enterprises Ltd. the appellants had a conversation with Mr. Katsu Hirose, the owner of the store, in which they asked Mr. Hirose if he was "interested" in herring spawn on kelp. Mr. Hirose informed the appellants that he did not purchase herring spawn on kelp from Native Indians. Upon leaving Seaborn Enterprises Ltd. the appellants, who had been under surveillance by fisheries officers throughout these events, were arrested and the entire 4,200 pounds of herring spawn on kelp was seized. Upon arrest the appellant William Gladstone produced an Indian food fish licence permitting him to harvest 500 pounds of herring spawn on kelp.

At the time at which the appellants were charged s. 20(3) of the *Pacific Herring Fishery Regulations* read:

20. . . .

(3) No person shall buy, sell, barter or attempt to buy, sell, or barter herring spawn on kelp other than herring spawn on kelp taken or collected under the authority of a Category J licence.

The appellants have not disputed the essential facts of the case. The essence of the appellants' defence is that, in these circumstances, the regulations violated the appellants' aboriginal rights as recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* with the result that, by operation of s. 52 of the *Constitution Act, 1982*, the regulations are of no force or effect with respect to the appellants. The appellants also take the position that the facts related to the shipment of the herring spawn on kelp, and the conversation with Mr. Hirose, are insufficient to constitute an "attempt to sell" in law.

Section 35(1) of the *Constitution Act, 1982* reads:

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

Ltd. à Vancouver. Au cours d'une conversation avec M. Katsu Hirose, propriétaire de Seaborn Enterprises Ltd., ils lui ont demandé s'il était «intéressé» à se procurer de la rogue de hareng sur varech. Ce dernier leur a répondu qu'il n'achetait pas ce produit à des autochtones. À leur sortie de l'établissement, les appelants, qui avaient été surveillés par des agents des pêches tout au long de l'opération, ont été arrêtés, et les 4 200 livres de rogue de hareng sur varech ont été saisies. Au moment de son arrestation, l'appelant William Gladstone a exhibé un permis de pêche de subsistance des Indiens l'autorisant à récolter 500 livres de rogue de hareng sur varech.

À la date où les appelants ont été inculpés, le par. 20(3) du *Règlement de pêche du hareng du Pacifique* était ainsi rédigé:

20. . . .

(3) Il est interdit à quiconque d'acheter, de vendre, d'échanger ou de tenter d'acheter, de vendre ou d'échanger de la rogue de hareng sur varech, à moins que celle-ci n'ait été prise ou recueillie en vertu d'un permis de catégorie J.

Les appelants n'ont pas contesté les faits essentiels de l'affaire. Essentiellement, les appelants font valoir pour leur défense que, dans les circonstances de la présente affaire, les règlements violent leurs droits ancestraux reconnus et confirmés par le par. 35(1) de la *Loi constitutionnelle de 1982*, de sorte qu'en vertu de l'art. 52 de cette loi ces règlements sont inopérants à leur égard. Ils soutiennent en outre que les faits concernant le transport de la rogue de hareng sur varech et la conversation avec M. Hirose sont insuffisants pour constituer, en droit, une «tentative de vente».

Voici le texte du par. 35(1) de la *Loi constitutionnelle de 1982*:

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

II. Judgments Below

Provincial Court, Lemiski Prov. Ct. J.

6 At trial the appellants made a series of technical arguments related to the Crown's proof of the essential elements of the offences with which they were charged. The appellants also argued that the conditions placed on fishing licences constituted improper delegation and that the regulations were *ultra vires* the federal government. None of these arguments was successful at trial and they have all, with one exception, been abandoned on the appeal to this Court. As noted, the appellants have maintained their position that the facts do not support the Crown's contention that the appellants engaged in an "attempt to sell" herring spawn on kelp. The trial judge rejected this argument, holding that "the evidence of an 'attempt to sell' is overwhelming".

7 The appellants also argued at trial that, if they did attempt to sell herring spawn on kelp, they did so pursuant to an aboriginal right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. The trial judge accepted this argument, finding as a matter of fact that the Heiltsuk people "continuously traded spawn on kelp over the years to the present time". The trial judge held, further, that this right had not been extinguished. Although regulations passed since 1927 had curtailed the herring spawn on kelp fishery, the trial judge cited *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1099, for the proposition that these regulations were "simply a manner of controlling the fisheries, not defining underlying rights"; given that this was the case, the trial judge held that the Crown had not demonstrated a clear and plain intention to extinguish the aboriginal right of the appellants to trade in herring spawn on kelp.

8 The trial judge held that the aboriginal rights of the appellants were infringed by the regulations. He held that it was unreasonable to limit the appel-

II. Décisions des juridictions inférieures

Cour provinciale, le juge Lemiski

Au procès, les appelants ont présenté une série d'arguments de forme concernant la preuve produite par le ministère public pour établir les éléments essentiels des infractions reprochées. Ils ont aussi prétendu que les conditions dont les permis de pêche étaient assortis constituaient une délégation irrégulière et que les règlements outrepassaient les pouvoirs du gouvernement fédéral. Aucun de ces arguments n'a été retenu au procès et tous, sauf un, ont été abandonnés dans le cadre du présent pourvoi. Comme il a déjà été souligné, les appelants continuent d'affirmer que les faits n'étaient pas la prétention du ministère public qu'ils ont «tenté de vendre» de la rogue de hareng sur varech. Le juge du procès a rejeté cet argument, statuant que [TRADUCTION] «la preuve de la «tentative de vente» est accablante».

Au procès, les appelants ont également plaidé que si, effectivement, ils ont tenté de vendre de la rogue de hareng sur varech, ils l'ont fait conformément à un droit ancestral reconnu et confirmé par le par. 35(1) de la *Loi constitutionnelle de 1982*. Le juge du procès a accepté cet argument, statuant, en tant que conclusion de fait, que les Heiltsuk [TRADUCTION] «avaient continuellement échangé de la rogue de hareng sur varech au fil des ans, et ce jusqu'à nos jours». Il a en outre conclu que ce droit n'avait pas été éteint. Même si des règlements pris depuis 1927 ont eu pour effet de restreindre la récolte de la rogue de hareng sur varech, le juge du procès s'est appuyé sur l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075, à la p. 1099, pour déclarer que les règlements en cause étaient «simplement une façon de contrôler les pêcheries et non de définir des droits sous-jacents»; étant donné ce fait, le juge du procès a statué que le ministère public n'avait pas établi l'existence d'une intention claire et expresse d'éteindre le droit ancestral des appelants de faire le commerce de la rogue de hareng sur varech.

Le juge du procès a décidé que les droits ancestraux des appelants avaient été violés par les règlements. Il a conclu qu'il était déraisonnable de res-

lants' rights, that the regulations had the potential to cause hardship to the appellants and that the regulations interfered with the appellants' preferred means of exercising their aboriginal rights, with the result that the *Sparrow* test for infringement had been met.

The trial judge held, however, that the infringement of the appellants' aboriginal rights was justified. He held that the Crown had demonstrated a valid legislative objective in so far as there was a potential conservation concern with the herring spawn on kelp fishery. Further, he held that while the infringement of the appellants' rights was excessive in relation to the legislative objective, there had been consultation with the Native Brotherhood of B.C. In sum, he held that given the difference between the appellants' actions and the aboriginal right they claimed to be acting pursuant to, the interference with their actions by the regulations was a justifiable interference with their rights. In the result, the trial judge convicted the appellants on both counts.

British Columbia Supreme Court, Anderson J. (1991), 13 W.C.B. (2d) 601

The appellants were partially successful on appeal to the British Columbia Supreme Court. Anderson J. held that the facts as found by the trial judge, while supporting the appellants' conviction for attempting to sell herring spawn on kelp in violation of s. 20(3) of the *Pacific Herring Fishery Regulations*, did not support the appellants' conviction for offering to sell herring spawn on kelp in violation of s. 27(5) of the *British Columbia Fishery (General) Regulations*. What the appellants said to Mr. Hirose was only an invitation to treat, not an offer to sell.

Anderson J. agreed with the trial judge that the effect of the regulations on the appellants' s. 35(1) rights was insufficient to invalidate the application of those regulations to the appellants. While he agreed with the trial judge that there was a tradi-

treindre les droits des appelants, que les règlements étaient susceptibles d'être indûment rigoureux et qu'ils privaient les appelants de leur moyen préféré d'exercer leurs droits ancestraux, de sorte que le critère énoncé dans *Sparrow* pour déterminer l'existence d'une atteinte avait été respecté.

Le juge du procès a toutefois conclu que l'atteinte aux droits ancestraux des appelants était justifiée. Il a statué que le ministère public avait démontré l'existence d'un objectif législatif régulier, dans la mesure où il existait un problème potentiel de conservation en ce qui concerne la rogue de hareng sur varech. De plus, il a jugé que, même si l'atteinte aux droits des appelants était excessive par rapport à l'objectif législatif, la Native Brotherhood of B.C. avait néanmoins été consultée. En somme, il a conclu que, vu la différence entre les activités des appelants et le droit ancestral en vertu duquel ils prétendaient avoir agi, la restriction apportée à leurs activités par les règlements était une atteinte justifiable à leurs droits. En conséquence, le juge du procès a déclaré les appelants coupables des deux chefs.

Cour suprême de la Colombie-Britannique, le juge Anderson (1991), 13 W.C.B. (2d) 601

Les appelants ont eu partiellement gain de cause en appel devant la Cour suprême de la Colombie-Britannique. Le juge Anderson a statué que même si les faits constatés par le juge du procès étaient la déclaration de culpabilité des appelants coupables à l'égard de la tentative de vente de rogue de hareng sur varech, infraction prévue au par. 20(3) du *Règlement de pêche du hareng du Pacifique*, ils n'appuyaient pas leur déclaration de culpabilité à l'accusation d'avoir offert ce produit, contrairement au par. 27(5) du *Règlement de pêche général de la Colombie-Britannique*. Les propos des appelants à M. Hirose étaient seulement une invitation à traiter ensemble, non une offre de vente.

Le juge Anderson a dit être d'accord avec le juge du procès que l'effet des règlements sur les droits des appelants était insuffisant pour invalider leur application à ces derniers. Même si, à l'instar du juge du procès, il a conclu à l'existence d'un

tional right to trade herring spawn on kelp, and that that right had not been extinguished, he held, in disagreement with the trial judge, that the fisheries regulations did not infringe the appellants' aboriginal rights. He held that the right of the appellants was not an "absolute and unfettered right to harvest herring spawn in any quantity and to sell the spawn so harvested commercially". The extent of the transaction to be engaged in by the appellants was inconsistent with the aboriginal rights on which they relied. The aboriginal right to trade in herring spawn on kelp is preserved by the operation of the Indian food fishing licences and by the Category J licence issued to the Heiltsuk Band; the limitation of the herring spawn on kelp fishery beyond what is permitted by the regulations cannot be said to be an infringement of the appellants' aboriginal rights.

droit traditionnel d'échanger de la rogue de hareng sur varech et à la non-extinction de ce droit, il a statué, au contraire du juge du procès, que les règlements de pêche ne portaient pas atteinte aux droits ancestraux des appelants. Il a conclu que le droit des appelants n'était pas un [TRADUCTION] «droit absolu et illimité de récolter n'importe quelle quantité de rogue de hareng et de vendre cette récolte commercialement». L'ampleur de l'opération que les appelants entendaient réaliser était incompatible avec les droits ancestraux qu'ils ont invoqués. Le droit ancestral d'échanger de la rogue de hareng sur varech est préservé par l'effet des permis de pêche de subsistance des Indiens et par les permis de catégorie J délivrés à la bande des Heiltsuk. L'interdiction de récolter plus de rogue de hareng sur varech que la quantité permise par règlement ne peut être considérée comme une atteinte aux droits ancestraux des appelants.

12 Anderson J. thus allowed the appeal in respect of the appellants' conviction for violating s. 27(5) of the *British Columbia Fishery (General) Regulations* but dismissed the appeal of the appellants' conviction for violating s. 20(3) of the *Pacific Herring Fishery Regulations*. The Crown has not appealed Anderson J.'s decision allowing the appeal of the appellants on the s. 27(5) issue.

Le juge Anderson a donc fait droit à l'appel formé par les appelants contre la déclaration de culpabilité fondée sur le par. 27(5) du *Règlement de pêche général de la Colombie-Britannique*, mais il a rejeté leur appel quant à celle fondée sur le par. 20(3) du *Règlement de pêche du hareng du Pacifique*. Le ministère public n'a pas fait appel de la décision du juge Anderson accueillant l'appel formé par les appelants sur la question touchant le par. 27(5).

British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 133

Cour d'appel de la Colombie-Britannique (1993), 80 B.C.L.R. (2d) 133

13 Hutcheon J.A., writing for a majority of the Court on this issue, rejected the appellants' argument that the Crown had failed to prove the essential elements of the offence of an attempt to sell herring spawn on kelp. Hutcheon J.A. held at para. 13, that the distinction between mere preparation and an attempt to sell is a "matter of 'common sense'" and that, in this case, the evidence was sufficient to demonstrate that the appellants had been guilty of an attempt to sell. Hutcheon J.A. also rejected the appellants' argument that the regulations, in these circumstances, constituted an unconstitutional violation of their s. 35(1) rights. Hutcheon J.A. agreed with the trial judge that the appellants had demonstrated an aboriginal right to

S'exprimant sur ce point au nom des juges de la majorité, le juge Hutcheon a rejeté l'argument des appelants que le ministère public n'avait pas prouvé les éléments essentiels de l'infraction de tentative de vente de rogue de hareng sur varech. Il a statué, au par. 13, que la distinction entre la simple préparation en vue de la vente et la tentative de vendre est [TRADUCTION] «affaire de «bon sens»», et que, en l'espèce, la preuve était suffisante pour établir que les appelants étaient coupables de tentative de vente. Le juge Hutcheon a également rejeté l'argument des appelants que, dans ces circonstances, les règlements constituaient une violation inconstitutionnelle des droits qui leur sont garantis par le par. 35(1). Il a été d'avis, tout comme le juge

trade herring spawn on kelp and that the actions of the appellants were, given the historical evidence demonstrating extensive trade by the Heiltsuk prior to contact, consistent with the aboriginal right asserted. He also agreed with the trial judge that the regulations constituted a *prima facie* interference with the aboriginal right to trade herring spawn on kelp but that that interference with the appellants' rights was justified.

Hutcheon J.A.'s reasons for upholding the interference with the appellants' rights as justified were different than those of the trial judge. Hutcheon J.A. held that the trial judge was in error in so far as he relied on the appellants' actions rather than on the impact of the regulations on the appellants. Considering the regulatory scheme itself, Hutcheon J.A. held that the consultation with the Native Indian Brotherhood of B.C., and the allocation of herring spawn on kelp to the Heiltsuk Band, demonstrated that the Crown had fulfilled its responsibility to the Heiltsuk and had not, as such, engaged in an unjustified interference with the appellants' aboriginal rights.

Macfarlane J.A., writing for himself and two others, agreed with Hutcheon J.A.'s disposition of the appellants' argument that the Crown had failed to demonstrate the essential elements of the offence. He disagreed, however, with Hutcheon J.A.'s analysis of the appellants' s. 35(1) arguments. In Macfarlane J.A.'s view, the appellants failed to demonstrate that the Heiltsuk Band had an aboriginal right to sell herring spawn on kelp commercially. Macfarlane J.A. held that the facts as found by the trial judge did not demonstrate that the trade of herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk. In Macfarlane J.A.'s view, at para. 50, "the quality and character of the activity in aboriginal times was quite different from that disclosed by the evidence in this case". Macfarlane J.A. also held, however, that if he were incorrect, and an aboriginal right to trade in herring spawn on kelp existed,

du procès, que les appelants avaient établi l'existence d'un droit ancestral d'échanger de la rogue de hareng sur varech et que, compte tenu de la preuve historique démontrant qu'il y avait des échanges importants de ce produit par les Heiltsuk avant le contact avec les Européens, leurs activités étaient compatibles avec le droit ancestral revendiqué. Il a aussi partagé l'avis de ce dernier que les règlements constituaient une atteinte à première vue au droit ancestral des appelants d'échanger de la rogue de hareng sur varech, mais que cette atteinte était justifiée.

Le juge Hutcheon a conclu que l'atteinte aux droits des appelants était justifiée, mais pour des motifs différents de ceux du juge du procès. Il a jugé que ce dernier avait commis une erreur en s'appuyant sur les actions des appelants plutôt que sur l'effet des règlements sur ceux-ci. Prenant en considération le régime de réglementation lui-même, le juge Hutcheon a statué que les consultations menées auprès de la Native Indian Brotherhood of B.C. et l'attribution de rogue de hareng sur varech à la bande des Heiltsuk établissaient que l'État s'était acquitté de sa responsabilité envers les Heiltsuk et n'avait pas, par le fait même, porté une atteinte injustifiée aux droits ancestraux des appelants.

Le juge Macfarlane, au nom de deux autres juges, a souscrit à la conclusion du juge Hutcheon sur l'argument des appelants que le ministère public n'avait pas prouvé les éléments essentiels de l'infraction. Il a cependant dit être en désaccord avec l'analyse faite par le juge Hutcheon des arguments des appelants fondés sur le par. 35(1). De l'avis du juge Macfarlane, les appelants n'ont pas démontré que la bande des Heiltsuk avait un droit ancestral de vendre commercialement de la rogue de hareng sur varech. Il a conclu que les faits constatés par le juge du procès n'établissaient pas que l'échange de rogue de hareng sur varech faisait partie intégrante de la culture distinctive des Heiltsuk. À son avis, au par. 50, [TRADUCTION] «les activités exercées aux temps des aborigènes étaient très différentes, de par leur qualité et leur nature, de celles révélées par la preuve en l'espèce». Toutefois, le juge Macfarlane a également

he would agree with Hutcheon J.A. that the Crown had met the burden of proof on the question of justification.

statué que, s'il avait tort et qu'il existait un droit ancestral d'échanger de la rogue de hareng sur varech, il serait d'accord avec le juge Hutcheon que le ministère public s'était acquitté de la charge de la preuve sur la question de la justification.

16

Lambert J.A. dissented. In his view, at para. 79, the appellants had an aboriginal right to trade herring spawn "in quantities measured in tons" which, he held, had been infringed by the fisheries regulations. Lambert J.A. held that this infringement was not justified. First, the herring spawn on kelp fishery, because not involving the death of the female fish as occurs in the herring roe fishery, does not create any conservation concerns beyond those dealt with in the regulation of the herring roe fishery. Second, the band was not compensated for what is, in effect, a confiscation of the herring spawn on kelp fishery. Finally, the only consultation that took place was with the Native Indian Brotherhood of B.C., not with the Heiltsuk Band itself; such consultation was inadequate to support the government's claim that the regulations were justified.

Le juge Lambert a exprimé sa dissidence. Au par. 79, il a dit être d'avis que les appelants possédaient un droit ancestral d'échanger de la rogue de hareng sur varech [TRADUCTION] «en quantités mesurables en tonnes», droit qui, a-t-il conclu, avait été violé par les règlements de pêche. Il a jugé que cette atteinte n'était pas justifiée. Premièrement, comme la récolte de la rogue de hareng sur varech n'entraîne pas la mort de la femelle, contrairement à la pêche du hareng prêt à frayer, la première activité ne crée pas d'autres problèmes de conservation que ceux visés par la réglementation de la pêche du hareng prêt à frayer. Deuxièmement, la bande n'a pas été indemnisée pour ce qui est, en fait, une confiscation de la récolte de la rogue de hareng sur varech. Troisièmement, seule la Native Indian Brotherhood of B.C. a été consultée et non la bande des Heiltsuk. Ces consultations sont insuffisantes pour étayer la prétention du ministère public que les règlements étaient justifiés.

III. Grounds of Appeal

III. Moyens d'appel

17

Leave to appeal to this Court was granted on March 10, 1994. The following constitutional question was stated:

L'autorisation de pourvoi devant notre Cour a été accordée le 10 mars 1994. La question constitutionnelle suivante a été formulée:

Is s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324, as it read on April 28, 1988, of no force or effect with respect to the appellants in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellants?

Le paragraphe 20(3) du *Règlement de pêche du hareng du Pacifique*, DORS/84-324, tel qu'il se lisait le 28 avril 1988, est-il, dans les circonstances de la présente affaire, inopérant à l'égard des appelants en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'ils invoquent?

The appellants appealed on the basis that the courts below were in error in holding that the actions of the appellants were sufficient to constitute an attempt to sell in law. The appellants also appealed on the basis that, given that the evidence presented at trial demonstrated the extent and significance of Heiltsuk trading activities, the Court of Appeal erred in holding that the appellants do not have an

Les appelants se pourvoient pour le motif que les juridictions inférieures ont fait erreur en statuant que leurs actions étaient suffisantes pour constituer en droit une tentative de vente. Ils ont aussi fait valoir que, comme la preuve présentée au procès établissait l'ampleur et l'importance des activités d'échange des Heiltsuk, la Cour d'appel avait commis une erreur en décidant que les appelants ne

aboriginal right to trade and sell herring spawn on kelp. The appellants argued further that because the regulations constituted a total ban on the sale of any herring spawn on kelp, the Court of Appeal erred in not finding a *prima facie* infringement of the appellants' aboriginal rights. Finally, the appellants argued that the Crown did not adduce sufficient evidence to support its assertion that the regulations fulfilled a conservation objective and that the Crown had failed to fulfil its fiduciary obligation to the Heiltsuk Band, with the result that the Court of Appeal erred in finding that any infringement which did exist was justified.

IV. Analysis

Attempt to Sell

Before turning to the heart of the appellants' case — the argument that their convictions constitute an unjustifiable infringement of the aboriginal rights recognized and affirmed by s. 35(1) — it is necessary to dispose of their argument that the facts do not demonstrate an "attempt to sell" as required by s. 20(3) of the *Pacific Herring Fishery Regulations*. The basis of the appellants' position is that because the Crown only provided evidence to show that the appellants asked Mr. Hirose if he was "interested" in herring spawn on kelp, without providing any evidence that the appellants had discussed the quantity, quality, price or delivery date of the herring spawn on kelp with Mr. Hirose, the Crown only demonstrated that the appellants had engaged in preparation for an attempt to sell; the Crown did not demonstrate that the appellants had actually attempted to sell herring spawn on kelp to Mr. Hirose.

This argument is without merit. In *R. v. Deutsch*, [1986] 2 S.C.R. 2, Le Dain J., writing for a unanimous Court on this issue, discussed the distinction between an attempt and mere preparation at pp. 22-23:

It has been frequently observed that no satisfactory general criterion has been, or can be, formulated for drawing the line between preparation and attempt, and that

possédaient pas le droit ancestral de vendre et d'échanger de la rogue de hareng sur varech. Les appelants ont aussi soutenu que, parce que le règlement interdit totalement la vente de ce produit, la Cour d'appel a commis une erreur en ne concluant pas à une atteinte à première vue à leurs droits ancestraux. Enfin, ils ont plaidé que le ministère public n'a pas présenté une preuve suffisante pour étayer son assertion que le règlement répondait à un objectif de conservation et que Sa Majesté ne s'était pas acquittée de son obligation de fiduciaire envers la bande des Heiltsuk, de sorte que la Cour d'appel a commis une erreur en concluant que toute atteinte effectivement portée était justifiée.

IV. Analyse

Tentative de vente

Avant d'arriver au cœur de la thèse des appelants — l'argument que leurs déclarations de culpabilité constituent une atteinte injustifiable à leurs droits ancestraux reconnus et confirmés par le par. 35(1) — il est nécessaire de statuer sur leur argument que les faits n'établissent pas qu'il y a eu «tentative de vente» au sens du par. 20(3) du *Règlement de pêche du hareng du Pacifique*. Cet argument repose sur ce qui suit: comme le ministère public a uniquement présenté des éléments de preuve visant à établir que les appelants avaient demandé à M. Hirose s'il était «intéressé» à se procurer de la rogue de hareng sur varech, sans apporter la preuve qu'ils avaient discuté avec ce dernier de la quantité, de la qualité, du prix ou de la date de livraison du produit, le ministère public a simplement démontré que les appelants avaient fait des préparatifs en vue d'une tentative de vente, et non que ceux-ci avaient effectivement tenté de vendre de la rogue de hareng sur varech à M. Hirose.

Cet argument n'est pas fondé. Dans l'arrêt *R. c. Deutsch*, [1986] 2 R.C.S. 2, le juge Le Dain, exprimant la décision unanime de la Cour sur ce point, a examiné la distinction entre la tentative et la simple préparation, aux pp. 22 et 23:

On a souvent fait remarquer qu'aucun critère général satisfaisant n'a été ou ne peut être formulé pour tracer la ligne de démarcation entre la préparation et la tentative

the application of this distinction to the facts of a particular case must be left to common sense judgment. . . . Despite academic appeals for greater clarity and certainty in this area of the law I find myself in essential agreement with this conclusion.

In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.

In this case the facts as found by the trial judge clearly demonstrate that the appellants attempted to sell herring spawn on kelp to Mr. Hirose. The appellants arranged for the shipment of the herring spawn on kelp to Vancouver, they took a sample of the herring spawn on kelp to Mr. Hirose's store and they specifically asked Mr. Hirose if he was "interested" in herring spawn on kelp. The appellants' actions have sufficient proximity to the acts necessary to complete the offence of selling herring spawn on kelp to move those actions beyond mere preparation to an actual attempt. I would note here that the appellants have not disputed the facts as found by the trial judge and that the courts below were unanimous in finding that the actions of the appellant were sufficient to amount to an attempt to sell.

Section 35(1) of the Constitution Act, 1982

In *Sparrow*, *supra*, Dickson C.J. and La Forest J., writing for a unanimous court, held that an analysis of a claim under s. 35(1) has four steps: first, the court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right; second, a court must determine whether that right was extinguished prior to the enactment of s. 35(1) of the *Constitution Act, 1982*; third, a court must determine whether that right has been infringed; finally, a court must determine whether that infringement was justified.

et que l'application de cette distinction aux faits d'une affaire en particulier devait être une question de jugement fondé sur le bon sens. [. . .] Malgré les demandes des auteurs de doctrine pour plus de clarté et plus de certitude dans ce domaine du droit, je suis essentiellement d'accord avec cette conclusion.

À mon avis, la distinction entre la préparation et la tentative est essentiellement qualitative et met en jeu le lien entre la nature et la qualité de l'acte en question et la nature de l'infraction complète, bien qu'il faille nécessairement examiner, en faisant cette distinction qualitative, la proximité relative de l'acte en question avec ce qui aurait constitué une infraction complète, sous l'angle du temps, du lieu et des actes sous le contrôle de l'accusé qui restent à être accomplis.

En l'espèce, les faits constatés par le juge du procès établissent clairement que les appelants ont tenté de vendre de la rogue de hareng sur varech à M. Hirose. Ils ont fait transporter de la rogue de hareng sur varech à Vancouver, ils en ont apporté un échantillon au magasin de M. Hirose et ils lui ont expressément demandé s'il était «intéressé» à s'en procurer. Les actions des appelants sont suffisamment proches de celles requises pour qu'il y ait perpétration de l'infraction de vente de rogue de hareng sur varech, de sorte qu'elles dépassent la simple préparation et constituent une tentative véritable. Je souligne ici que les appelants n'ont pas contesté les faits constatés par le juge du procès, et que les juridictions inférieures ont toutes conclu que les actions des appelants étaient suffisantes pour constituer une tentative de vente.

Le paragraphe 35(1) de la Loi constitutionnelle de 1982

Dans *Sparrow*, précité, le juge en chef Dickson et le juge La Forest ont rédigé la décision unanime de la Cour et statué que l'analyse des demandes fondées sur le par. 35(1) comporte quatre volets: premièrement, le tribunal doit déterminer si le requérant a prouvé qu'il exerçait un droit ancestral; deuxièmement, il doit déterminer s'il y a eu extinction de ce droit avant l'édiction du par. 35(1) de la *Loi constitutionnelle de 1982*; troisièmement, il doit déterminer s'il y a eu atteinte à ce droit; enfin, il doit déterminer si l'atteinte était justifiée.

This judgment will undertake the analysis required for the four steps of the *Sparrow* framework, taking into account the elaboration of that framework in the cases of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Nikal*, [1996] 1 S.C.R. 1013, all of which were heard contemporaneously with this appeal. I will also undertake to clarify the *Sparrow* framework as is required in order to apply that framework to the different circumstances of this appeal.

Definition

This appeal, like those heard contemporaneously in *N.T.C. Smokehouse* and *Van der Peet*, requires the Court to consider the scope of the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. In this case it must be determined whether the appellants Donald and William Gladstone can, on the basis of the test laid out in *Van der Peet*, claim to have been acting pursuant to an aboriginal right when they attempted to sell herring spawn on kelp to Seaborn Enterprises Ltd. In *Van der Peet* the Court held, at para. 46, that to be recognized as an aboriginal right an activity must be “an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right”. Thus, the appellants in this case must demonstrate that their attempt to sell herring spawn on kelp was an element of a practice, custom, or tradition integral to the distinctive culture of the Heiltsuk Band.

The first step in applying the *Van der Peet* test is the determination of the precise nature of the claim being made, taking into account such factors as the nature of the action said to have been taken pursuant to an aboriginal right, the government regulation argued to infringe the right, and the practice, custom or tradition relied upon to establish the right. At this stage of the analysis the Court is, in essence, determining what the appellants will have to demonstrate to be an aboriginal right in order for the activities they were engaged in to be encompassed by s. 35(1). There is no point in the

Dans le présent jugement, je vais appliquer le cadre d'analyse en quatre volets exposé dans *Sparrow* et explicité dans les pourvois *R. c. Van der Peet*, [1996] 2 R.C.S. 507, *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672, et *R. c. Nikal*, [1996] 1 R.C.S. 1013, qui ont tous été entendus en même temps que le présent appel. Je vais également clarifier ce cadre d'analyse, dans la mesure nécessaire pour l'appliquer aux circonstances différentes de la présente espèce.

Définition

Dans le cadre du présent pourvoi, tout comme dans ceux entendus en même temps, *Van der Peet* et *N.T.C. Smokehouse*, notre Cour est tenue d'examiner la portée des droits ancestraux reconnus et confirmés par le par. 35(1) de la *Loi constitutionnelle de 1982*. En l'espèce, il faut déterminer si les appelants Donald et William Gladstone peuvent, sur le fondement du critère énoncé dans *Van der Peet*, affirmer qu'ils exerçaient un droit ancestral quand ils ont tenté de vendre de la rogue de hareng sur varech à Seaborn Enterprises Ltd. Dans *Van der Peet*, notre Cour a statué, au par. 46, que, pour être reconnue comme un droit ancestral, une activité doit être «un élément d'une coutume, pratique ou tradition faisant partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit en question». Par conséquent, en l'espèce, les appelants doivent démontrer que leur tentative de vendre de la rogue de hareng sur varech était un élément d'une coutume, pratique ou tradition faisant partie intégrante de la culture distinctive de la bande des Heiltsuk.

La première étape dans l'application du critère énoncé dans *Van der Peet* consiste à déterminer la nature précise de la revendication des appelants, compte tenu de facteurs tels que la nature de l'acte qui aurait, affirme-t-on, été accompli en vertu d'un droit ancestral, le règlement gouvernemental qui, prétend-on, violerait ce droit, et la coutume, pratique ou tradition invoquée pour établir l'existence du droit revendiqué. À cette étape de l'analyse, notre Cour détermine essentiellement en quoi consiste le droit ancestral dont les appelants doivent établir l'existence pour que leurs activités soient

appellants' being shown to have an aboriginal right unless that aboriginal right includes the actual activity they were engaged in; this stage of the *Van der Peet* analysis ensures that the Court's inquiry is tailored to the actual activity of the appellants.

visées par le par. 35(1). Il ne sert à rien d'établir que les appelants possèdent un droit ancestral si ce droit n'englobe pas l'activité concrète à laquelle ils s'adonnaient. Cette étape de l'analyse établie dans *Van der Peet* fait en sorte que l'examen de notre Cour est adapté à l'activité concrète exercée par les appelants.

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This case, like *N.T.C. Smokehouse*, potentially creates problems at the characterization stage. The actions of the appellants, like the actions of the members of the Sheshaht and Opetchesaht bands in *N.T.C. Smokehouse*, appear to be best characterized as the commercial exploitation of herring spawn on kelp. By contrast, the regulations under which the appellants were charged, like the regulations at issue in *N.T.C. Smokehouse*, prohibit all sale or trade in herring spawn on kelp without a Category J licence, appear, therefore, to be best characterized as aimed at the exchange of herring spawn on kelp for money or other goods, regardless of whether the extent or scale of that sale or trade could reasonably be characterized as commercial in nature. The means to resolve this difficulty in characterization, as was the case in *N.T.C. Smokehouse*, is by addressing both possible characterizations of the appellants' claim. This judgment will thus consider first, whether the appellants can demonstrate that the Heiltsuk Band has an aboriginal right to exchange herring spawn on kelp for money or other goods and will then go on to consider, second, whether the appellants have demonstrated the further aboriginal right of the Heiltsuk Band to sell herring spawn on kelp to the commercial market.

Dans la présente affaire, tout comme dans *N.T.C. Smokehouse*, des problèmes risquent de se poser à l'étape de la caractérisation. Il semble que, comme dans le cas des actes des membres de la bande des Sheshaht et de celle des Opetchesaht dans *N.T.C. Smokehouse*, la meilleure façon de caractériser les actes des appelants est de considérer qu'il s'agit de l'exploitation commerciale de la rogue de hareng sur varech. Par contraste, comme il interdit complètement la vente ou l'échange de rogue de hareng sur varech qui n'a pas été récoltée en vertu d'un permis de catégorie J, il convient de caractériser le règlement en vertu duquel les appelants ont été inculpés, à l'instar de celui en cause dans *N.T.C. Smokehouse*, de règlement visant l'échange de la rogue de hareng sur varech contre de l'argent ou d'autres biens, peu importe que l'ampleur ou l'étendue des activités de vente et d'échange puissent raisonnablement être caractérisées comme étant de nature commerciale. Comme dans *N.T.C. Smokehouse*, le moyen de résoudre ce problème de caractérisation réside dans l'examen des deux façons possibles de caractériser la revendication des appelants. Aussi, dans le présent jugement, se demandera-t-on, dans un premier temps, si les appelants sont en mesure de démontrer que la bande des Heiltsuk possède le droit ancestral d'échanger de la rogue de hareng sur varech contre de l'argent ou d'autres biens, et, dans un deuxième temps, si les appelants ont fait la preuve que la bande des Heiltsuk a aussi le droit ancestral de vendre ce produit sur le marché commercial.

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The second step in the *Van der Peet* test requires the Court to determine whether the practice, custom or tradition claimed to be an aboriginal right was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the particular aboriginal people in question. The Court must thus, as has just been noted, determine in this

Conformément à la deuxième étape de l'analyse établie dans *Van der Peet*, notre Cour doit déterminer si la coutume, pratique ou tradition qui, prétend-on, est un droit ancestral faisait, avant le contact avec les Européens, partie intégrante de la société autochtone distinctive du groupe particulier d'autochtones en cause. En l'espèce, notre Cour

case whether the exchange of herring spawn on kelp for money or other goods, and/or the sale or trade of herring spawn on kelp in the commercial marketplace, were, prior to contact, defining features of the distinctive culture of the Heiltsuk.

The facts as found by the trial judge, and the evidence on which he relied, support the appellants' claim that exchange of herring spawn on kelp for money or other goods was a central, significant and defining feature of the culture of the Heiltsuk prior to contact. Moreover, those facts support the appellants' further claim that the exchange of herring spawn on kelp on a scale best characterized as commercial was an integral part of the distinctive culture of the Heiltsuk. In his reasons Lemiski Prov. Ct. J. summarized his findings of fact as follows:

It cannot be disputed that hundreds of years ago, the Heiltsuk Indians regularly harvested herring spawn on kelp as a food source. The historical/anthropological records readily bear this out.

I am also satisfied that this Band engaged in inter-tribal trading and barter of herring spawn on kelp. The exhibited Journal of Alexander McKenzie [*sic*] dated 1793 refers to this trade and the defence lead [*sic*] evidence of several other references to such trade.

The Crown conceded that there may have been some incidental local trade but questions its extent and importance. The very fact that early explorers and visitors to the Bella Bella region noted this trading has to enhance its significance. All the various descriptions of this trading activity are in accord with common sense expectations. Obviously one would not expect to see balance sheets and statistics in so primitive a time and setting. [Emphasis added.]

There was extensive evidence presented at trial to support Lemiski Prov. Ct. J.'s findings. In the journal of Alexander Mackenzie, referred to by the trial judge, is the following entry from 1793:

doit donc décider, comme je viens de l'indiquer, si l'échange de rogue de hareng sur varech contre de l'argent ou d'autres biens, ou encore si la vente ou l'échange de ce produit sur le marché commercial étaient, avant le contact avec les Européens, des caractéristiques déterminantes de la culture distinctive des Heiltsuk.

Les faits constatés par le juge du procès, ainsi que la preuve sur laquelle il s'est appuyé étaient la prétention des appelants que l'échange de la rogue de hareng sur varech contre de l'argent ou d'autres biens était une caractéristique fondamentale, importante et déterminante de la culture distinctive des Heiltsuk avant le contact avec les Européens. De plus, ces faits appuient aussi la thèse des appelants que l'échange de la rogue de hareng sur varech, sur une échelle qu'il convient de qualifier de commerciale, faisait partie intégrante de la culture distinctive des Heiltsuk. Dans ses motifs, le juge Lemiski de la Cour provinciale a résumé ainsi ses conclusions de fait:

[TRADUCTION] Il est incontestable qu'il y a des siècles, les Indiens Heiltsuk récoltaient régulièrement la rogue de hareng sur varech comme source de nourriture. C'est un fait dont la réalité est attestée par les documents historiques et anthropologiques.

Je suis également convaincu que la bande échangeait cette denrée avec d'autres tribus. Le journal d'Alexander McKenzie [*sic*] datant de 1793, qui a été versé en preuve, fait mention de ces échanges et la défense a présenté des éléments de preuve faisant état de nombreuses autres mentions de ces échanges.

Le ministère public a concédé qu'il a pu y avoir certains échanges accessoires, mais il a mis en doute leur ampleur et leur importance. Le fait même que les premiers explorateurs et visiteurs de la région de Bella Bella aient noté ces échanges en accentue l'importance. Les diverses descriptions faites de ces activités d'échange concordent avec ce à quoi on peut logiquement s'attendre. Il va de soi que personne ne s'attend à trouver des bilans et des statistiques à une époque et en des lieux aussi primitifs. [Je souligne.]

Les conclusions du juge Lemiski sont fondées sur l'abondante preuve produite au procès. Dans le journal d'Alexander Mackenzie, dont a fait état le juge du procès, on lit le passage suivant datant de 1793:

The Indians who had caused us so much alarm, we now discovered to be inhabitants of the islands, and traders in various articles, such as cedar-bark, prepared to be wove [*sic*] into mats, fish-spawn, copper, iron, and beads, the latter of which they get on their own coast. For these they receive in exchange roasted salmon, hemlock-bark cakes, and the other kind made of salmon roes, sorrel, and bitter berries. [Emphasis added.]

Similarly, the journal of Dr. William Tolmie, a fur trader, includes the following entry for April 16, 1834:

From 15 to 20 large canoes of Wacash's people passed on their way to the Caughquill country — the canoes were laden with boxes, hampers &c filled with dried herring spawn, which they are to barter for Oolaghens — the covers of their boxes are fitted similarly to that of a bandbox — hampers small & twisted of cedar bark. [Emphasis added.]

The defence expert, Dr. Barbara Lane, whose testimony was accepted by the trial judge, said in her report on the culture of the Heiltsuk people:

Pacific herring spawn only in certain locations. Consequently, some native groups had access to quantities of spawn beyond their needs and others had access to little or no spawn. This partly explains the extensive trade in spawn among native groups along the coast. Tons of spawn were transported by canoe from districts with good spawning areas to places not so favored.

After the spawn was processed, flotillas of freight canoes carrying tons of spawn product travelled between districts carrying boxes and hampers. These canoes travelled for trading purposes from one tribe to another and were under the direction of their respective chiefs. [Emphasis added.]

All of this evidence supports the position of the appellants that, prior to contact, exchange and trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk.

[TRADUCTION] Nous avons découvert que les Indiens qui nous avaient causé tant d'inquiétude habitaient les îles et échangeaient divers articles tels que l'écorce de thuya, préparée en vue du tressage de nattes, les œufs de poisson, le cuivre, le fer et les billes décoratives, celles-ci étant recueillies sur leur propre côte. En retour, ils reçoivent du saumon grillé, des gâteaux d'écorce de pruche, ainsi que l'autre sorte faite d'œufs de saumon, d'oseille et de shépherdie du Canada. [Je souligne.]

De même, le journal de William Tolmie, qui faisait la traite des fourrures, renferme l'inscription suivante datée du 16 avril 1834:

[TRADUCTION] Nous avons croisé de 15 à 20 grands canots transportant des Wacash en route vers le pays des Caughquill — les canots étaient chargés de boîtes, de paniers, etc., remplis d'œufs de hareng séchés, destinés à être échangés aux Oolaghens — les couvercles des boîtes sont fixés à la façon des couvercles des cartons à chapeau — les paniers sont petits et faits d'écorce de thuya tressée. [Je souligne.]

L'expert cité par la défense, Barbara Lane, dont le témoignage a été accepté par le juge du procès, a déclaré ceci dans son rapport sur la culture des Heiltsuk:

[TRADUCTION] Le hareng du Pacifique fraie seulement dans certains endroits. Par conséquent, alors que certains groupes autochtones avaient accès à des sources d'œufs qui dépassaient leurs besoins, d'autres groupes n'avaient que peu ou pas accès à cette ressource. Cela explique en partie les échanges importants d'œufs que pratiquaient entre eux les groupes autochtones le long de la côte. Des tonnes d'œufs étaient transportés par canot des districts riches en œufs aux lieux moins favorisés.

Après que les œufs avaient été traités, des flottilles de canots à marchandises transportant des tonnes d'œufs voyageaient d'un district à l'autre, chargés de boîtes et de paniers. Ces canots se déplaçaient, à des fins d'échanges, d'une tribu à l'autre, suivant les ordres des différents chefs. [Je souligne.]

Tous ces éléments de preuve étayaient la thèse des appelants que, avant le contact avec les Européens, l'échange de roque de hareng sur varech faisait partie intégrante de la culture distinctive des Heiltsuk.

In *Van der Peet*, at para. 62, this Court held that a claimant to an aboriginal right need not provide direct evidence of pre-contact activities to support his or her claim, but need only provide evidence which is “directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights”. In *Van der Peet* this was described as the requirement of “continuity” — the requirement that a practice, custom or tradition which is integral to the aboriginal community now be shown to have continuity with the practices, customs or traditions which existed prior to contact. The evidence presented in this case, accepted by the trial judge and summarized above, is precisely the type of evidence which satisfies this requirement. The appellants have provided clear evidence from which it can be inferred that, prior to contact, Heiltsuk society was, in significant part, based on such trade. The Heiltsuk were, both before and after contact, traders of herring spawn on kelp. Moreover, while to describe this activity as “commercial” prior to contact would be inaccurate given the link between the notion of commerce and the introduction of European culture, the extent and scope of the trading activities of the Heiltsuk support the claim that, for the purposes of s. 35(1) analysis, the Heiltsuk have demonstrated an aboriginal right to sell herring spawn on kelp to an extent best described as commercial. The evidence of Dr. Lane, and the diary of Dr. Tolmie, point to trade of herring spawn on kelp in “tons”. While this evidence relates to trade post-contact, the diary of Alexander Mackenzie provides the link with pre-contact times; in essence, the sum of the evidence supports the claim of the appellants that commercial trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk prior to contact.

Dans *Van der Peet*, au par. 62, notre Cour a décidé que la personne qui revendique un droit ancestral n’a pas à produire de preuve directe d’activités antérieures au contact avec les Européens pour appuyer sa revendication, mais seulement une preuve qui «tende à démontrer lesquels des aspects de la collectivité et de la société autochtones datent d’avant le contact avec les Européens. Constitueront des droits ancestraux les coutumes, pratiques et traditions dont l’origine peut être attribuée aux ancêtres de la collectivité autochtone en cause, qui vivaient avant le contact avec les Européens». Dans *Van der Peet*, la notion de «continuité» a été utilisée pour définir cette exigence — savoir l’obligation de démontrer qu’une coutume, pratique ou tradition faisant partie intégrante aujourd’hui de la culture distinctive de la collectivité autochtone marque une continuité avec des coutumes, pratiques ou traditions qui existaient avant le contact avec les Européens. La preuve présentée en l’espèce, acceptée par le juge du procès et résumée précédemment est précisément le type de preuve qui satisfait à cette exigence. Les appelants ont fourni une preuve claire, qui permet d’inférer que, avant le contact avec les Européens, la société heiltsuk comptait, dans une large mesure, sur ce type d’échanges. Les Heiltsuk, tant avant qu’après le contact avec les Européens, échangeaient la roque de hareng sur varech. De plus, bien qu’il ne serait pas exact de qualifier cette activité de «commerciale», étant donné le lien entre la notion de commerce et l’introduction de la culture européenne, l’ampleur et la portée des activités d’échange des Heiltsuk étayaient la prétention que, aux fins de l’analyse fondée sur le par. 35(1), les Heiltsuk ont démontré l’existence d’un droit ancestral de vendre de la roque de hareng sur varech sur une échelle qu’il convient de qualifier de commerciale. Le témoignage de M^{me} Lane et le journal de M. Tolmie font état d’échanges de roque de hareng sur varech mesurables en «tonnes». Quoique cette preuve concerne les échanges postérieurs au contact avec les Européens, le journal d’Alexander Mackenzie établit le lien avec l’époque qui a précédé. Essentiellement, l’ensemble de la preuve étaye la prétention des appelants que l’échange de roque de hareng sur varech faisait partie intégrante de la culture distinctive des Heiltsuk avant le contact avec les Européens.

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I would note that the significant difference between the situation of the appellants in this case, and the appellants in *Van der Peet* and *N.T.C. Smokehouse*, lies in the fact that for the Heiltsuk Band trading in herring spawn on kelp was not an activity taking place as an incident to the social and ceremonial activities of the community; rather, trading in herring spawn on kelp was, in itself, a central and significant feature of Heiltsuk society. In *Van der Peet* and *N.T.C. Smokehouse* the findings of fact at trial suggested that whatever trade in fish had taken place prior to contact was purely incidental to the social and ceremonial activities of the aboriginal societies making the claim; here the evidence suggests that trade in herring spawn on kelp was not an incidental activity for the Heiltsuk but was rather a central and defining feature of Heiltsuk society.

Extinguishment, Infringement and Justification

30

The appellants have demonstrated that they were acting pursuant to an aboriginal right to trade herring spawn on kelp on a commercial basis. I will therefore turn to the other three stages of the *Sparrow* analysis, that is, to the questions of whether the right under which the appellants were acting has been extinguished, whether that right was infringed by the actions of the government and, finally, whether that infringement was justified.

Extinguishment

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The test for determining when an aboriginal right has been extinguished was laid out by this Court in *Sparrow*. Relying on the judgment of Hall J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, the Court in *Sparrow* held at p. 1099 that "[t]he test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right". Further, the Court held that the mere fact that a right had, in the past, been regulated by the government, and its exercise subject to various terms and conditions, was not suffi-

Je tiens à souligner que la différence importante qui existe entre la situation des appelants en l'espèce et celle des appelants dans les arrêts *Van der Peet* et *N.T.C. Smokehouse* est le fait que, dans le cas des Heiltsuk, l'échange de rogue de hareng sur varech n'était pas une activité accessoire des activités sociales et rituelles de la collectivité. Ces échanges étaient, en soi, une caractéristique fondamentale et importante de la société heiltsuk. Dans les arrêts *Van der Peet* et *N.T.C. Smokehouse*, les conclusions de fait tirées au procès tendaient à indiquer que, quelle que soit la nature des échanges de poisson ayant été pratiqués avant le contact avec les Européens, ceux-ci étaient purement accessoires aux activités sociales et rituelles des sociétés autochtones qui revendiquaient le droit, alors qu'en l'espèce la preuve semble indiquer que les échanges de la rogue de hareng sur varech n'étaient pas une activité accessoire de la bande des Heiltsuk, mais plutôt une caractéristique fondamentale et importante de la société heiltsuk.

Extinction, violation et justification

Les appelants ont démontré qu'ils avaient agi en vertu d'un droit ancestral d'échanger de la rogue de hareng sur varech sur une échelle commerciale. J'en arrive donc aux trois autres volets de l'analyse établie dans *Sparrow*, c'est-à-dire l'examen des questions de savoir si le droit invoqué par les appelants a été éteint, s'il y a été porté atteinte par les actions de l'État et, dans l'affirmative, si cette atteinte était justifiée.

Extinction

Le critère permettant de déterminer si un droit ancestral a été éteint a été formulé par notre Cour dans l'arrêt *Sparrow*, s'appuyant sur les motifs du juge Hall dans *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313, elle a dit ceci dans *Sparrow*, à la p. 1099: «[I]e critère de l'extinction qui doit être adopté, à notre avis, est que l'intention du Souverain d'éteindre un droit ancestral doit être claire et expresse». En outre, la Cour a conclu que le seul fait que, dans le passé, un droit a été réglementé par l'État et que son exercice a été assujéti à diverses conditions, n'était pas

cient to extinguish the right. The argument that it did so (*Sparrow*, at p. 1097)

confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.

The regulations relied on by the Crown in that case were, the Court held at p. 1099, "simply a manner of controlling the fisheries, not defining underlying rights".

The reasoning used to reject the Crown's argument in *Sparrow* applies equally to the Crown's argument in this case. To understand why this is so it will be necessary to review the legislation relied upon by the Crown in its argument that the Heiltsuk's right to harvest herring spawn on kelp on a commercial basis was extinguished prior to 1982.

There are two types of legislative action relied upon by the Crown: the provisions of the *Fisheries Act* which, prior to 1955, prohibited the destruction of the "fry of food fishes", and the provisions of the Fisheries regulations relating directly to the herring spawn fishery. The former are exemplified by s. 39 of the *Fisheries Act* of 1927 which stated that "The fry of food fishes shall not be at any time destroyed"; identical provisions existed in the 1932 and 1952 *Fisheries Acts*. The latter first appeared in 1955. In 1955 the 1954 *British Columbia Fishery Regulations* were amended by SOR/55-260, s. 3, by the addition of a new s. 21A:

21A. No person shall take or collect by any means herring, eggs from herring spawning areas, and no person shall buy, sell, barter, process or traffic in herring eggs so taken; but an Indian may at any time take or collect herring eggs from spawning areas for use as food by Indians and their families but for no other purpose.

suffisant pour éteindre ce droit. L'argument voulant que le droit ait été éteint (*Sparrow*, à la p. 1097)

confond [...] la réglementation et l'extinction. Que l'exercice du droit fasse l'objet d'une réglementation très minutieuse, cela ne signifie pas que ce droit est par le fait même éteint.

Le règlement invoqué par le ministère public dans cette affaire constituait, de conclure la Cour, à la p. 1099, «simplement une façon de contrôler les pêcheries et non de définir des droits sous-jacents».

Le raisonnement qui a mené au rejet de l'argument du ministère public dans l'arrêt *Sparrow* s'applique également à son argument dans le présent pourvoi. Afin de comprendre pourquoi il en va ainsi, il sera nécessaire d'étudier la législation invoquée par le ministère public au soutien de son argument que le droit de récolter de la rogue de hareng sur varech sur une échelle commerciale a été éteint avant 1982.

Le ministère public invoque deux types de mesures législatives: les dispositions de la *Loi sur les pêcheries* qui, avant 1955, interdisaient la destruction du «frai du poisson comestible» et celles des règlements de pêche qui touchent directement la récolte des œufs de hareng. Un exemple du premier type de dispositions est l'art. 39 de la *Loi sur les pêcheries* de 1927 qui prévoyait ceci: «Le frai du poisson comestible ne doit jamais être détruit»; dans ses versions de 1932 et de 1952, cette loi comportait des dispositions identiques. Les premières mesures du deuxième type remontent à 1955, année au cours de laquelle le *Règlement de pêche de la Colombie-Britannique* de 1954 a été modifié par DORS/55-260, art. 3, par insertion d'une nouvelle disposition, l'art. 21A:

21A. Il est interdit de prendre ou de recueillir par un moyen quelconque des œufs de hareng dans les zones de fraye, et il est interdit d'acheter, de vendre, de troquer, de traiter les œufs de hareng ainsi pris ou d'en faire le commerce. Toutefois, un Indien peut en tout temps prendre ou recueillir des œufs de hareng dans les zones de fraye comme nourriture pour les Indiens et leur famille, mais pour aucune autre fin.

Similar prohibitions on the harvest and sale of herring spawn continued until 1974 (SOR/74-50, s. 9). At that time the section was amended so that the provision read

21A (1) Subject to subsection (2), no person shall, except by written permission of the Regional Director, by any means take or collect herring eggs from herring spawning areas, or buy, sell, barter, process or traffic in herring eggs so taken.

(2) An Indian may at any time take or collect herring eggs from herring spawning areas for use as food for himself and his family (SOR/72-417, s. 7).

This regulatory scheme remained in place until 1980 when the provision (which had been transferred to s. 17 of the *Pacific Herring Fishery Regulations*, C.R.C., c. 825) was amended by SOR/80-876, s. 8 to read

17. No person shall

(a) take or collect herring roe except under authority of a licence issued pursuant to the *Pacific Fishery Registration and Licensing Regulations*; or

(b) possess herring roe unless it was so taken or collected.

According to the submissions of the Crown, no further modifications to this regulatory scheme took place prior to the enactment of the *Constitution Act, 1982*.

None of these regulations, when viewed individually or as a whole, can be said to express a clear and plain intention to extinguish the aboriginal rights of the Heiltsuk Band. While to extinguish an aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of aboriginal rights, it must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme. In this instance, the regulations and legislation regulating the herring spawn on kelp fishery prior to 1982 do not demonstrate any consistent intention on the part of the Crown. At various times prior to 1982 aboriginal peoples have been entirely prohibited from harvesting herring spawn

Des interdictions analogues visant la récolte et la vente d'œufs de hareng sont restées en vigueur jusqu'en 1974 (DORS/74-50, art. 9), date à laquelle cet article a été modifié ainsi:

21A. (1) Sous réserve des dispositions du paragraphe (2), il est interdit, si ce n'est avec la permission écrite du directeur régional, de prendre ou de recueillir par un moyen quelconque des œufs de hareng dans les zones de fraye ou d'acheter, de vendre, de troquer, de traiter les œufs de hareng ainsi pris ou d'en faire le commerce.

(2) Un Indien peut en tout temps prendre ou recueillir des œufs de hareng dans les zones de frai du hareng, comme nourriture pour lui-même et sa famille (DORS/72-417, art. 7).

Ce régime de réglementation est resté en place jusqu'en 1980, où le texte (devenu entre-temps l'art. 17 du *Règlement de pêche du hareng du Pacifique*, C.R.C., ch. 825) a été modifié ainsi par DORS/80-876, art. 8:

17. Il est interdit à quiconque

a) de prendre ou de recueillir de quelque façon que ce soit de la roque de hareng, à moins que ce produit soit pris en vertu d'un permis délivré selon le *Règlement sur l'immatriculation et la délivrance de permis pour la pêche dans le Pacifique*; ou

b) d'avoir en sa possession de la roque de hareng à moins de l'avoir prise ou recueillie selon ledit permis.

D'après les observations du ministère public, ce régime de réglementation est resté inchangé jusqu'à l'édiction de la *Loi constitutionnelle de 1982*.

Il est impossible d'affirmer que, individuellement ou collectivement, ces diverses dispositions réglementaires expriment une intention claire et expresse d'éteindre les droits ancestraux de la bande des Heiltsuk. Même si, pour éteindre un droit ancestral, il n'est peut-être pas nécessaire que le gouvernement utilise des mots faisant explicitement état de l'extinction de droits ancestraux, le ministère public ne doit pas se borner à démontrer que, dans le passé, l'exercice d'un droit ancestral a été réglementé. Dans le présent cas, les dispositions réglementaires et législatives qui régissaient la récolte de la roque de hareng sur varech avant 1982 ne témoignent pas d'une intention constante de l'État. Avant 1982, les peuples autochtones se

on kelp, allowed to harvest herring spawn on kelp for food only, allowed to harvest herring spawn on kelp for sale with the written permission of the regional director and allowed to take herring roe pursuant to a licence granted under the *Pacific Fishery Registration and Licensing Regulations*. Such a varying regulatory scheme cannot be said to express a clear and plain intention to eliminate the aboriginal rights of the appellants and of the Heiltsuk Band. As in *Sparrow*, the Crown has only demonstrated that it controlled the fisheries, not that it has acted so as to delineate the extent of aboriginal rights.

The Crown also argued, however, that even if the regulations do not extinguish the appellants' aboriginal rights, their rights were extinguished by the enactment of Order in Council, P.C. 2539, of September 11, 1917. Regulation 2539 reads as follows:

Whereas it is represented that since time immemorial, it has been the practice of the Indians of British Columbia to catch salmon by means of spears and otherwise after they have reached the upper non-tidal portions of the rivers;

And whereas while after commercial fishing began it became eminently desirable that all salmon that succeeded in reaching the upper waters should be allowed to go on to their spawning beds unmolested, in view of the great importance the Indians attached to their practice of catching salmon they have been permitted to do so for their own food purposes only, and to this end subsection 2 of section 8 of the Special Fishery Regulations for British Columbia provides as follows: —

“2. Indians may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for themselves and their families, but for no other purpose; but no Indian shall spear, trap or pen fish on their spawning grounds, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved.”

sont vu successivement interdire complètement de récolter de la rogue de hareng sur varech, permettre de le faire mais à des fins alimentaires seulement, autoriser à le faire avec la permission écrite du directeur régional et, enfin, autoriser à le faire en vertu d'un permis délivré sous le régime du *Règlement sur l'immatriculation et la délivrance de permis pour la pêche dans le Pacifique*. Il n'est pas possible d'affirmer qu'un régime de réglementation aussi changeant exprime une intention claire et exprime d'abolir les droits ancestraux des appelants et de la bande des Heiltsuk. Comme dans *Sparrow*, le ministère public a tout au plus démontré que l'État avait pris des mesures visant à contrôler la pêche et non à délimiter l'étendue des droits ancestraux.

Cependant, le ministère public a également prétendu que, même si les règlements n'ont pas eu pour effet d'éteindre les droits ancestraux des appelants, ces droits ont été éteints par suite de la prise du décret C.P. 2539 du 11 septembre 1917, dont voici le texte:

[TRADUCTION] Attendu qu'on fait valoir que, depuis des temps immémoriaux, les Indiens de la Colombie-Britannique ont pour pratique de capturer le saumon au harpon ou par d'autres moyens après que le poisson a atteint les parties supérieures des eaux sans marée des cours d'eau;

Et attendu que, depuis le début de la pêche commerciale, il est devenu éminemment souhaitable que tous les saumons qui réussissent à remonter dans ces eaux puissent atteindre indemnes les frayères, vu la grande importance que les Indiens attachent à cette pratique, il leur a été permis de le faire pour se nourrir seulement; et, à cette fin, le paragraphe 2 de l'article 8 des Règlements de pêche particuliers à la Colombie-Britannique prévoit ce qui suit: —

«2. Les Indiens, avec la permission de l'inspecteur en chef des pêcheries, peuvent en tout temps capturer du poisson destiné à leur alimentation et à celle de leur famille, mais il leur est défendu de faire servir à d'autres fins, le poisson ainsi capturé; toutefois, nul Indien ne doit faire usage de harpons ou de pièges, ni ne peut enfermer des poissons dans les frayères ni dans aucun autre endroit affecté à la reproduction naturelle ou artificielle du poisson, ni en tout autre lieu réservé.»

And whereas notwithstanding this concession, great difficulty is being experienced in preventing the Indians from catching salmon in such waters for commercial purposes and recently, an Indian was convicted before a local magistrate for a violation of the above quoted regulation, the evidence being that he had been found fishing and subsequently selling fish. The case was appealed and the decision of the magistrate reversed, it being held that there was no proof that the fish caught by the Indian were those sold by him;

And whereas it is further represented that it is practically impossible for the Fishery Officers to keep fish that may be caught by the Indians in non-tidal waters, ostensibly for their own food purposes, under observation from the time they are caught until they are finally disposed of in one way or another;

And whereas the Department of the Naval Service is informed that the Indians have concluded that this regulation is ineffective, and this season arrangements are being made by them to carry on fishing for commercial purposes in an extensive way;

And whereas it is considered to be in the public interest that this should be prevented and the Minister of the Naval Service, after consultation with the Department of Justice on the subject, recommends that action as follows be taken;

Therefore His Excellency the Governor General in Council, under the authority of section 45 of the Fisheries Act, 4-5 George V, Chapter 8, is pleased to order and it is hereby ordered as follows: —

Subsection 2 of section 8 of the Special Fishery Regulations for the Province of British Columbia, adopted by Order in Council of the 9th February, 1915, is hereby rescinded, and the following is hereby enacted and substituted in lieu thereof: —

“2. An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose. The Chief Inspector of Fisheries shall have the power in any such permit (a) to limit or fix the area of the waters in which such fish may be caught; (b) to limit or fix the means by which, or the manner in which such fish may be caught, and (c) to limit or fix the time in which such permission shall be operative. An Indian shall not fish for or catch fish pursuant to the said permit except in the waters by the means or in the manner and within the time limit expressed in the said permit, and any fish caught pursuant to any such permit shall not be sold or other-

Et attendu que, en dépit de cette concession, il est très difficile d'empêcher les Indiens de pêcher le saumon à des fins commerciales dans ces eaux et que, récemment, un Indien a été déclaré coupable par un magistrat local d'une infraction au règlement précité, la preuve ayant établi qu'il avait pêché et ensuite vendu le poisson capturé. L'affaire a été portée en appel et la décision du magistrat infirmée, le tribunal statuant qu'il n'y avait aucune preuve que les poissons pris par l'Indien étaient ceux qu'il avait vendus;

Et attendu qu'on fait aussi valoir qu'il est pratiquement impossible pour les surveillants des pêches d'observer constamment le poisson qui a pu être pris par les Indiens dans les eaux sans marée, apparemment pour leur propre alimentation, depuis le moment où il est pris jusqu'à celui où il en est disposé définitivement, d'une manière ou d'une autre;

Et attendu que le ministère du Service naval a été informé que les Indiens ont conclu que ce règlement est inefficace, et que, cette saison, ils font des préparatifs en vue de pêcher à des fins commerciales sur une grande échelle;

Et attendu qu'il est jugé être dans l'intérêt public d'empêcher ces activités, et que le ministère du Service naval, après avoir consulté le ministère de la Justice à cet égard, recommande que soient prises les mesures suivantes;

À ces causes, il plaît à Son Excellence le Gouverneur général en conseil, sous l'empire de l'article 45 de la Loi sur les pêcheries, 4-5 George V, chapitre 8, de décréter ce qui suit: —

Le paragraphe 2 de l'article 8 des Règlements de pêche particuliers à la Colombie-Britannique, pris par décret daté du 9 février 1915, est par les présentes abrogé et remplacé par ce qui suit:

«2. Les Indiens avec la permission de l'inspecteur en chef des pêcheries, peuvent en tout temps capturer du poisson destiné à leur alimentation et à celle de leur famille, mais il leur est défendu de faire servir à d'autres fins, le poisson ainsi capturé. L'inspecteur des pêcheries a le pouvoir dans le permis délivré à cet effet; a) de délimiter ou de fixer l'étendue des pêcheries où il est permis de pêcher; b) d'indiquer ou de prescrire les procédés de pêche; enfin c) de déterminer l'époque où ce permis devient effectif. Les Indiens n'ont pas le droit de capturer les espèces de poisson spécifiées, si ce n'est dans les eaux, d'après le procédé, et à l'époque prescrite dans ce permis, et ils ne peuvent ni les vendre ni en disposer autrement;

wise disposed of and a violation of the provisions of the said permit shall be deemed to be a violation of these regulations. . . .” [Emphasis added.]

The language of the Regulation suggests that the government had two purposes in enacting the amendment to the existing scheme: first, the government wished to ensure that conservation goals were met so that salmon reached their “spawning grounds”; second, the government wished to pursue those goals in a manner which would ensure that the special protection granted to the Indian food fishery would continue. The government attempted to meet these goals by making it clear that no special protection was being granted to the Indian commercial fishery and that, instead, the Indian commercial fishery would be subject to the general regulatory system governing commercial fishing in the province.

Under the *Sparrow* test for extinguishment, this Regulation cannot be said to have extinguished the aboriginal right to fish commercially held by the appellants in this case. The government’s purpose was to ensure that conservation goals were met, and that the Indian food fishery’s special protection would continue; its purpose was not to eliminate aboriginal rights to fish commercially. It is true that through the enactment of this regulation the government placed aboriginal rights to fish commercially under the general regulatory scheme applicable to commercial fishing, and therefore did not grant the aboriginal commercial fishery special protection of the kind given to aboriginal food fishing; however, the failure to recognize an aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right.

That the government did not in fact have this intention becomes clear when one looks at the general regulatory scheme of which this Regulation is one part. First, aboriginal people were not prohibited, and have never been prohibited since the scheme was introduced in 1908, from obtaining

toutes violations des dispositions du permis constituent une infraction à ces règlements . . . » [Je souligne.]

Le texte du règlement tend à indiquer que le gouvernement visait deux objectifs en modifiant le régime existant: premièrement, il désirait assurer la réalisation d’objectifs de conservation, de sorte que les saumons puissent atteindre leurs «frayères»; deuxièmement, il désirait poursuivre ces objectifs de manière à assurer le maintien de la protection spéciale accordée à la pêche pratiquée par les Indiens à des fins alimentaires. Le gouvernement a tenté d’atteindre ces objectifs en établissant clairement qu’aucune protection spéciale n’était accordée aux activités de pêche commerciale des Indiens, mais qu’au contraire ces activités seraient assujetties au régime général de réglementation de la pêche commerciale dans la province.

Selon le critère formulé dans *Sparrow*, relativement à l’extinction, il est impossible d’affirmer que le règlement a éteint le droit ancestral de pêche commerciale détenu par les appelants en l’espèce. L’objectif du gouvernement était d’assurer la réalisation d’objectifs de conservation et de maintenir la protection spéciale dont bénéficiait la pêche pratiquée par les Indiens à des fins alimentaires. L’objectif du gouvernement n’était pas d’éliminer les droits ancestraux de pêche commerciale. Il est vrai que, par la prise de ce règlement, le gouvernement a assujéti les droits ancestraux de pêche commerciale au régime général de réglementation applicable à la pêche commerciale, et qu’il n’a en conséquence pas accordé à la pêche commerciale des autochtones une protection spéciale du genre de celle accordée aux activités de pêche pratiquées par ceux-ci à des fins alimentaires. Cependant, le fait de ne pas reconnaître à un droit la qualité de droit ancestral et de ne pas lui accorder une protection spéciale ne constituent pas l’intention claire et expresse requise pour éteindre le droit en question.

Il ressort clairement de l’examen du régime général de réglementation dans lequel s’inscrit ce règlement que telle n’était pas l’intention du gouvernement. Premièrement, il n’était pas interdit aux autochtones, et il ne leur a d’ailleurs jamais été interdit depuis l’établissement du régime en 1908,

licences to fish commercially under the regulatory scheme applicable to commercial fishing. Second, and more importantly, the government has, at various times, given preferences to aboriginal commercial fishing. For example, the government has provided for greatly reduced licensing fees for aboriginal fishers and has attempted to encourage aboriginal participation in the commercial fishery. I would note the statistics cited by the interveners the British Columbia Fisheries Survival Coalition and British Columbia Wildlife Federation to the effect that, in 1929, of the 13,860 commercial salmon licences issued 3,632 were held by aboriginal people and that, during and after World War II, there was a "substantial fleet of Indian-owned and operated seine boats, as well as gill-netters and trollers". The interveners assert that, today, aboriginal participation in the commercial fishery is at a considerably higher percentage than the percentage of aboriginal people in the population as a whole. Such substantial encouragement of the aboriginal commercial fishery is not, in my view, consistent with the assertion that through enacting a Regulation aimed at ensuring conservation of the fishery in a manner which continues the special protection given to the aboriginal food fishery, the government had the clear and plain intention to extinguish the aboriginal rights to fish commercially held by some aboriginal peoples in the province.

d'obtenir des permis de pêche commerciale en vertu du régime de réglementation applicable à ce type de pêche. Deuxièmement, fait encore plus important, le gouvernement a, à divers moments, pris des mesures préférentielles en faveur de la pêche commerciale autochtone. Par exemple, le gouvernement a réduit considérablement le montant des droits payables par les pêcheurs autochtones pour obtenir un permis et il a tenté d'encourager leur participation à la pêche commerciale. Je tiens à mentionner les statistiques citées par les intervenantes British Columbia Fisheries Survival Coalition et British Columbia Wildlife Federation : en 1929, les autochtones détenaient 3 632 des 13 860 permis de pêche commerciale du saumon délivrés; pendant et après la Seconde Guerre mondiale, il existait [TRADUCTION] «une importante flotte de senneurs, de bateaux pour la pêche au filet à maille et de bateaux pour la pêche à la traîne appartenant à des Indiens et exploités par eux». Ces intervenantes soutiennent que, de nos jours, la participation autochtone à la pêche commerciale représente un pourcentage considérablement plus élevé que celui des autochtones au sein de l'ensemble de la population. À mon avis, cet encouragement important en faveur de la pêche commerciale autochtone ne concorde pas avec l'affirmation que, en prenant un règlement de pêche visant des objectifs de conservation, de manière à maintenir la protection spéciale accordée à la pêche pratiquée par les autochtones à des fins alimentaires, le gouvernement avait l'intention claire et expresse d'éteindre les droits ancestraux de pêche commerciale détenus par certains peuples autochtones dans la province.

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Finally, I would note that the Regulation is of an entirely different nature than the document relied on for a finding of extinguishment in *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 933, (*per* Cory J.) and *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 46 (*per* Cory J.). Section 12 of the *Natural Resources Transfer Agreement* (NRTA), the provision at issue in those cases, is a provision in a constitutional document, the enactment of which provides for a permanent settlement of the legal rights of the aboriginal groups to whom it applies. The Regulation, by contrast, was merely a statutory document

Enfin, je tiens à préciser que la nature de ce règlement est tout à fait différente de celle du document sur lequel notre Cour s'est fondée pour conclure à l'extinction dans les arrêts *R. c. Horseman*, [1990] 1 R.C.S. 901, à la p. 933 (le juge Cory), et *R. c. Badger*, [1996] 1 R.C.S. 771, au par. 46 (le juge Cory). L'article 12 de la *Convention sur le transfert des ressources naturelles* (Convention) — disposition contestée dans ces affaires — est une disposition faisant partie d'un document constitutionnel qui pourvoit au règlement permanent des droits juridiques des groupes autochtones

dealing with an immediate conservation concern and was subject to amendment through nothing more elaborate than the normal legislative process. The NRTA was aimed at achieving a permanent clarification of the province's legislative jurisdiction and of the legal rights of aboriginal peoples within the province; the Regulation was aimed at dealing with the immediate problems caused by the fact that an insufficient number of salmon were reaching their spawning grounds. The intention of the government in enacting the Regulation must, as a consequence, be viewed quite differently from its intention in enacting the NRTA, with the result that while the NRTA can be seen as evincing the necessary clear and plain intention to extinguish aboriginal rights to hunt commercially in the province to which it applies, the Regulation cannot be seen as evincing the necessary clear and plain intention to extinguish aboriginal rights to fish commercially in British Columbia.

Infringement

Sparrow also lays out the test for determining whether or not the government has infringed the aboriginal rights of the appellants (at pp. 1111-12):

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis.

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1) certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

auxquels il s'applique. À l'opposé, le règlement était uniquement un texte législatif portant sur des préoccupations immédiates en matière de conservation, qui pouvait être modifié tout simplement par recours au processus législatif. La Convention visait à clarifier de façon permanente la compétence législative de la province ainsi que les droits juridiques des peuples autochtones au sein de la province. Le règlement visait plutôt à régler les problèmes immédiats causés par le fait qu'il n'y avait pas suffisamment de saumons qui atteignaient les frayères. Il faut en conséquence considérer que, en prenant le règlement, le gouvernement avait une intention tout à fait différente de celle qu'il avait en édictant la Convention. Il s'ensuit donc que bien qu'il soit possible de considérer que la Convention atteste l'intention claire et expresse requise pour éteindre les droits ancestraux de chasse commerciale dans la province où elle s'applique, le règlement ne fait pas de même à l'égard des ancestraux de pêche commerciale en Colombie-Britannique.

Atteinte

Dans l'arrêt *Sparrow*, la Cour a aussi énoncé le critère permettant de déterminer si l'État a porté atteinte aux droits ancestraux des appelants (aux pp. 1111 et 1112):

La première question à poser est de savoir si la loi en question a pour effet de porter atteinte à un droit ancestral existant. Dans l'affirmative, elle constitue une violation à première vue du par. 35(1). Le Parlement n'est pas censé agir d'une manière contraire aux droits et aux intérêts des autochtones et, en réalité, il peut être empêché de le faire par la seconde étape de l'analyse fondée sur le par. 35(1).

Pour déterminer si les droits de pêche ont subi une atteinte constituant une violation à première vue du par. 35(1), on doit poser certaines questions. Premièrement, la restriction est-elle déraisonnable? Deuxièmement, le règlement est-il indûment rigoureux? Troisièmement, le règlement refuse-t-il aux titulaires du droit le recours à leur moyen préféré de l'exercer? C'est au particulier ou au groupe qui conteste la mesure législative qu'il incombe de prouver qu'il y a eu violation à première vue.

The test as laid out in *Sparrow* is determined to a certain extent by the factual context in which it was articulated; the Court must take into account variations in the factual context of the appeal which affect the application of the test.

Comme le critère énoncé dans cet arrêt est, dans une certaine mesure, fonction du contexte factuel dans lequel il a été formulé, notre Cour doit, selon les pourvois, tenir compte des différences factuelles qui influent sur l'application du critère.

40 At the infringement stage, the primary distinction between the factual context of *Sparrow*, and the context of this appeal, is that the regulation impugned in *Sparrow* — a net length restriction — was challenged independently of the broader fisheries management scheme of which it was a part. In this case, while the appellants' constitutional challenge is focused on a single regulation — s. 20(3) of the *Pacific Herring Fishery Regulations* — the scope of the challenge is much broader than the terms of s. 20(3). The appellants' arguments on the points of infringement and justification effectively impugn the entire approach taken by the Crown to the management of the herring spawn on kelp fishery.

Quant au volet relatif à l'atteinte, la distinction principale entre le contexte factuel de l'affaire *Sparrow* et celui de la présente espèce est que le règlement attaqué dans la première — la limitation de la longueur des filets — l'a été indépendamment du régime global de gestion de la pêche dont il faisait partie. En l'espèce, même si la contestation constitutionnelle des appelants vise une seule mesure réglementaire — le par. 20(3) du *Règlement de pêche du hareng du Pacifique* — la portée de cette contestation dépasse largement le texte de ce paragraphe. Les arguments des appelants en ce qui concerne l'atteinte et la justification mettent effectivement en cause l'ensemble de la politique de l'État en matière de gestion de la récolte de la rogue de hareng sur varech.

41 The fact that the appellants' challenge to the legislation is broader than that of the appellant in *Sparrow* arises from the difference in the nature of the regulation being challenged. Restrictions on net length have an impact on an individual's ability to exercise his or her aboriginal rights, and raise conservation issues, which can be subject to constitutional scrutiny independent of the broader regulatory scheme of which they are a part. The Category J licence requirement, on the other hand, cannot be scrutinized for the purposes of either infringement or justification without considering the entire regulatory scheme of which it is a part. The requirement that those engaged in the commercial fishery have licences is, as will be discussed in more detail below, simply a constituent part of a larger regulatory scheme setting the amount of herring that can be caught, the amount of herring allotted to the herring spawn on kelp fishery and the allocation of herring spawn on kelp amongst different users of the resource. All the aspects of this regulatory scheme potentially infringe the rights of the appellants in this case; to consider s. 20(3) apart from this broader regulatory

Le fait que la contestation de la législation présentée par les appelants ait une portée plus large que celle présentée par l'appelant dans *Sparrow* découle de la différence de nature entre les règlements attaqués. Les restrictions imposées à la longueur des filets ont un effet sur la capacité d'une personne d'exercer ses droits ancestraux et soulèvent des questions de conservation qui peuvent faire l'objet d'un examen constitutionnel, indépendamment du régime global de réglementation dont elles font partie. En revanche, l'obligation d'obtenir un permis de catégorie J ne peut pas être examinée, à l'étape de l'atteinte ou de la justification, sans prise en considération de l'ensemble du régime de réglementation dans lequel elle s'inscrit. L'obligation pour ceux qui pratiquent la pêche commerciale de détenir un permis est, comme nous le verrons de manière plus approfondie plus loin, simplement un élément constitutif d'un régime global de réglementation qui fixe la quantité de hareng pouvant être prise, la quantité de hareng attribuée à la récolte de rogue de hareng sur varech et la répartition de cette récolte entre les divers usagers de la ressource. Comme tous les

scheme for the herring fishery would distort the Court's inquiry.

The significance of this difference for the *Sparrow* test is that the questions asked by this Court in *Sparrow* must, in this case, be applied not simply to s. 20(3) but also to the other aspects of the regulatory scheme of which s. 20(3) is one part. In order to do this it will be necessary to consider, in some detail, the regulatory scheme being challenged by the appellants in this case. Before doing so, however, I have one further comment with regards to the test for infringement laid out by this Court in *Sparrow*.

The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

aspects de ce régime de réglementation sont susceptibles de porter atteinte aux droits des appelants dans la présente espèce, étudier le par. 20(3) isolément de ce régime global de réglementation de la pêche au hareng fausserait l'examen de notre Cour.

L'importance de cette différence pour ce qui concerne l'application du critère établi dans *Sparrow* est que les questions formulées par notre Cour dans cet arrêt doivent en l'espèce être posées à l'égard non seulement du par. 20(3), mais également des autres aspects du régime de réglementation dont ce paragraphe fait partie. À cette fin, il est nécessaire d'examiner assez en détail le régime de réglementation contesté par les appelants dans le présent pourvoi. Toutefois, avant de commencer cet examen, je tiens à faire une autre remarque sur le critère relatif à l'atteinte établi par notre Cour dans l'arrêt *Sparrow*.

Il est possible que le critère relatif à l'atteinte formulé dans *Sparrow* semble, de prime abord, intrinsèquement contradictoire. D'une part, suivant ce critère, les appelants ont simplement à établir l'existence d'une atteinte à première vue à leurs droits pour démontrer la violation de ces droits, ce qui tend à indiquer que toute diminution appréciable des droits des appelants constitue une violation pour l'application de cette analyse. D'autre part, les questions auxquelles les tribunaux doivent répondre, en vertu de ce critère, pour déterminer s'il y a eu atteinte font entrer en jeu des notions comme le caractère déraisonnable ou «indûment» rigoureux de la mesure en cause, notions qui tendent à indiquer qu'il faut établir davantage qu'une diminution appréciable pour prouver l'atteinte. Cette contradiction intrinsèque est cependant plus apparente que réelle. Les questions posées par notre Cour dans *Sparrow* ne définissent pas le concept de l'atteinte à première vue, mais mettent uniquement en exergue certains facteurs qui indiquent qu'une telle atteinte a été commise. Le simple fait qu'on réponde par la négative à l'une de ces questions n'empêche pas le tribunal de conclure à l'existence d'une atteinte à première vue. Cette réponse négative n'est qu'un des facteurs que le tribunal doit prendre en considération pour déterminer s'il y a eu atteinte à première vue.

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I now turn to the regulatory scheme challenged by the appellants in this case. I will consider this scheme both as it exists now and in terms of its historical development. The reason for this is that some aspects of the scheme challenged by the appellants go back to the introduction of the commercial herring spawn on kelp fishery in the early 1970s; as such, in order to scrutinize those aspects it is necessary to consider the regulation of the herring fishery from its inception.

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The commercial herring spawn on kelp and herring roe fisheries, in the form in which they exist today, developed in British Columbia in the early 1970s. Prior to that time herring was exploited primarily for the purpose of reducing the fish to oil. The shift in the use of the herring fishery resulted from a confluence of factors; in particular, extensive overfishing had radically depleted the herring stock (in 1965 the reduction fishery was shut down indefinitely) in response to which the Department of Fisheries and Oceans shifted from a policy of taking the maximum sustainable yield of the herring stock each year to a policy of exploiting the herring fishery so as to maximize the economic and social benefits derived from that fishery for the people of Canada. As part of this policy shift the Department of Fisheries and Oceans encouraged the growth of a commercial herring spawn on kelp fishery. Because herring spawn on kelp is eaten as part of the traditional celebration of the new year in Japan, an export market for this product existed; the herring industry and the Department of Fisheries and Oceans believed that this market could be exploited lucratively.

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From the time of the Department of Fisheries and Oceans' policy shift in the early 1970s, until 1982, the Department regulated the herring stock through the measurement of spawn escapement (the calculation of the number of eggs spawned in a given year). In 1982, this means for measuring and controlling the herring stock was modified; at that time the Department adopted a policy of estimating the size of the herring stock in each year and of setting the allowable catch at 20 per cent of

J'aborde maintenant l'examen du régime de réglementation contesté par les appelants en l'espèce. Je vais l'étudier tant en regard de sa forme actuelle que de son évolution historique, car certains aspects de ce régime remontent à l'implantation de la pêche commerciale de la rogue de hareng sur varech au début des années 1970. Par conséquent, pour examiner ces divers aspects, il est nécessaire d'étudier la réglementation de la pêche au hareng depuis ses débuts.

La pêche commerciale de la rogue de hareng sur varech et celle du hareng prêt à frayer, telles qu'elles existent aujourd'hui, ont commencé en Colombie-Britannique au début des années 1970. Auparavant, le hareng était exploité principalement pour la production d'huile. Le changement dans l'utilisation du hareng a résulté de la convergence de différents facteurs. De façon plus particulière, une surpêche généralisée avait eu pour effet d'épuiser radicalement les stocks de hareng (en 1965, la pêche pour la production d'huile a été fermée indéfiniment), amenant le ministère des Pêches et Océans à remplacer la politique du rendement équilibré annuel maximal des stocks de hareng par une politique d'exploitation du hareng propre à optimiser les retombées socio-économiques de cette pêche pour le Canada. Dans le cadre de cette réorientation de la politique, le ministère des Pêches et Océans a encouragé la croissance de la pêche commerciale de la rogue de hareng sur varech. Comme cette denrée est consommée dans le cadre des festivités du nouvel an au Japon, il existait un marché d'exportation pour ce produit. L'industrie du hareng et le ministère des Pêches et Océans ont cru que ce marché pourrait être lucratif.

À compter du jour où le ministère des Pêches et Océans a changé de politique au début des années 1970 jusqu'en 1982, il a régulé les stocks de hareng en mesurant l'échappée (le calcul du nombre d'œufs au cours d'une année donnée). En 1982, cette méthode de mesure et de contrôle des stocks de hareng a été modifiée. Le ministère a décidé d'appliquer une politique d'estimation annuelle des stocks de hareng et de fixer les prises permises à 20 pour 100 de ces stocks. La politique

that stock. The 1982 stock measurement and allotment policy has been subject to only one amendment since its adoption: in 1988 the Department of Fisheries and Oceans qualified the constant harvest rate of 20 per cent so as to allow for minimum spawn escapement.

It should be noted that the measurement of the herring stock is a problem of considerable difficulty. As the defence expert, Dr. Gary Vigers, noted

... in the real situation, fisheries management is full of uncertainty — from the inability to identify primary governing forces at each stage of recruitment, to subjective (but unintentional) sampling bias of fisheries officers observations ..., to extrapolation of assessments to entire populations. Each level of measurement has intrinsic errors which may be amplified at the next level of evaluation.

In my opinion, two major uncertainty factors that may defy quantification and are totally unaccounted for in the current methods of stock assessment are the predicted recruitment of eggs to larval populations, and the predicted recruitment of larval populations to juvenile populations. Examples abound to illustrate that hatching success of eggs is highly variable and affected by almost every physical factor conceivable in the nearshore environment. ...

The 20 per cent allotted herring catch is distributed by the Department to the various herring fisheries, with the herring roe fishery (where the eggs are extracted from the female fish prior to spawning) bearing the brunt of variations in the herring stock. The Department sets the herring spawn on kelp fishery at a constant level of 2,275 tons; other non-roë herring fisheries are, similarly, set at constant levels. The herring roe fishery, on the other hand, varies depending on the levels of the herring stock. The rationale for this allotment policy is that the herring roe fishery is agreed to be more destructive to the herring stock than the herring spawn on kelp and other herring fisheries; it is felt by the Department that, as such, the herring roe

d'évaluation et de répartition de 1982 n'a été modifiée qu'une fois depuis son adoption. En 1988, le ministère des Pêches et Océans a assorti le taux d'exploitation constant de 20 pour 100 d'une réserve conçue pour assurer une échappée minimale.

Il convient de noter que la mesure des stocks de hareng est une tâche ardue. Comme l'a fait observer Gary Vigers, l'expert cité par la défense:

[TRADUCTION] ... dans la pratique, la gestion de la pêche est remplie d'incertitudes — incapacité de cerner les influences dominantes à chaque stade du renouvellement des populations, biais du processus d'échantillonnage (quoique involontaire) dans les observations des agents des pêches [...], application d'estimations à des populations entières. À chaque étape de l'évaluation, il se produit des erreurs inhérentes qui peuvent être amplifiées à l'étape suivante.

À mon avis, deux facteurs d'incertitude importants, qui défient peut-être toute quantification et dont les méthodes actuelles d'évaluation des stocks ne tiennent aucunement compte, sont le taux de renouvellement prévu des populations de larves par les œufs et le taux de renouvellement prévu des populations de juvéniles par les larves. On peut citer nombre d'exemples pour montrer que le succès de l'éclosion des œufs est très variable et est influencé par pratiquement toutes les conditions naturelles imaginables du milieu à proximité du rivage ...

Les prises de hareng permises — fixées à 20 pour 100 — sont réparties par le ministère entre les divers secteurs de la pêche au hareng, la pêche au hareng prêt à frayer (où les œufs sont extraits de la femelle avant le frai) supportant le gros des fluctuations des stocks de hareng. Le ministère limite la récolte de la rogue de hareng sur varech à un niveau constant de 2 275 tonnes; les autres secteurs sont aussi limités à des niveaux constants. En revanche, dans le cas de la pêche au hareng prêt à frayer, les niveaux sont fixés en fonction des stocks de hareng. La raison d'être de cette politique est que, de l'aveu général, cette pêche réduit davantage les stocks de hareng que la récolte de la rogue de hareng sur varech et les autres types de

fishery should be the fishery most responsive to fluctuations in the herring stock. The only year in which there was a significant drop in the herring stock was 1986. The decrease in the stock in that year resulted in the closure of the herring roe fishery; the amount of herring allotted to the herring spawn on kelp fishery was also reduced.

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Commercial herring spawn on kelp licences were first issued in 1975. At that time, applicants "were told that priority would be given to applicants who have previous experience in catching and live holding herring and to residents of remote coastal communities" (Department of Fisheries report, "1975 Herring Spawn on Kelp Fishery"). In a 1985 briefing note prepared by the Department of Fisheries and Oceans, the Department stated that the initial issuance of licences in 1975 evaluated applicants "considering the individual's previous experience and knowledge of herring, area of residence and citizenship status and/or membership in Native Indian Band. Thirteen permits were issued, each allowing 6 tons of production".

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In 1988, the year relevant to this appeal, the herring stock was estimated at 350,000 tons, of which 160,000 tons were "fishable". The total allocation for the herring fishery was 40,000 tons, of which 2,275 tons was allotted to the herring spawn on kelp fishery. Of that 2,275 tons, 224 tons was allotted to Category J licence holders. There were 28 such licences issued in 1988, each with an 8-ton quota. Of those 28 licences 16 were held by Native Indian bands. One was held by the Heiltsuk Band.

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To summarize, the government's scheme for regulating the herring spawn on kelp fishery can be divided into four constituent parts: (1) the government determines the amount of the herring

pêches de ce poisson. Pour cette raison, le ministère estime que la pêche au hareng prêt à frayer est celle qui doit subir le plus les contrecoups des fluctuations des stocks de hareng. L'année 1986 a été la seule où l'on a observé une baisse importante des stocks de ce poisson. La diminution des stocks cette année-là a entraîné la fermeture de la pêche au hareng prêt à frayer. La part réservée à la récolte de rogue de hareng sur varech a elle aussi été réduite.

Les premiers permis de pêche commerciale de la rogue de hareng sur varech ont été délivrés en 1975. À ce moment-là, les demandeurs de permis [TRADUCTION] «se sont fait dire que la priorité serait donnée à ceux ayant de l'expérience dans la prise du hareng et la conservation de ce poisson en vivier, ainsi qu'aux résidents des collectivités riveraines éloignées» (rapport du ministère des Pêches, «1975 Herring Spawn on Kelp Fishery»). Dans une note d'information datée de 1985 et préparée par le ministère des Pêches et Océans, celui-ci a dit que, pour la délivrance initiale des permis en 1975, les demandeurs avaient été évalués [TRADUCTION] «en fonction de leur connaissance du hareng, de leur expérience de cette pêche, de leur lieu de résidence et de leur qualité de citoyen ou de membre d'une bande indienne. Treize permis ont été délivrés, chacun attribuant un contingent de production de 6 tonnes».

En 1988, année pertinente pour le présent pourvoi, les stocks de hareng ont été estimés à 350 000 tonnes, dont 160 000 tonnes dites «exploitables». Le contingent total de la pêche au hareng a été fixé à 40 000 tonnes, dont 2 275 tonnes ont été attribuées à la récolte de rogue de hareng sur varech. De ces 2 275 tonnes, 224 tonnes ont été réparties entre des titulaires de permis de catégorie J. Vingt-huit permis de ce type ont été délivrés en 1988, chacun se voyant accorder un contingent de huit tonnes. De ces 28 permis, 16 étaient détenus par des bandes indiennes, dont un par la bande des Heiltsuk.

En résumé, le régime gouvernemental de réglementation de la récolte de la rogue de hareng sur varech peut être divisé en quatre éléments constitutifs: (1) l'État détermine la proportion des stocks

stock that will be harvested in a given year; (2) the government allots the herring stock to the different herring fisheries (herring roe, herring spawn on kelp and other herring fisheries); (3) the government allots the herring spawn on kelp fishery to various user groups (commercial users and the Indian food fishery); and, (4) the government allots the commercial herring spawn on kelp licences.

Because each of these constituent parts has a different objective, and each involves a different pattern of government action, at the stage of justification it will be necessary to consider them separately; however, at the infringement stage the government scheme can be considered as a whole. The reason for this is that at the infringement stage it is the cumulative effect on the appellants' rights from the operation of the regulatory scheme that the court is concerned with. The cumulative effect of the regulatory scheme on the appellants' rights is, simply, that the total amount of herring spawn on kelp that can be harvested by the Heiltsuk Band for commercial purposes is limited. Thus, in order to demonstrate that there has been a *prima facie* infringement of their rights, the appellants must simply demonstrate that limiting the amount of herring spawn on kelp that they can harvest for commercial purposes constitutes, on the basis of the test laid out in *Sparrow*, a *prima facie* interference with their aboriginal rights.

In light of the questions posed by this Court in *Sparrow*, it seems clear that the appellants have discharged their burden of demonstrating a *prima facie* interference with their aboriginal rights. Prior to the arrival of Europeans in North America, the Heiltsuk could harvest herring spawn on kelp to the extent they themselves desired, subject only to such limitations as were imposed by any difficulties in transportation, preservation and resource availability, as well as those limitations that they thought advisable to impose for the purposes of conservation; subsequent to the enactment of the regulatory scheme described above the Heiltsuk can harvest herring spawn on kelp for commercial purposes only to the limited extent allowed by the

de hareng qui sera récoltée au cours d'une année donnée; (2) il répartit les stocks de hareng entre les divers secteurs de la pêche de ce poisson (hareng prêt à frayer, roque de hareng sur varech et autres types de pêche); (3) il répartit la part attribuée à la récolte de la roque de hareng sur varech entre les divers groupes d'utilisateurs (utilisateurs commerciaux et Indiens pratiquant la pêche de subsistance); (4) il répartit les permis de pêche commerciale de la roque de hareng sur varech.

Parce que chacun de ces éléments constitutifs vise un objectif différent et entraîne des mesures gouvernementales distinctes, il sera nécessaire, à l'étape de la justification, de les examiner séparément. Toutefois, à l'étape de l'atteinte, le régime gouvernemental de réglementation peut être étudié globalement car, à cette étape, c'est l'effet cumulatif de l'application du régime de réglementation sur les droits des appelants qui intéresse le tribunal. L'effet cumulatif du régime sur les droits des appelants est tout simplement que la quantité totale de roque de hareng sur varech qui peut être récoltée par la bande des Heiltsuk à des fins commerciales est limitée. Par conséquent, pour établir qu'il y a atteinte à première vue de leurs droits, les appelants doivent simplement démontrer que la limitation de la quantité de roque de hareng sur varech qui peut être récoltée à des fins commerciales constitue, selon le critère énoncé dans *Sparrow*, une atteinte à première vue à leurs droits ancestraux.

Compte tenu des questions formulées par notre Cour dans *Sparrow*, il semble clair que les appelants se sont acquittés de la charge de démontrer une atteinte à première vue à leurs droits ancestraux. Avant l'arrivée des Européens en Amérique du Nord, les Heiltsuk pouvaient récolter autant de roque de hareng sur varech qu'ils le désiraient, sous réserve uniquement des limitations découlant des problèmes de transport, de préservation et de disponibilité de la ressource, ainsi que des limitations qu'ils estimaient souhaitables de respecter à des fins de conservation. Par suite de l'établissement du régime de réglementation décrit précédemment, les Heiltsuk ne peuvent récolter que la quantité limitée de roque de hareng sur varech à

government. To use the language of Cory J. in *R. v. Nikal*, *supra*, at para. 104, the government's regulatory scheme "clearly impinge[s]" upon the rights of the appellant and, as such, must be held to constitute a *prima facie* infringement of those rights.

Justification

In *Sparrow*, Dickson C.J. and La Forest J. articulated a two-part test for determining whether government actions infringing aboriginal rights can be justified. First, the government must demonstrate that it was acting pursuant to a valid legislative objective (at p. 1113):

Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

Second, the government must demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples. This means, Dickson C.J. and La Forest J. held, that the government must demonstrate that it has given the aboriginal fishery priority in a manner consistent with this Court's decision in *Jack v. The Queen*, [1980] 1 S.C.R. 294, at p. 313, where Dickson J. (as he then was) held that the correct order of priority in the fisheries is "(i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing". Dickson C.J. and La Forest J. elaborated this priority requirement as follows, at p. 1116:

While the detailed allocation of maritime resources is a task that must be left to those having expertise in the

des fins commerciales autorisée par l'État. Pour reprendre les propos du juge Cory dans l'arrêt *R. c. Nikal*, précité, au par. 104, le régime gouvernemental de réglementation «empiète[e] clairement» sur les droits des appelants et, de ce fait, doit être considéré comme portant atteinte à première vue à ces droits.

Justification

Dans *Sparrow*, le juge en chef Dickson et le juge La Forest ont formulé un critère à deux volets permettant de déterminer si les actions de l'État qui portent atteinte aux droits ancestraux peuvent être justifiées. Premièrement, l'État doit démontrer qu'il a agi en vertu d'un objectif législatif régulier (à la p. 1113):

À ce stade, la cour se demanderait si l'objectif visé par le Parlement en autorisant le ministère à adopter des règlements en matière de pêche est régulier. Serait également examiné l'objectif poursuivi par le ministère en adoptant le règlement en cause. L'objectif de préserver, par la conservation et la gestion d'une ressource naturelle par exemple, des droits visés au par. 35(1) serait régulier. Seraient également réguliers des objectifs visant apparemment à empêcher l'exercice de droits visés au par. 35(1) lorsque cet exercice nuirait à l'ensemble de la population ou aux peuples autochtones eux-mêmes, ou d'autres objectifs jugés impérieux et réels.

Deuxièmement, l'État doit établir que ses actions sont compatibles avec son obligation de fiduciaire envers les peuples autochtones. Cela signifie, de conclure le juge en chef Dickson et le juge La Forest, que l'État doit prouver qu'il a accordé la priorité à la pêche autochtone, d'une manière conforme à l'arrêt de notre Cour *Jack c. La Reine*, [1980] 1 R.C.S. 294, à la p. 313, où le juge Dickson (plus tard Juge en chef) a statué que l'ordre de priorité à respecter en matière de pêche était le suivant: «(i) la protection de la ressource; (ii) la pêche par les Indiens; (iii) la pêche commerciale par les non-Indiens; ou (iv) la pêche sportive par les non-Indiens». Le juge en chef Dickson et le juge La Forest ont explicité ainsi cette exigence quant à la priorité, à la p. 1116:

Bien que la répartition détaillée de ressources maritimes soit une tâche devant être confiée aux experts dans le

area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

Dickson C.J. and La Forest J. also held at p. 1119 that the Crown's fiduciary duty to aboriginal peoples would require the Court to ask, at the justification stage, such further questions as:

... whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. ...

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

As was noted with regards to the question of infringement, the framework for analysing aboriginal rights laid out in *Sparrow* depends to a considerable extent on the legal and factual context of that appeal. In this case, where, particularly at the stage of justification, the context varies significantly from that in *Sparrow*, it will be necessary to revisit the *Sparrow* test and to adapt the justification test it lays out in order to apply that test to the circumstances of this appeal.

domaine, on doit satisfaire d'abord aux besoins alimentaires des Indiens en procédant à cette répartition. L'importance d'accorder la priorité absolue au droit ancestral de pêcher pour se nourrir peut s'expliquer ainsi. Si, au cours d'une année donnée, il s'avérait nécessaire pour les besoins de la conservation de réduire le nombre de prises de poisson et que ce nombre soit égal à celui requis par les Indiens pour leur alimentation, alors il résulterait de la nature constitutionnelle de leur droit de pêche que c'est aux Indiens que reviendrait la totalité des poissons pouvant être pris suite aux mesures de conservation. Si, d'une manière plus réaliste, il restait encore du poisson après que les besoins alimentaires des Indiens eurent été satisfaits, ce seraient alors les pêcheurs sportifs et les pêcheurs commerciaux qui feraient les frais de ces mesures de conservation.

Le juge en chef Dickson et le juge La Forest ont en outre conclu, à la p. 1119, que compte tenu de l'obligation de fiduciaire de l'État envers les peuples autochtones notre Cour devrait, à l'étape de la justification, examiner d'autres questions, notamment celles de:

... savoir si, en tentant d'obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation est prévue en cas d'expropriation et si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre. ...

Nous ne nous proposons pas de présenter une énumération exhaustive des facteurs à considérer dans l'appréciation de la justification. Qu'il suffise de souligner que la reconnaissance et la confirmation exigent que le gouvernement, les tribunaux et même l'ensemble des Canadiens soient conscients des droits des peuples autochtones et qu'ils les respectent.

Comme il a été noté à l'égard de la question de l'atteinte, l'application du cadre d'analyse des droits ancestraux établi dans *Sparrow*, est dans une large mesure fonction du contexte juridique et factuel de cet arrêt. Dans le présent pourvoi, particulièrement à l'étape de la justification, comme le contexte diffère considérablement de celui de l'affaire *Sparrow*, il sera nécessaire de réexaminer le critère établi dans cet arrêt et d'adapter le critère de la justification qui y est énoncé, afin de l'appliquer aux circonstances de l'espèce.

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Two points of variation are of particular significance. First, the right recognized and affirmed in this case — to sell herring spawn on kelp commercially — differs significantly from the right recognized and affirmed in *Sparrow* — the right to fish for food, social and ceremonial purposes. That difference lies in the fact that the right at issue in *Sparrow* has an inherent limitation which the right recognized and affirmed in this appeal lacks. 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. The commercial sale of the herring spawn on kelp, on the other hand, has no such internal limitation; the only limits on the Heiltsuk's need for herring spawn on kelp for commercial sale are the external constraints of the demand of the market and the availability of the resource. This is particularly so in this case where the evidence supports a right to exchange fish on a genuinely commercial basis; the evidence in this case does not justify limiting the right to harvest herring spawn on kelp on a commercial basis to, for example, the sale of herring spawn on kelp for the purposes of obtaining a "moderate livelihood". Even Lambert J.A., who used the moderate livelihood standard in dissent in the *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, and *R. v. N.T.C. Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158, did not so confine the rights of the appellants in this case, defining their right at para. 79 as the right to "harvest herring spawn deposited on kelp . . . for the purposes of trade in quantities measured in tons, subject only to the need for conservation of the resource". I do not necessarily endorse this characterization; however, it supports the basic point that the aboriginal right in this case is, unlike the right at issue in *Sparrow*, without internal limitation.

Deux points sur lesquels les contextes divergents présentent une importance particulière. Premièrement, le droit reconnu et confirmé dans la présente espèce — celui de vendre de la rogue de hareng sur varech commercialement — diffère considérablement du droit reconnu et confirmé dans *Sparrow* — celui de pêcher à des fins alimentaires, sociales et rituelles. Cette différence réside dans le fait que le droit en cause dans *Sparrow* comporte une limite intrinsèque qui est absente dans le cas du droit reconnu et confirmé visé dans le présent pourvoi. Les besoins en poisson d'une bande autochtone donnée, à des fins alimentaires, sociales et rituelles, comportent une limite intrinsèque — en effet, à un certain point, la bande aura assez de poisson pour satisfaire ces besoins. En revanche, la vente commerciale de rogue de hareng sur varech ne comporte pas de telles limites intrinsèques. Les seules limites aux besoins des Heiltsuk en matière de rogue de hareng sur varech destinée à la vente commerciale sont les restrictions extrinsèques dictées par la demande du marché et la disponibilité de la ressource. C'est particulièrement le cas en l'espèce, car la preuve étaye l'existence d'un droit d'échanger le poisson sur une échelle véritablement commerciale. Dans le présent pourvoi, la preuve ne justifie pas de limiter le droit de récolter de la rogue de hareng sur varech sur une échelle commerciale, par exemple, à la vente de ce produit en vue d'assurer «une subsistance convenable». Même le juge Lambert, qui a appliqué la norme de la subsistance convenable dans sa dissidence dans les arrêts *R. c. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, et *R. c. N.T.C. Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158, n'a pas restreint ainsi le droit des appelants en l'espèce, qu'il a défini, au par. 79, comme étant celui de [TRADUCTION] «récolter de la rogue de hareng sur varech [. . .] pour en faire le commerce en quantités mesurables en tonnes, sous réserve seulement du besoin d'assurer la conservation de la ressource». Je ne souscris pas nécessairement à cette caractérisation. Cependant, elle étaye l'argument fondamental que le droit ancestral visé en l'espèce n'est pas, contrairement à celui en cause dans *Sparrow*, assorti de limites intrinsèques.

The significance of this difference for the *Sparrow* test relates to the position taken in that case that, subject to the limits of conservation, aboriginal rights holders must be given priority in the fishery. In a situation where the aboriginal right is internally limited, so that it is clear when that right has been satisfied and other users can be allowed to participate in the fishery, the notion of priority, as articulated in *Sparrow*, makes sense. In that situation it is understandable that in an exceptional year, when conservation concerns are severe, it will be possible for aboriginal rights holders to be alone allowed to participate in the fishery, while in more ordinary years other users will be allowed to participate in the fishery after the aboriginal rights to fish for food, social and ceremonial purposes have been met.

Where the aboriginal right has no internal limitation, however, what is described in *Sparrow* as an exceptional situation becomes the ordinary: in the circumstance where the aboriginal right has no internal limitation, the notion of priority, as articulated in *Sparrow*, would mean that where an aboriginal right is recognized and affirmed that right would become an exclusive one. 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 in the manner suggested in *Sparrow* 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.

In my view, such a result was not the intention of *Sparrow*. The only circumstance contemplated by *Sparrow* was where the aboriginal right was internally limited; the judgment simply does not consider how the priority standard should be applied in circumstances where the right has no such internal limitation. That this is the case can be seen by a consideration of the judgment of *Jack*, *supra*, which was relied upon by Dickson C.J. and

L'importance de cette différence pour l'application du critère établi dans *Sparrow* tient à la position qui a été arrêtée dans cet arrêt et selon laquelle, sous réserve des limites découlant des besoins de conservation, la priorité en matière de pêche doit être accordée aux titulaires de droits ancestraux. Dans une situation où le droit ancestral est intrinsèquement limité, et où il est, de ce fait, facile de déterminer s'il a été respecté et si les autres usagers peuvent être autorisés à pêcher, l'application de la notion de priorité formulée dans *Sparrow* est logique. Dans un tel cas, il est compréhensible que, au cours d'une année exceptionnelle, où les problèmes en matière de conservation sont sérieux, il sera possible d'autoriser seulement les titulaires de droits ancestraux à pêcher, tandis que, au cours des années plus normales, les autres usagers seront autorisés à pêcher, après que les droits des autochtones de pêcher à des fins alimentaires, sociales et rituelles auront été respectés.

Toutefois, quand le droit ancestral ne comporte pas de limite intrinsèque, la situation décrite dans *Sparrow* comme étant exceptionnelle devient alors la norme: dans les cas où le droit ancestral est dépourvu de limite intrinsèque, l'application de la notion de priorité formulée dans *Sparrow* signifierait que si un droit ancestral est reconnu et confirmé, ce droit deviendrait exclusif. Parce que le droit de vendre de la rogue de hareng sur varech sur le marché commercial ne peut jamais être considéré comme ayant été respecté complètement tant que la ressource est encore disponible et que le marché n'est pas saturé, donner priorité à ce droit de la manière proposée dans *Sparrow* équivaldrait à conférer à son titulaire l'exclusivité vis-à-vis de quiconque ne jouit pas du droit ancestral de participer à la récolte de la rogue de hareng sur varech.

À mon avis, l'arrêt *Sparrow* ne vise pas un tel résultat. La seule circonstance prévue par notre Cour était celle où le droit ancestral était intrinsèquement limité. Ce jugement ne traite tout simplement pas de la manière dont la norme d'établissement de l'ordre de priorité doit être appliquée dans les cas où le droit n'est pas assorti de limite intrinsèque. Cette conclusion ressort de l'examen de l'arrêt *Jack*, précité, sur lequel se sont appuyés le

La Forest J. in their articulation of the notion of priority. While *Jack* undoubtedly stands for the proposition for which it was cited, it is interesting to note that in that case, Dickson J. specifically distinguished at p. 313 between food and commercial fishing:

[The appellants'] position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.

I agree with the general tenor of this argument. Article 13 calls for distinct protection of the Indian fishery, in that pre-Confederation policy gave the Indians a priority in the fishery. That priority is at its strongest when we speak of Indian fishing for food purposes, but somewhat weaker when we come to local commercial purposes. [Emphasis added.]

In *Sparrow* it was obviously not necessary for Dickson C.J. and La Forest J. to address the distinction suggested by Dickson J. (as he then was) in *Jack*; that such a distinction exists suggests, however, that *Sparrow* should not be seen as the final word on the question of priority, at least where the aboriginal right in question does not have the internal limitation which the right actually at issue in *Sparrow* did.

The basic insight of *Sparrow* — that aboriginal rights holders have priority in the fishery — is a valid and important one; however, the articulation in that case of what priority means, and its suggestion that it can mean exclusivity under certain limited circumstances, must be refined to take into account the varying circumstances which arise when the aboriginal right in question has no internal limitations.

Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have

juge en chef Dickson et le juge La Forest pour formuler la notion de priorité. Alors que l'arrêt *Jack* étaye manifestement la proposition au soutien de laquelle il a été cité, il est intéressant de signaler que, dans cette affaire, le juge Dickson a explicitement fait une distinction entre la pêche à des fins alimentaires et la pêche à des fins commerciales, à la p. 313:

[Les appelants] préconisent plutôt, me semble-t-il, l'ordre de priorité suivant: (i) la protection de la ressource; (ii) la pêche par les Indiens; (iii) la pêche commerciale par les non-Indiens; ou (iv) la pêche sportive par les non-Indiens; les Indiens ne devraient pas subir en premier lieu le fardeau des mesures de protection.

J'accepte cet argument dans ses grandes lignes. L'article 13 exige qu'une protection distincte soit accordée à la pêche par les Indiens parce que la ligne de conduite suivie avant la Confédération accordait priorité aux Indiens en ce domaine. Cette priorité se comprend pleinement lorsque les Indiens pêchent pour se nourrir mais s'explique moins bien lorsqu'il s'agit de pêche à des fins de commerce local. [Je souligne.]

Dans *Sparrow* le juge en chef Dickson et le juge La Forest n'avaient de toute évidence pas besoin de se pencher sur la distinction dont parle le juge Dickson (plus tard Juge en chef) dans *Jack*. L'existence d'une telle distinction semble cependant indiquer que *Sparrow* ne doit pas être considéré comme ayant tranché définitivement la question de la priorité, du moins dans les cas où le droit ancestral en cause n'est pas assorti de la limite intrinsèque que comportait le droit visé dans *Sparrow*.

L'idée fondamentale exprimée dans *Sparrow* — savoir que les titulaires de droits ancestraux ont priorité en matière de pêche — est valable et importante. Toutefois, la formulation dans cette affaire du sens de la notion de priorité et l'assertion selon laquelle elle peut vouloir dire exclusivité dans certaines circonstances limitées doivent être précisées pour tenir compte des diverses circonstances susceptibles de se présenter dans les cas où le droit ancestral en cause n'est pas assorti de limite intrinsèque.

Lorsque le droit ancestral en cause n'est pas assorti de limite intrinsèque, la doctrine relative à l'ordre de priorité n'exige pas que, une fois les

been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

The content of this priority — something less than exclusivity but which nonetheless gives priority to the aboriginal right — must remain somewhat vague pending consideration of the government's actions in specific cases. Just as the doctrine of minimal impairment under s. 1 of the *Canadian Charter of Rights and Freedoms* has not been read as meaning that the courts will impose a standard "least drastic means" requirement on the government in all cases, but has rather been interpreted as requiring the courts to scrutinize government action for reasonableness on a case-by-case basis (see, for example, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 993-94; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at pp. 526-27; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 285-86; *R. v. Butler*, [1992] 1 S.C.R. 452, at pp. 504-5), priority under *Sparrow's* justification test cannot be assessed against a precise standard but must rather be assessed in each case to determine whether the government has acted in a fashion which reflects that it has truly taken into account the existence of aboriginal rights. Under the minimal impairment branch of the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103), where the government is balancing the interests of competing groups, the court does not scrutinize the government's actions so as to determine whether the government took the least rights-impairing action pos-

objectifs de conservation respectés, l'État répartisse la ressource de façon à ce que ceux qui détiennent un droit ancestral d'exploiter commercialement la ressource se voient accorder le droit exclusif de le faire. Au contraire, cette doctrine commande que l'État démontre que, dans la répartition de la ressource, il a tenu compte de l'existence des droits ancestraux et réparti la ressource d'une manière qui respecte le fait que les titulaires de ces droits ont, en matière d'exploitation de la pêche, priorité sur les autres usagers. Il s'agit d'un droit à la fois substantiel et procédural. À l'étape de la justification, l'État doit démontrer que les modalités de répartition de la ressource ainsi que la répartition elle-même reflètent l'intérêt prioritaire des titulaires des droits ancestraux à l'égard de cette pêche.

Le contenu de ce droit de priorité — qui sans aller jusqu'à l'exclusivité, donne néanmoins préférence au droit ancestral — doit rester assez vague tant que les actions de l'État n'ont pas été examinées dans des cas précis. Tout comme le principe de l'atteinte minimale fondé sur l'article premier de la *Charte canadienne des droits et libertés* n'a pas été interprété comme voulant dire que les tribunaux imposeront à l'État, dans tous les cas, une norme fondée sur l'obligation d'appliquer le «moyen le moins draconien», mais plutôt comme ayant pour effet d'exiger d'eux qu'ils examinent le caractère raisonnable des actions de l'État au cas par cas: (voir, par exemple, les arrêts *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, aux pp. 993 et 994; *Stoffman c. Vancouver General Hospital*, [1990] 3 R.C.S. 483, aux pp. 526 et 527; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, aux pp. 285 et 286; *R. c. Butler*, [1992] 1 R.C.S. 452, aux pp. 504 et 505), l'application de la doctrine relative à l'ordre de priorité en vertu du critère de justification établi dans *Sparrow* ne peut pas être évaluée selon une norme précise, mais doit plutôt être appréciée en fonction de chaque cas, pour déterminer si l'État a agi d'une manière indiquant qu'il a véritablement tenu compte de l'existence de droits ancestraux. Dans l'application du volet de l'atteinte minimale du critère de l'arrêt (*R. c. Oakes*, [1986] 1 R.C.S. 103), dans les cas où l'État soupèse les intérêts de

sible; instead the court considers the reasonableness of the government's actions, taking into account the need to assess "conflicting scientific evidence and differing justified demands on scarce resources" (*Irwin Toy, supra*, at p. 993). Similarly, under *Sparrow's* priority doctrine, where the aboriginal right to be given priority is one without internal limitation, courts should assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such rights.

groupes opposés, le tribunal n'examine pas les actions de l'État pour déterminer s'il a pris les mesures qui portent le moins possible atteinte aux droits, il s'interroge plutôt sur le caractère raisonnable de ces actions, en tenant compte de la nécessité d'évaluer des «preuves scientifiques contradictoires et de[s] demandes légitimes mais contraires quant à la répartition de ressources limitées» (*Irwin Toy*, précité, à la p. 993). De même, en vertu de la doctrine relative à l'ordre de priorité énoncée dans *Sparrow* lorsque le droit ancestral auquel la priorité doit être donnée n'est pas assorti de limite intrinsèque, les tribunaux doivent évaluer les actions de l'État non pas pour voir si celui-ci a conféré ce droit en exclusivité (le moyen le moins draconien), mais plutôt pour déterminer si l'État a tenu compte de l'existence et de l'importance du droit en question.

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That no blanket requirement is imposed under the priority doctrine should not suggest, however, that no guidance is possible in this area, or that the government's actions will not be subject to scrutiny. Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food *versus* commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users. These questions, like those in *Sparrow*, do not represent an exhaustive list of the factors that may be taken into account in determining whether the government can be said to have given priority to aboriginal

Cependant, le fait que la doctrine relative à l'ordre de priorité n'impose pas d'obligation générale ne devrait pas donner à penser qu'aucune indication ne peut être formulée à cet égard ou que les actions de l'État ne feront pas l'objet d'un examen. Les questions pertinentes pour déterminer si l'État a donné la priorité aux titulaires de droits ancestraux sont celles qui ont été énumérées dans *Sparrow* relativement aux consultations et à l'indemnisation, ainsi que d'autres questions telles que celle de savoir si l'État a facilité l'exercice du droit ancestral de participer à la pêche (en réduisant les droits payables pour les permis, par exemple), si les objectifs que poursuit l'État en établissant un régime de réglementation donné reflètent la nécessité de tenir compte du droit de priorité des titulaires de droits ancestraux, la mesure dans laquelle la participation à la pêche par les titulaires de droits ancestraux correspond au pourcentage que représente leur population par rapport à la population totale, la manière dont l'État a concilié les différents droits ancestraux visant une pêche donnée (par exemple le droit de pêcher à des fins alimentaires par opposition à celui de pêcher à des fins commerciales), l'importance de la pêche pour le bien-être économique et matériel de la bande en question, ainsi que les critères appliqués par l'État, par exemple, dans la répartition des permis de pêche commerciale entre les divers usagers. Ces

rights holders; they give some indication, however, of what such an inquiry should look like.

Before turning to the second relevant difference between this case and *Sparrow*, I would note one or two points in favour of the interpretation of priority just adopted. As was emphasized in this Court's decision in *Van der Peet*, aboriginal rights are highly fact specific — the existence of an aboriginal right is determined through consideration of the particular distinctive culture, and hence of the specific practices, customs and traditions, of the aboriginal group claiming the right. The rights recognized and affirmed by s. 35(1) are not rights held uniformly by all aboriginal peoples in Canada; the nature and existence of aboriginal rights vary in accordance with the variety of aboriginal cultures and traditions which exist in this country. As a result, governments must not only make decisions about how to allocate fish between aboriginal rights holders and those who do not enjoy such rights, but must also make decisions as to how to allocate fish both between different groups of aboriginal rights holders and between different aboriginal rights. The government must, for example, make decisions as to how to allocate fish between those aboriginal peoples with the aboriginal right to fish for food, social and ceremonial purposes, and those aboriginal peoples who have aboriginal rights to sell fish commercially; it must also decide, where more than one aboriginal group has a right to sell fish commercially, how much fish each group will have access to.

The existence of such difficult questions of resource allocation supports the position that, where a right has no adequate internal limitations, the notion of exclusivity of priority must be rejected. Certainly the holders of such aboriginal rights must be given priority, along with all others

questions, tout comme celles posées dans *Sparrow* ne constituent pas une liste exhaustive des facteurs qui doivent être pris en considération pour déterminer s'il est possible d'affirmer que l'État a accordé la priorité aux titulaires de droits ancestraux. Toutefois, ils donnent une certaine idée de ce à quoi l'examen devrait ressembler.

Avant d'examiner la seconde différence pertinente entre la présente affaire et l'arrêt *Sparrow*, je tiens à mentionner un ou deux points qui appuient l'interprétation qui vient d'être adoptée en ce qui concerne le droit de priorité. Comme notre Cour l'a souligné dans *Van der Peet*, l'existence de droits ancestraux dépend largement des faits propres à chaque cas — pour statuer sur l'existence d'un tel droit, il faut examiner la culture distinctive particulière du groupe autochtone particulier qui revendique le droit, donc ses coutumes, pratiques et traditions spécifiques. Les droits reconnus et confirmés par le par. 35(1) ne sont pas des droits qui sont détenus uniformément par tous les peuples autochtones au Canada. En effet, l'existence des droits ancestraux et leur nature sont fonction des diverses cultures et traditions autochtones qui existent au pays. En conséquence, l'État est non seulement appelé à répartir les ressources halieutiques entre les titulaires de droits ancestraux et ceux qui ne possèdent pas de tels droits, mais également à répartir la ressource entre différents groupes de titulaires de droits ancestraux, ainsi qu'entre divers types de droits ancestraux. Par exemple, l'État doit répartir de telles ressources entre des peuples autochtones qui ont le droit ancestral de pêcher à des fins alimentaires, sociales et rituelles, et d'autres peuples autochtones qui ont le droit ancestral de vendre du poisson commercialement. Il doit aussi fixer, lorsque plus d'un groupe autochtone a le droit de vendre du poisson commercialement, la quantité de poisson qui sera attribuée à chaque groupe.

L'existence de ces difficiles questions de répartition de la ressource étaye la position voulant que, dans les cas où un droit n'est pas assorti de limites intrinsèques adéquates, la notion de priorité exclusive doit être écartée. Certes, il faut donner aux titulaires de tels droits ancestraux, ainsi qu'à tous

holding aboriginal rights to the use of a particular resource; however, the potential existence of other aboriginal rights holders with an equal claim to priority in the exploitation of the resource, suggests that there must be some external limitation placed on the exercise of those aboriginal rights which lack internal limitation. Unless the possibility of such a limitation is recognized, it is difficult to see how the government will be able to make decisions of resource allocation amongst the various parties holding prioritized rights to participate in the fishery. And while this does not lead automatically to the conclusion that, as between aboriginal rights holders and those who do not hold such rights, the notion of exclusivity must be rejected, it does point to some of the difficulties inherent in the recognition of such a concept in the context of this and similar cases.

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It should also be noted that the aboriginal rights recognized and affirmed by s. 35(1) exist within a legal context in which, since the time of the Magna Carta, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation:

... the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike.

[I]t has been unquestioned law that since Magna Charta [*sic*] no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation.

[*Attorney-General of British Columbia v. Attorney General of Canada*, [1914] A.C. 153 (J.C.P.C.), at pp. 169-70, *per* Viscount Haldane.]

While the elevation of common law aboriginal rights to constitutional status obviously has an impact on the public's common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s. 35(1), those common law rights

les autres titulaires de droits ancestraux, la priorité quant à l'utilisation d'une ressource particulière. Toutefois, la possibilité qu'il y ait d'autres titulaires de droits ancestraux ayant un droit de priorité égal en vue de l'exploitation de la ressource tend à indiquer que l'exercice des droits ancestraux dépourvus de limites intrinsèques doit être assujéti à certaines limites extrinsèques. À moins de reconnaître la possibilité de telles limites, il est en effet difficile de voir comment l'État sera en mesure de répartir la ressource entre les diverses parties possédant des droits de pêche prioritaires. De plus, bien que ce fait ne m'amène pas automatiquement à conclure que, entre les titulaires de droits ancestraux et ceux qui ne possèdent pas de tels droits, la notion d'exclusivité doit être écartée, il fait cependant ressortir certaines des difficultés inhérentes à la reconnaissance d'un tel concept dans le contexte du présent pourvoi et d'autres espèces analogues.

En outre, il convient de signaler que les droits ancestraux reconnus et confirmés par le par. 35(1) existent dans un contexte juridique où, depuis l'époque de la Grande Charte, on reconnaît en common law un droit de pêcher dans les eaux à marée qui ne peut être aboli que par l'édiction de textes législatifs constitutionnels:

[TRADUCTION] ... les sujets de Sa Majesté ont le droit non seulement de naviguer mais encore de pêcher en haute mer et dans les eaux à marée.

[I]l est établi sans conteste en droit depuis la Grande Charte qu'aucune nouvelle pêcherie exclusive ne peut être créée par concession royale dans les eaux à marée et qu'aucun droit du public de pêcher dans de telles eaux, existant alors, ne peut être retiré sans texte législatif constitutionnel.

[*Arrêt Attorney-General of British Columbia c. Attorney-General of Canada*, [1914] A.C. 153 (J.C.P.C.), aux pp. 169 et 170 (le vicomte Haldane).]

Même si le fait d'élever des droits ancestraux fondés sur la common law au rang de garanties constitutionnelles a manifestement une incidence sur les droits qu'a le public, en vertu de la common law, de pêcher dans les eaux à marée, on n'enten-

would be extinguished in cases where an aboriginal right to harvest fish commercially existed. As was contemplated by *Sparrow*, in the occasional years where conservation concerns drastically limit the availability of fish, satisfying aboriginal rights to fish for food, social and ceremonial purposes may involve, in that year, abrogating the common law right of public access to the fishery; however, it was not contemplated by *Sparrow* that the recognition and affirmation of aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an aboriginal right to sell fish commercially. As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.

That this should not be the case becomes particularly clear when it is remembered that, as was noted above, the existence of aboriginal rights varies amongst different aboriginal peoples, with the result that the notion of priority applies not only between aboriginals and other Canadians, but also between those aboriginal peoples who have an aboriginal right to use the fishery and those who do not. For aboriginal peoples like the Sheshaht, Opetchesaht and the Sto:lo, the fact that they were unable to demonstrate that their aboriginal rights include the right to sell fish on a commercial basis should not mean, if another aboriginal group is able to establish such a right, that the rights they hold in common with other Canadians — to participate in the commercial fishery — are eliminated. This could not have been intended by the enactment of s. 35(1).

I now turn to the second significant difference between this case and *Sparrow*. In *Sparrow*, while

dait sûrement pas, par l'édiction du par. 35(1), que ces droits reconnus au public par la common law soient éteints dans les cas où il existe un droit ancestral de pêcher commercialement. Comme il a été envisagé dans *Sparrow* au cours des années où, pour des besoins de conservation, il faut limiter de façon draconienne les prises de poisson, il est possible que pour respecter les droits ancestraux de pêche à des fins alimentaires sociales et rituelles il faille, au cours des années en question, suspendre le droit d'accès à cette pêche qui est reconnu au public par la common law. Toutefois, il n'a pas été envisagé dans cet arrêt que la reconnaissance et la confirmation de droits ancestraux auraient pour effet de mettre fin à ce droit d'accès du public, dans tous les cas où il existe, à l'égard d'une pêcherie, un droit ancestral de vendre le poisson commercialement. En tant que droit reconnu par la common law mais non par la Constitution, le droit d'accès du public à une pêcherie doit clairement céder la priorité aux droits ancestraux. Cependant, la reconnaissance de droits ancestraux ne doit pas être interprétée comme ayant pour effet d'éteindre le droit d'accès du public.

La conclusion qu'il ne doit pas en être ainsi ressort de façon particulièrement claire de l'observation, faite précédemment, que l'existence de droits ancestraux varie en fonction des peuples autochtones concernés, de sorte que la notion de priorité s'applique non seulement entre les autochtones et les autres Canadiens, mais également entre les peuples autochtones qui ont le droit ancestral d'exploiter la pêche visée et ceux qui ne l'ont pas. Dans le cas de peuples autochtones comme les Sheshaht, les Opetchesaht et les Sto:lo, le fait qu'ils n'aient pas été en mesure de démontrer que leurs droits ancestraux incluent le droit de vendre du poisson à des fins commerciales ne signifie pas, à supposer qu'un autre groupe autochtone parviendrait à établir l'existence d'un tel droit, que le droit qu'ils possèdent avec tous les autres Canadiens — savoir celui de participer à la pêche commerciale — est éliminé. Il n'est pas possible qu'on ait voulu ce résultat en édictant le par. 35(1).

J'aborde maintenant la seconde différence importante entre la présente affaire et l'arrêt *Spar-*

the Court recognized at p. 1113 that, beyond conservation, there could be other “compelling and substantial” objectives pursuant to which the government could act in accordance with the first branch of the justification test, the Court was not required to delineate what those objectives might be. Further, in delineating the priority requirement, and the relationship between aboriginal rights-holders and other users of the fishery, the only objective considered by the Court was conservation. This limited focus made sense in *Sparrow* because the net-length restriction at issue in that case was argued by the Crown to have been necessary as a conservation measure (whether it was necessary as such was not actually decided in that case); in this case, however, while some aspects of the government’s regulatory scheme arguably relate to conservation — setting the total allowable catch at 20 per cent of the estimated herring stock, requiring the herring roe fishery to bear the brunt of variations in the herring stock because it is more environmentally destructive — other aspects of the government’s regulatory scheme bear little or no relation to issues of conservation. Once the overall level of the herring catch has been established, and allocated to the different herring fisheries, it makes no difference in terms of conservation who is allowed to catch the fish. Conservation of the fishery is simply not affected once, after the herring spawn on kelp fishery is set at 2,275 tons, 224 tons or 2,275 tons is allocated to the commercial fishery or to some other use. This is not to suggest that these decisions are unimportant or made pursuant to unimportant objectives, but simply that, whatever objectives the government is pursuing in making such decisions, conservation is not (or is only marginally) one of them. As such, it is necessary in this case to consider what, if any, objectives the government may pursue, other than con-

row. Dans cet arrêt, bien que notre Cour ait reconnu, à la p. 1113, que, pour les fins du premier volet du critère de la justification, il peut exister, outre la conservation, d’autres objectifs «impérieux et réels» en vertu desquels l’État pourrait agir, elle n’a toutefois pas eu à préciser quels pourraient être ces objectifs. De plus, pour définir les exigences applicables pour établir l’ordre de priorité ainsi que les rapports entre les titulaires de droits ancestraux et les autres usagers de la pêche, la conservation est le seul objectif que notre Cour a pris en considération. Cet examen restreint était logique dans *Sparrow*, car le ministère public avait soutenu que la limitation de la longueur des filets en cause dans cette affaire était une mesure de conservation nécessaire (de fait, la question de la nécessité de cette mesure n’a pas été tranchée dans cet arrêt). Toutefois, dans la présente affaire, même s’il est possible d’affirmer que certains aspects du régime gouvernemental de réglementation visent la conservation — par exemple le fait de fixer à 20 pour 100 des stocks estimatifs de hareng le total des prises admissibles ou celui d’exiger que les pêcheurs de hareng prêt à frayer fassent les frais des fluctuations des stocks de hareng, étant donné que cette pêche est moins écologique — d’autres aspects de ce régime ne concernent que peu ou pas des questions de conservation. Une fois que le niveau global des prises de hareng a été fixé et que celles-ci ont été réparties entre les divers secteurs de la pêche de ce poisson, le fait que ce soit un groupe ou un autre qui soit autorisé à prendre le poisson ne change rien du point de vue de la conservation. Une fois la récolte de la rogue de hareng sur varech fixée à 2 275 tonnes, le fait d’attribuer 224 tonnes ou encore 2 275 tonnes au secteur commercial ou à quelque autre groupe d’usagers n’influe tout simplement pas sur la conservation de cette ressource. Cela ne veut pas dire que ces décisions ne sont pas importantes ou qu’elles sont prises dans la poursuite d’objectifs sans importance, mais tout simplement que quels que soient les objectifs visés par ces décisions la conservation ne figure pas parmi ces objectifs (ou, dans l’affirmative, seulement de façon marginale). Il est donc nécessaire, dans le présent pourvoi, de se demander quels sont, s’il en est, les objectifs que l’État peut poursuivre, outre la conservation, et qui per-

servation, which will be sufficient to satisfy the first branch of the *Sparrow* justification standard.

Considering this question is made more difficult in this case because, as will be discussed below, almost no evidence has been provided to this Court about the objectives the government was pursuing in allocating the herring resource as it did. Absent some concrete objectives to assess, it is difficult to identify the objectives other than conservation that will meet the “compelling and substantial” standard laid out in *Sparrow*. That being said, however, it is possible to make some general observations about the nature of the objectives that the government can pursue under the first branch of the *Sparrow* justification test.

In *Oakes*, *supra*, Dickson C.J. observed at p. 136 that it is not only the case that the rights and freedoms protected by the *Charter* must be understood through the purposes underlying the protection of those rights, but that the limitations on rights allowed under s. 1 of the *Charter* must, similarly, be understood through the purposes underlying the *Charter*:

A second contextual element of interpretation of s. 1 is provided by the words “free and democratic society”. Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution. . . . The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

Although the aboriginal rights recognized by s. 35(1) are, as was noted in *Van der Peet*, fundamentally different from the rights in the *Charter*, the same basic principle — that the purposes underlying the rights must inform not only the definition of the rights but also the identification of those

mettront de satisfaire au premier volet de la norme de justification énoncée dans *Sparrow*.

Dans le présent cas, l'examen de cette question se complique, comme nous le verrons plus loin, du fait qu'il n'a été présenté à notre Cour pratiquement aucun élément de preuve concernant les objectifs que poursuivait l'État en répartissant la ressource comme il l'a fait. En l'absence d'objectifs concrets à examiner, il est difficile de déterminer les objectifs autres que la conservation qui sont des objectifs «impérieux et réels» au sens de la norme formulée dans *Sparrow*. Cela dit, cependant, il est possible de faire quelques observations générales sur la nature des objectifs que l'État peut poursuivre tout en satisfaisant au premier volet du critère de justification établi dans *Sparrow*.

Dans *Oakes*, précité, le juge en chef Dickson a fait remarquer, à la p. 136, que, s'il est vrai que les droits et libertés protégés par la *Charte* doivent être interprétés en fonction des objets qui sous-tendent la protection de ces droits, les limites apportées aux droits en conformité avec l'article premier de la *Charte* doivent, de la même façon, être interprétées en fonction des objets qui sous-tendent la *Charte*:

Un second élément contextuel d'interprétation de l'article premier est fourni par l'expression «société libre et démocratique». L'inclusion de ces mots à titre de norme finale de justification de la restriction des droits et libertés rappelle aux tribunaux l'objet même de l'enchâssement de la *Charte* dans la Constitution [. . .] Les valeurs et les principes sous-jacents d'une société libre et démocratique sont à l'origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu'une restriction d'un droit ou d'une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer.

Même si, comme il a été dit dans *Van der Peet*, les droits ancestraux reconnus par le par. 35(1) sont fondamentalement différents des droits garantis par la *Charte*, le même principe de base s'applique à l'analyse de la justification en vertu du par. 35(1) — savoir que les objets qui sous-tendent les droits en question doivent non seulement servir à la définition de ces droits, mais également à la détermi-

limits on the rights which are justifiable — applies equally to the justification analysis under s. 35(1).

nation des limites apportées à ceux-ci et qui sont justifiables.

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In *Van der Peet* the purposes underlying s. 35(1)'s recognition and affirmation of aboriginal rights were identified, at para. 43, as

Dans *Van der Peet*, les objets qui sous-tendent la reconnaissance et la confirmation des droits ancestraux par le par. 35(1) ont été interprétés, au par. 43, comme étant

first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.

premièrement, le moyen par lequel la Constitution reconnaît le fait qu'avant l'arrivée des Européens en Amérique du Nord le territoire était déjà occupé par des sociétés autochtones distinctives, et, deuxièmement, le moyen de concilier cette occupation antérieure avec l'affirmation par Sa Majesté de sa souveraineté sur le territoire canadien.

In the context of the objectives which can be said to be compelling and substantial under the first branch of the *Sparrow* justification test, the import of these purposes is that the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.

Dans le cadre de l'application du premier volet du critère de justification établi dans *Sparrow*, sont considérés comme des objectifs impérieux et réels les objectifs visant soit la reconnaissance de l'occupation antérieure de l'Amérique du Nord par les peuples autochtones soit — et, à l'étape de la justification, ce genre d'objectifs pourrait bien être le plus pertinent — la conciliation de cette occupation avec l'affirmation par Sa Majesté de sa souveraineté sur ce territoire.

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Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader

Les droits ancestraux sont reconnus et confirmés par le par. 35(1) afin de concilier l'existence, en Amérique du Nord, de sociétés autochtones distinctives avant l'arrivée des Européens avec l'affirmation par Sa Majesté de sa souveraineté sur ce territoire. Ils constituent le moyen de préserver les éléments fondamentaux qui font partie intégrante de ces sociétés. Cependant, comme les sociétés autochtones distinctives existent au sein d'une communauté sociale, politique et économique plus large, communauté dont elles font partie et sur laquelle s'exerce la souveraineté de Sa Majesté, il existe des circonstances où, dans la poursuite d'objectifs importants ayant un caractère impérieux et réel pour l'ensemble de la communauté (compte tenu du fait que les sociétés autochtones font partie de celle-ci), certaines restrictions de ces droits sont justifiables. Les droits ancestraux sont un élément nécessaire de la conciliation de l'existence des sociétés autochtones avec la communauté politique plus large à laquelle ces dernières appartiennent.

community as a whole, equally a necessary part of that reconciliation.

The recognition of conservation as a compelling and substantial goal demonstrates this point. Given the integral role the fishery has played in the distinctive cultures of many aboriginal peoples, conservation can be said to be something the pursuit of which can be linked to the recognition of the existence of such distinctive cultures. Moreover, because conservation is of such overwhelming importance to Canadian society as a whole, including aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part. In this way, conservation can be said to be a compelling and substantial objective which, provided the rest of the *Sparrow* justification standard is met, will justify governmental infringement of aboriginal rights.

Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.

I now turn to the application of the *Sparrow* justification test to the government regulatory scheme challenged in this case. As has already been noted, the government's regulatory scheme has four con-

Les limites imposées à ces droits sont également un élément nécessaire de cette conciliation, si les objectifs qu'elles visent sont suffisamment importants pour la communauté dans son ensemble.

La reconnaissance de la conservation en tant qu'objectif impérieux et réel démontre cette affirmation. Vu le rôle fondamental qu'a joué la pêche dans la culture distinctive de nombreux peuples autochtones, il est possible d'affirmer que la conservation est un objectif dont la poursuite peut être liée à la reconnaissance de l'existence de telles cultures distinctives. De plus, comme la conservation revêt une importance primordiale pour la société canadienne dans son ensemble, y compris pour les membres autochtones de cette société, elle est un objectif dont la poursuite est compatible avec la conciliation de l'existence des sociétés autochtones avec la société canadienne plus large dont ces dernières font partie. Dans cette optique, il est possible d'affirmer que la conservation est un objectif impérieux et réel qui justifie la violation par l'État de droits ancestraux, à la condition qu'il soit satisfait aux autres éléments de la norme de justification établie dans *Sparrow*.

Bien que je n'entende aucunement me prononcer de façon définitive sur cette question, je dirais qu'en ce qui concerne la répartition de ressources halieutiques données, une fois que les objectifs de conservation ont été respectés, des objectifs tels que la poursuite de l'équité sur les plans économique et régional ainsi que la reconnaissance du fait que, historiquement, des groupes non autochtones comptent sur ces ressources et participent à leur exploitation, sont le genre d'objectifs susceptibles (du moins dans les circonstances appropriées) de satisfaire à cette norme. Dans les circonstances appropriées de tels objectifs sont dans l'intérêt de tous les Canadiens et, facteur plus important encore, la conciliation de l'existence des sociétés autochtones avec le reste de la société canadienne pourrait bien dépendre de leur réalisation.

Je vais maintenant appliquer le critère de justification établi dans *Sparrow* au régime gouvernemental de réglementation contesté dans le présent pourvoi. Comme il a été dit plus tôt, ce régime de

stituent parts, which, for ease of reference, I will reiterate here: (1) the government determines the amount of the herring stock that will be harvested in a given year; (2) the government allots the herring stock to the different herring fisheries (herring roe, herring spawn on kelp and other herring fisheries); (3) the government allots the herring spawn on kelp fishery to various user groups (commercial users and the Indian food fishery); and, (4) the government allots the commercial herring spawn on kelp licences.

réglementation comprend quatre éléments constitutifs, que je vais répéter par souci de commodité: (1) l'État détermine la proportion des stocks de hareng qui sera récoltée au cours d'une année donnée; (2) il répartit les stocks de hareng entre les divers secteurs de la pêche de ce poisson (hareng prêt à frayer, roque de hareng sur varech et autres types de pêche); (3) il répartit la part attribuée à la récolte de la roque de hareng sur varech entre les divers groupes d'usagers (usagers commerciaux et Indiens pratiquant la pêche de subsistance); (4) il répartit les permis de pêche commerciale de la roque de hareng sur varech.

Other than with regards to the first aspect of the government's regulatory scheme, the evidence and testimony presented in this case is insufficient for this Court to make a determination as to whether the government's regulatory scheme is justified. The trial in this case concluded on May 7, 1990, several weeks prior to the release of this Court's judgment in *Sparrow*. Perhaps as a result of this fact, the testimony, evidence and argument presented at the trial simply do not contain the information that is necessary for this Court to assess whether, in allocating the 40,000 tons of herring allotted to the herring fishery, the government has either acted pursuant to a compelling and substantial objective or has acted in a manner consistent with the fiduciary obligation it owes to aboriginal peoples. It is not that the Crown has failed to discharge its burden of demonstrating that the scheme for allocating the 20 per cent of the herring stock was justified; it is simply that the question of whether or not that scheme of allocation was justified was not addressed at trial, at least in the sense necessary for this Court to decide the question of whether, under the *Sparrow* test, it was justified.

Sauf en ce qui concerne le premier aspect du régime gouvernemental de réglementation, la preuve documentaire et testimoniale produite dans la présente affaire est insuffisante pour permettre à notre Cour de déterminer si ce régime est justifié. En l'espèce, le procès dans la présente affaire s'est terminé le 7 mai 1990, plusieurs semaines avant que soit rendu l'arrêt *Sparrow* par notre Cour. Peut-être est-ce à cause de ce fait que la preuve documentaire et testimoniale ainsi que les arguments présentés au procès ne renferment tout simplement pas les renseignements nécessaires pour permettre à notre Cour d'apprécier si, en répartissant le contingent de 40 000 tonnes fixé pour la pêche au hareng, l'État a agi en vue de réaliser un objectif impérieux et réel ou s'il a agi d'une manière compatible avec son obligation de fiduciaire envers les peuples autochtones. Ce n'est pas que le ministère public ne s'est pas acquitté du fardeau de démontrer que les modalités de répartition du contingent des prises admissibles fixé à 20 pour 100 des stocks de hareng étaient justifiées, mais simplement que cette question n'a pas été examinée au procès, du moins pas d'une manière suffisante pour permettre à notre Cour de trancher la question de savoir si, suivant le critère établi dans *Sparrow*, ces modalités étaient justifiées.

The lack of evidence is problematic with regards to both aspects of the *Sparrow* analysis. First, in so far as an evaluation of the government's objective is concerned, no witnesses testified, and no documents were submitted as evidence, with regards to the objectives pursued by the government in allo-

Le manque d'éléments de preuve pose des problèmes en ce qui a trait aux deux aspects de l'analyse exigée par l'arrêt *Sparrow*. Premièrement, pour ce qui est de l'évaluation de l'objectif visé par l'État, aucun témoin n'est venu déposer et aucun document n'a été présenté en preuve relati-

cating the herring, and the herring spawn on kelp, amongst different user groups. As was noted above, there was evidence presented about the selection criteria used by the Department of Fisheries and Oceans in allocating herring spawn on kelp licences in 1975; however, no evidence was presented as to how or why those selection criteria were chosen or applied. Also, the evidence does not indicate whether those selection criteria changed over time (not all licences were allocated in 1975) or whether the emphasis placed on the different criteria varied. Clear evidence was presented at trial demonstrating that setting the total herring catch at 20 per cent was directed at conservation, but no evidence was presented regarding the objectives sought to be attained in allocating that 20 per cent amongst different user groups.

Second, with regards to priority, there is no evidence as to how much (if any) aboriginal participation there is in the herring roe fishery or as to whether there are any existing aboriginal rights to participate in the herring roe fishery, whether for food or commercial purposes. Whether the allocation of herring between the herring roe and herring spawn on kelp fishery meets the *Sparrow* test for priority will depend in part on the existence (or non-existence) of such rights. There is, similarly, no evidence as to whether other aboriginal rights in the herring spawn on kelp fishery exist — whether for food or commercial purposes — and as to the number of such rights holders there might be.

Other evidentiary problems exist with regards to the priority analysis. There is no evidence as to how, between the different aboriginal bands holding Category J licences, allocation decisions are made. There is no evidence as to how, or to whom, the remaining 2,051 tons of herring spawn on kelp

vement aux objectifs poursuivis par l'État dans la répartition du hareng et de la roque de hareng sur varech entre les divers groupes d'utilisateurs. Comme il a été indiqué précédemment, des éléments de preuve ont été présentés quant aux critères de sélection appliqués par le ministère des Pêches et Océans dans la délivrance des permis de récolte de la roque de hareng sur varech en 1975. Toutefois, aucun élément de preuve n'a été produit afin d'expliquer comment ou pourquoi ces critères de sélection étaient choisis ou appliqués. En outre, la preuve n'indique pas si ces critères de sélection ont changé au fil des ans (les permis n'ont pas tous été délivrés en 1975) ou si l'importance accordée aux divers critères a varié. Au procès, il a été présenté des éléments de preuve démontrant clairement que la décision de fixer le total des prises admissibles à 20 pour 100 des stocks avait pour objet la conservation de la ressource, mais aucune preuve n'a été présentée quant aux objectifs visés dans le cadre de la répartition de ces 20 pour 100 entre les divers groupes d'utilisateurs.

Deuxièmement, pour ce qui est de l'ordre de priorité, il n'y a aucun élément de preuve concernant l'ampleur (le cas échéant) de la participation des autochtones à la pêche au hareng prêt à frayer, ni sur la question de savoir s'il y a des droits ancestraux existants de participer à cette pêche, que ce soit à des fins alimentaires ou commerciales. La réponse à la question de savoir si la répartition de la ressource entre la pêche au hareng prêt à frayer et la récolte de la roque de hareng sur varech satisfait au critère établi dans *Sparrow* relativement à l'ordre de priorité dépendra en partie de l'existence (ou de l'inexistence) de tels droits. De même, aucune preuve n'a été produite quant à savoir s'il existe d'autres droits ancestraux visant la récolte de la roque de hareng sur varech — que ce soit à des fins alimentaires ou commerciales — et quant au nombre de titulaires de tels droits.

Il existe d'autres problèmes de preuve en ce qui concerne l'analyse de la question de l'ordre de priorité. Aucun élément de preuve n'a été produit sur la manière dont sont prises les décisions concernant la répartition de la ressource entre les diverses bandes autochtones titulaires de permis de

is allocated after the 224 tons of herring spawn on kelp is allocated to Category J licences. There is also no evidence as to how many aboriginal groups live in the region of the herring spawn on kelp fishery, what percentage aboriginal peoples are of the population in that region, and the size of the Heiltsuk Band relative to other aboriginal groups and the general population in the region.

catégorie J. Aucune preuve n'indique à qui et suivant quels critères sont attribuées les 2 051 tonnes de roque de hareng sur varech qui restent après que les 224 tonnes réservées aux titulaires de permis de catégorie J ont été réparties entre ces derniers. Il n'y a pas non plus de preuve concernant le nombre de groupes d'autochtones qui vivent dans la région où est récoltée cette ressource, le pourcentage que représentent les autochtones par rapport à l'ensemble de la population de cette région et la taille de la bande des Heiltsuk par rapport aux autres groupes autochtones et à la population générale de la région.

81 In the courts below, the judges considering the justification issue avoided the difficulties created by the inadequacy of the evidentiary record in two ways: they either held that the nature of the appellants' actions rendered the government's actions justifiable (the approach of the trial judge) or they held that the allocation of 60 per cent of Category J licences to aboriginal groups demonstrated that the government's regulatory scheme was justifiable. The problem with the first of these approaches is that the nature of the appellants' actions is not relevant to the inquiry into the constitutionality of the regulation under which they were charged. The problem with the second approach is that the fact that 60 per cent of the Category J licences were held by aboriginal people does not demonstrate, in itself, that the licences were allocated in a manner which took into account the existence of aboriginal rights. It is, perhaps, consistent with that having taken place, but absent some further evidence as to how or why this result was reached, about the percentage of aboriginal people in relation to the population of the British Columbia coast as a whole, and about the other allocation issues in the herring roe and herring spawn on kelp fisheries, the fact that 60 per cent of the Category J licences are held by aboriginal peoples does not, on its own, serve to justify the government's actions.

Les juges des cours inférieures qui ont étudié la question de la justification ont évité de deux façons les difficultés créées par l'insuffisance de la preuve: soit en statuant que la nature des actions des appelants avait pour effet de rendre les actions de l'État justifiables (approche appliquée par le juge du procès), soit en concluant que l'attribution de 60 pour 100 des permis de catégorie J aux groupes autochtones démontrait que le régime de réglementation public était justifiable. Le problème que pose la première approche est que la nature des actions des appelants n'est pas pertinente pour l'examen de la constitutionnalité de la disposition réglementaire en vertu de laquelle ils ont été accusés. Le problème que pose la seconde approche est que le fait que 60 pour 100 des permis de catégorie J étaient détenus par des autochtones ne démontre pas, en soi, que les permis ont été répartis d'une manière qui tenait compte de l'existence de droits ancestraux. Peut-être ce fait est-il compatible avec une telle conclusion, mais le fait que 60 pour 100 des permis de catégorie J sont détenus par des autochtones ne saurait, en soi, justifier les actions de l'État en l'absence d'éléments de preuve supplémentaires indiquant comment ou pourquoi on est arrivé à ce résultat, donnant le pourcentage que représentent les autochtones par rapport à l'ensemble de la population de la côte de la Colombie-Britannique et concernant les autres questions de répartition que soulèvent la pêche au hareng prêt à frayer et la récolte de la roque de hareng sur varech.

Obviously a new trial will not necessarily provide complete and definitive answers to all of these questions; however, given that the parties simply did not address the justifiability of the government scheme, other than the setting of the herring catch at 20 per cent of the total herring stock, a new trial will almost certainly provide the court with better information than currently exists. Prior to *Sparrow* it was not clear what the government, or parties challenging government action, had to demonstrate in order to succeed in s. 35(1) cases; this lack of clarity undoubtedly contributed to the deficiency of the evidentiary record in this case. A new trial on the question of justification will remedy this deficiency.

A new trial is not, however, necessary with regards to the first aspect of the government's scheme; the evidentiary record clearly demonstrates that this aspect of the government's scheme was justified. Witnesses testified as to the conservation objectives of setting the stock at 20 per cent and as to the difficulties encountered by the herring fishery when the catch was set at much higher levels, as was the case in the 1960s. Moreover, the defence witness Dr. Gary Vigers testified that "fisheries management is full of uncertainty"; in the context of such uncertainty this Court must grant a certain level of deference to the government's approach to fisheries management.

Although the evidence regarding consultation is somewhat scanty, and more will hopefully be presented at a new trial on the justification issue, there is some evidence to suggest that the government was cognizant of the views of aboriginal groups with regards to the herring fishery. The correspondence between the Native Brotherhood and the Department is indicative of the existence of such consultation. Finally, the setting of the herring catch at 20 per cent of the fishable herring

Il va de soi qu'un nouveau procès n'apportera pas nécessairement des réponses complètes et définitives à toutes ces questions. Cependant, comme les parties n'ont tout simplement pas abordé la question du caractère justifiable du régime gouvernemental de réglementation, sauf pour la fixation des prises admissibles à 20 pour 100 de l'ensemble des stocks de hareng, un nouveau procès fournira certainement au tribunal des renseignements plus complets que ceux disponibles actuellement. Avant l'arrêt *Sparrow*, ce que l'État ou les parties qui contestaient les mesures prises par ce dernier devaient prouver pour avoir gain de cause dans les affaires fondées sur le par. 35(1) n'était pas clair. Cette incertitude a sans aucun doute contribué aux lacunes dont souffre la preuve au dossier dans la présente affaire. La tenue d'un nouveau procès sur la question de la justification permettra d'y remédier.

Un nouveau procès n'est toutefois pas nécessaire à l'égard du premier aspect du régime gouvernemental de réglementation. La preuve au dossier démontre clairement que cet aspect du régime était justifié. Des témoins ont déposé à l'égard des objectifs de conservation visés par la décision de fixer les prises admissibles à 20 pour 100 des stocks, et des difficultés éprouvées par la pêche au hareng lorsque ces prises étaient établies à des niveaux beaucoup plus élevés, comme c'était le cas dans les années 1960. De plus, Gary Vigers, témoin expert de la défense, a déclaré que «la gestion de la pêche est remplie d'incertitudes». Compte tenu de ces incertitudes, notre Cour doit, dans une certaine mesure, s'en remettre à l'approche appliquée par l'État dans la gestion des pêches.

Même si la preuve touchant les consultations est un peu sommaire et qu'il est à souhaiter qu'elle sera étoffée à l'occasion d'un nouveau procès sur la question de la justification, il existe néanmoins certains éléments qui tendent à indiquer que l'État connaissait les vues des groupes autochtones sur la pêche au hareng. La correspondance échangée par la Native Brotherhood et le ministère témoigne de l'existence de ces consultations. Enfin, comme elle vise des objets de conservation et qu'elle ne porte

stock, because aimed at conservation, and not affecting the priority of aboriginal versus non-aboriginal users of the fishery, is consistent with the priority scheme as laid out in *Sparrow* and as elaborated in this judgment.

V. Disposition

In the result, the appeal is allowed and a new trial directed on the issue of guilt or innocence and, with regards to the constitutionality of s. 20(3), on the issue of the justifiability of the government's allocation of herring.

For the reasons given above, the constitutional question must be answered as follows:

Question: Is s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324, as it read on April 28, 1988, of no force or effect with respect to the appellants in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellants?

Answer: This question will have to be sent back to trial to be answered in accordance with the analysis set out in these reasons.

The following are the reasons delivered by

LA FOREST J. (dissenting) — This appeal raises the issue of whether s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324 is, in the circumstances of this case, of no force or effect as infringing on s. 35(1) of the *Constitution Act, 1982*, by which the aboriginal rights of Canada's aboriginal people are recognized and affirmed. Section 20(3) prohibits buying, selling or bartering, or attempting to buy, sell or barter herring spawn on kelp not taken under the authority of a Category J. licence. The issue raised involves a consideration of whether the Heiltsuk people of British Columbia had at one time an aboriginal right to trade and sell herring spawn on kelp and its nature; whether, assuming there was such a right, it

pas atteinte au droit de priorité des usagers autochtones vis-à-vis des autres usagers de la ressource, la décision de fixer les prises admissibles à 20 pour 100 des stocks de hareng exploitables est compatible avec l'ordre de priorité établi dans *Sparrow*, et explicité dans le présent jugement.

V. Dispositif

En conséquence, je suis d'avis de faire droit au pourvoi et d'ordonner un nouveau procès sur la question de la culpabilité ou de l'innocence, et, en ce qui concerne la constitutionnalité du par. 20(3), sur la question du caractère justifiable de la répartition du hareng par l'État.

Pour les motifs qui précèdent, la question constitutionnelle doit recevoir la réponse suivante:

Question: Le paragraphe 20(3) du *Règlement de pêche du hareng du Pacifique*, DORS/84-324, tel qu'il se lisait le 28 avril 1988, est-il, dans les circonstances de la présente affaire, inopérant à l'égard des appelants en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'ils invoquent?

Réponse: Cette question doit être renvoyée à la juridiction de première instance afin qu'on y réponde conformément à l'analyse exposée dans les présents motifs.

Version française des motifs rendus par

LE JUGE LA FOREST (dissident) — Le présent pourvoi soulève la question de savoir si le par. 20(3) du *Règlement de pêche du hareng du Pacifique*, DORS/84-324, est, dans les circonstances de la présente affaire, inopérant parce qu'il porte atteinte au par. 35(1) de la *Loi constitutionnelle de 1982* qui reconnaît et confirme les droits ancestraux des peuples autochtones du Canada. Le paragraphe 20(3) interdit d'acheter, de vendre, d'échanger ou de tenter d'acheter, de vendre ou d'échanger de la roque de hareng sur varech, à moins que celle-ci n'ait été récoltée en vertu d'un permis de catégorie J. Pour trancher la question soulevée, il nous faut d'abord décider si les Heiltsuk de la Colombie-Britannique ont déjà eu le

has been extinguished; and whether if such right continues to exist its infringement may be justified.

Background

The Chief Justice has set forth the facts and judicial history in some detail and I need only set them forth in brief terms here.

The appellants are members of the Heiltsuk people of British Columbia and were charged with having offered to sell and with having attempted to sell herring spawn on kelp contrary to s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, which provides that contravention of the Act or the regulations adopted thereunder is an offence punishable on summary conviction. The regulations, adopted by the Governor in Council in accordance with s. 34 of the Act, form a federal regulatory scheme relating to herring fishing in Canadian fisheries waters on the Pacific Coast. Section 20(3) of the regulations reads:

20. . . .

(3) No person shall buy, sell, barter, or attempt to buy, sell, or barter herring spawn on kelp other than herring spawn on kelp taken or collected under the authority of a Category J licence.

During the course of the proceedings, the appellants raised a number of issues relating to the evidence presented by the Crown and the elements of the offences with which they were charged. The appellants have abandoned most of these arguments, but nonetheless submitted before this Court that the Crown had failed to correctly prove an attempt to sell. On this issue, it is sufficient to say that I agree with the Chief Justice, and I shall therefore confine myself to the constitutional issues.

The appellants were initially convicted of both charges against them. Although the trial judge recognized that the Act and the regulations infringed

droit ancestral de vendre et d'échanger de la rogue de hareng sur varech, et quelle était la nature de ce droit. À supposer qu'un tel droit ait existé, il faut ensuite se demander s'il a été éteint. Enfin, dans l'hypothèse où ce droit continuerait d'exister, il faut déterminer si sa violation peut être justifiée

Contexte

Comme le Juge en chef a exposé en détail les faits et l'historique des procédures judiciaires, il me suffira de les rappeler brièvement.

Les appelants, des Heiltsuk de la Colombie-Britannique, ont été accusés d'avoir offert de vendre et d'avoir tenté de vendre de la rogue de hareng sur varech contrairement au par. 61(1) de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14, qui dispose que toute contravention à la Loi ou à ses règlements d'application est punissable sur déclaration de culpabilité par procédure sommaire. Le règlement en cause, pris par le gouverneur en conseil en vertu de l'art. 34 de la Loi, établit un régime fédéral de réglementation applicable à la pêche au hareng dans les pêcheries canadiennes de la côte du Pacifique. Le paragraphe 20(3) du règlement est ainsi rédigé:

20. . . .

(3) Il est interdit à quiconque d'acheter, de vendre, d'échanger ou de tenter d'acheter, de vendre ou d'échanger de la rogue de hareng sur varech, à moins que celle-ci n'ait été prise ou recueillie en vertu d'un permis de catégorie J.

Au cours des procédures, les appelants ont soulevé un certain nombre de questions concernant la preuve produite par le ministère public et les éléments constitutifs des infractions dont ils ont été accusés. Ils ont abandonné la plupart de ces arguments, mais ont néanmoins soutenu devant notre Cour que le ministère public n'avait pas prouvé correctement la tentative de vente. Sur ce point, qu'il suffise de dire que je suis d'accord avec le Juge en chef et que je m'en tiendrai donc aux questions d'ordre constitutionnel.

Les appelants ont d'abord été déclarés coupables des deux accusations portées contre eux. Bien que le juge du procès ait reconnu que la Loi et le

the appellants' constitutional right to barter and sell herring spawn on kelp, he was of the opinion that such infringement was justified and, therefore, constitutionally valid. On appeal to the Supreme Court of British Columbia, Anderson J. upheld the conviction on the second count (attempt to sell), concluding that the appellants' constitutional right to trade herring spawn on kelp was not infringed by the Act or its regulations. A majority of a five-judge panel of the Court of Appeal for British Columbia (1993), 80 B.C.L.R. (2d) 133, dismissed the appellants' appeal with respect to the second count, finding that they were not at the time the offences were allegedly committed exercising an aboriginal right. The appellants applied for and were granted leave to appeal to this Court. Subsequently, the Chief Justice stated the following constitutional question:

Is s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324, as it read on April 28, 1988, of no force or effect with respect to the appellants in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellants?

Analysis

It will, I think, be useful to set forth my conclusions at the outset. I have had the advantage of reading the reasons of the Chief Justice and those of my colleagues Justices L'Heureux-Dubé and McLachlin in the instant appeals and in the companion cases of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672. Although I am in general agreement with the framework articulated by the Chief Justice in *Van der Peet* pertaining to the definition of the nature and scope of aboriginal rights recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*, I cannot share his views regarding its application to the present case. As I see it, the appellants have failed to establish that when they took part in the activities giving rise to this litigation, they were exercising an aboriginal right.

Règlement portaient atteinte au droit constitutionnel des appelants de vendre et d'échanger de la rogue de hareng sur varech, il a dit être d'avis que cette atteinte était justifiée et donc constitutionnellement valide. En appel devant la Cour suprême de la Colombie-Britannique, le juge Anderson a confirmé la déclaration de culpabilité à l'égard du deuxième chef (tentative de vente), concluant que le droit constitutionnel des appelants d'échanger de la rogue de hareng sur varech n'était pas violé par la Loi ou son règlement d'application. Une formation de cinq juges de la Cour d'appel de la Colombie-Britannique (1993), 80 B.C.L.R. (2d) 133, a, à la majorité, rejeté l'appel formé par les appelants contre le deuxième chef d'accusation, statuant que ces derniers n'exerçaient pas un droit ancestral au moment où ils auraient perpétré les infractions. Les appelants ont demandé et obtenu l'autorisation de se pourvoir devant notre Cour. Par la suite, le Juge en chef a formulé la question constitutionnelle suivante:

Le paragraphe 20(3) du *Règlement de pêche du hareng du Pacifique*, DORS/84-324, tel qu'il se lisait le 28 avril 1988, est-il, dans les circonstances de la présente affaire, inopérant à l'égard des appelants en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'ils invoquent?

Analyse

Il sera utile, je crois, de formuler mes conclusions dès le départ. J'ai eu l'avantage de lire les motifs du Juge en chef et ceux de mes collègues les juges L'Heureux-Dubé et McLachlin dans les présents pourvois et les pourvois connexes *R. c. Van der Peet*, [1996] 2 R.C.S. 507, et *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672. Quoique je sois d'accord de façon générale avec le cadre d'analyse établi par le Juge en chef dans *Van der Peet* relativement à la définition de la nature et de la portée des droits ancestraux reconnus et confirmés par le par. 35(1) de la *Loi constitutionnelle de 1982*, je ne peux partager son avis quant à l'application de ce cadre d'analyse à la présente espèce. À mon sens, les appelants n'ont pas établi qu'ils exerçaient un droit ancestral lorsqu'ils ont participé aux activités ayant donné naissance au

Moreover, even if the appellants had demonstrated that the Heiltsuk of British Columbia did at some time benefit from the aboriginal right claimed, I am of the view that any such right would now be extinguished. I would therefore dismiss the appeals and answer the constitutional question in the negative, and I need not enter into the issue of justification.

1. *The Aboriginal Right Issue*

In the *Van der Peet* case, the Chief Justice proceeded to a purposive analysis of s. 35(1) of the *Constitution Act, 1982* in defining the content of aboriginal rights as they are recognized and affirmed in our Constitution. This provision reads:

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

The basis of aboriginal rights, he explained, lies in aboriginal occupation of the territory that is now Canada before the arrival of Europeans. As Judson J. had earlier put it in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 328, "the 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, as he added, is the foundation of Indian title and, I would add, of aboriginal rights generally. It follows that these rights, though (as *R. v. Sparrow*, [1990] 1 S.C.R. 1075, confirms) exercisable by modern instrumentalities, must in essence be integrally related to traditional Indian habits and mode of life. To use the Chief Justice's expression, an aboriginal right is the right to engage in a practice or activity that is integral to their distinctive culture as it existed when the Europeans arrived. To gain constitutional status, such a right must not have been extinguished by the Crown before the coming into force of s. 35(1) in 1982.

présent litige. De plus, même s'ils avaient démontré que les Heiltsuk de la Colombie-Britannique ont, à une certaine époque, effectivement joui du droit ancestral revendiqué, je suis d'avis qu'un tel droit est maintenant éteint. Je rejeterais donc les pourvois et répondrais par la négative à la question constitutionnelle. Je n'ai pas à examiner la question de la justification.

1. *La question du droit ancestral*

Dans *Van der Peet*, le Juge en chef a d'abord analysé les objets qui sous-tendent le par. 35(1) de la *Loi constitutionnelle de 1982*, afin de définir la portée des droits ancestraux reconnus et confirmés dans notre Constitution. Cette disposition est ainsi libellée:

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Le fondement des droits ancestraux, a-t-il expliqué, réside dans l'occupation par les autochtones, avant l'arrivée des Européens, du territoire qui forme maintenant le Canada. Comme l'avait déjà dit le juge Judson dans l'arrêt *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313, à la p. 328, «il reste que lorsque les colons sont arrivés, les Indiens étaient déjà là, ils étaient organisés en sociétés et occupaient les terres comme leurs ancêtres l'avaient fait depuis des siècles». Voilà, a précisé le juge Judson, le fondement du titre indien, et, ajouterais-je, celui des droits ancestraux en général. Il s'ensuit que, même s'ils peuvent être exercés par des moyens modernes (comme le confirme l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075), ces droits doivent par essence faire partie intégrante des coutumes et du mode de vie traditionnels des Indiens. Pour reprendre la formule du Juge en chef, un droit ancestral est le droit qu'ont des autochtones de s'adonner à une pratique ou à une activité qui faisait partie intégrante de leur culture distinctive, telle qu'elle existait lorsque les Européens sont arrivés. Pour se voir reconnaître un statut constitutionnel, un tel droit ne doit pas avoir été éteint par l'État avant l'entrée en vigueur du par. 35(1) en 1982.

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The trial judge, Lemiski Prov. Ct. J., came to the conclusion that the Heiltsuk people of British Columbia did have an aboriginal right, within the meaning of s. 35(1), to barter and trade herring spawn on kelp, but that the activities the appellants engaged in at the time the offences were allegedly committed were very different from the traditional activities that had given rise to that aboriginal right. In coming to this conclusion, Lemiski Prov. Ct. J. had the benefit of this Court's decision in *Sparrow, supra*, and it is apparent that he, too, shared the view that an aboriginal right pertained to what formed an integral part of the distinctive culture of a given aboriginal society. His conclusions of facts explaining his position are stated in the following passage of his reasons:

This is not a situation where a small quantity of spawn was openly sold, traded or bartered in the Bella Bella region.

The Accused were attempting to sell a relatively large quantity of spawn in a surreptitious manner to a foreign buyer in a location far removed from the Heiltsuk Band's region. In the total context of the historical manner and extent of the herring spawn on kelp trade by the Heiltsuk Band and the present manner and extent of commercial trade Fisheries Officers were justified in interfering with this transaction.

The overall justification lies within the broad definition of proper management and conservation of the resource. The special trust relationship cannot be applied to offset that because of the unique circumstances.

I am satisfied that this transaction was totally out of character and context with respect to either any existing exercise of aboriginal rights to sell fish or any licensed sale. In *Sparrow* the Supreme Court of Canada said:

"Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group".

There is no evidence before me that the Accused were conducting a transaction "in keeping with the culture and existence" of the Heiltsuk Band. [Emphasis added.]

Le juge Lemiski de la Cour provinciale, juge du procès, a conclu que les Heiltsuk de la Colombie-Britannique avaient un droit ancestral, au sens du par. 35(1), d'échanger de la rogue de hareng sur varech, mais que les activités auxquelles s'adonnaient les appelants au moment des infractions reprochées étaient très différentes des activités traditionnelles qui avaient donné naissance à ce droit ancestral. Lorsqu'il a tiré cette conclusion, le juge Lemiski avait eu l'avantage de prendre connaissance de l'arrêt *Sparrow* de notre Cour, précité, et il est évident qu'il était lui aussi d'avis qu'un droit ancestral se rapporte à ce qui faisait partie intégrante de la culture distinctive d'une société autochtone donnée. Ses conclusions de fait expliquant sa position sont énoncées dans le passage qui suit de ses motifs:

[TRADUCTION] Il ne s'agit pas d'une situation où une petite quantité de rogue a été vendue ou échangée ouvertement dans la région de Bella Bella.

Les accusés ont tenté de vendre subrepticement une quantité relativement importante de rogue à un acheteur étranger, dans un lieu très éloigné de la région où vit la bande des Heiltsuk. Vu le contexte global des modalités et de l'ampleur des échanges de rogue de hareng sur varech faits historiquement par la bande de Heiltsuk, ainsi que les modalités et l'ampleur de la présente opération commerciale, les agents des pêches étaient justifiés d'empêcher cette opération.

La justification générale réside dans la définition large de la gestion et de la conservation judicieuses de la ressource. Les rapports spéciaux de fiduciaire ne peuvent, vu les circonstances exceptionnelles, être invoqués pour faire échec à cette justification.

Je suis convaincu que, de par sa nature et de par le contexte, cette opération ne constitue aucunement l'exercice de droits ancestraux de vendre du poisson ou une vente autorisée. Dans *Sparrow*, la Cour suprême du Canada a dit ceci:

«Les droits de pêche ne sont pas des droits de propriété au sens traditionnel. Il s'agit de droits qui appartiennent à un groupe et qui sont en harmonie avec la culture et le mode de vie de ce groupe».

Il ne m'a été présenté aucune preuve indiquant que les accusés effectuaient une opération «en harmonie avec la culture et le mode de vie» de la bande des Heiltsuk. [Je souligne.]

On this basis, I would conclude that the appellants have not established that they were exercising an aboriginal right at the time the alleged offences were committed. I am prepared to agree that the Heiltsuk had an aboriginal right to barter and trade herring spawn on kelp to a certain degree. The evidence demonstrated that the Heiltsuk had been engaged in such activities for some time before contact with the Europeans and those activities, at times, involved very large quantities of fish. As the evidence demonstrated, such activities had special significance to the Heiltsuk. After the resource had satisfied their own needs, they engaged in such trading activities only because they valued sharing resources with other bands who did not have access to such a resource. As the majority of the Court of Appeal put it, at para. 50: "[t]he aboriginal activity was rooted in a culture which gave significance to sharing a resource, to which one nation had ready access, while other Indian peoples did not." In that sense, the bartering and trading of herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk Band because of the distinctive significance such activities had for them. That special significance is what made bartering and trading in herring spawn on kelp a part of their distinctive culture.

It is important to underline that the trial judge's findings of fact are to the effect that the activity of bartering and trading historically engaged in by the Heiltsuk people was not in itself of a kind that can be characterized as forming an integral part of their distinctive culture. Bartering and trading was integral to the distinctive culture of the Heiltsuk Band because of the context in which it occurred. Without it, such activity does not constitute an integral part of their distinctive culture and thus any trading and bartering that is not done in that context cannot in any way be said to form an integral part of the distinctive culture of the Heiltsuk society.

Sur ce fondement, je concluais que les appelants n'ont pas établi qu'ils exerçaient un droit ancestral au moment des infractions reprochées. Je suis disposé à convenir que les Heiltsuk possédaient, dans une certaine mesure, un droit ancestral d'échanger de la rogue de hareng sur varech. La preuve a montré que les Heiltsuk exerçaient de telles activités depuis un certain temps déjà avant le contact avec les Européens, et que ces activités portaient parfois sur de très importantes quantités de poisson. Comme la preuve l'a démontré, ces activités avaient une importance spéciale pour les Heiltsuk. Une fois que la ressource leur avait permis de satisfaire leurs propres besoins, ils ne pratiquaient ce genre d'activités d'échange que parce qu'il était important pour eux de partager des ressources avec d'autres bandes n'ayant pas accès à celles-ci. Comme l'ont exprimé les juges de la majorité de la Cour d'appel, au par. 50: [TRADUCTION] «[l]es activités des autochtones étaient enracinées dans une culture qui accordait de l'importance au partage d'une ressource à laquelle une nation indienne avait, contrairement à d'autres, aisément accès.» En ce sens, les échanges de rogue de hareng sur varech faisaient partie intégrante de la culture distinctive de la bande des Heiltsuk à cause de l'importance distinctive que celle-ci attachait à ces activités. Cette importance spéciale est ce qui faisait des échanges de rogue de hareng sur varech une partie de la culture distinctive de la bande.

Il importe de souligner que les conclusions de fait du juge du procès indiquent que les échanges pratiqués historiquement par les Heiltsuk n'étaient pas en soi un type d'activités pouvant être qualifiées de partie intégrante de la culture distinctive de ceux-ci. Ces activités d'échange faisaient partie intégrante de la culture distinctive de la bande des Heiltsuk en raison du contexte dans lequel elles se déroulaient. En dehors de ce contexte, ces activités ne font pas partie intégrante de la culture distinctive des Heiltsuk et, en conséquence, il est impossible d'affirmer que les échanges qui ne sont pas effectués dans ce contexte font partie intégrante de la culture distinctive de la société heiltsuk.

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Accordingly, I agree with the trial judge and the majority of the Court of Appeal that the activities the appellants were engaged in when the offences were allegedly committed did not form an integral part of the distinctive culture of the Heiltsuk people. It is elementary that when the Heiltsuk trade herring spawn on kelp in large quantities to Japanese clients, they do so for the unique — although quite legitimate — purpose of satisfying their own financial interests and clearly not in pursuance of the values rooted in their cultural distinctiveness to which I have referred. Consequently, I do not think that the aboriginal rights of the Heiltsuk people are infringed because they cannot by virtue of such rights sell herring spawn on kelp as they wish to Japanese interests.

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My conviction is strengthened by the fact that the evidence established that it was not before the 1970s that the Heiltsuk engaged in commercial activities involving herring spawn on kelp and that they did so in response to a strong demand for the product from Asian markets. The Heiltsuk herring spawn on kelp industry therefore developed in order to take advantage of an economic opportunity created by that strong demand (see also *Heiltsuk Indian Band v. Canada* (1993), 59 F.T.R. 308). We are light years away from the ancient practice of sharing resources with fellow bands in furtherance of spiritual ideals.

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In view of the different conclusion arrived at by the Chief Justice, however, it becomes important to examine in more detail the factual and evidentiary foundation that lies at the root of our disagreement. Briefly, the Chief Justice's conclusion is that the appellants had successfully established that when they offered to sell herring spawn on kelp — the events that led to the charges — they were exercising an aboriginal right. In his view, the facts as found by the trial judge, as well as the evidence he relied upon, supported the appellants' claim that the "exchange of herring spawn on kelp for money or other goods was a central, significant and defining feature of the culture of the Heiltsuk

Par conséquent, je suis d'accord avec le juge du procès et la majorité de la Cour d'appel que les activités exercées par les appelants au moment des infractions reprochées ne faisaient pas partie intégrante de la culture distinctive des Heiltsuk. Il va de soi que lorsque les Heiltsuk vendent de la rogue de hareng sur varech en grandes quantités à des clients japonais, ils le font dans le but unique — quoique tout à fait légitime — de veiller à leurs propres intérêts financiers, et manifestement pas conformément aux valeurs enracinées dans la culture distinctive dont je viens de parler. En conséquence, je ne pense pas que les droits ancestraux des Heiltsuk ont été violés parce que ceux-ci ne peuvent pas, en vertu de ces droits, vendre à leur guise de la rogue de hareng sur varech à des clients japonais.

Ma conviction est renforcée par le fait que la preuve a établi que ce n'est qu'à compter des années 1970 que les Heiltsuk ont commencé à pratiquer des activités commerciales visant la rogue de hareng sur varech, et qu'ils l'ont fait pour répondre à la forte demande pour ce produit sur les marchés asiatiques. L'industrie de la rogue de hareng sur varech s'est donc développée chez les Heiltsuk en raison des possibilités économiques créées par cette forte demande (voir aussi la décision *Bande indienne des Heiltsuk c. Canada* (1993), 59 F.T.R. 308). Nous sommes à des années-lumière de l'ancienne pratique de partage des ressources avec des bandes amies dans la poursuite d'idéaux spirituels.

Toutefois, étant donné la conclusion différente tirée par le Juge en chef, il importe d'examiner plus en détail les faits et les éléments de preuve qui sont à la base de notre désaccord. En bref, le Juge en chef conclut que les appelants ont réussi à établir que, lorsqu'ils ont offert de vendre de la rogue de hareng sur varech — faits générateurs des accusations — ils exerçaient un droit ancestral. À son avis, les faits constatés par le juge du procès, ainsi que la preuve sur laquelle ce dernier s'est appuyé, étayaient la prétention des appelants que «l'échange de la rogue de hareng sur varech contre de l'argent ou d'autres biens était une caractéristique fondamentale, importante et déterminante de la culture

prior to contact" (at para. 26). He also added that the facts supported the appellants' further claim that "the exchange of herring spawn on kelp on a scale best characterized as commercial was an integral part of the distinctive culture of the Heiltsuk" (at para. 26). He referred to the trial judge's comments, found under sub-heading 2 "Ancestral Activity ('Existing Rights') of Part IV of his reasons, which I will for convenience repeat:

It cannot be disputed that hundreds of years ago, the Heiltsuk Indians regularly harvested herring spawn on kelp as a food source. The historical/anthropological records readily bear this out.

I am also satisfied that this Band engaged in inter-tribal trading and barter of herring spawn on kelp. The exhibited Journal of Alexander McKenzie [*sic*] dated 1793 refers to this trade and the defence lead [*sic*] evidence of several other references to such trade.

The Crown conceded that there may have been some incidental local trade but questions its extent and importance. The very fact that early explorers and visitors to the Bella Bella region noted this trading has to enhance its significance. All the various descriptions of this trading activity are in accord with common sense expectations. Obviously one would not expect to see balance sheets and statistics in so primitive a time and setting.

With respect, I cannot agree with the Chief Justice's conclusion. On the contrary, as I indicated earlier, my understanding of the trial judge's reasons is that he found the appellants had failed to establish that they were exercising an aboriginal right when they attempted to sell the herring spawn on kelp. The findings of fact of the trial judge were so understood and accepted by both the British Columbia Supreme Court and the Court of Appeal. The appellants have not convinced me that these should be disturbed. As I see it, the confusion arises from the fact that the trial judge made some of his findings — in the first of the passages from his reasons cited earlier (para. 7) — in the course of addressing the issue of justification. These find-

distinctive des Heiltsuk avant le contact avec les Européens» (au par. 26). Il a ajouté que les faits appuyaient aussi la thèse des appelants que «l'échange de la rogue de hareng sur varech, sur une échelle qu'il convient de qualifier de commerciale, faisait partie intégrante de la culture distinctive des Heiltsuk» (au par. 26). Il a fait état des observations formulées par le juge du procès, à la rubrique 2 [TRADUCTION] «Activité ancestrale («Droits existants»)», à la partie IV de ses motifs, observations que je vais répéter par souci de commodité:

[TRADUCTION] Il est incontestable qu'il y a des siècles, les Indiens Heiltsuk récoltaient régulièrement la rogue de hareng sur varech comme source de nourriture. C'est un fait dont la réalité est attestée par les documents historiques et anthropologiques.

Je suis également convaincu que la bande échangeait cette denrée avec d'autres tribus. Le journal d'Alexander McKenzie [*sic*] datant de 1793, qui a été versé en preuve, fait mention de ces échanges et la défense a présenté des éléments de preuve faisant état de nombreuses autres mentions de ces échanges.

Le ministère public a concédé qu'il a pu y avoir certains échanges accessoires, mais il a mis en doute leur ampleur et leur importance. Le fait même que les premiers explorateurs et visiteurs de la région de Bella Bella aient noté ces échanges en accentue l'importance. Les diverses descriptions faites de ces activités d'échange concordent avec ce à quoi on peut logiquement s'attendre. Il va de soi que personne ne s'attend à trouver des bilans et des statistiques à une époque et en des lieux aussi primitifs.

En toute déférence, je ne peux souscrire à la conclusion du Juge en chef. Au contraire, comme je l'ai dit plus tôt, il appert selon moi des motifs du juge du procès que ce dernier a conclu que les appelants n'ont pas établi qu'ils exerçaient un droit ancestral lorsqu'ils ont tenté de vendre de la rogue de hareng sur varech. Voilà comment et la Cour suprême et la Cour d'appel de la Colombie-Britannique ont interprété et accepté les conclusions de fait du juge du procès. Les appelants ne m'ont pas persuadé qu'il y avait lieu de modifier ces conclusions. Selon moi, la confusion résulte du fait que le juge du procès a formulé certaines de ses conclusions — qui figurent dans le premier des extraits cités précédemment (au par. 7) — dans le

ings were relevant to the definition of the scope of the aboriginal right at issue rather than to the issue of justification and he should have concluded from these that the appellants had failed to establish that they were exercising an aboriginal right when they attempted to sell the herring spawn on kelp.

cours de son analyse de la question de la justification. Ces constatations étaient pertinentes pour la définition de la portée du droit ancestral en cause plutôt qu'à l'égard de la question de la justification, et le juge du procès aurait dû en conclure que les appelants n'avaient pas établi qu'ils exerçaient un droit ancestral lorsqu'ils ont tenté de vendre de la rogue de hareng sur varech.

100 To fully understand the trial judge's reasoning, it is important to carefully review the passage from his reasons to which I have just referred. On the one hand, the trial judge found that the appellants established that the Heiltsuk people had had in a particular context an aboriginal right to barter and trade herring spawn on kelp to a certain extent, based on the findings of facts he made, and to which the Chief Justice referred. But he clearly was of the opinion that this is not what the appellants were doing here. The nature, the extent and the context in which the impugned transactions took place were such that they had absolutely no relationship to the traditional activities of trading and bartering herring spawn on kelp that had given rise to an aboriginal right.

Pour bien comprendre le raisonnement du juge du procès, il est important d'étudier attentivement le passage de ses motifs dont je viens de parler. Le juge du procès a bien statué, sur la foi des conclusions de fait qu'il a tirées et dont le Juge en chef a fait état, que les appelants avaient établi que les Heiltsuk avaient possédé, dans un contexte particulier, un droit ancestral d'échanger de la rogue de hareng sur varech dans une certaine mesure. Toutefois, il était clairement d'avis que ce n'était pas ce que les appelants avaient fait en l'espèce. La nature, l'ampleur et le contexte des opérations reprochées étaient absolument sans rapport avec les activités traditionnelles d'échange de rogue de hareng sur varech qui avaient donné naissance à un droit ancestral.

101 Anderson J. of the British Columbia Supreme Court also made comments relevant to the definition of the scope of the right at issue in the part of his reasons regarding justification. He first agreed with the trial judge that "the Heiltsuk Band historically had taken herring spawn on kelp for food and domestic purposes and also had engaged in inter-tribal trading and bartering of herring spawn and accordingly, that they had an aboriginal right to do so". But he added — in the course of dealing with justification — that he had not been able to "translate that right into an absolute and unfettered right to harvest herring spawn in any quantity and to sell the spawn so harvested commercially". The majority of the Court of Appeal correctly interpreted the scope of the trial judge's analysis that, at the end of the day, indicated that the appellants had failed to establish that they were exercising an aboriginal right when they offered to sell the herring spawn

Le juge Anderson de la Cour suprême de la Colombie-Britannique a lui aussi fait des observations pertinentes quant à la définition de la portée du droit en cause dans la partie de ses motifs traitant de la justification. Il a d'abord souscrit aux propos du juge du procès selon lesquels [TRADUCTION] «la bande des Heiltsuk avait historiquement récolté de la rogue de hareng sur varech pour se nourrir et pour des fins domestiques, en plus d'échanger cette ressource à d'autres tribus, de sorte qu'elle avait un droit ancestral de le faire». Cependant, il a ajouté — dans son examen de la question de la justification — qu'il avait été incapable de [TRADUCTION] «considérer ce droit comme étant un droit absolu et illimité de récolter n'importe quelle quantité de rogue de hareng et de vendre cette récolte commercialement». La Cour d'appel à la majorité a correctement interprété la portée de l'analyse du juge du procès qui l'a, en bout de ligne, amené à conclure que les appelants n'avaient pas établi qu'ils exerçaient un droit ancestral lorsqu'ils ont offert de vendre de la rogue

on kelp. Macfarlane J.A. had this to say, at paras. 49-52:

It is clear that the trial judge and the summary appeal judge did not view the activity in question as being an integral part of the distinctive culture of the Heiltsuk people. I agree that the activity is different in nature and quality than the aboriginal right identified by the evidence.

The case is not one that turns on quantity, although both judges below took account of the quantity involved. There was evidence of considerable quantities being transported to other Indians in aboriginal times. But the quality and character of the activity in aboriginal times was quite different from that disclosed by the evidence in this case. The aboriginal activity was rooted in a culture which gave significance to sharing a resource, to which one nation had ready access, while other Indian peoples did not.

Both judges below said that the activity in question in this case was not of the same character as the activity which attracts protection as an aboriginal right.

In my view, the appellants have not established that they were exercising an aboriginal right when they attempted to sell the product in Vancouver. [Emphasis added.]

As the Chief Justice explained in his reasons in *Van der Peet*, *supra*, taking into account the perspective of the aboriginal people is necessary because one of the purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. But it is also necessary to do so in order to properly delineate the scope of aboriginal rights. The perspective a given aboriginal people had regarding a given practice indicates its place within its society and, ultimately, whether it was integral to its distinctive culture and to what extent. This, I think, is clear from the reasons of the Chief Justice in *Van der Peet* (see para. 58) as I understand them, but, with respect, I do not think it was properly taken into account in his analysis

de hareng sur varech. Le juge Macfarlane a dit ceci, aux par. 49 à 52:

[TRADUCTION] De toute évidence, le juge du procès et le juge d'appel des poursuites sommaires n'ont pas considéré que les activités en question faisaient partie intégrante de la culture distinctive des Heiltsuk. Je suis d'accord que ces activités diffèrent, de par leur nature et leur qualité, du droit ancestral révélé par la preuve.

Les quantités ne sont pas l'élément déterminant du présent litige, bien que les deux juges des juridictions inférieures aient tenu compte de la quantité en cause. Il y avait des éléments de preuve indiquant que des quantités considérables étaient transportées chez d'autres Indiens aux temps des aborigènes. Toutefois, les activités exercées aux temps des aborigènes étaient très différentes, de par leur qualité et leur nature, de celles révélées par la preuve en l'espèce. Les activités des autochtones étaient enracinées dans une culture qui accordait de l'importance au partage d'une ressource à laquelle une nation indienne avait, contrairement à d'autres, aisément accès.

Les deux juges des juridictions inférieures ont dit que les activités en question n'étaient pas de la même nature que celles justifiant d'être protégées à titre de droit ancestral.

À mon avis, les appelants n'ont pas établi qu'ils exerçaient un droit ancestral lorsqu'ils ont tenté de vendre le produit à Vancouver. [Je souligne.]

Comme le Juge en chef l'a expliqué dans ses motifs dans l'arrêt *Van der Peet*, précité, il faut tenir compte du point de vue des autochtones parce que l'un des objets du par. 35(1) est la conciliation de la préexistence de sociétés autochtones distinctives avec l'affirmation de la souveraineté de Sa Majesté. Cependant, il est également nécessaire de le faire pour bien délimiter la portée des droits ancestraux. Le point de vue qu'avait un peuple autochtone donné à l'égard d'une certaine pratique indique la place de cette pratique dans cette société et, en définitive, si cette pratique faisait partie intégrante de la culture distinctive de ce peuple et, si oui, dans quelle mesure. À mon avis, cela ressort clairement des motifs du Juge en chef dans *Van der Peet* (voir le par. 58), mais, en toute déférence, je ne crois qu'il en ait été tenu adéquatement compte dans l'analyse du Juge en chef dans le présent

here given the findings of fact made by the trial judge.

The conclusion arrived at by the Chief Justice to the effect that the facts supported the appellants' further claim that "the exchange of herring spawn on kelp on a scale best characterized as commercial was an integral part of the distinctive culture of the Heiltsuk" people, therefore, seems to me wholly inconsistent with the findings of fact made by the trial judge and confirmed by both appellate courts to the effect that the impugned transactions lacked that fundamental element upon which it was found that historical trading and bartering practices was an aboriginal right. That is why I cannot agree with the Chief Justice's analysis and conclusion.

I would add that in *Van der Peet, supra*, the Chief Justice held, at para. 59, that a "practical way" to assess whether a given activity was integral to the distinctive culture of a given aboriginal society is to ask "whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is". I do not think it is possible in the present case to answer this question in the affirmative when the evidence and the findings of fact made by the trial judge upon it, and followed by both appellate courts, are properly taken into account. The impugned transactions occurred outside the particular context that constitutes the specific reason why ancient trading and bartering practices were considered integral to the distinctive culture of the Heiltsuk.

I, therefore, conclude that the appellants have failed to establish that, in engaging in the activities that have given rise to this litigation, they were exercising an aboriginal right.

2. The Issue of Extinction

Section 35(1) of the *Constitution Act, 1982* guarantees existing treaty and aboriginal rights. As this Court noted in *Sparrow, supra*, this implies that rights falling within the purview of s. 35(1) are those which had not been extinguished by the

pourvoi, eu égard aux conclusions de fait du juge du procès.

La conclusion du Juge en chef, selon laquelle les faits appuyaient aussi la thèse des appelants que [TRADUCTION] «l'échange de la roque de hareng sur varech, sur une échelle qu'il convient de qualifier de commerciale, faisait partie intégrante de la culture distinctive des Heiltsuk», me semble donc tout à fait incompatible avec les conclusions de fait du juge du procès — confirmées par les deux juridictions d'appel — portant que les opérations reprochées étaient dépourvues de l'élément fondamental qui avait permis de conclure que les pratiques historiques d'échange constituaient un droit ancestral. Voilà pourquoi je ne peux souscrire à l'analyse et à la conclusion du Juge en chef.

J'ajouterais que, dans *Van der Peet*, précité, le Juge en chef a statué, au par. 59, qu'une «façon pratique» de déterminer si une activité donnée faisait partie intégrante de la culture distinctive d'une société autochtone donnée est de se demander «si, sans cette coutume, pratique ou tradition, la culture en cause serait fondamentalement modifiée ou différente». Je ne pense pas qu'il soit possible de répondre par l'affirmative à cette question dans la présente espèce si l'on prend correctement en considération la preuve ainsi que les conclusions de fait qui ont été tirées par le juge du procès à partir de celle-ci et suivies par les deux juridictions d'appel. Les opérations reprochées sont survenues hors du contexte particulier qui constitue la raison précise pour laquelle les anciennes pratiques d'échange ont été considérées comme faisant partie intégrante de la culture distinctive des Heiltsuk.

En conséquence, je conclus que les appelants n'ont pas établi qu'ils exerçaient un droit ancestral lorsqu'ils ont accompli les activités ayant donné naissance au présent litige.

2. La question de l'extinction

Le paragraphe 35(1) de la *Loi constitutionnelle de 1982* garantit les droits existants — ancestraux ou issus de traités. Comme notre Cour l'a signalé dans l'arrêt *Sparrow*, précité, cela signifie que les droits visés au par. 35(1) sont ceux qui n'avaient

Crown pursuant to its power to do so when this provision came into force on April 17, 1982. The Court also made clear in *Sparrow* that the party invoking extinguishment has the onus of demonstrating that the Crown had expressed a clear and plain intention of extinguishing the aboriginal right at issue.

It is important at the outset to emphasize that, contrary to the views of Lambert J.A., the *Sparrow* decision only stands for the proposition that the Crown had not expressed a clear and plain intention to extinguish aboriginal rights regarding fishing for food, including social and ceremonial purposes, in British Columbia. This Court was very careful to confine its reasons to the specific circumstances of that case and it would be incorrect to hold that *Sparrow* stands for the proposition that the Crown has never expressed any intention to extinguish aboriginal rights — assuming they exist — relating to fishing for commercial or livelihood purposes. The Court stated, at p. 1101:

In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's food fishing licence. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes. [Emphasis in original.]

Before this Court, the Crown's argument was twofold. Its first submission was that Order in Council P.C. 2539 dated September 11, 1917, reveals a clear and plain intention on the part of the Crown to extinguish any aboriginal rights relating to commercial fisheries in British Columbia. Alternatively, it submitted that the fisheries regulations applicable in British Columbia regarding commercial harvesting of herring spawn on kelp before the coming into force of s. 35(1) of the *Constitution Act, 1982* intended to limit aboriginal

pas été éteints par l'État en vertu du pouvoir qu'il avait de le faire quand ce paragraphe est entré en vigueur le 17 avril 1982. Notre Cour a également clairement indiqué qu'il incombe à la partie qui invoque l'extinction du droit ancestral en cause de démontrer que l'État a exprimé l'intention claire et expresse d'éteindre ce droit.

Il importe au départ de souligner que, contrairement à l'opinion du juge Lambert de la Cour d'appel, l'arrêt *Sparrow* permet seulement d'affirmer que l'État n'avait pas exprimé l'intention claire et expresse d'éteindre les droits ancestraux en ce qui concerne la pêche pratiquée à des fins alimentaires, y compris à des fins sociales et rituelles, en Colombie-Britannique. Notre Cour a pris grand soin de s'en tenir, dans ses motifs, aux circonstances spécifiques de l'espèce, et il serait inexact de conclure que l'arrêt *Sparrow* permet d'affirmer que l'État n'a jamais exprimé l'intention d'éteindre — à supposer qu'ils existent — des droits ancestraux de pêcher à des fins commerciales ou de subsistance. À la page 1101, notre Cour a dit ceci:

Devant les tribunaux d'instance inférieure, la présente affaire n'a pas été débattue en fonction de l'existence d'un droit ancestral de pêcher à des fins commerciales ou de subsistance. Les débats ont plutôt porté, et portent encore, sur la validité d'une restriction quant à la longueur des filets qui touche le permis de pêche de subsistance de l'appelant. Nous adoptons donc, pour les fins du présent pourvoi, la caractérisation de ce droit donnée par la Cour d'appel et limitons nos motifs au sens de la reconnaissance et de la confirmation constitutionnelles du droit ancestral existant de pêcher à des fins de subsistance et à des fins sociales et rituelles. [Souligné dans l'original.]

Devant notre Cour, le ministère public a présenté un argument à deux volets. D'une part, il a soutenu que le décret C.P. 2539 daté du 11 septembre 1917 révèle l'intention claire et expresse de l'État d'éteindre tout droit ancestral relatif à la pêche commerciale en Colombie-Britannique. D'autre part, il a affirmé que le règlement de pêche concernant la récolte commerciale de la rogue de hareng sur varech qui s'appliquait en Colombie-Britannique avant l'entrée en vigueur du par. 35(1) de la *Loi constitutionnelle de 1982* visait à limiter

activity in a way that indicates the required clear and plain intention to extinguish the aboriginal right at issue.

les activités des autochtones, d'une manière indiquant l'existence de l'intention claire et expresse requise pour entraîner l'extinction du droit ancestral en cause.

109 The Crown urges this Court to consider Order in Council P.C. 2539 carefully. The point, I think, is important, for in my view the Order in Council reveals a plain, clear and unequivocal intention on the part of the Crown to extinguish any aboriginal rights relating to commercial fisheries in British Columbia, and I shall first turn to that issue.

Le ministère public invite notre Cour à examiner attentivement le décret C.P. 2539. Ce point est, je crois, important car à mon avis le décret révèle l'intention claire, expresse et non équivoque de l'État d'éteindre tout droit ancestral relatif à la pêche commerciale en Colombie-Britannique. Je vais donc l'examiner en premier lieu.

110 Order in Council P.C. 2539 amended s. 8(2) of the *Special Fishery Regulations for the Province of British Columbia* dated February 9, 1915 in order to give the fishing authorities more effective means to enforce the prohibition regarding commercial fisheries found at that time in the regulations relating to the Indian food fishing rights, while also vesting in the Chief Inspector of Fisheries the power to require permits for Indian fishing for food. As this Court held in *Sparrow, supra*, at p. 1096, "[t]he 1917 regulations were intended to make still stronger the provisions against commercial fishing in the exercise of the Indian right to fish for food" (emphasis added). The prohibition found in s. 8(2) had been introduced in the *1894 Regulations* (as s. 1), one of the very first enactments dealing with Indian Fisheries in British Columbia. Although I have found it useful to underline some key passages, it is necessary to consider Order in Council 2539 in its entirety in order to fully understand its meaning. It reads:

Le décret C.P. 2539 a modifié le par. 8(2) des *Règlements de pêche particuliers à la Colombie-Britannique*, datés du 9 février 1915, afin de donner aux responsables de la pêche des moyens plus efficaces de faire respecter l'interdiction concernant la pêche commerciale qui figurait alors dans le règlement régissant les droits des Indiens de pêcher à des fins alimentaires, et de conférer à l'inspecteur en chef des pêcheries le pouvoir d'exiger que les Indiens se procurent des permis les autorisant à pêcher pour se nourrir. Comme a conclu notre Cour dans *Sparrow*, précité, à la p. 1096, «[l]e règlement de 1917 avait pour but de rendre encore plus sévères les dispositions interdisant la pêche commerciale dans l'exercice du droit des Indiens de pêcher à des fins alimentaires» (je souligne). L'interdiction énoncée au par. 8(2) avait été introduite par le *Règlement de 1894* (à l'art. 1), l'un des tout premiers textes de loi portant sur la pêche indienne en Colombie-Britannique. Même si j'ai jugé utile de souligner certains passages clefs du décret C.P. 2539, il est nécessaire d'examiner celui-ci dans son ensemble afin de bien en saisir le sens. Voici le texte du décret:

Whereas it is represented that since time immemorial, it has been the practice of the Indians of British Columbia to catch salmon by means of spears and otherwise after they have reached the upper non-tidal portions of the rivers;

[TRADUCTION] Attendu qu'on fait valoir que, depuis des temps immémoriaux, les Indiens de la Colombie-Britannique ont pour pratique de capturer le saumon au harpon ou par d'autres moyens après que le poisson a atteint les parties supérieures des eaux sans marée des cours d'eau;

And whereas while after commercial fishing began it became eminently desirable that all salmon that succeeded in reaching the upper waters should be allowed to go on to their spawning beds unmolested, in view of the great importance the Indians attached to their prac-

Et attendu que, depuis le début de la pêche commerciale, il est devenu éminemment souhaitable que tous les saumons qui réussissent à remonter dans ces eaux puissent atteindre indemnes les frayères, vu la grande importance que les Indiens attachent à cette pratique, il

tice of catching salmon they have permitted to do so for their own food purposes only, and to this end subsection 2 of section 8 of the Special Fishery Regulations for British Columbia provides as follows: —

“2. Indians may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for themselves and their families, but for no other purpose; but no Indian shall spear, trap or pen fish on their spawning grounds, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved.”

And whereas notwithstanding this concession, great difficulty is being experienced in preventing the Indians from catching salmon in such waters for commercial purposes and recently, an Indian was convicted before a local magistrate for a violation of the above quoted regulation, the evidence being that he had been found fishing and subsequently selling fish. The case was appealed and the decision of the magistrate reversed, it being held that there was no proof that the fish caught by the Indian were those sold by him;

And whereas it is further represented that it is practically impossible for the Fishery Officers to keep fish that may be caught by the Indians in non-tidal waters, ostensibly for their own food purposes, under observation from the time they are caught until they are finally disposed of in one way or another;

And whereas the Department of the Naval Service is informed that the Indians have concluded that this regulation is ineffective, and this season arrangements are being made by them to carry on fishing for commercial purposes in an extensive way;

And whereas it is considered to be in the public interest that this should be prevented and the Minister of the Naval Service, after consultation with the Department of Justice on the subject, recommends that action as follows be taken;

Therefore His Excellency the Governor General in Council, under the authority of section 45 of the Fisheries Act, 4-5 George V, Chapter 8, is pleased to order and it is hereby ordered as follows: —

Subsection 2 of section 8 of the Special Fishery Regulations for the Province of British Columbia, adopted

leur a été permis de le faire pour se nourrir seulement; et, à cette fin, le paragraphe 2 de l'article 8 des Règlements de pêche particuliers à la Colombie-Britannique prévoit ce qui suit: —

«2. Les Indiens, avec la permission de l'inspecteur en chef des pêcheries, peuvent en tout temps capturer du poisson destiné à leur alimentation et à celle de leur famille, mais il leur est défendu de faire servir à d'autres fins, le poisson ainsi capturé; toutefois, nul Indien ne doit faire usage de harpons ou de pièges, ni ne peut enfermer des poissons dans les frayères ni dans aucun autre endroit affecté à la reproduction naturelle ou artificielle du poisson, ni en tout autre lieu réservé.»

Et attendu que, en dépit de cette concession, il est très difficile d'empêcher les Indiens de pêcher le saumon à des fins commerciales dans ces eaux et que, récemment, un Indien a été déclaré coupable par un magistrat local d'une infraction au règlement précité, la preuve ayant établi qu'il avait pêché et ensuite vendu le poisson capturé. L'affaire a été portée en appel et la décision du magistrat infirmée, le tribunal statuant qu'il n'y avait aucune preuve que les poissons pris par l'Indien étaient ceux qu'il avait vendus;

Et attendu qu'on fait, aussi valoir qu'il est pratiquement impossible pour les surveillants des pêches d'observer constamment le poisson qui a pu être pris par les Indiens dans les eaux sans marée, apparemment pour leur propre alimentation, depuis le moment où il est pris jusqu'à celui où il en est disposé définitivement, d'une manière ou d'une autre;

Et attendu que le ministère du Service naval a été informé que les Indiens ont conclu que ce règlement est inefficace, et que, cette saison, ils font des préparatifs en vue de pêcher à des fins commerciales sur une grande échelle;

Et attendu qu'il est jugé être dans l'intérêt public d'empêcher ces activités, et que le ministère du Service naval, après avoir consulté le ministère de la Justice à cet égard, recommande que soient prises les mesures suivantes;

À ces causes, il plaît à Son Excellence le Gouverneur général en conseil, sous l'empire de l'article 45 de la *Loi sur les pêcheries*, 4-5 George V, chapitre 8, de décréter ce qui suit: —

Le paragraphe 2 de l'article 8 des Règlements de pêche particuliers à la Colombie-Britannique, pris par

by Order in Council of the 9th February, 1915, is hereby rescinded, and the following is hereby enacted and substituted in lieu thereof: —

“2. An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose. . . . An Indian shall not fish for or catch fish pursuant to the said permit except in the waters by the means or in the manner and within the time limit expressed in the said permit, and any fish caught pursuant to any such permit shall not be sold or otherwise disposed of and a violation of the provisions of the said permit shall be deemed to be a violation of these regulations.

(a) Proof of a sale or of a disposition by any other means by an Indian of any fish shall be prima facie evidence that such fish was caught by the said Indian, and that it was caught for a purpose other than to be used as food for himself or his family, and shall throw on the Indian the onus of proving that such fish was not caught under or pursuant to the provisions of any such permit.

(b) No Indian shall spear, trap or pen fish on their spawning grounds, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved.

(c) Any person buying any fish or portion of any fish caught under such permit shall be guilty of an offence against these regulations.” [Emphasis added.]

décret daté du 9 février 1915, est par les présentes abrogé et remplacé par ce qui suit: —

«2. Les Indiens avec la permission de l'inspecteur en chef des pêcheries, peuvent en tout temps capturer du poisson destiné à leur alimentation et à celle de leur famille, mais il leur est défendu de faire servir à d'autres fins, le poisson ainsi capturé. [. . .] Les Indiens n'ont pas le droit de capturer les espèces de poisson spécifiées, si ce n'est dans les eaux, d'après le procédé, et à l'époque prescrite dans ce permis, et ils ne peuvent ni les vendre ni en disposer autrement, toutes violations des dispositions du permis constituent une infraction à ces règlements.

a) Le fait pour un indien de vendre du poisson ou d'en disposer de toute autre façon constitue une preuve suffisante pour faire soupçonner que le poisson a été capturé par cet indien, et qu'il l'a été dans un but étranger à celui de son alimentation ou celle de sa famille; il lui devient conséquemment nécessaire de prouver que ce poisson n'a pas été pêché en vertu des dispositions du permis.

b) Nul indien ne peut faire usage de harpons ou de pièges, ni ne peut enfermer des poissons dans les frayères ni dans aucun autre endroit affecté à la reproduction naturelle ou artificielle du poisson, ni en tout autre lieu réservé.

c) Toute personne achetant du poisson ou un morceau de poisson capturé en vertu d'un tel permis se rend passible d'un délit contre ces règlements.» [Je souligne.]

111 The key to a proper understanding of the Order in Council lies in its preamble, in which the purpose and rationale of the prohibition is clearly stated. In the first two paragraphs of the preamble, there is an explicit reference to (a) the fact that the aboriginal peoples of British Columbia had been catching salmon by means of spears and otherwise “since time immemorial” and to (b) the fact that, in view of the great importance the aboriginal people of British Columbia attached to that practice, they have been permitted to do so for their own food purposes as provided for in s. 8(2) of the 1915 regulations. To me, this constitutes explicit recognition on the part of the Crown of the importance of allowing the aboriginal people of British Columbia to catch fish as they had been doing since time immemorial. Therefore, the permission provided for in s. 8(2) constitutes a positive legislative rec-

La clef pour bien interpréter le décret réside dans son préambule, où sont clairement énoncés l'objet et la raison d'être de l'interdiction. Dans les deux premiers paragraphes du préambule, on fait explicitement mention: a) du fait que les peuples autochtones de la Colombie-Britannique ont pris du saumon à l'aide de harpons ou par d'autres moyens «depuis des temps immémoriaux»; b) du fait que, vu la grande importance qu'accordaient à cette pratique les peuples autochtones de la Colombie-Britannique, ils étaient autorisés à la poursuivre pour satisfaire leurs propres besoins alimentaires, conformément au par. 8(2) du règlement de 1915. À mon sens, cela constitue la reconnaissance explicite par l'État du fait qu'il était important de permettre aux autochtones de la Colombie-Britannique de prendre le poisson comme ils l'avaient fait depuis des temps immé-

ognition of the aboriginal people's right to engage in fishing practices they had engaged in since time immemorial and which had great importance to them. In other words, in light of this preamble, s. 8(2) constitutes the translation of an acknowledged aboriginal practice into a statutory right.

However, it is expressly noted in the preamble, as it is in s. 8(2), that this "concession" on the part of the Crown in favour of aboriginal peoples of British Columbia regarding traditional fishing practices was not to have any commercial dimension. In other words, the Crown refused to recognize that traditional aboriginal fishing practices could in any way translate into statutory rights relating to commercial fisheries while expressly providing that engaging in commercial practices in the exercise of the Indian statutory right to food fishing was prohibited and constituted a regulatory offence.

I cannot come to any other conclusion than that Order in Council P.C. 2539 evinces a clear and plain intention on the part of the Crown to extinguish aboriginal rights relating to commercial fisheries — should they ever have existed. When the Crown has specifically chosen to address the issue of the translation of aboriginal practices into statutory rights and has expressly decided to limit the scope of these rights, as was done in British Columbia in relation to Indian fishing practices, then it follows, in my view, that aboriginal rights relating to practices that were specifically excluded were thereby extinguished.

I also note that, as the respondent explained, s. 8(2) has always been a central feature of the regulatory scheme regarding the Indian food fishery in British Columbia since 1894 (*Fishery Regulations for the Province of British Columbia*, P.C. 650); see, for example, s. 13(2) of the 1922 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 1918), s. 15 of the 1925 Regulations (*Special Fishery Regulations for the*

moriaux. Par conséquent, la permission accordée au par. 8(2) constitue une reconnaissance concrète dans la loi du droit des autochtones de poursuivre les pratiques qu'ils suivaient depuis des temps immémoriaux et qui avaient pour eux une grande importance. Autrement dit, vu sous l'éclairage de ce préambule, le par. 8(2) fait d'une pratique autochtone reconnue un droit prévu par la loi.

Toutefois, il est expressément souligné dans le préambule, tout comme au par. 8(2), que cette «concession» de l'État en faveur des peuples autochtones de la Colombie-Britannique en ce qui concerne les pratiques traditionnelles de pêche n'aurait pas de dimension commerciale. En d'autres mots, l'État refusait de reconnaître que les pratiques traditionnelles de pêche des autochtones pouvaient, de quelque manière que ce soit, être converties en droits de pêche commerciale, et indiquait expressément qu'il était interdit de s'adonner à des pratiques commerciales dans l'exercice du droit qu'avaient les Indiens en vertu de la loi de pêcher pour se nourrir, et que de telles pratiques constituaient des infractions au règlement.

Je ne peux que conclure qu'il ressort du décret C.P. 2539 une intention claire et expresse de la part de l'État d'éteindre les droits ancestraux relatifs à la pêche commerciale — si ces droits ont jamais existé. Lorsque l'État a spécifiquement choisi de prendre des mesures concernant la question de la conversion de pratiques autochtones en droits prévus par la loi, et qu'elle a expressément décidé de limiter la portée de ces droits, comme ce fut le cas en Colombie-Britannique relativement aux pratiques des Indiens en matière de pêche, il s'ensuit, à mon avis, que les droits ancestraux touchant des pratiques qui ont été spécifiquement exclues ont, de ce fait, été éteints.

Je souligne également que, comme l'a expliqué l'intimée, le par. 8(2) a toujours été un aspect central du régime de réglementation touchant la pêche pratiquée à des fins alimentaires par les Indiens en Colombie-Britannique depuis 1894 (*Règlement de pêche de la Colombie-Britannique*, C.P. 650); voir, par exemple, le par. 13(2) du Règlement de 1922 (*Règlements de pêche particuliers à la Colombie-Britannique*, C.P. 1918), l'art. 15 du Règlement de

Province of British Columbia, P.C. 483), s. 11(2) of the 1930 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 512), s. 10(2) of the 1938 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 899), s. 32 of the 1954 Regulations (*British Columbia Fishery Regulations*, SOR/54-659), s. 29 of the 1977 Regulations (*British Columbia Fishery (General) Regulations*, SOR/77-716), s. 27 of the 1984 Regulations (*British Columbia Fishery (General) Regulations*, SOR/84-248). Thus, in light of the provision's rationale as stated explicitly in Order in Council 2539, it seems to me that it has always been a central feature of the regulatory scheme regarding the Indian food fishery in British Columbia that the Crown did not perceive the Indians' fishing rights rooted in practices integral to their distinctive culture for centuries as extending to commercial fisheries.

1925 (*Règlements de pêche particuliers à la Colombie-Britannique*, C.P. 483), le par. 11(2) du Règlement de 1930 (*Règlements de pêche particuliers à la Colombie-Britannique*, C.P. 512), le par. 10(2) du Règlement de 1938 (*Règlements de pêche particuliers à la Colombie-Britannique*, C.P. 899), l'art. 32 du Règlement de 1954 (*Règlement de pêche de la Colombie-Britannique*, DORS/54-659), l'art. 29 du Règlement de 1977 (*Règlement de pêche général de la Colombie-Britannique*, DORS/77-716) et l'art. 27 du Règlement de 1984 (*Règlement de pêche général de la Colombie-Britannique*, DORS/84-248). Par conséquent, à la lumière de la raison d'être de la disposition, qui est explicitement énoncée dans le décret C.P. 2539, il me semble que le point de vue de l'État — selon lequel les droits de pêche des Indiens enracinés dans des pratiques faisant partie intégrante de leur culture distinctive depuis des siècles ne s'étendaient pas à la pêche commerciale — a toujours été une caractéristique centrale du régime de réglementation visant la pêche pratiquée à des fins alimentaires par les Indiens en Colombie-Britannique.

115 My colleague Justice McLachlin, in her reasons, expresses the opinion in *Van der Peet*, *supra*, that Order in Council P.C. 2539 did not extinguish aboriginal rights to fish commercially for two reasons. The first is that a clear and plain intention on the part of the Crown to extinguish an aboriginal right can only be found if three elements are present: acknowledgment of an aboriginal right, conflict of the right proposed with policy and resolution of the two. Order in Council P.C. 2539 fails to meet that test, she states, because "[t]here is no recognition in the words of the regulation of any aboriginal right to fish"; see para. 289. Her second reason is that aboriginal peoples of British Columbia have never been totally prohibited from engaging in commercial fisheries since it has always been available to them to do so according to the regulatory scheme relating to commercial fisheries.

Dans ses motifs dans l'arrêt *Van der Peet*, précité, ma collègue le juge McLachlin exprime l'avis que le décret C.P. 2539 n'a pas éteint les droits ancestraux de pêche commerciale, et ce pour deux raisons. La première est qu'il n'est possible de conclure à l'intention claire et expresse de l'État d'éteindre un droit ancestral que si trois éléments sont réunis: la reconnaissance de l'existence d'un droit ancestral; un conflit entre le droit revendiqué et la politique proposée; la résolution du conflit. Or, affirme-t-elle, le décret C.P. 2539 ne satisfait pas à ce critère, parce que «[l]e texte du règlement ne reconnaît d'aucune façon l'existence de quelque droit de pêche ancestral»; voir le par. 289. La seconde raison est qu'il n'a jamais été totalement interdit aux peuples autochtones de la Colombie-Britannique de participer à la pêche commerciale, puisqu'il leur a toujours été loisible de le faire conformément au régime de réglementation visant cette pêche.

116 I do not agree with my colleague that finding a clear and plain intention should require an

Je ne souscris pas à l'avis de ma collègue que, pour conclure à l'existence d'une intention claire

acknowledgment of the existence of an aboriginal right on the part of the Crown. Although the fiduciary nature of the relationship between the Crown and aboriginal peoples must be taken into account in assessing whether or not a clear and plain intention to extinguish an aboriginal right exists in a given scheme, one must be careful not to set standards that could realistically never be met by the Crown since this would, as a practical matter, render virtually meaningless the Crown's power to extinguish aboriginal rights. Historically, the Crown has always been very reluctant to recognize any legal effect to concepts such as "aboriginal rights" and "aboriginal title", as this Court discussed at length in *Sparrow*, *supra*, at pp. 1103 *et seq.* This historical reality cannot be ignored in assessing whether a plain and clear intention to extinguish an aboriginal right exists in a given context. To require specific acknowledgment of the existence of an aboriginal right by the Crown in the manner proposed by my colleague McLachlin J. would for that reason not, in my view, be realistic. Indeed such an approach has been implicitly rejected by this Court; see, for example, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654.

I also disagree with my colleague's reasoning that Order in Council P.C. 2539 does not constitute a clear and plain intention to extinguish an aboriginal right because aboriginal peoples had always been permitted to participate in commercial fisheries in accordance with the distinct regulatory scheme relating to commercial fisheries. As I mentioned, I think the Order in Council speaks for itself. It seems to me that when, in regulations dealing specifically with the rights of the Indians to fish, it prohibited them from engaging in commercial fisheries, it must have intended to limit their rights *qua* Indians. I do not see that it is necessary for the Crown to prohibit them from fishing under regulations directed not only to Indians but also to all members of the public.

et expresse, il faut qu'il y ait reconnaissance par l'État de l'existence d'un droit ancestral. Même si la nature fiduciaire des rapports entre l'État et les peuples autochtones doit être prise en considération dans l'examen de la question de savoir s'il se dégage d'un régime donné une intention claire et expresse d'éteindre un droit ancestral, il faut avoir soin de ne pas fixer de normes auxquelles l'État ne pourrait réalistement jamais satisfaire, car, dans la pratique, cela rendrait virtuellement sans effet le pouvoir de l'État d'éteindre des droits ancestraux. Historiquement, l'État a toujours été très réticent à reconnaître quelque effet juridique à des concepts tels que les «droits ancestraux» et le «titre aborigène», comme il ressort de l'examen approfondi fait par notre Cour dans *Sparrow*, précité, aux pp. 1103 et suiv. Il ne faut pas faire abstraction de cette réalité historique dans l'examen de la question de savoir s'il existe, dans un contexte donné, une intention claire et expresse d'éteindre un droit ancestral. Voilà pourquoi il serait irréaliste, à mon sens, d'exiger la reconnaissance spécifique par l'État de l'existence d'un droit ancestral, comme le propose ma collègue le juge McLachlin. De fait, notre Cour a implicitement rejeté une telle approche; voir, par exemple, l'arrêt *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654.

Je ne suis pas d'accord non plus avec le raisonnement de ma collègue lorsqu'elle dit que le décret C.P. 2539 n'indique pas une intention claire et expresse d'éteindre un droit ancestral parce que les autochtones ont toujours été autorisés à participer à la pêche commerciale conformément au régime de réglementation distinct applicable à cette pêche. Comme je l'ai dit plus tôt, j'estime que le texte du décret est éloquent. Il me semble que lorsque, dans un règlement portant précisément sur les droits de pêche des Indiens, l'État interdisait à ceux-ci de pratiquer la pêche commerciale, il devait avoir l'intention de limiter les droits dont ils jouissaient en qualité d'Indiens. Je ne crois pas qu'il soit nécessaire que l'État interdise aux Indiens de pêcher dans un règlement qui s'appliquerait non seulement à eux, mais aussi à tous les membres du public.

118 It is also important to note that although commercial fishing was, generally speaking, not totally prohibited, commercial harvesting of herring spawn on kelp was the subject of a total prohibition until 1974. For that reason, the considerations to be taken into account at this stage of the analysis are different from those in *Van der Peet, supra*, because in that case a general aboriginal right to commercial fisheries was claimed, as opposed to the more specific right to commercial harvesting of herring spawn on kelp claimed in the instant case. This leads me to discuss briefly the Crown's second submission.

119 The Crown argued that a clear and plain intention on the part of the Crown to extinguish the aboriginal right claimed by the appellants could be found in the regulatory scheme relating to commercial harvesting of herring spawn on kelp. That scheme has for many years prohibited commercial harvesting of herring spawn on kelp, as indicated by the Chief Justice and McLachlin J., although since 1974 the activity has been permitted to those to whom a licence has been issued for that purpose. The Crown urges this Court to distinguish the regulations at issue in *Sparrow, supra*, on the basis that those regulations were concerned with protecting the food fishery for aboriginal people and were, therefore, found to constitute an affirmation of that right.

120 The Chief Justice dismissed the argument on the basis that the regulatory scheme relating to commercial harvesting of herring spawn on kelp was analogous to that discussed in *Sparrow, supra*. There, this Court addressed the question of extinguishment in the context of the aboriginal right of the Musqueam Indians of British Columbia to fish for food and ceremonial purposes. This Court's analysis demonstrated that, over the years, Indian fishing for food and ceremonial purposes had been progressively regulated; see pp. 1095 *et seq.* as well as the reasons of Dickson J. (as he then was) in *Jack v. The Queen*, [1980] 1 S.C.R. 294, at pp. 308 *et seq.* But, however regulated the activity became, this Court refused to find that the aborigi-

Il importe en outre de souligner que, même si la pêche commerciale n'était pas, de façon générale, totalement interdite, la récolte commerciale de la rogue de hareng sur varech a fait l'objet d'une interdiction totale jusqu'en 1974. Pour cette raison, les facteurs dont il faut tenir compte à cette étape de l'analyse ne sont pas les mêmes que dans *Van der Peet*, précité, étant donné que, dans cette affaire, l'on revendiquait un droit ancestral général de pratiquer la pêche commerciale, par opposition au droit plus spécifique réclamé en l'espèce, soit celui de récolter commercialement de la rogue de hareng sur varech. Cela m'amène à examiner brièvement le second argument du ministère public.

Le ministère public a soutenu qu'il était possible de dégager du régime de réglementation visant la récolte commerciale de la rogue de hareng sur varech une intention claire et expresse de la part de l'État d'éteindre le droit ancestral revendiqué par les appelants. Ce régime a, pendant de nombreuses années, interdit la récolte commerciale de cette ressource, comme l'ont indiqué le Juge en chef et le juge McLachlin, quoique, depuis 1974, les titulaires de permis délivrés à cette fin peuvent exercer cette activité. Le ministère public invite notre Cour à établir une distinction entre le règlement visé en l'espèce et celui en cause dans *Sparrow*, précité, parce que le second visait à protéger le droit des autochtones de pêcher pour se nourrir, et qu'il a, en conséquence, été jugé qu'il constituait une confirmation de ce droit.

Le Juge en chef a rejeté cet argument pour le motif que le régime de réglementation de la récolte commerciale de la rogue de hareng sur varech était analogue au régime examiné dans *Sparrow*, précité. Dans cet arrêt, notre Cour a examiné la question de l'extinction dans le contexte du droit ancestral des Indiens Musqueams de la Colombie-Britannique de pêcher à des fins alimentaires et rituelles. L'analyse de notre Cour a démontré que, au fil des ans, la pêche pratiquée par les Indiens à des fins alimentaires et rituelles avait été progressivement réglementée: voir les pp. 1095 *et suiv.*, ainsi que les motifs du juge Dickson (plus tard Juge en chef) dans *Jack c. La Reine*, [1980] 1 R.C.S. 294, aux pp. 308 *et suiv.* Toutefois, peu

nal right of fishing for food and social and ceremonial purposes had been extinguished. The Court had this to say, at pp. 1097 and 1099:

At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.

There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

If this were all, I would be inclined to agree with the Chief Justice's position on this point. But I think there is an important distinction to be drawn between the regulations at issue here and those discussed in *Sparrow*. While commercial harvesting of herring spawn on kelp had been totally prohibited in British Columbia until 1974, Indian fishing for food including social and ceremonial purposes had never been prohibited when s. 35(1) of the *Constitution Act, 1982* came into force. For this reason, I would refrain from holding that the reasoning adopted by this Court in *Sparrow*, which was to the effect that mere regulation of a right does not amount to a clear and plain intention to extinguish an aboriginal right, would be determinative of the Crown's second argument in the present case.

However, I prefer not to discuss this issue in further detail and will not, therefore, discuss whether the prohibition relating to commercial harvesting of herring spawn on kelp in force until 1974 in itself indicates a plain and clear intention on the part of the Crown to extinguish the aboriginal right

importe le degré de réglementation auquel l'activité est devenue assujettie, notre Cour a refusé de conclure que le droit ancestral de pêcher à des fins alimentaires, sociales et rituelles avait été éteint. Elle a dit ceci, aux pp. 1097 et 1099:

En réalité, l'intimé confond dans son argumentation la réglementation et l'extinction. Que l'exercice du droit fasse l'objet d'une réglementation très minutieuse, cela ne signifie pas que ce droit est par le fait même éteint.

La *Loi sur les pêcheries* ou ses règlements d'application détaillés ne font état d'aucune intention claire et expresse de mettre fin au droit ancestral des Indiens de pêcher. Le fait qu'une disposition autorisant explicitement les Indiens à pêcher à des fins de subsistance ait pu s'appliquer à tous les Indiens et que la délivrance des permis ait pendant longtemps été discrétionnaire et effectuée sur une base individuelle plutôt que collective n'indique aucunement une intention claire d'éteindre le droit. Ces permis constituaient simplement une façon de contrôler les pêcheries et non de définir des droits sous-jacents.

Si c'était tout, je serais porté à souscrire à la position du Juge en chef sur ce point. Cependant, je crois qu'il faut faire une distinction importante entre le règlement visé en l'espèce et celui en cause dans *Sparrow*. Alors que la récolte commerciale de la rogue de hareng sur varech a été totalement interdite en Colombie-Britannique jusqu'en 1974, la pêche pratiquée par les Indiens à des fins alimentaires, y compris à des fins sociales et rituelles, ne l'avait jamais été lorsque le par. 35(1) de la *Loi constitutionnelle de 1982* est entré en vigueur. Pour cette raison, je m'abstiendrais de conclure que le raisonnement suivi par notre Cour dans *Sparrow*, savoir que la simple réglementation d'un droit ancestral ne constitue pas une intention claire et expresse d'éteindre ce droit, est déterminant à l'égard du second argument du ministère public dans la présente espèce.

Toutefois, je préfère ne pas examiner ce point plus en détail, et je ne vais donc pas trancher la question de savoir si l'interdiction de récolter commercialement de la rogue de hareng sur varech qui a été en vigueur jusqu'en 1974 indique en soi une intention claire et expresse de l'État d'éteindre le

claimed by the appellants. It is not necessary for me to do so since I have already concluded that the Crown has expressed a clear and plain intention in Order in Council P.C. 2539 to extinguish any aboriginal rights relating to commercial fisheries in British Columbia — assuming they ever existed. The question whether extinguishment of aboriginal rights can occur by necessary implication and if so, in what circumstances, is therefore left to another day.

droit ancestral revendiqué par les appelants. Il n'est pas nécessaire que je le fasse, puisque j'ai déjà conclu que l'État avait manifesté, dans le décret C.P. 2539, l'intention claire et expresse d'éteindre tous les droits ancestraux relatifs à la pêche commerciale en Colombie-Britannique — à supposer qu'ils aient jamais existé. La question de savoir si des droits ancestraux peuvent être éteints par implication nécessaire, et, si oui, dans quelles circonstances, devra donc être tranchée à une autre occasion.

123

On a final note, I wish to emphasize that our Court has recently held on two different occasions that s. 12 of the *Natural Resources Transfer Agreement* (confirmed by the *Constitution Act, 1930*, R.S.C., 1985, App. II, No. 26, Schedule 2) constituted a clear and plain intention on the part of the Crown to extinguish treaty rights to commercial hunting; see *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 933 (*per* Cory J.), and *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 46 (*per* Cory J.). This provision reads:

En terminant, je tiens à souligner que notre Cour a récemment statué, à deux occasions différentes, que l'art. 12 de la *Convention sur le transfert des ressources naturelles* (confirmée par la *Loi constitutionnelle de 1930*, L.R.C. (1985), app. II, n° 26, annexe 2) exprimait l'intention claire et expresse de l'État d'éteindre les droits issus de traités en matière de chasse commerciale: voir *R. c. Horseman*, [1990] 1 R.C.S. 901, à la p. 933 (le juge Cory), et *R. c. Badger*, [1996] 1 R.C.S. 771, au par. 46 (le juge Cory). Cette disposition est ainsi rédigée:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

12. Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

This provision is similar in many respects to Order in Council P.C. 2539. They both are provisions in which the Crown specifically effected a translation of traditional aboriginal practices into legal rights. In both cases, the rights were limited to sustenance purposes. However, in the Order in Council, fishing for commercial purposes was expressly excluded. This was not the case in s. 12 of the *Natural Resources Transfer Agreement* in which no mention is made of commercial practices. Nonetheless, our Court held that it sufficiently demonstrated a clear and plain intention on the part of the

Cette disposition est, à bien des égards, analogue au décret C.P. 2539. Dans les dispositions des deux textes, l'État a spécifiquement fait de pratiques autochtones des droits prévus par la loi. Dans les deux cas, l'exercice des droits visés a été limité à des fins alimentaires. Cependant, dans le décret, la pêche à des fins commerciales a été expressément exclue, alors que ce n'a pas été le cas à l'art. 12 de la *Convention sur le transfert des ressources naturelles*, dans lequel il n'est fait aucune mention des pratiques commerciales. Néanmoins, notre Cour a conclu que cette disposi-

Crown to extinguish commercial rights to hunt for commercial purposes that had been recognized in a treaty. If s. 12 reveals a clear and plain intention to extinguish treaty rights relating to commercial hunting, it is difficult to see how this Court could conclude that Order in Council P.C. 2539 — which is more explicit regarding the exclusion of any commercial component of fishing rights — does not reveal a clear and plain intention on the part of the Crown to extinguish commercial fishing rights in British Columbia.

I am, therefore, of the view that the Crown has established that, assuming appellants were exercising an aboriginal right when they offered to sell herring spawn on kelp, such a right has been extinguished.

Conclusion

I would dismiss the appeals and answer the constitutional question in the negative.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. — This appeal, as well as the appeals in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, in which reasons are being released concurrently, concern aboriginal rights as constitutionally protected under s. 35(1) of the *Constitution Act, 1982*.

This broad issue was dealt with in *Van der Peet*, released concurrently. Both cases involve mainly the definition of the nature and extent of aboriginal rights. In this case, the particular question is whether the Heiltsuk Band, of which the appellants are members, possesses an existing aboriginal right to fish which includes the right to sell, trade and barter fish for commercial purposes. If this right exists, the Court must then determine whether the *Pacific Herring Fishery Regulations*, SOR/84-324, enacted pursuant to the *Fisheries Act*, R.S.C. 1970, c. F-14, constitute a *prima facie*

intention démontrant suffisamment l'existence d'une intention claire et expresse de la part de l'État d'éteindre les droits de chasser à des fins commerciales qui avaient été reconnus par traité. Si l'art. 12 révèle une intention claire et expresse d'éteindre les droits issus de traité en matière de chasse commerciale, il est difficile d'imaginer comment notre Cour pourrait conclure que le décret C.P. 2539 — qui est plus explicite en ce qui concerne l'exclusion de toute dimension commerciale des droits de pêche — n'indique pas une intention claire et expresse de la part de l'État d'éteindre les droits de pêche commerciale en Colombie-Britannique.

Je suis donc d'avis que le ministère public a établi que, à supposer que les appelants exerçaient un droit ancestral quand ils ont offert de vendre de la rogue de hareng sur varech, ce droit a été éteint.

Conclusion

Je suis d'avis de rejeter les pourvois et de répondre à la question constitutionnelle par la négative.

Les motifs suivants ont été rendus par

LE JUGE L'HEUREUX-DUBÉ — Le présent pourvoi ainsi que les pourvois *R. c. Van der Peet*, [1996] 2 R.C.S. 507, et *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672, dont les motifs sont rendus en même temps, portent sur les droits ancestraux qui bénéficient de la protection de la Constitution en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*.

Cette question générale a été étudiée dans l'arrêt *Van der Peet*, rendu à la même date. Ces pourvois portent respectivement principalement sur la définition de la nature et de la portée des droits ancestraux. En l'espèce, la question particulière est de savoir si la bande des Heiltsuk, à laquelle appartiennent les appelants, possède un droit de pêche ancestral existant qui inclut le droit de vendre et d'échanger du poisson à des fins commerciales. Si ce droit existe, notre Cour doit alors décider si le *Règlement de pêche du hareng du Pacifique*, DORS/84-324, adopté en application de la *Loi sur*

infringement of such right and, if so, whether the infringement is justified.

les pêcheries, S.R.C. 1970, ch. F-14, constitue une atteinte *prima facie* à ce droit et, dans l'affirmative, si cette atteinte est justifiée.

128 The Chief Justice has set out the facts and judgments and there is no need to restate them here. I will refer only to the constitutional question that he formulated after leave to appeal was granted by this Court:

Is s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324, as it read on April 28, 1988, of no force or effect with respect to the appellants in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellants?

Le Juge en chef a exposé les faits et les jugements, et il n'est pas nécessaire de les reprendre. Je ne citerai que la question constitutionnelle qu'il a formulée après que l'autorisation de pourvoi a été accordée par notre Cour:

Le paragraphe 20(3) du *Règlement de pêche du hareng du Pacifique*, DORS/84-324, tel qu'il se lisait le 28 avril 1988, est-il, dans les circonstances de la présente affaire, inopérant à l'égard des appelants en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'ils invoquent?

129 The Chief Justice is of the view that the Heiltsuk people do possess an aboriginal right to fish which includes the right to sell fish for commercial purposes. As well, referring to the *Sparrow* test, he holds that the aboriginal right to sell fish was not extinguished by a clear and plain intention and that s. 20(3) of the *Pacific Herring Fishery Regulations* constitutes a *prima facie* infringement of such right. He concludes, however, that the case should be remanded to trial on the question of justification because there is insufficient evidence to enable this Court to decide it. Lamer C.J. also opines that the elements of the infraction are all proven. I agree with the result reached by the Chief Justice and, generally, with the reasons he adopts subject, however, to the following remarks regarding mainly the definition of the nature and extent of aboriginal rights, and the delineation of the aboriginal right claimed in this case.

Le Juge en chef est d'avis que les Heiltsuk possèdent effectivement un droit de pêche ancestral qui inclut le droit de vendre du poisson à des fins commerciales. En outre, se reportant au test établi dans *Sparrow*, il estime que le droit ancestral de vendre du poisson n'a pas été éteint par suite de la manifestation d'une intention claire et expresse, et que le par. 20(3) du *Règlement de pêche du hareng du Pacifique* constitue une atteinte *prima facie* à ce droit. Il conclut toutefois qu'il y a lieu de renvoyer l'affaire pour la tenue d'un nouveau procès sur la question de la justification, étant donné que la preuve est insuffisante pour permettre à notre Cour de trancher celle-ci. Le juge en chef Lamer est aussi d'avis que les éléments de l'infraction ont tous été prouvés. Je suis d'accord avec le résultat auquel il arrive et, de façon générale, avec les motifs qu'il donne, sous réserve cependant des remarques suivantes, qui concernent surtout la définition de la nature et de la portée des droits ancestraux, ainsi que la délimitation du droit ancestral revendiqué en l'espèce.

130 I pause here to note that this case is confined to the recognition of an aboriginal right and to the protection afforded to it under s. 35(1) of the *Constitution Act, 1982*. The appellants did not invoke by-laws applicable on reserve lands, nor did they rely on any aboriginal title or treaty rights. The appellants simply argue that the Heiltsuk possess an aboriginal right to fish — arising out of the historic occupation and use of their ancestral lands —

Je fais une parenthèse pour dire que la présente affaire ne porte que sur la reconnaissance d'un droit ancestral et sur la protection accordée à ce droit en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*. Les appelants n'ont pas invoqué de règlement administratif applicable aux terres des réserves ni de titre aborigène ou de droits issus de traités. Ils prétendent simplement que les Heiltsuk ont — en raison de l'occupation et de l'utilisation

which includes the right to sell, trade and barter fish for commercial purposes, and that this right benefits from the s. 35(1) constitutional protection.

It is also noteworthy that the questions at issue must be considered in light of the analytical framework for constitutional claims of aboriginal right set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In a nutshell, the *Sparrow* test includes three steps, namely: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a *prima facie* infringement of such right; and (3) the justification of the infringement. The case at bar involves all but the last step.

This being said, in the following discussion, I will briefly examine the approach to the interpretation of the nature and extent of aboriginal rights as well as the delineation of the aboriginal right claimed, and how they lead me to the same result as the Chief Justice on the question of the definition of the aboriginal right.

I. Interpretation of Aboriginal Rights

At the outset, I want to emphasize that when defining the nature and extent of constitutionally protected aboriginal rights, it is important to keep in mind the traditional and fundamental interpretative canons relating to aboriginal law and to s. 35(1) of the *Constitution Act, 1982*, which can be summarized as follows. Section 35(1) must be given a generous, large and liberal interpretation and uncertainties, ambiguities or doubts should be resolved in favour of the natives. Further, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people. Finally, but most significantly, aboriginal rights protected under s. 35(1) have to be viewed in the context of the specific history and culture of the native society and with regard to native perspective on the meaning of the rights asserted. I wish to point out, in passing, that although the Chief Justice claims

historiques de leurs terres ancestrales — un droit ancestral de pêche qui inclut le droit de vendre et d'échanger du poisson à des fins commerciales, et que ce droit bénéficie de la protection constitutionnelle du par. 35(1).

Il convient également de noter que les questions en litige doivent être examinées à la lumière du cadre d'analyse des revendications de droits ancestraux en vertu de la Constitution qui a été exposé dans *R. c. Sparrow*, [1990] 1 R.C.S. 1075. Bref, le test formulé dans *Sparrow* comporte trois étapes: (1) l'évaluation et la définition d'un droit ancestral existant (y compris son extinction), (2) l'établissement d'une atteinte *prima facie* à ce droit, et (3) la justification de cette atteinte. Il faut, dans le cadre du présent pourvoi, passer par toutes ces étapes sauf la dernière.

Cela dit, je vais, dans les paragraphes qui suivent, examiner brièvement les méthodes qu'il convient d'appliquer pour interpréter la nature et la portée des droits ancestraux et définir le droit ancestral revendiqué, et expliquer ensuite pourquoi elles m'amènent au même résultat que le Juge en chef sur la question de la définition du droit ancestral.

I. Interprétation des droits ancestraux

Tout d'abord, je tiens à souligner que, pour définir la nature et la portée des droits ancestraux bénéficiant de la protection constitutionnelle, il importe de tenir compte des principes traditionnels et fondamentaux d'interprétation relatifs au droit touchant les autochtones et au par. 35(1) de la *Loi constitutionnelle de 1982*, qui peuvent être résumés de la façon suivante. Le paragraphe 35(1) doit recevoir une interprétation généreuse, large et libérale, et les ambiguïtés, doutes ou incertitudes doivent être résolus en faveur des autochtones. En outre, les droits ancestraux doivent être interprétés à la lumière des rapports spéciaux de fiduciaire et de la responsabilité de Sa Majesté à l'égard des peuples autochtones. Finalement, le dernier principe — mais aussi le plus important — est que les droits ancestraux protégés par le par. 35(1) doivent être interprétés dans le contexte de l'histoire et de la culture particulières de la société autochtone

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to use these principles of interpretation, his approach to the definition of aboriginal rights appears to be somewhat restrictive.

concernée, et en tenant compte du point de vue des autochtones eux-mêmes quant à la signification des droits revendiqués. Je tiens à faire remarquer, en passant, que même si le Juge en chef affirme suivre ces principes d'interprétation, la méthode qu'il applique pour définir les droits ancestraux semble un peu restrictive.

134 The approach proposed by the Chief Justice centres on individualized practices of an aboriginal group of people which existed prior to contact with the Europeans. With respect, as I explained in detail in *Van der Peet*, *supra* — which reasons should be read as if herein recited at length — this position poses serious problems relating to both the characteristics and the time aspects of the definition of aboriginal rights.

La méthode proposée par le Juge en chef est axée sur les pratiques propres à un groupe d'autochtones et qui existaient avant le contact avec les Européens. En toute déférence, toutefois, comme je l'ai expliqué en détail dans *Van der Peet*, précité, — dont les motifs que j'y ai exposés doivent être tenus pour reproduits intégralement en l'espèce — cette position pose de sérieux problèmes tant en ce qui concerne les caractéristiques que la période dont il faut tenir compte pour définir les droits ancestraux.

135 In *Van der Peet*, after a detailed review of the possible approaches to the interpretation of aboriginal rights under s. 35(1), I concluded that the "frozen right" approach focusing on aboriginal practices should not be adopted. Instead, the definition of aboriginal rights should refer to the notion of "integral part of their distinctive culture" and should "permit their [aboriginal rights'] evolution over time" (see *Sparrow*, *supra*, at pp. 1099 and 1093). I gave the following guidelines on this approach (at para. 180):

Dans *Van der Peet*, après avoir examiné en détail les différentes méthodes d'interprétation possibles des droits ancestraux protégés par le par. 35(1), j'ai conclu qu'il n'y avait pas lieu d'adopter la méthode fondée sur les «droits figés», qui s'attache aux pratiques autochtones. Au contraire, la définition des droits ancestraux devrait être axée sur la notion de «partie intégrante de la culture distinctive» et devrait «permettre à ces droits d'évoluer avec le temps» (voir *Sparrow*, précité, aux pp. 1099 et 1093). J'ai formulé les lignes directrices qui suivent au sujet de cette méthode (au par. 180):

In the end, the proposed general guidelines for the interpretation of the nature and extent of aboriginal rights constitutionally protected under s. 35(1) can be summarized as follows. The characterization of aboriginal rights should refer to the rationale of the doctrine of aboriginal rights, i.e., the historic occupation and use of ancestral lands by the natives. Accordingly, aboriginal practices, traditions and customs would be recognized and affirmed under s. 35(1) of the Constitution Act, 1982 if they are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. Furthermore, the period of time relevant to the assessment of aboriginal activities should not involve a specific date, such as British sovereignty, which would crystallize aboriginal's distinctive culture in time. Rather, as aboriginal practices, traditions and customs change and evolve, they will be pro-

En définitive, les lignes directrices générales proposées pour l'interprétation de la nature et de l'étendue des droits protégés constitutionnellement par le par. 35(1) peuvent être résumées ainsi. La caractérisation des droits ancestraux devrait se faire en fonction du fondement de la doctrine des droits ancestraux, c.-à-d. l'occupation et l'utilisation historiques par les autochtones de leurs terres ancestrales. En conséquence, les coutumes, pratiques et traditions autochtones seront reconnues et confirmées en vertu du par. 35(1) de la Loi constitutionnelle de 1982 si elles sont suffisamment importantes et fondamentales pour l'organisation sociale et la culture d'un groupe particulier d'autochtones. De plus, la période pertinente pour l'appréciation des activités autochtones ne devrait pas être fonction d'une date spécifique, par exemple l'affirmation de la souveraineté britannique, car cela aurait pour effet de cristalliser dans le

tected in s. 35(1) provided that they have formed an integral part of the distinctive aboriginal culture for a substantial continuous period of time. [Emphasis added.]

Before reviewing the evidence presented at trial to determine whether the distinctive aboriginal culture of the Heiltsuk supports the recognition of an aboriginal right, we have to delineate the aboriginal right claimed in this case. That I now propose to do.

II. The Delineation of the Aboriginal Right Claimed

At the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 133, as in *Van der Peet, supra*, the majority framed the issue as being whether the Heiltsuk possess an aboriginal right to fish which includes the right to make commercial use of the fish. As I discussed in *Van der Peet*, case law on treaty and aboriginal rights relating to trade supports the making of a distinction between, on the one hand, the sale, trade and barter of fish for livelihood, support and sustenance purposes and, on the other, the sale, trade and barter of fish for purely commercial purposes: see *Sparrow, supra*; *R. v. Horseman*, [1990] 1 S.C.R. 901; and *R. v. Jones* (1993), 14 O.R. (3d) 421. In this regard, I agree with the Chief Justice that the delineation of aboriginal rights must be viewed on a continuum.

In this case, because of the type of transactions which led to the convictions, it appears that the aboriginal right at issue falls on the part of the spectrum relating to the sale, trade and barter of fish for commercial purposes, not on the part dealing with livelihood, support and sustenance purposes (see *Van der Peet, supra*, at para. 192).

The appellants were charged with violating s. 20(3) of the *Pacific Herring Fishery Regulations*, thereby committing an offence contrary to s. 61(1) of the *Fisheries Act*. These charges arose out of a

temps la culture autochtone distinctive. Au contraire, comme les coutumes, pratiques et traditions autochtones changent et évoluent, elles seront protégées par le par. 35(1) si elles ont fait partie intégrante de la culture autochtone distinctive pendant une période considérable et ininterrompue. [Je souligne.]

Avant d'étudier la preuve présentée au procès et de déterminer si la culture autochtone distinctive des Heiltsuk appuie la reconnaissance d'un droit ancestral, nous devons délimiter le droit ancestral revendiqué dans le présent pourvoi. C'est ce que je me propose de faire maintenant.

II. La délimitation du droit ancestral revendiqué

La Cour d'appel de la Colombie-Britannique (1993), 80 B.C.L.R. (2d) 133, à la majorité a considéré, tout comme dans *Van der Peet*, précité, que la question en litige était de savoir si les Heiltsuk possèdent un droit de pêche ancestral incluant le droit de faire une utilisation commerciale du poisson. Comme je l'ai dit dans *Van der Peet*, la jurisprudence sur les droits ancestraux ou issus de traités concernant les échanges appuie l'établissement d'une distinction entre, d'une part, la vente et l'échange de poisson à des fins de subsistance, et, d'autre part, la vente et l'échange de poisson à des fins purement commerciales: voir les arrêts *Sparrow*, précité, *R. c. Horseman*, [1990] 1 R.C.S. 901, et *R. c. Jones* (1993), 14 O.R. (3d) 421. À cet égard, je conviens avec le Juge en chef que les droits ancestraux doivent être considérés comme formant les divers éléments d'un spectre.

En l'espèce, en raison du type d'opération qui a entraîné les déclarations de culpabilité, il semble que le droit ancestral en cause corresponde à la partie du spectre qui concerne la vente et l'échange de poisson à des finis commerciales, plutôt qu'à celle touchant les activités exercées à des fins de subsistance (voir *Van der Peet*, précité, au par. 192).

Les appelants ont été accusés d'avoir enfreint le par. 20(3) du *Règlement de pêche du hareng du Pacifique*, commettant ainsi une infraction prévue au par. 61(1) de la *Loi sur les pêcheries*. Ces accu-

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series of events in April 1988 aimed at an attempt to sell herring spawn on kelp that was not harvested or sold under the authority of a Category J Licence. The appellants covertly transported 4,200 pounds of herring spawn on kelp from Bella Bella and then attempted to sell it to Mr. Hirose, the owner of Seaborn Enterprises Ltd. The appellants were arrested by Fisheries Officers after they returned from Mr. Hirose's store.

sations découlaient d'une série d'événements survenus en avril 1988 et au cours desquels les appelants avaient tenté de vendre de la rogue de hareng sur varech qui n'avait pas été récoltée ou vendue en vertu d'un permis de catégorie J. Ils ont transporté subrepticement 4 200 livres de rogue de hareng sur varech de Bella Bella, qu'ils ont ensuite tenté de vendre à M. Hirose, propriétaire de Seaborn Enterprises Ltd. Les appelants ont été arrêtés à la sortie de l'établissement de M. Hirose par des agents des pêches.

140 There is no evidence as to the purposes for which the appellants sold the herring spawn on kelp or as to the use that they were going to make of the money. However, from the overall evidence on the record, especially that of the quantity of herring spawn on kelp that the two appellants wanted to sell, it is reasonable to find that the attempted transaction between the appellants and Mr. Hirose was directed at providing an economic profit. Besides, the appellants themselves argued both before the courts below and before this Court that the Heiltsuk possess an aboriginal right to fish for what amounts to be commercial purposes.

Il n'y a pas d'élément de preuve concernant les fins pour lesquelles les appelants ont vendu la rogue de hareng sur varech ou l'utilisation qu'ils comptaient faire du produit de cette vente. Toutefois, il ressort de l'ensemble de la preuve au dossier, surtout celle touchant la quantité de rogue de hareng sur varech que les deux appelants voulaient vendre, qu'il est raisonnable de conclure que l'opération qu'ils ont tentée d'effectuer avec M. Hirose visait à réaliser des profits. Du reste, ils ont eux-mêmes soutenu, tant devant les tribunaux inférieurs que devant notre Cour, que les Heiltsuk possèdent un droit ancestral de pêcher à des fins équivalant à des fins commerciales.

141 The legislative provision under constitutional challenge in this case is aimed at both commercial and non-commercial sale, trade and barter of herring spawn on kelp. Section 20(3) of the *Pacific Herring Fishery Regulations* reads as follows:

La disposition législative faisant l'objet de la présente contestation constitutionnelle vise la vente et l'échange de rogue de hareng sur varech à des fins commerciales et non commerciales. Le paragraphe 20(3) du *Règlement de pêche du hareng du Pacifique* est ainsi rédigé:

20. . . .

20. . . .

(3) No person shall buy, sell, barter or attempt to buy, sell, or barter herring spawn on kelp other than herring spawn on kelp taken or collected under the authority of a Category J licence.

(3) Il est interdit à quiconque d'acheter, de vendre, d'échanger ou de tenter d'acheter, de vendre ou d'échanger de la rogue de hareng sur varech, à moins que celle-ci n'ait été prise ou recueillie en vertu d'un permis de catégorie J.

This provision prohibits any sale, trade or barter of herring spawn on kelp — whether for livelihood, support and sustenance purposes or for purely commercial purposes — except for that harvested under the authority of a Category J licence. If the facts giving rise to the offence indicated that the sale, trade and barter were for livelihood, support and maintenance, the question of the validity of s.

Cette disposition interdit la vente et l'échange de la rogue de hareng sur varech — que ce soit à des fins de subsistance ou à des fins purement commerciales —, sauf si la rogue a été récoltée en vertu d'un permis de catégorie J. Si les faits à l'origine des accusations indiquaient que la vente et l'échange ont été effectués à des fins de subsistance, la question de la validité du par. 20(3) du

20(3) of the Regulations would raise a different issue, one which does not arise here. In the instant case, the aboriginal right claimed is the right to sell, trade and barter fish for commercial purposes and we must decide whether, in that respect, the provision under scrutiny complies with the constitutional protection afforded to aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.

It is now necessary to look at the historical evidence to see whether the particular group of aboriginal people, the Heiltsuk Band, of which the appellants are members, have sold, traded and bartered fish for commercial purposes, in a manner sufficiently significant and fundamental to their culture and social organization, for a substantial continuous period of time.

III. Definition of Aboriginal Rights

As I have already noted elsewhere, the approach I favour to interpret the nature and extent of aboriginal rights differs significantly from the one adopted by the Chief Justice. In my view, the question is whether the evidence reveals that the sale, trade and barter of herring spawn on kelp for commercial purposes have formed an integral part of the Heiltsuk people's distinctive aboriginal culture — i.e., to have been sufficiently significant and fundamental to their culture and social organization — for a substantial continuous period of time. Although the Chief Justice refers to the notion of “integral part of the distinctive aboriginal culture” in his interpretation of the aboriginal right at hand, he focuses on pre-contact individualized aboriginal practices, an approach from which I must distance myself.

The findings of fact by the trial judge as well as the substantial review of the evidence by the Chief Justice show that the trade of herring spawn on kelp for commercial purposes among the Heiltsuk and with other native people was extensive and organized in a market-type economy. More impor-

Règlement soulèverait une question différente, qui ne se pose toutefois pas en l'espèce. Dans le présent cas, le droit ancestral revendiqué est celui de vendre et d'échanger du poisson à des fins commerciales, et il nous faut déterminer si, à cet égard, la disposition en cause est compatible avec la protection constitutionnelle accordée aux droits ancestraux par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Il est maintenant nécessaire d'examiner la preuve historique pour voir si le groupe particulier d'autochtones en cause, la bande des Heiltsuk, dont font partie les appelants, a vendu et échangé du poisson à des fins commerciales d'une façon suffisamment importante et fondamentale pour son organisation sociale et sa culture pendant une période considérable et ininterrompue.

III. Définition des droits ancestraux

Comme je l'ai déjà indiqué, la méthode que je favorise pour définir la nature et l'étendue des droits ancestraux diffère considérablement de celle adoptée par le Juge en chef. À mon avis, la question qu'il faut se poser est celle de savoir si la preuve révèle que la vente et l'échange de rogue de hareng sur varech à des fins commerciales ont fait partie intégrante de la culture autochtone distinctive des Heiltsuk — c'est-à-dire si ces activités ont été suffisamment importantes et fondamentales pour leur organisation sociale et leur culture — pendant une période considérable et ininterrompue. Même si le Juge en chef se réfère à la notion de «partie intégrante de la culture autochtone distinctive» dans son interprétation du droit ancestral en cause, il s'attache aux pratiques autochtones propres qui existaient avant le contact avec les Européens, approche à laquelle je ne peux me rallier.

Il ressort des conclusions de fait du juge du procès et de l'examen approfondi de la preuve fait par le Juge en chef que les échanges de rogue de hareng sur varech à des fins commerciales entre les Heiltsuk et entre ceux-ci et d'autres autochtones étaient considérables et organisés dans une sorte

tantly, it appears, especially from a native perspective, that such activities formed part of, and was indeed integral to, the distinctive aboriginal culture of the Heiltsuk. Put another way, to use the terminology of the test proposed in *Van der Peet, supra*, the sale, trade and barter of fish for commercial purposes was sufficiently significant and fundamental to the culture and social organization of the Heiltsuk people. Consequently, the criterion regarding the characterization of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* is met in this case.

d'économie de marché. Fait plus important, il semble, en particulier du point de vue des autochtones, que ces activités faisaient partie — de fait faisaient partie intégrante — de la culture autochtone distinctive des Heiltsuk. Autrement dit, pour reprendre la terminologie utilisée dans le test proposé dans *Van der Peet*, précité, les activités de vente et d'échange de poisson à des fins commerciales étaient suffisamment importantes et fondamentales pour l'organisation sociale et la culture des Heiltsuk. En conséquence, le critère applicable afin de caractériser les droits ancestraux protégés par le par. 35(1) de la *Loi constitutionnelle de 1982* est satisfait en l'espèce.

145 Also, the evidence reveals that the Heiltsuk have sold, traded and bartered fish for commercial purposes for a substantial continuous period of time. In that respect, we must consider the type of aboriginal practices, traditions and customs, the particular aboriginal culture and society, and the reference period of 20 to 50 years (see *Van der Peet, supra*, at para. 178). Here, there is ample evidence showing that the Heiltsuk have traded herring spawn on kelp, in large enough amounts to be for commercial purposes, for centuries before the coming of the Europeans. Further, as the trial judge found after considering the historical record and expert evidence, such commercial activities have continued, though in modernized forms, until the present day. Therefore, the time requirement for the recognition of an aboriginal right is also met.

De plus, la preuve révèle que les Heiltsuk ont vendu et échangé du poisson à des fins commerciales pendant une période considérable et ininterrompue. Sur ce point, il nous faut tenir compte du type de coutumes, pratiques et traditions autochtones en cause, de la culture et de la société autochtones visées et, enfin, de la période de référence de 20 à 50 ans (voir *Van der Peet*, précité, au par. 178). En l'espèce, il existe une preuve abondante établissant que les Heiltsuk ont, pendant des siècles avant l'arrivée des Européens, échangé de la rogue de hareng sur varech en quantités suffisamment grandes pour que ces échanges puissent être considérés comme des activités faites à des fins commerciales. En outre, comme l'a constaté le juge du procès après avoir étudié la preuve historique et les témoignages d'experts, ces activités commerciales continuent d'être pratiquées de nos jours, quoique sous des formes modernes. Par conséquent, l'exigence de durée applicable pour la reconnaissance d'un droit ancestral est également satisfaite.

146 As a result, I agree with the Chief Justice that the Heiltsuk people, of which the appellants are members, possess an aboriginal right to sell, trade and barter fish for commercial purposes, which is protected under s. 35(1) of the *Constitution Act, 1982*. It remains to be determined, under the *Sparrow* test, whether such right is extinguished and whether the *Pacific Herring Fishery Regulations* infringe upon this right.

En définitive, tout comme le Juge en chef, je suis d'avis que les Heiltsuk, dont font partie les appelants, possèdent un droit ancestral de vendre et d'échanger du poisson à des fins commerciales, qui est protégé en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*. Il reste à déterminer, conformément au test établi dans *Sparrow*, si ce droit a été éteint et si le *Règlement de pêche du hareng du Pacifique* porte atteinte à ce droit.

IV. Extinguishment and Infringement

As regards the issues of extinguishment and *prima facie* infringement, I agree for the most part with the reasons of the Chief Justice and the conclusions he reaches.

The Heiltsuk's aboriginal right to sale, trade and barter herring spawn on kelp for commercial purposes has not been extinguished by a "clear and plain" intention of the Sovereign (see *Sparrow*, *supra*, at p. 1099). In *N.T.C. Smokehouse*, *supra*, I emphasized that the hurdle to extinguish aboriginal rights is high indeed (at para. 78):

I am prepared to accept that the extinguishment of aboriginal rights can be accomplished through a series of legislative acts. However, *Sparrow* specifically stands for the proposition that the intention to extinguish must nonetheless be clear and plain. This is diametrically opposed to the position that extinguishment may be achieved by merely regulating an activity or that legislation necessarily inconsistent with the continued enjoyment of an aboriginal right can be deemed to extinguish it. Clear and plain means that the Government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible. [Emphasis in original.]

In the case at bar, the respondent argues that the test is met when the aboriginal right and the activities contemplated by the legislation cannot co-exist. Such an approach, based on the view adopted by the United States Supreme Court in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), is irreconcilable with the "clear and plain intention" test favoured in Canada. As a result, the legislation relied upon by the respondent is insufficient to extinguish the aboriginal right to sell, trade and barter fish for commercial purposes. In fact, as in *Sparrow*, *supra*, such legislation merely regulates aboriginal activities and does not amount to extinguishment.

Furthermore, as regards the question of *prima facie* infringement, s. 20(3) of the *Pacific Herring Fishery Regulations* no doubt violates such aborig-

IV. Extinction et atteinte

En ce qui concerne les questions de l'extinction et de l'atteinte *prima facie*, je souscris pour l'essentiel aux motifs du Juge en chef et à ses conclusions.

Le droit ancestral des Heiltsuk de vendre et d'échanger de la rogue de hareng sur varech à des fins commerciales n'a pas été éteint par suite de la manifestation d'une intention «claire et expresse» du Souverain (voir *Sparrow*, précité, à la p. 1099). Dans *N.T.C. Smokehouse*, précité, j'ai souligné que le test à respecter en matière d'extinction des droits ancestraux est très exigeant (au par. 78):

Je suis disposée à admettre que l'extinction des droits ancestraux peut résulter d'une série de mesures législatives. Néanmoins, *Sparrow* prévoit spécifiquement que l'intention d'éteindre des droits doit être claire et expresse, ce qui va diamétralement à l'encontre de la thèse que l'extinction peut découler du seul fait de la réglementation d'une activité ou du fait de l'existence d'une mesure législative nécessairement incompatible avec la jouissance continue d'un droit ancestral. L'expression claire et expresse veut dire que le gouvernement doit viser les activités autochtones en question et les éteindre explicitement en interdisant désormais l'exercice. [Souligné dans l'original.]

En l'espèce, l'intimée soutient que le test est satisfait dans les cas où le droit ancestral et les activités visées par les mesures législatives ne peuvent pas coexister. Une telle position, fondée sur le point de vue adopté par la Cour suprême des États-Unis dans l'arrêt *United States c. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), est inconciliable avec le test de «l'intention claire et expresse» privilégié au Canada. En conséquence, les mesures législatives invoquées par l'intimée sont insuffisantes pour éteindre le droit ancestral de vendre et d'échanger du poisson à des fins commerciales. De fait, tout comme dans *Sparrow*, précité, ces mesures législatives ne font que réglementer les activités autochtones et n'entraînent pas l'extinction du droit de les exercer.

Qui plus est, en ce qui concerne la question de l'atteinte *prima facie*, il ne fait aucun doute que le par. 20(3) du *Règlement de pêche du hareng du*

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inal right since it directly conflicts, both by its object and by its effects, with native sale, trade and barter of herring spawn on kelp. In *Sparrow*, Dickson C.J. and La Forest J. provided the following guidelines regarding infringement (at p. 1112):

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

Pacifique viole un tel droit ancestral puisqu'il entre directement en conflit, tant de par son objet que de par ses effets, avec la vente et l'échange de roque de hareng sur varech par les autochtones. Dans *Sparrow*, le juge en chef Dickson et le juge La Forest ont formulé les lignes directrices suivantes relativement à l'atteinte (à la p. 1112):

Pour déterminer si les droits de pêche ont subi une atteinte constituant une violation à première vue du par. 35(1), on doit poser certaines questions. Premièrement, la restriction est-elle déraisonnable? Deuxièmement, le règlement est-il indûment rigoureux? Troisièmement, le règlement refuse-t-il aux titulaires du droit le recours à leur moyen préféré de l'exercer? C'est au particulier ou au groupe qui conteste la mesure législative qu'il incombe de prouver qu'il y a eu violation à première vue. En ce qui concerne les faits du présent pourvoi, le règlement serait jugé constituer une atteinte à première vue si on concluait qu'il impose une restriction néfaste à l'exercice par les Musqueams de leur droit de pêcher à des fins de subsistance. Nous tenons à souligner ici que la question en litige n'exige pas simplement qu'on examine si la prise autorisée de poissons a été réduite au-dessous de ce qui est requis pour subvenir aux besoins alimentaires et rituels raisonnables des Musqueams. Le critère nécessite plutôt qu'on se demande si, de par son objet ou son effet, la restriction imposée quant à la longueur des filets porte atteinte inutilement aux intérêts protégés par le droit de pêche.

151 Although I agree with the analysis of the Chief Justice on this issue, I want to emphasize that the burden to demonstrate that legislation infringes upon an existing aboriginal right, which is borne by the claimant, is fairly low. *Sparrow* speaks of "*prima facie*" infringement, which is defined in the *Black's Law Dictionary* (6th ed. 1990) as follows (at p. 1189): "Lat. At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably". Therefore, the aboriginal right claimant does not even have to prove on the balance of probability that the impugned legislation constitutes an infringement, and surely not that it "clearly impinges" upon the right, as the Chief Justice seems to suggest. The only thing that the claimant must show is that, on its face, the legislation comes into conflict with a recognized aboriginal right, either because of its object or its effects. In the

Bien que je souscrive à l'analyse du Juge en chef sur cette question, je tiens à souligner que le fardeau d'établir qu'une mesure législative porte atteinte à un droit ancestral existant, qui incombe à la personne qui revendique un tel droit, est assez peu exigeant. Dans *Sparrow*, on parle d'atteinte «*prima facie*», expression définie ainsi dans le *Black's Law Dictionary* (6^e éd. 1990) (à la p. 1189): [TRADUCTION] «Lat. À première vue; de prime abord; d'après les apparences; autant qu'on puisse en juger d'après la première impression; vraisemblablement». Par conséquent, la personne qui revendique un droit ancestral n'a même pas à prouver, selon la prépondérance des probabilités, que la mesure législative contestée constitue une atteinte, et sûrement pas qu'elle «empiète clairement» sur le droit en question, comme le Juge en chef semble suggérer. Tout ce que cette personne doit prouver, c'est que, de prime abord, la mesure

instant case, the appellants overwhelmingly discharged their burden in that regard.

Consequently, I conclude that the Heiltsuk Band's aboriginal right to sell, trade and barter fish for commercial purposes is "existing", as it has not been extinguished by a clear and plain intention of the Sovereign, and that s. 20(3) of the *Pacific Herring Fishery Regulations* constitutes a "prima facie infringement" of this aboriginal right, as *per* the *Sparrow* test.

As to the question of justification, I agree with the Chief Justice that there is insufficient evidence to rule on it and I agree as well with his comments on this issue, particularly as regards the doctrine of priority and our decision in *Jack v. The Queen*, [1980] 1 S.C.R. 294.

V. Disposition

In the result, I would dispose of the appeal in the manner stated by the Chief Justice and answer the constitutional question as he suggests.

The following are the reasons delivered by

MCLACHLIN J. — This appeal concerns the right of the Heiltsuk of Bella Bella to sell herring spawn on kelp that is harvested from that region. The appellants, William and Donald Gladstone, harvested herring spawn on kelp near Bella Bella, transported it to Vancouver, and attempted to sell it there. The sale of herring spawn on kelp without a licence is prohibited. The appellants made a number of arguments in their defence before the lower courts. The only issue left to be decided by this Court is whether the Regulations prohibiting the sale of herring spawn on kelp are invalid because they infringe the appellants' aboriginal right, as *per* s. 35 of the *Constitution Act, 1982*. If the Regulations violate the appellants' aboriginal right,

législative entre en conflit avec un droit ancestral reconnu, soit de par son objet soit de par ses effets. Dans le présent pourvoi, les appelants se sont nettement acquittés du fardeau qui leur incombait à cet égard.

En conséquence, je conclus que le droit ancestral de la bande des Heiltsuk de vendre et d'échanger du poisson à des fins commerciales est un droit «existant», puisqu'il n'a pas été éteint par suite de la manifestation d'une intention claire et expresse du Souverain, et que le par. 20(3) du *Règlement de pêche du hareng du Pacifique* constitue une «atteinte *prima facie*» à ce droit ancestral, selon le test établi dans *Sparrow*.

Pour ce qui est de la question de la justification, je suis d'avis, tout comme le Juge en chef, que la preuve est insuffisante pour permettre de la trancher, et je souscris également à ses observations sur cette question, particulièrement en ce qui concerne la doctrine relative à l'ordre de priorité et la décision de notre Cour dans *Jack c. La Reine*, [1980] 1 R.C.S. 294.

V. Dispositif

En définitive, je suis d'avis de trancher le pourvoi de la manière indiquée par le Juge en chef et de répondre comme il le suggère à la question constitutionnelle.

Version française des motifs rendus par

LE JUGE MCLACHLIN — Le présent pourvoi porte sur le droit des Heiltsuk de Bella Bella de vendre de la rogue de hareng sur varech récoltée dans cette région. Les appelants, William et Donald Gladstone, ont récolté de la rogue de hareng sur varech près de Bella Bella, puis ils l'ont transportée à Vancouver où ils ont tenté de la vendre. Il est interdit de vendre de la rogue de hareng sur varech sans permis. En défense, les appelants ont présenté de nombreux arguments devant les juridictions inférieures. La seule question que notre Cour a à trancher est de savoir si les dispositions réglementaires interdisant de vendre la rogue de hareng sur varech sont inopérantes parce qu'elles portent atteinte au droit ancestral reconnu

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they will be invalidated to the extent of the conflict by s. 52 of the *Constitution Act, 1982*.

aux appelants par l'art. 35 de la *Loi constitutionnelle de 1982*. Si oui, elles seront, dans la mesure de l'incompatibilité, déclarées inopérantes en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*

This case was heard with *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, released contemporaneously. In *Van der Peet*, I detail the approach I would adopt to the interpretation of aboriginal rights to use a fisheries resource. This decision applies the principles set out in *Van der Peet*.

Le présent pourvoi a été entendu avec les pourvois *R. c. Van der Peet*, [1996] 2 R.C.S. 507, et *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672, qui sont rendus à la même date. Dans *Van der Peet*, précité, j'énonce de façon détaillée la méthode à suivre pour interpréter les droits ancestraux visant l'utilisation des ressources d'une pêcherie. Les présents motifs appliquent les principes énoncés dans *Van der Peet*.

The questions posed by this appeal are as follows:

Les questions qui se posent dans le présent pourvoi sont les suivantes:

1. Do the Heiltsuk possess an aboriginal right under s. 35(1) of the *Constitution Act, 1982* which entitles them to sell herring spawn on kelp?
 - (a) Has a *prima facie* right been established?
 - (b) If so, has it been extinguished?
2. If the right is established, do the government Regulations prohibiting the sale of herring spawn on kelp infringe that right?
3. If the Regulations infringe the right, are they justified?

1. Les Heiltsuk possèdent-ils, en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*, le droit ancestral de vendre de la rogue de hareng sur varech?
 - a) A-t-on établi, à première vue, l'existence d'un tel droit?
 - b) Si oui, ce droit a-t-il été éteint?
2. Si l'existence du droit a été établie, les dispositions réglementaires prises par l'État pour interdire la vente de rogue de hareng sur varech portent-elles atteinte à ce droit?
3. Si oui, ces dispositions réglementaires sont-elles justifiées?

My conclusions in this appeal may be summarized as follows. Following the reasons I set out in *Van der Peet, supra*, the appellants, as members of the Heiltsuk Band, have established that they have an aboriginal right to harvest and sell herring spawn on kelp for sustenance purposes. That right was not extinguished by any regulatory legislation prior to 1982, and is therefore confirmed by the *Constitution Act, 1982*. The right is limited by the Heiltsuk's traditional reliance on the resource, which was to secure sustenance. It is also limited by the power of the Crown to limit or prohibit exploitation of the resource that is incompatible with its continued use. There is insufficient evidence to determine whether the current regulatory framework satisfies the sustenance needs of the

Mes conclusions dans le présent pourvoi peuvent être résumées ainsi. Conformément aux motifs que j'ai énoncés dans *Van der Peet*, précité, les appelants, en tant que membres de la bande des Heiltsuk, ont établi qu'ils possèdent le droit ancestral de récolter et de vendre de la rogue de hareng sur varech à des fins de subsistance. Ce droit n'a pas été éteint par aucune mesure législative portant réglementation de la ressource avant 1982, et il est donc confirmé par la *Loi constitutionnelle de 1982*. Il est restreint par les limites de l'exploitation traditionnelle de cette ressource faite par les Heiltsuk, qui visait à assurer leur subsistance. Il est aussi restreint par le pouvoir qu'a l'État de limiter ou d'interdire l'exploitation de cette ressource qui serait incompatible avec son utilisation continue. La

Heiltsuk people. Therefore, the questions of whether the Heiltsuk's right to sell herring spawn on kelp for sustenance was infringed and, if so, whether any such infringement is justified by the Crown, must be decided at a new trial.

1. Has the Right of the Heiltsuk to Trade Herring Spawn on Kelp Been Established?

The test for determining whether an aboriginal people possesses an aboriginal right to trade fish is discussed in the companion case of *Van der Peet*. I there concluded, at paras. 278-79, that there is an aboriginal right

to obtain from the river or the sea . . . that which the particular aboriginal people have traditionally obtained from the portion of the river or sea. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration.

The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource. In most cases, one would expect the aboriginal right to trade to be confined to what is necessary to provide basic housing, transportation, clothing and amenities — the modern equivalent of what the aboriginal people in question formerly took from the land or the fishery, over and above what was required for food and ceremonial purposes.

The historical evidence in this case is somewhat different from the companion cases of *Van der Peet*, *supra*, and *N.T.C. Smokehouse*, *supra*. In those cases, the Sto:lo, Sheshaht and Opetchesaht peoples claimed the right to continue to sell fish from salmon fisheries off which they traditionally lived. The evidence in both cases indicated that there had been trade in fish with other aboriginal

preuve est insuffisante pour permettre de déterminer si le régime de réglementation actuel respecte les besoins des Heiltsuk en matière de subsistance. Par conséquent, les questions de savoir s'il a été porté atteinte au droit des Heiltsuk de vendre de la rogue de hareng sur varech à des fins de subsistance, et, dans l'affirmative, si cette atteinte peut être justifiée par l'État, doivent être tranchées dans le cadre d'un nouveau procès.

1. Le droit des Heiltsuk d'échanger de la rogue de hareng sur varech a-t-il été établi?

Le critère permettant de déterminer si un peuple autochtone possède le droit ancestral d'échanger du poisson a été analysé dans le pourvoi connexe *Van der Peet*, où j'ai conclu, aux par. 278 et 279, à l'existence d'un droit ancestral

. . . [de] tirer du fleuve, de la rivière ou de la mer en question ce que les autochtones concernés ont traditionnellement tiré du secteur exploité. Si les autochtones démontrent qu'ils ont traditionnellement tiré leur subsistance du fleuve, de la rivière ou de la mer, ils ont alors à première vue le droit de continuer à le faire, s'ils n'ont pas, par traité, échangé ce droit contre autre chose.

Ce droit est la poursuite de l'exploitation historique de la ressource par les autochtones visés. Il n'y a donc rien qui justifie d'élargir le droit au-delà de ce qui est nécessaire pour permettre aux autochtones de se procurer des biens de remplacement raisonnables à la place de ceux qu'ils ont traditionnellement obtenus pour la ressource. Dans la plupart des cas, il est permis de penser que le droit ancestral de commercer se limite à ce qui est nécessaire pour pourvoir aux besoins de base en matière de logement, de transport, d'habillement et de commodités de la vie — l'équivalent moderne de ce que les autochtones en question tiraient dans le passé du territoire ou de la pêche, en sus de leurs besoins alimentaires et rituels.

La preuve de nature historique en l'espèce est quelque peu différente de celle disponible dans les pourvois connexes *Van der Peet* et *N.T.C. Smokehouse*, précités. Dans ces pourvois, les Sto:lo, les Sheshaht et les Opetchesaht ont affirmé avoir le droit de continuer de vendre le saumon pris dans les pêcheries dont ils ont traditionnellement tiré leur subsistance. Dans ces deux affaires, la preuve

bands and with European settlers when they arrived. The trade that had occurred historically was on a small scale. Much of the trade was in the form of barter for other necessities such as other kinds of food and clothing, and other goods when trade expanded to European settlers. Some of the trade occurred at traditional potlatches, where social relations were formed and agreements made for peaceful cohabitation among different tribes. In these cases, the evidence was that the peoples in question relied heavily on the salmon resource for their food needs, as well as for barter.

a montré qu'il y avait des échanges de poisson à d'autres bandes autochtones, ainsi qu'aux colons blancs après leur arrivée. Historiquement, ce commerce s'est fait sur une petite échelle, et il prenait en grande partie la forme de troc visant à se procurer d'autres biens de première nécessité tels que des denrées alimentaires, des vêtements ainsi que d'autres types de biens, lorsque le commerce s'est élargi aux colons européens. Certains échanges avaient lieu à l'occasion des potlachs traditionnels, qui étaient l'occasion pour les différentes tribus d'établir des rapports sociaux et de conclure des accords de cohabitation pacifique. Dans les pourvois susmentionnés, la preuve a indiqué que les peuples en question comptaient beaucoup sur le saumon pour satisfaire leurs besoins alimentaires et comme monnaie d'échange.

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In this case, the Heiltsuk claim an aboriginal right to continue to trade in herring spawn on kelp from the Bella Bella region, where they have lived for at least two centuries. The appellants claim that the Heiltsuk relied on the herring spawn on kelp both as a food source and for trade. There is extensive evidence of historical trading of herring spawn on kelp between the Heiltsuk and the neighbouring aboriginal peoples. The trade that took place was on a large scale, involving quantities of herring spawn on kelp of at least 15 tonnes. As the trial judge put it:

It cannot be disputed that hundreds of years ago, the Heiltsuk Indians regularly harvested herring spawn on kelp as a food source. The historical/anthropological records readily bear this out.

I am also satisfied that this Band engaged in inter-tribal trading and barter of herring spawn on kelp. The exhibited Journal of Alexander McKenzie dated 1793 refers to this trade and the defence lead [*sic*] evidence of several other references to such trade.

The developed trading patterns of the Heiltsuk trade in herring spawn on kelp was undisputed. An expert witness for the defence put it this way:

En l'espèce, les Heiltsuk revendiquent le droit ancestral de continuer à faire le commerce de la rogue de hareng sur varech récoltée dans la région de Bella Bella, où ils vivent depuis au moins deux siècles. Les appelants affirment que les Heiltsuk ont utilisé la rogue de hareng sur varech tant comme source alimentaire que comme monnaie d'échange. Il y a une abondante preuve indiquant que, historiquement, les Heiltsuk ont échangé de la rogue de hareng sur varech aux peuples autochtones voisins. Il s'agissait d'échanges faits sur une grande échelle et mettant en jeu des quantités de rogue de hareng sur varech d'au moins 15 tonnes. Comme l'a dit le juge du procès:

[TRADUCTION] Il est incontestable qu'il y a des siècles, les Indiens Heiltsuk récoltaient régulièrement la rogue de hareng sur varech comme source de nourriture. C'est un fait dont la réalité est attestée par les documents historiques et anthropologiques.

Je suis également convaincu que la bande échangeait cette denrée avec d'autres tribus. Le journal d'Alexander McKenzie [*sic*] datant de 1793, qui a été versé en preuve, fait mention de ces échanges et la défense a présenté des éléments de preuve faisant état de nombreuses autres mentions de ces échanges.

Le caractère structuré des échanges de rogue de hareng sur varech faits par les Heiltsuk n'a pas été contesté. Voici comment ces structures ont été décrites par un témoin expert de la défense:

For at least two centuries the Heiltsuk have been the hub of a trade network, exporting herring spawn to almost all of the surrounding native people.

[TRADUCTION] Pendant au moins deux siècles, les Heiltsuk ont été au centre d'un réseau d'échanges dans le cadre duquel ils exportaient de la roque de hareng à presque tous les peuples autochtones voisins.

Herring spawn harvested, processed, and packaged by the Heiltsuk was traded to their Tsimshian, Kitimat, and Bella Coola neighbors on the mainland and to Kwakiutl on Vancouver Island. Some of these trade relations were noted in accounts written by the first white men to visit the central coast. Those of Alexander Mackenzie (1793), William Tolmie (1835) and James Douglas (1840) documenting Heiltsuk trade of herring spawn to Bella Coola, Kwakiutl, and Tsimshian, respectively, are corroborated by other accounts describing the same patterns of trade at much later dates.

La roque de hareng récoltée, transformée et empaquetée par les Heiltsuk était échangée à leurs voisins les Tsimshian, les Kitimat et les Bella Coola sur le continent, ainsi qu'aux Kwakiutl sur l'île de Vancouver. Les premiers Blancs qui ont visité la région du centre de la côte ont fait état de certaines de ces relations commerciales dans leurs comptes rendus de ces visites. Les comptes rendus d'Alexander Mackenzie (1793), de William Tolmie (1835) et de James Douglas (1840), qui documentent les échanges de roque de hareng faits par les Heiltsuk aux Bella Coola, aux Kwakiutl et aux Tsimshian respectivement, sont corroborés par d'autres comptes rendus qui ont décrit, beaucoup plus tard, ces mêmes échanges.

These early accounts describe a trade which was already established. This attests not only to the aboriginal nature of the trade, but also the existence of regularized relations between the groups engaged in these trading patterns.

Ces premiers comptes rendus décrivent un commerce qui était déjà bien établi. Ce fait atteste non seulement la nature autochtone du commerce, mais aussi l'existence de relations systématisées entre les groupes participant à ces échanges commerciaux.

The appellants' factum also cited expert evidence of the large quantities of trade in herring spawn on kelp:

Dans leur mémoire, les appelants ont également cité des témoignages d'expert faisant état des grandes quantités de roque de hareng sur varech échangées:

Pacific herring spawn only in certain locations. Consequently, some native groups had access to quantities of spawn beyond their needs and others had access to little or no spawn. This partly explains the extensive trade in spawn among native groups along the coast. Tons of spawn were transported by canoe from districts with good spawning areas to places not so favoured.

[TRADUCTION] Le hareng du Pacifique fraie seulement dans certains endroits. Par conséquent, alors que certains groupes autochtones avaient accès à des sources d'œufs qui dépassaient leurs besoins, d'autres groupes n'avaient que peu ou pas accès à cette ressource. Cela explique en partie les échanges importants d'œufs que pratiquaient entre eux les groupes autochtones le long de la côte. Des tonnes d'œufs étaient transportés par canot des districts riches en œufs aux lieux moins favorisés.

After the spawn were processed, flotillas of freight canoes carrying tons of spawn product travelled between districts carrying boxes and hampers.

Après que les œufs avaient été traités, des flottilles de canots à marchandises transportant des tonnes d'œufs voyageaient d'un district à l'autre, chargés de boîtes et de paniers.

The Court of Appeal, reviewed evidence of the diary of Alexander Mackenzie which indicated that, in exchange for the herring spawn on kelp, the Heiltsuk received "roasted salmon, hemlock-bark cakes, and the other kind made of salmon roes, sorrel, and bitter berries". Lambert J.A. noted

La Cour d'appel a, examiné la preuve tirée du journal d'Alexander Mackenzie qui indiquait que, en échange de la roque de hareng sur varech, les Heiltsuk recevaient [TRADUCTION] «du saumon grillé, des gâteaux d'écorce de pruche, ainsi que l'autre sorte faite d'œufs de saumon, d'oseille et de

that food products were the principal commodity obtained by the Heiltsuk in exchange for the herring spawn on kelp. Other goods received in exchange for herring spawn on kelp included elk skins for clothing, blankets, and seaweed.

163 Thus, evidence of an established trading network is clear in this case. The Heiltsuk derived their sustenance from trade derived from the herring spawn on kelp resource; they relied on trade to supply them with the necessities of life, principally other food products.

164 The next question is whether the Heiltsuk's use of the resource of herring spawn on kelp was confined to sustenance or whether the trade in question allowed the band to accumulate wealth beyond that required for a basic standard of living. The evidence indicates that large quantities of herring spawn on kelp were traded — amounts that would yield great wealth today because of large demand for herring spawn on kelp by foreign markets. However, the right to derive from a resource what was traditionally derived from that resource is not necessarily a right to harvest the same quantity of fish from that resource as was traditionally harvested. The right is rather to take from the fishery enough to secure "the modern equivalent of what the aboriginal people in question formerly took from the land or the fishery".

165 Despite the large quantities of herring spawn on kelp traditionally traded, the evidence does not indicate that the trade of herring spawn on kelp provided for the Heiltsuk anything more than basic sustenance. There is no evidence in this case that the Heiltsuk accumulated wealth which would exceed a sustenance lifestyle from the herring spawn on kelp fishery. It follows that the aboriginal right to trade in herring spawn on kelp from the Bella Bella region is limited to such trade as secures the modern equivalent of sustenance:

shépherdie du Canada». Le juge Lambert a fait remarquer que les principaux biens obtenus par les Heiltsuk en échange de la roque de hareng sur varech étaient des denrées alimentaires. Parmi les autres biens qu'ils recevaient en échange, mentionnons des peaux d'élan pour se vêtir, ainsi que des couvertures et des algues.

Par conséquent, la preuve démontre clairement en l'espèce l'existence d'un réseau d'échanges établi. Les Heiltsuk tiraient leur subsistance d'échanges fondés sur l'exploitation de la roque de hareng sur varech. Ils comptaient sur ces échanges pour se procurer les biens nécessaires à la vie, principalement d'autres produits alimentaires.

La question suivante est de savoir si l'utilisation de la roque de hareng sur varech par les Heiltsuk se limitait à des fins de subsistance, ou si les échanges en question permettaient à la bande d'accumuler de la richesse au-delà du strict nécessaire. La preuve indique que de grandes quantités de roque de hareng sur varech étaient échangées, quantités qui aujourd'hui rapporteraient des sommes considérables, compte tenu de la grande demande pour ce produit sur les marchés étrangers. Cependant, le droit de tirer d'une ressource ce qui en était tiré traditionnellement n'équivaut pas nécessairement au droit d'en récolter la même quantité. Ce droit consiste plutôt à pêcher en quantité suffisante «l'équivalent moderne de ce que les autochtones en question tiraient dans le passé du territoire ou de la pêche».

En dépit des grandes quantités de roque de hareng sur varech échangées traditionnellement, il ne ressort pas de la preuve que ces échanges rapportaient aux Heiltsuk plus que ce qui est nécessaire pour satisfaire les besoins essentiels. Il n'y a en l'espèce aucun élément de preuve indiquant que les Heiltsuk auraient tiré de la récolte de la roque de hareng sur varech des richesses incompatibles avec une économie de subsistance. Il s'ensuit que le droit ancestral de faire le commerce de la roque de hareng sur varech récoltée dans la région de Bella Bella se limite aux échanges assurant l'équivalent moderne de cette économie de subsistance: les choses essentielles, c'est-à-dire la nourriture, le

the basics of food, clothing and housing, supplemented by a few amenities.

2. Has the Heiltsuk Right to Sell Herring Spawn on Kelp Been Extinguished?

The Crown argued that if the Heiltsuk did have an aboriginal right to sell herring spawn on kelp, it was extinguished prior to 1982. The Crown refers to the regulatory scheme put in place in 1908, and Order in Council P.C. 2539 of 1917. This is the same regulatory scheme that the Crown put forth in *Van der Peet*, *supra*, to make the argument that any aboriginal right to fish commercially was extinguished prior to 1982. As discussed there, it does not support extinguishment.

The Crown also referred to provisions of the *Fisheries Act* of 1867-68 pertaining to the "young" of fish (S.C. 1868, c. 60, s. 13(9)): "No person shall fish for, catch, kill, buy, sell or possess the young of any of the fish named in this Act, or in any Regulation or Regulations under it". Because herring was a fish named under the Act, the prohibition extended to herring spawn on kelp. An exception provided for the harvesting of fish spawn by Indians for food purposes. This prohibition on the harvesting fish spawn continued until 1974, when the harvesting of fish spawn for sale was allowed with a permit. The Crown argues that these regulations extinguished any aboriginal right to sell herring spawn on kelp.

I cannot conclude that these regulations extinguished the aboriginal right of the Heiltsuk people to use herring spawn on kelp as a source of sustenance. The regulations do not manifest the "clear and plain" intention required to extinguish an aboriginal right. The most likely purpose of these regulatory measures was to conserve the young of the resource in order to foster the growth of the fisheries. A measure aimed at conservation of a resource is not inconsistent with a recognition of

vêtement et le logement, complétées par quelques commodités de la vie.

2. Le droit des Heiltsuk de vendre de la rogue de hareng sur varech a-t-il été éteint?

Le ministère public a plaidé que si les Heiltsuk ont effectivement eu le droit ancestral de vendre de la rogue de hareng sur varech, ce droit a été éteint avant 1982. Le ministère public se réfère au régime de réglementation mis en place en 1908 et au décret du conseil C.P. 2539 de 1917. Il s'agit du même régime de réglementation que le ministère public a invoqué, dans *Van der Peet*, précité, au soutien de son argument que tout droit ancestral de pêcher commercialement a été éteint avant 1982. Ainsi qu'il a été dit dans ce pourvoi, ce régime n'étaye pas la thèse de l'extinction.

Le ministère public s'est aussi référé à la disposition de l'*Acte des pêcheries* de 1867-1868 concernant le «fretin» des poissons (S.C. 1868, ch. 60, par. 13(9)): «Personne ne pêchera, ne prendra ou ne tuera, n'achètera, vendra ni n'aura en sa possession le fretin des poissons nommés dans le présent acte, ou dans aucun règlement ou règlements établis sous son autorité». Étant donné que le hareng était un poisson désigné en vertu de l'Acte, l'interdiction s'appliquait à la rogue de hareng sur varech. Une exception était prévue à l'égard de la récolte d'œufs de poisson par les Indiens pour se nourrir. Cette interdiction de récolter des œufs de poisson est restée en vigueur jusqu'en 1974, date à laquelle la récolte de cette ressource à des fins de vente a été autorisée, moyennant obtention d'un permis. Le ministère public prétend que la réglementation en question a éteint tout droit ancestral de vendre de la rogue de hareng sur varech.

Je ne peux conclure que cette réglementation a éteint le droit ancestral des Heiltsuk d'utiliser la rogue de hareng sur varech comme moyen de subsistance. La réglementation n'exprime pas l'intention «claire et expresse» requise pour entraîner l'extinction d'un droit ancestral. L'objet le plus vraisemblable des ces mesures de réglementation était d'assurer la conservation du fretin de ce poisson dans le but de favoriser la croissance de cette pêche. Une mesure ayant pour but la conservation

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an aboriginal right to make use of that resource. Indeed, there is no evidence that these regulations were intended to relate to the aboriginal right at all.

3. Does the Current Regulatory Scheme Infringe the Aboriginal Right to Fish commercially for Sustenance?

169 In *Van der Peet*, *supra*, at para. 298, I framed the question to be asked in order to determine whether the government has infringed the aboriginal right to fish for sustenance as follows: does the current regulatory scheme have the effect of “interfering with an existing aboriginal right”? The right is that of the Heiltsuk to sell herring spawn on kelp for sustenance purposes.

170 To demonstrate that an aboriginal right has been interfered with, an aboriginal person must establish a *prima facie* right to engage in the prohibited conduct at issue. However, the Crown may rebut the inference of infringement if it can demonstrate that the regulatory scheme, viewed as a whole, accommodates the collective aboriginal right in question.

171 As discussed above, the appellants, as members of the Heiltsuk, have a right to harvest and sell herring spawn on kelp for the purpose of sustenance, a right apparently denied by the regulation under which the appellants stand charged. Thus, the first requirement of the test is met.

172 However, the Crown denies infringement of the aboriginal right on the ground that the sale in question took place within a regulatory scheme which sufficiently accommodates the right of the Heiltsuk to sell herring spawn on kelp. The Heiltsuk possessed a “Category J” licence to harvest and sell herring spawn on kelp at the time that the attempted sale at issue in this case took place. That licence was one of 28 licences issued to harvest and sell herring spawn on kelp during the 1988 season. It entitled the Heiltsuk to harvest 16,000

d’une ressource n’est pas incompatible avec la reconnaissance d’un droit ancestral d’utiliser cette ressource. De fait, il n’y a aucune preuve que cette réglementation visait d’aucune façon le droit ancestral.

3. Le régime de réglementation actuel porte-t-il atteinte au droit ancestral de pêcher commercialement à des fins de subsistance?

Dans *Van der Peet*, précité, au par. 298, j’ai formulé de la façon suivante la question qu’il faut se poser afin de déterminer si le gouvernement a porté atteinte au droit ancestral de pêcher à des fins de subsistance: le régime de réglementation actuel a-t-il pour effet de «porter atteinte à un droit ancestral existant»? Le droit en cause est celui des Heiltsuk de vendre de la roque de hareng sur varech à des fins de subsistance.

Pour démontrer qu’il a été porté atteinte à un droit ancestral, un autochtone doit établir l’existence à première vue d’un droit d’accomplir l’acte prohibé en cause. Toutefois, le ministère public peut repousser l’inférence qu’il y a atteinte en démontrant que, considéré dans son ensemble, le régime de réglementation respecte le droit ancestral collectif en question.

Comme il a été dit ci-dessus, les appelants ont, en tant que membres de la bande des Heiltsuk, le droit de récolter et de vendre la roque de hareng sur varech à des fins de subsistance, droit dont ils sont apparemment privés par la disposition réglementaire en vertu de laquelle ils ont été accusés. Par conséquent, la première condition du critère est remplie.

Cependant, le ministère public nie qu’il y a atteinte au droit ancestral, affirmant que la vente en question a eu lieu dans le cadre d’un régime de réglementation qui respecte suffisamment le droit des Heiltsuk de vendre de la roque de hareng sur varech. Au moment où la tentative de vente en question a eu lieu, les Heiltsuk étaient titulaires d’un permis de catégorie J qui les autorisait à récolter et à vendre de la roque de hareng sur varech. Ce permis était l’un des 28 permis de ce genre qui avaient été délivrés au cours de la saison

pounds of herring spawn on kelp, and the price per pound that year was between \$25 and \$28. The licence was issued in the name of one designated member of the Heiltsuk Band, but it was for use of the band as a whole. In short, in this case, unlike *Van der Peet* and *N.T.C. Smokehouse*, *supra*, the Crown argues that it has put in place a regulatory scheme that satisfies the aboriginal right.

The evidence does not disclose whether the "Category J" licence issued to the Heiltsuk was sufficient to satisfy the Heiltsuk's aboriginal right to sell herring spawn on kelp for sustenance. In order to determine whether the quantity of herring spawn on kelp allocated by the licence issued to the band was sufficient to satisfy the sustenance needs of the Heiltsuk, information as to their sustenance needs is required. I would refer the case for a new trial for determination of whether the projected revenue from the herring spawn on kelp sold pursuant to the "Category J" licence suffices to meet the Heiltsuk's sustenance needs.

4. Is the Limitation Placed on the Heiltsuk Right to Sell Herring Spawn on Kelp Justified?

Because of my position on the infringement issue, I do not reach this question. If infringement were established at a new trial, the question of whether such an infringement was justified should be decided at that point, according to the principles set out in *Van der Peet*, *supra*.

5. Conclusion

I would allow the appeal to the extent of confirming the existence of an aboriginal right of the Heiltsuk to sell herring spawn on kelp for sustenance purposes. I would order a new trial in order to decide whether that right has been infringed, and if so, whether such an infringement has been justified.

1988. En vertu de ce permis, les Heiltsuk pouvaient récolter 16 000 livres de rogue de hareng sur varech, dont le prix de vente au cours de l'année en question a oscillé entre 25 \$ et 28 \$ la livre. Le permis qui avait été délivré au nom d'un membre désigné de la bande des Heiltsuk était valable pour l'ensemble de la bande. Bref, en l'espèce, contrairement aux affaires *Van der Peet* et *N.T.C. Smokehouse*, précitées, le ministère public prétend qu'il a mis en place un régime de réglementation qui respecte le droit ancestral.

La preuve n'indique pas si le permis de catégorie J délivré aux Heiltsuk respectait suffisamment le droit ancestral des Heiltsuk de vendre de la rogue de hareng sur varech à des fins de subsistance. Afin de déterminer si la quantité de rogue de hareng sur varech attribuée au moyen du permis délivré à la bande était suffisante pour combler les besoins des Heiltsuk en matière de subsistance, il faut disposer d'information sur ces besoins. Je suis d'avis de renvoyer l'affaire en vue de la tenue d'un nouveau procès afin d'y déterminer si les revenus escomptés de la vente de rogue de hareng sur varech conformément au permis de catégorie J sont suffisants pour satisfaire les besoins des Heiltsuk en matière de subsistance.

4. Les limites imposées au droit des Heiltsuk de vendre de la rogue de hareng sur varech sont-elles justifiées?

Vu ma position sur la question de l'atteinte, je n'ai pas à examiner la question susmentionnée. Si, dans le cadre d'un nouveau procès, on établit l'existence d'une atteinte, la question de savoir si elle était justifiée doit alors être tranchée conformément aux principes énoncés dans *Van der Peet*, précité.

5. Conclusion

Je suis d'avis d'accueillir le pourvoi et de confirmer l'existence du droit ancestral des Heiltsuk de vendre de la rogue de hareng sur varech à des fins de subsistance. J'ordonnerais la tenue d'un nouveau procès afin de déterminer s'il y a eu atteinte à ce droit et, dans l'affirmative, si cette atteinte est justifiée.

Appeal allowed, LA FOREST J. dissenting.

Solicitors for the appellants: Blake, Cassels & Graydon, Vancouver.

Solicitor for the respondent: The Attorney General of Canada, Ottawa.

Solicitors for the interveners the Attorney General of British Columbia: Fuller, Pearlman, Victoria.

Solicitor for the intervenor the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitor for the intervenor the Fisheries Council of British Columbia: J. Keith Lowes, Vancouver.

Solicitors for the interveners the British Columbia Fisheries Survival Coalition and British Columbia Wildlife Federation: Russell & DuMoulin, Vancouver.

Solicitors for the intervenor the First Nations Summit: Ratcliff & Company, North Vancouver.

Solicitors for the interveners Delgamuukw, et al.: Rush, Crane, Guenther & Adams, Vancouver.

Solicitors for the interveners Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner: Pape & Salter, Vancouver.

Pourvoi accueilli, le juge LA FOREST est dissident.

Procureurs des appelants: Blake, Cassels & Graydon, Vancouver.

Procureur de l'intimée: Le procureur général du Canada, Ottawa.

Procureurs de l'intervenant le procureur général de la Colombie-Britannique: Fuller, Pearlman, Victoria.

Procureur de l'intervenant le procureur général de l'Alberta: Le procureur général de l'Alberta, Edmonton.

Procureur de l'intervenant le Fisheries Council of British Columbia: J. Keith Lowes, Vancouver.

Procureurs des intervenantes la British Columbia Fisheries Survival Coalition et la British Columbia Wildlife Federation: Russell & DuMoulin, Vancouver.

Procureurs de l'intervenant le First Nations Summit: Ratcliff & Company, North Vancouver.

Procureurs des intervenants Delgamuukw et autres: Rush, Crane, Guenther & Adams, Vancouver.

Procureurs des intervenants Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese et Allan Gardner: Pape & Salter, Vancouver.

Ivan Morris and Carl Olsen *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General for Saskatchewan, Attorney General of Alberta, Eagle Village First Nation (Migizy Odenaw), Red Rock Indian Band, Conseil de la Nation huronne-wendat, Te'mexw Treaty Association, Chief Allan Claxton and Chief Roger William *Intervenors*

INDEXED AS: **R. v. MORRIS**

Neutral citation: **2006 SCC 59.**

File No.: 30328.

2005: October 14; 2006: December 21.

Present: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Aboriginal law — Treaty rights — Right to hunt — Two members of Tsartlip Indian Band charged under provincial wildlife legislation of hunting with firearm during prohibited hours and hunting with illuminating device — Whether treaty right to hunt includes right to hunt at night with illuminating device — Whether provincial legislation of general application infringes band's treaty right to hunt — Whether provincial legislation applicable to band by virtue of s. 88 of Indian Act — Wildlife Act, S.B.C. 1982, c. 57, ss. 27(1)(d), (e), 29 — Indian Act, R.S.C. 1985, c. I-5, s. 88.

Ivan Morris et Carl Olsen *Appelants*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général de la Saskatchewan, procureur général de l'Alberta, Première Nation de Eagle Village (Migizy Odenaw), bande indienne de Red Rock, Conseil de la Nation huronne-wendat, Te'mexw Treaty Association, chef Allan Claxton et chef Roger William *Intervenants*

RÉPERTORIÉ : **R. c. MORRIS**

Référence neutre : **2006 CSC 59.**

N° du greffe : 30328.

2005 : 14 octobre; 2006 : 21 décembre.

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

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

Droit des Autochtones — Droits issus de traités — Droit de chasse — Deux membres de la bande indienne des Tsartlip accusés en vertu d'une loi provinciale sur la faune d'avoir chassé avec une arme à feu pendant les heures d'interdiction et d'avoir chassé à l'aide d'une source lumineuse — Le droit de chasse issu d'un traité comprend-il le droit de chasser la nuit à l'aide d'une source lumineuse? — Les mesures législatives provinciales d'application générale portent-elles atteinte au droit de chasse conféré par traité à la bande? — Les mesures législatives provinciales sont-elles applicables à la bande par l'effet de l'art. 88 de la Loi sur les Indiens? — Wildlife Act, S.B.C. 1982, ch. 57, art. 27(1)(d), (e), 29 — Loi sur les Indiens, L.R.C. 1985, ch. I-5, art. 88.

This is Exhibit UU referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British Columbia

Constitutional law — Indians — Provincial wildlife legislation — Two members of Tsartlip Indian Band charged under provincial wildlife legislation of hunting with firearm during prohibited hours and hunting with illuminating device — Whether valid provincial legislation of general application inapplicable to band because it interferes with band's treaty right to hunt — Whether provincial legislation nonetheless applicable by virtue of s. 88 of Indian Act — Constitution Act, 1867, ss. 91(24), 92(13) — Indian Act, R.S.C. 1985, c. I-5, s. 88 — Wildlife Act, S.B.C. 1982, c. 57, s. 27(1)(d), (e).

The accused, both members of the Tsartlip Indian Band of the Saanich Nation, were hunting at night when they shot at a decoy deer set up by provincial conservation officers to trap illegal hunters. They were arrested and charged with several offences under British Columbia's *Wildlife Act*, including: (1) hunting wildlife with a firearm during prohibited hours (s. 27(1)(d)); (2) hunting by the use or with the aid of a light or illuminating device (s. 27(1)(e)); and (3) hunting without reasonable consideration for the lives, safety or property of other persons (s. 29). At trial, as a defence to the charges under s. 27(1), the accused raised their right "to hunt over the unoccupied lands . . . as formerly" under the North Saanich Treaty of 1852. They also introduced evidence that the particular night hunt for which they were charged was not dangerous. The trial judge found that "night hunting with illumination was one of the various methods employed by the Tsartlip [people] from time immemorial". However, despite the evidence that night hunting by Tsartlip hunters had yet to result in an accident, he nonetheless concluded that the accused did not have a treaty right to hunt at night because hunting at night with an illuminating device was "inherently unsafe". The trial judge entered convictions on count 1, conditionally stayed count 2 because of the rule against multiple convictions arising from the same delict, and entered acquittals on count 3. Both the summary conviction appeal judge and the majority of the Court of Appeal upheld the convictions based on the prohibition of night hunting (s. 27(1)(d)).

Droit constitutionnel — Indiens — Loi provinciale sur la faune — Deux membres de la bande indienne des Tsartlip accusés en vertu d'une loi provinciale sur la faune d'avoir chassé avec une arme à feu pendant les heures d'interdiction et d'avoir chassé à l'aide d'une source lumineuse — Les mesures législatives provinciales d'application générale qui sont valides sont-elles inapplicables à la bande du fait qu'elles portent atteinte au droit de chasse conféré par traité à la bande? — Les mesures législatives provinciales sont-elles néanmoins applicables par l'effet de l'art. 88 de la Loi sur les Indiens? — Loi constitutionnelle de 1867, art. 91(24), 92(13) — Loi sur les Indiens, L.R.C. 1985, ch. I-5, art. 88 — Wildlife Act, S.B.C. 1982, ch. 57, art. 27(1)(d), (e).

Les accusés, tous deux membres de la bande indienne des Tsartlip de la Nation saanich, étaient en train de chasser de nuit lorsqu'ils ont tiré sur un leurre en forme de cerf que des agents de conservation provinciaux avaient installé pour piéger les braconniers. Ils ont été arrêtés et accusés de plusieurs infractions prévues par la *Wildlife Act* de la Colombie-Britannique, dont les suivantes : (1) avoir chassé un animal sauvage avec une arme à feu pendant les heures d'interdiction (al. 27(1)d)); (2) avoir chassé à l'aide d'une lampe ou autre source lumineuse (al. 27(1)e)); (3) avoir chassé sans égard raisonnable pour la vie, la sécurité ou les biens d'autrui (art. 29). Au procès, pour leur défense contre les accusations fondées sur le par. 27(1), les accusés ont fait valoir leur droit de « chasser sur les terres inoccupées [. . .] comme autrefois » que leur confère le Traité de Saanich nord de 1852. Ils ont aussi produit des éléments de preuve établissant que la chasse nocturne particulière faisant l'objet de leur inculpation n'était pas dangereuse. Selon le juge du procès, « la chasse nocturne à l'aide d'une source lumineuse est l'une des diverses méthodes employées par les Tsartlip depuis des temps immémoriaux ». Toutefois, malgré la preuve que la chasse nocturne pratiquée par les Tsartlip n'avait encore causé aucun accident, il a statué que les accusés ne disposaient d'aucun droit conféré par traité qui leur permet de chasser la nuit, car la chasse nocturne à l'aide d'une source lumineuse est « intrinsèquement dangereuse ». Il a inscrit des déclarations de culpabilité relativement au premier chef d'accusation, a ordonné la suspension conditionnelle des procédures concernant le deuxième chef en raison de la règle interdisant les déclarations de culpabilité multiples pour le même délit et a inscrit des acquittements relativement au troisième chef. Le juge d'appel des poursuites sommaires et les juges majoritaires de la Cour d'appel ont confirmé les déclarations de culpabilité fondées sur l'interdiction de la chasse nocturne (al. 27(1)d)).

Held (McLachlin C.J. and Bastarache and Fish JJ. dissenting): The appeal should be allowed. The convictions are set aside and acquittals entered.

Per Binnie, Deschamps, Abella and Charron JJ.: The Tsartlip's right to hunt at night with the aid of illuminating devices is protected by the North Saanich Treaty. The historical context indicates that the parties intended the treaty to include the full panoply of hunting practices in which the Tsartlip people had engaged before they agreed to relinquish control over their lands. One of those practices was night hunting and, as the trial judge acknowledged, night hunting by the Tsartlip includes, and always has included, night hunting with the aid of illuminating devices. Even on a literal construction, the language of the treaty supports the view that the right to hunt "as formerly" means the right to hunt according to the methods used by the Tsartlip at the time of and before the treaty. The right of the Tsartlip to hunt at night with illuminating devices has of necessity evolved from its pre-treaty tools to its current implements, and the use of guns, spotlights, and motor vehicles reflects the current state of the evolution of the Tsartlip's historic hunting practices. However, it is acknowledged that it could not have been within the common intention of the parties that the Tsartlip would be granted a right to hunt dangerously, since no treaty confers on its beneficiaries a right to put human lives in danger. This is confirmed by the language of the treaty itself, which restricts hunting to "unoccupied lands", away from any town or settlement. Since British Columbia is a very large province, it cannot plausibly be said that a night hunt with illumination is unsafe everywhere and in all circumstances, even within the treaty area at issue in this case. Accordingly, while s. 29 of the *Wildlife Act*, which prohibits hunting or trapping "without reasonable consideration for the lives, safety or property of other persons", is a limit that does not impair the treaty rights of aboriginal hunters and trappers, paras. (d) and (e) of s. 27(1), which apply without exception to the whole province, are overbroad and infringe the treaty right to hunt. Something less than an absolute prohibition on night hunting can address the concern for safety. [14] [25-35] [40] [59]

The relevant provisions of the *Wildlife Act* are valid provincial legislation under s. 92(13) of the *Constitution Act, 1867*. Since treaty rights to hunt lie squarely within federal jurisdiction, provincial laws of general

Arrêt (la juge en chef McLachlin et les juges Bastarache et Fish sont dissidents) : Le pourvoi est accueilli. Les déclarations de culpabilité sont annulées et des acquittements sont inscrits.

Les juges Binnie, Deschamps, Abella et Charron : Le droit des Tsartlip de chasser la nuit à l'aide d'une source lumineuse est protégé par le Traité de Saanich nord. Il ressort du contexte historique que l'intention des parties était d'englober dans le traité toute la panoplie des pratiques de chasse auxquelles s'adonnaient les Tsartlip avant d'accepter de renoncer au contrôle de leurs terres. L'une de ces pratiques est la chasse nocturne et, comme l'a admis le juge du procès, la chasse nocturne pratiquée par les Tsartlip comprend, aujourd'hui comme toujours, la chasse nocturne à l'aide d'une source lumineuse. Même interprété littéralement, le texte du traité permet de confirmer que le droit de chasser « comme autrefois » signifie le droit de chasser selon les méthodes utilisées par les Tsartlip au moment du traité et dans la période qui l'a précédé. Le droit des Tsartlip de chasser la nuit à l'aide d'une source lumineuse a nécessairement évolué depuis les outils employés avant le traité jusqu'aux instruments actuels, et l'emploi de fusils, de projecteurs et de véhicules à moteur reflète l'état actuel de l'évolution des modes de chasse traditionnels des Tsartlip. Cependant, il est reconnu que l'intention commune des parties ne pouvait pas être d'accorder aux Tsartlip le droit de chasser dangereusement puisque aucun traité ne confère à ses bénéficiaires le droit de mettre en danger des vies humaines. Cela est confirmé par le texte du traité lui-même, qui restreint la chasse aux « terres inoccupées », loin des villes ou des peuplements. Étant donné que la Colombie-Britannique est une province très vaste, on ne peut affirmer de façon plausible que la chasse nocturne à l'aide d'une source lumineuse est dangereuse partout et dans toutes les circonstances, même dans la région qui est visée par le traité et qui est en cause en l'espèce. Par conséquent, alors que l'art. 29 de la *Wildlife Act*, lequel interdit de chasser ou de piéger « sans égard raisonnable pour la vie, la sécurité ou les biens d'autrui », constitue une limite qui ne porte pas atteinte aux droits conférés par traité aux chasseurs et piégeurs autochtones, les al. 27(1)d) et e), qui s'appliquent sans exception à l'ensemble de la province, ont une portée trop générale et portent atteinte au droit de chasse conféré par traité. Sans aller jusqu'à l'interdiction absolue de la chasse nocturne, il est possible de répondre aux préoccupations en matière de sécurité. [14] [25-35] [40] [59]

Les dispositions pertinentes de la *Wildlife Act* sont des mesures législatives provinciales valides selon le par. 92(13) de la *Loi constitutionnelle de 1867*. Étant donné que les droits de chasse issus de traités relèvent

application that are inapplicable because they impair “Indianness” may nonetheless be found to be applicable by incorporation under s. 88 of the *Indian Act*. While, on its face, s. 88 cannot be used to incorporate into federal law provincial laws that conflict with the terms of any treaty, the provinces may regulate treaty rights under certain circumstances. Provincial legislation of general application that interferes in an insignificant way with the exercise of that right do not infringe the right; but where, as in the case of s. 27(1)(d) and (e), such legislation is found to conflict with a treaty in a way that constitutes a *prima facie* infringement, the protection of treaty rights prevails and the provincial law cannot be incorporated under s. 88 of the *Indian Act*. [42-46] [50] [54]

Per McLachlin C.J. and Bastarache and Fish JJ. (dissenting): The impugned ban on night hunting with a firearm (s. 27(1)(d)) is valid provincial legislation that applies to the accused. [82]

The *Wildlife Act* falls in pith and substance within the province’s powers. It is not directed at a federal head, like Indians, but more generally at safety, a matter within provincial power. The ban on night hunting is an integrated part of a broader provincial scheme applicable to all British Columbians and aimed at assuring the safety of the province’s hunters and residents. Since this provision does not conflict with federal legislation, the doctrine of paramountcy has no application. Finally, where a provincial law of general application does not affect a treaty right, and does not otherwise touch upon core Indianness, that law applies *ex proprio vigore*, without recourse to s. 88 of the *Indian Act*. Provincial legislation that falls outside the internal limits on the treaty right that the parties to the treaty would have understood and intended does not encroach on the treaty right. [82] [87] [92]

A treaty must be interpreted in a manner that best reconciles the interests of the parties to it. The right to hunt protected by the treaty is subject to an internal limit: it does not include the right to hunt in an inherently hazardous manner. Rather, the right to hunt must be exercised reasonably. Although, at the time the treaty was signed, the practice of hunting at night did not pose the same dangers as it does today, the parties to the treaty must have understood that the right to

clairement de la compétence fédérale, les lois provinciales d’application générale qui sont inapplicables parce qu’elles touchent à l’« indianité » peuvent néanmoins être jugées applicables si elles sont incorporées au droit fédéral par l’effet de l’art. 88 de la *Loi sur les Indiens*. Même si on ne peut, de prime abord, recourir à l’art. 88 pour incorporer au droit fédéral des lois provinciales incompatibles avec des traités, les provinces peuvent dans certaines circonstances réglementer les droits issus de traités. Les lois provinciales d’application générale qui entravent de façon négligeable l’exercice d’un droit issu d’un traité ne portent pas atteinte à ce droit. Toutefois, si on conclut qu’une disposition législative provinciale entre en conflit avec un traité d’une manière qui constitue une atteinte à première vue, comme c’est le cas des al. 27(1)d) et e), la protection des droits issus de traités prévaut et la règle de droit provinciale ne peut être incorporée au droit fédéral par l’effet de l’art. 88 de la *Loi sur les Indiens*. [42-46] [50] [54]

La juge en chef McLachlin et les juges Bastarache et Fish (dissidents) : L’interdiction contestée de chasser la nuit avec une arme à feu (al. 27(1)d)) est une mesure législative provinciale valide qui s’applique aux accusés. [82]

La *Wildlife Act* relève, de par son caractère véritable, des pouvoirs de la province. Elle ne vise pas un chef de compétence fédéral, comme les Indiens, mais porte plus généralement sur la sécurité, matière de compétence provinciale. L’interdiction de la chasse nocturne fait partie intégrante d’un régime provincial plus vaste applicable à tous les Britanno-Colombiens et visant à assurer la sécurité des chasseurs et des résidents de la province. Étant donné que cette mesure législative n’est pas incompatible avec la législation fédérale, la règle de la prépondérance n’est pas applicable. Enfin, la loi provinciale d’application générale qui ne touche ni à un droit issu d’un traité ni autrement à l’essentiel de l’indianité s’applique d’elle-même, sans qu’il soit nécessaire de recourir à l’art. 88 de la *Loi sur les Indiens*. N’empièteraient pas sur le droit issu d’un traité les mesures législatives provinciales qui outrepassent ses limites intrinsèques que les parties au traité auraient comprises et envisagées. [82] [87] [92]

Les traités doivent être interprétés de la manière qui concilie le mieux les intérêts des parties. Le droit de chasse protégé par le traité comporte une limite intrinsèque : il n’inclut pas le droit de chasser de façon dangereuse en soi. Il doit plutôt être exercé de façon raisonnable. Même si, à l’époque de la signature du traité, la chasse nocturne ne présentait pas les mêmes dangers qu’aujourd’hui, les parties au traité devaient comprendre que le droit de chasser n’englobe pas le droit de

hunt did not carry with it a right to hunt dangerously. Furthermore, just as the methods and means of exercising the right should not be frozen in time, neither should the government's legitimate safety concerns. Adapting the exercise of treaty rights to modern weaponry without adapting the corollary legitimate safety concerns would lead to unacceptable results. [82] [108] [110] [115]

Here, s. 27(1)(d) of the *Wildlife Act* regulates the internal safety limit on the treaty right of the accused. A ban on night hunting with a firearm is a reasonable exercise of the Province's regulatory power in defining this internal limit. Since the regulation of dangerous hunting falls outside the scope of the treaty right to hunt, no treaty right is engaged. Accordingly, as no aboriginal right is asserted, and as the provincial law does not otherwise go to Indianness, the law applies *ex proprio vigore*. [82] [129] [132]

Cases Cited

By Deschamps and Abella JJ.

Applied: *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [1999] 3 S.C.R. 533; **referred to:** *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. White* (1964), 50 D.L.R. (2d) 613; *R. v. Bartleman* (1984), 55 B.C.L.R. 78; *Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79; *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Badger*, [1996] 1 S.C.R. 771; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Gladstone*, [1996] 2 S.C.R. 723.

By McLachlin C.J. and Fish J. (dissenting)

R. v. Sparrow, [1990] 1 S.C.R. 1075; *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *R. v. Francis*, [1988] 1 S.C.R. 1025; *General Motors of Canada Ltd. v. City*

chasser dangereusement. Par ailleurs, tout comme les méthodes et moyens employés pour l'exercice des droits ne sont pas figés dans le temps, les préoccupations légitimes du gouvernement en matière de sécurité ne doivent pas l'être non plus. Adapter l'exercice des droits issus de traités au contexte des armes modernes sans adapter son corollaire — les préoccupations légitimes en matière de sécurité — entraînerait des résultats inacceptables. [82] [108] [110] [115]

En l'espèce, l'al. 27(1)(d) de la *Wildlife Act* réglemente la limite intrinsèque — en matière de sécurité — du droit conféré par traité aux accusés. L'interdiction de la chasse nocturne avec une arme à feu est l'exercice raisonnable du pouvoir de réglementation de la province pour définir cette limite intrinsèque. Étant donné que la réglementation des pratiques de chasse dangereuses ne relève pas du champ d'application du droit de chasse issu d'un traité, aucun droit issu d'un traité n'est en jeu. Par conséquent, comme aucun droit ancestral n'est invoqué et que les règles de droit provinciales ne touchent pas autrement à l'indianité, elles s'appliquent d'elles-mêmes. [82] [129] [132]

Jurisprudence

Citée par les juges Deschamps et Abella

Arrêts appliqués : *R. c. Marshall*, [1999] 3 R.C.S. 456; *R. c. Marshall*, [1999] 3 R.C.S. 533; **arrêts mentionnés :** *Kienapple c. La Reine*, [1975] 1 R.C.S. 729; *R. c. White* (1964), 50 D.L.R. (2d) 613; *R. c. Bartleman* (1984), 55 B.C.L.R. 78; *Saanichton Marina Ltd. c. Claxton* (1989), 36 B.C.L.R. (2d) 79; *R. c. Marshall*, [2005] 2 R.C.S. 220, 2005 CSC 43; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *R. c. Sundown*, [1999] 1 R.C.S. 393; *R. c. Badger*, [1996] 1 R.C.S. 771; *Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)*, [2002] 2 R.C.S. 146, 2002 CSC 31; *Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031; *Dick c. La Reine*, [1985] 2 R.C.S. 309; *R. c. Côté*, [1996] 3 R.C.S. 139; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Gladstone*, [1996] 2 R.C.S. 723.

Citée par la juge en chef McLachlin et le juge Fish (dissidents)

R. c. Sparrow, [1990] 1 R.C.S. 1075; *Kienapple c. La Reine*, [1975] 1 R.C.S. 729; *Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)*, [2002] 2 R.C.S. 146, 2002 CSC 31; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S. 585, 2003 CSC 55; *R. c. Francis*, [1988] 1 R.C.S. 1025; *General Motors*

National Leasing, [1989] 1 S.C.R. 641; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sundown*, [1999] 1 S.C.R. 393; *Myran v. The Queen*, [1976] 2 S.C.R. 137; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Paul* (1993), 142 N.B.R. (2d) 55; *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43; *R. v. White* (1965), 52 D.L.R. (2d) 481, aff'g (1964), 50 D.L.R. (2d) 613; *Prince v. The Queen*, [1964] S.C.R. 81; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Seward* (1999), 171 D.L.R. (4th) 524; *R. v. Bernard* (2002), 200 N.S.R. (2d) 352, 2002 NSCA 5, leave to appeal refused, [2002] 3 S.C.R. vi; *R. v. Pariseau*, [2003] 2 C.N.L.R. 260; *R. v. Southwind*, [1991] O.J. No. 3612 (QL); *R. v. King*, [1996] O.J. No. 5458 (QL); *R. v. Harris*, [1998] B.C.J. No. 1016 (QL); *R. v. Ice*, [2000] O.J. No. 5857 (QL); *R. v. Stump*, [2000] 4 C.N.L.R. 260; *R. v. Barlow* (2000), 228 N.B.R. (2d) 289, leave to appeal refused, [2001] N.B.J. No. 145 (QL), 2001 NBCA 44; *Turner v. Manitoba* (2001), 160 Man. R. (2d) 256, 2001 MBCA 207; *R. v. Augustine* (2001), 232 N.B.R. (2d) 313, leave to appeal refused, [2001] N.B.J. No. 190 (QL), 2001 NBCA 57; *R. v. Maurice*, [2002] 2 C.N.L.R. 273, 2002 SKQB 68; *R. v. Pitawanakwat*, [2004] O.J. No. 2075 (QL), 2004 ONCJ 50; *R. v. Yapput*, [2004] O.J. No. 5055 (QL), 2004 ONCJ 318; *R. v. Maple*, [1982] 2 C.N.L.R. 181; *R. v. Machimity*, [1996] O.J. No. 4365 (QL); *R. v. Polches* (2005), 289 N.B.R. (2d) 72, 2005 NBQB 137.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 91(24), 92(13).
Constitution Act, 1982, s. 35.
Indian Act, R.S.C. 1985, c. I-5, s. 88.
Indian Act, S.C. 1951, c. 29.
Wildlife Act, S.B.C. 1982, c. 57, ss. 27(1)(d), (e), 28(1), 29.

Treaties

North Saanich Treaty of 1852.

Authors Cited

Wilkins, Kerry. "Of Provinces and Section 35 Rights" (1999), 22 *Dal. L.J.* 185.

APPEAL from a judgment of the British Columbia Court of Appeal (Lambert, Huddart and Thackray JJ.A.) (2004), 194 B.C.A.C. 107,

of Canada Ltd. c. City National Leasing, [1989] 1 R.C.S. 641; *Rothmans, Benson & Hedges Inc. c. Saskatchewan*, [2005] 1 R.C.S. 188, 2005 CSC 13; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *R. c. Marshall*, [1999] 3 R.C.S. 456; *R. c. Marshall*, [1999] 3 R.C.S. 533; *R. c. Badger*, [1996] 1 R.C.S. 771; *R. c. Sundown*, [1999] 1 R.C.S. 393; *Myran c. La Reine*, [1976] 2 R.C.S. 137; *R. c. Sutherland*, [1980] 2 R.C.S. 451; *Moosehunter c. La Reine*, [1981] 1 R.C.S. 282; *Dick c. La Reine*, [1985] 2 R.C.S. 309; *R. c. Côté*, [1996] 3 R.C.S. 139; *R. c. Paul* (1993), 142 R.N.-B. (2^e) 55; *R. c. Marshall*, [2005] 2 R.C.S. 220, 2005 CSC 43; *R. c. White* (1965), 52 D.L.R. (2d) 481, conf. (1964), 50 D.L.R. (2d) 613; *Prince c. The Queen*, [1964] R.C.S. 81; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *R. c. Seward* (1999), 171 D.L.R. (4th) 524; *R. c. Bernard* (2002), 200 N.S.R. (2d) 352, 2002 NSCA 5, autorisation de pourvoi refusée, [2002] 3 R.C.S. vi; *R. c. Pariseau*, [2003] 2 C.N.L.R. 260; *R. c. Southwind*, [1991] O.J. No. 3612 (QL); *R. c. King*, [1996] O.J. No. 5458 (QL); *R. c. Harris*, [1998] B.C.J. No. 1016 (QL); *R. c. Ice*, [2000] O.J. No. 5857 (QL); *R. c. Stump*, [2000] 4 C.N.L.R. 260; *R. c. Barlow* (2000), 228 R.N.-B. (2^e) 289, autorisation de pourvoi refusée, [2001] A.N.-B. n^o 145 (QL), 2001 NBCA 44; *Turner c. Manitoba* (2001), 160 Man. R. (2d) 256, 2001 MBCA 207; *R. c. Augustine* (2001), 232 R.N.-B. (2^e) 313, autorisation de pourvoi refusée, [2001] A.N.-B. n^o 190 (QL), 2001 NBCA 57; *R. c. Maurice*, [2002] 2 C.N.L.R. 273, 2002 SKQB 68; *R. c. Pitawanakwat*, [2004] O.J. No. 2075 (QL), 2004 ONCJ 50; *R. c. Yapput*, [2004] O.J. No. 5055 (QL), 2004 ONCJ 318; *R. c. Maple*, [1982] 2 C.N.L.R. 181; *R. c. Machimity*, [1996] O.J. No. 4365 (QL); *R. c. Polches* (2005), 289 R.N.-B. (2^e) 72, 2005 NBQB 137.

Lois et règlements cités

Loi constitutionnelle de 1867, art. 91(24), 92(13).
Loi constitutionnelle de 1982, art. 35.
Loi sur les Indiens, L.R.C. 1985, ch. I-5, art. 88.
Loi sur les Indiens, S.C. 1951, ch. 29.
Wildlife Act, S.B.C. 1982, ch. 57, art. 27(1)(d), (e), 28(1), 29.

Traités

Traité de Saanich nord de 1852.

Doctrine citée

Wilkins, Kerry. « Of Provinces and Section 35 Rights » (1999), 22 *Dal. L.J.* 185.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Lambert, Huddart et Thackray) (2004), 194 B.C.A.C. 107,

317 W.A.C. 107, 25 B.C.L.R. (4th) 45, 237 D.L.R. (4th) 693, [2004] 2 C.N.L.R. 219, [2004] 5 W.W.R. 403, [2004] B.C.J. No. 400 (QL), 2004 BCCA 121, affirming a judgment of Singh J., [2002] 4 C.N.L.R. 222, [2002] B.C.J. No. 1292 (QL), 2002 BCSC 780, upholding the convictions entered by Higinbotham Prov. Ct. J., [1999] B.C.J. No. 3199 (QL). Appeal allowed, McLachlin C.J. and Bastarache and Fish JJ. dissenting.

Louise Mandell, Q.C., Ardith Wal'petko We'dalx Walkem, Bruce Elwood and Michael Jackson, Q.C., for the appellants.

Lisa J. Mrozinski and Paul E. Yearwood, for the respondent.

Mitchell R. Taylor and Mark Kindrachuk, Q.C., for the intervener the Attorney General of Canada.

Ria Tzimas and Elaine M. Atkinson, for the intervener the Attorney General of Ontario.

René Morin, for the intervener the Attorney General of Quebec.

John G. Furey, for the intervener the Attorney General of New Brunswick.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Sandra C. M. Folkins and Angela Edgington, for the intervener the Attorney General of Alberta.

Diane Soroka, for the intervener the Eagle Village First Nation (Migizy Odenaw).

Harley I. Schachter, for the intervener the Red Rock Indian Band.

Michel Beaupré and Simon Picard, for the intervener Conseil de la Nation huronne-wendat.

Written submissions only by *Robert J. M. Janes and Dominique Nouvet,* for the intervener Te'mexw Treaty Association.

Written submissions only by *Jack Woodward and David M. Robbins,* for the intervener Chief Allan Claxton.

317 W.A.C. 107, 25 B.C.L.R. (4th) 45, 237 D.L.R. (4th) 693, [2004] 2 C.N.L.R. 219, [2004] 5 W.W.R. 403, [2004] B.C.J. No. 400 (QL), 2004 BCCA 121, qui a confirmé une décision du juge Singh, [2002] 4 C.N.L.R. 222, [2002] B.C.J. No. 1292 (QL), 2002 BCSC 780, qui avait confirmé les déclarations de culpabilité prononcées par le juge Higinbotham, [1999] B.C.J. No. 3199 (QL). Pourvoi accueilli, la juge en chef McLachlin et les juges Bastarache et Fish sont dissidents.

Louise Mandell, c.r., Ardith Wal'petko We'dalx Walkem, Bruce Elwood et Michael Jackson, c.r., pour les appelants.

Lisa J. Mrozinski et Paul E. Yearwood, pour l'intimée.

Mitchell R. Taylor et Mark Kindrachuk, c.r., pour l'intervenant le procureur général du Canada.

Ria Tzimas et Elaine M. Atkinson, pour l'intervenant le procureur général de l'Ontario.

René Morin, pour l'intervenant le procureur général du Québec.

John G. Furey, pour l'intervenant le procureur général du Nouveau-Brunswick.

P. Mitch McAdam, pour l'intervenant le procureur général de la Saskatchewan.

Sandra C. M. Folkins et Angela Edgington, pour l'intervenant le procureur général de l'Alberta.

Diane Soroka, pour l'intervenante la Première Nation de Eagle Village (Migizy Odenaw).

Harley I. Schachter, pour l'intervenante la bande indienne de Red Rock.

Michel Beaupré et Simon Picard, pour l'intervenant le Conseil de la Nation huronne-wendat.

Argumentation écrite seulement par *Robert J. M. Janes et Dominique Nouvet,* pour l'intervenante Te'mexw Treaty Association.

Argumentation écrite seulement par *Jack Woodward et David M. Robbins,* pour l'intervenant le chef Allan Claxton.

Written submissions only by *David M. Rosenberg, Patricia Hutchings and Jay Nelson*, for the intervener Chief Roger William.

Argumentation écrite seulement par *David M. Rosenberg, Patricia Hutchings et Jay Nelson*, pour l'intervenant le chef Roger William.

The judgment of Binnie, Deschamps, Abella and Charron JJ. was delivered by

Version française du jugement des juges Binnie, Deschamps, Abella et Charron rendu par

1 DESCHAMPS AND ABELLA JJ. — This case raises the question whether a provincial government acting within its constitutionally mandated powers can interfere with treaty rights and, if so, to what extent.

LES JUGES DESCHAMPS ET ABELLA — Il s'agit en l'espèce de déterminer si un gouvernement provincial agissant dans les limites des pouvoirs que lui confère la Constitution peut porter atteinte aux droits issus de traités et, dans l'affirmative, dans quelle mesure.

2 In 1852, James Douglas, Governor of the Colony of Vancouver Island, representing the British Crown, enshrined in a treaty the recognition that the Saanich Nation would be “at liberty to hunt over the unoccupied lands; and to carry on our fisheries as formerly”. Ivan Morris and Carl Olsen, both members of the Tsartlip Band of the Saanich Nation, were charged, among other charges, under s. 27(1)(d) and (e) of British Columbia's *Wildlife Act*, S.B.C. 1982, c. 57, for doing what the Tsartlip have done, as the trial judge noted, “from time immemorial”: hunting for food at night with the aid of illuminating devices.

En 1852, James Douglas, gouverneur de la colonie de l'île de Vancouver, représentant la Couronne britannique, a garanti par traité à la Nation saanich qu'elle aurait [TRADUCTION] « toute liberté pour chasser sur les terres inoccupées et pêcher comme autrefois ». Ivan Morris et Carl Olsen, tous deux membres de la bande indienne des Tsartlip de la Nation saanich, ont été accusés, entre autres, en vertu des al. 27(1)d) et e) de la *Wildlife Act* de la Colombie-Britannique, S.B.C. 1982, ch. 57, d'avoir pratiqué une activité que, comme l'a souligné le juge du procès, les Tsartlip pratiquent [TRADUCTION] « depuis des temps immémoriaux » : la chasse nocturne de subsistance à l'aide d'une source lumineuse.

3 As a defence to the charges under s. 27, Morris and Olsen raised their right to hunt under the North Saanich Treaty of 1852 (“Treaty”). The Crown concedes that Morris and Olsen have a right to hunt but asserts a ban on hunting at night. Morris and Olsen counter that they were observing safe hunting practices and that provincial regulations cannot affect their treaty right.

MM. Morris et Olsen ont fait valoir pour leur défense contre les accusations fondées sur l'art. 27 le droit de chasse que leur confère le Traité de Saanich nord de 1852 (« Traité »). La Couronne leur reconnaît le droit de chasse, mais affirme la validité de l'interdiction de la chasse nocturne. MM. Morris et Olsen répliquent qu'ils observaient des pratiques de chasse sécuritaires et que la réglementation provinciale ne peut toucher à leur droit issu d'un traité.

4 In this case, we conclude that the Tsartlip's right to hunt at night with the aid of illuminating devices is protected by treaty. Although the prohibition against dangerous hunting contained in s. 29 of the *Wildlife Act* is a limit that does not infringe the treaty right, the complete prohibition on hunting at night with an illuminating device set out in

Nous concluons en l'espèce que le droit des Tsartlip de chasser la nuit à l'aide d'une source lumineuse est protégé par traité. Alors que l'interdiction de chasser dangereusement prévue à l'art. 29 de la *Wildlife Act* constitue une limite qui ne porte pas atteinte au droit issu d'un traité, l'interdiction absolue de chasser la nuit à l'aide d'une source

s. 27 is overbroad because it prohibits both safe and unsafe hunting, and, in the case of aboriginal hunters, infringes their treaty right.

The evidence at trial was that the Tsartlip's historic aboriginal practice of hunting at night with illumination has yet to result in a single known accident caused by those engaging in it. In our view, paras. (d) and (e) of s. 27(1) of the *Wildlife Act*, despite being part of a valid provincial law of general application, prohibit the exercise of a protected treaty right and are inapplicable in this case. We would therefore allow the appeal, set aside the convictions and enter acquittals.

1. Background

Morris and Olsen were arrested on November 28, 1996 on Vancouver Island for breaches of prohibitions contained in the *Wildlife Act*: hunting of wildlife with a firearm during prohibited hours (s. 27(1)(d)); hunting by the use or with the aid of a light or illuminating device (s. 27(1)(e)); hunting without reasonable consideration for the lives, safety or property of other persons (s. 29); and, in the case of Olsen only, discharging a firearm at wildlife from a motor vehicle (s. 28(1)).

The backdrop to the prosecution of Morris and Olsen was a change of administrative policy on the part of the provincial Crown, acting through conservation officers. The evidence is that the Tsartlip had hunted at night for generations until the charges were laid in this case. They had received confirmation from the Minister of Forests, David Zirnheld, that there would be no prosecutions in connection with the exercise of hunting and fishing rights pursuant to the Treaty. On the basis of this assurance, the Tsartlip entered into an arrangement with Doug Turner, Chief Enforcement Officer of the Conservation Officer Service for Vancouver Island, whereby any treaty beneficiary charged in relation to night hunting was instructed to phone Mr. Turner. Once Mr. Turner received confirmation

lumineuse prévue à l'art. 27 a une portée trop générale, car elle vise à la fois la chasse dangereuse et la chasse sécuritaire et, dans le cas des chasseurs autochtones, elle porte atteinte à leur droit issu d'un traité.

Selon la preuve présentée au procès, la traditionnelle chasse nocturne autochtone à l'aide d'une source lumineuse que pratiquent les Tsartlip n'a encore, à ce que l'on sache, causé aucun accident de la part des chasseurs. À notre avis, les al. 27(1)d) et e) de la *Wildlife Act*, même s'ils font partie d'une loi provinciale d'application générale qui est valide, interdisent l'exercice d'un droit protégé par traité et sont inapplicables en l'espèce. Nous sommes donc d'avis d'accueillir le pourvoi, d'annuler les déclarations de culpabilité et d'inscrire des acquittements.

1. Contexte

MM. Morris et Olsen ont été arrêtés le 28 novembre 1996 sur l'île de Vancouver pour avoir enfreint des interdictions énoncées dans la *Wildlife Act* : avoir chassé un animal sauvage avec une arme à feu pendant les heures d'interdiction (al. 27(1)d)); avoir chassé à l'aide d'une lampe ou autre source lumineuse (al. 27(1)e)); avoir chassé sans égard raisonnable pour la vie, la sécurité ou les biens d'autrui (art. 29); et — dans le cas de M. Olsen seulement — avoir déchargé une arme à feu sur un animal sauvage à partir d'un véhicule à moteur (par. 28(1)).

La poursuite contre MM. Morris et Olsen a été intentée dans le contexte d'une nouvelle politique administrative de la Couronne provinciale, qui agit par l'intermédiaire des agents de conservation. Selon la preuve, les Tsartlip pratiquaient la chasse nocturne depuis des générations jusqu'à ce que les accusations soient portées en l'espèce. Ils avaient reçu du ministre des Forêts, David Zirnheld, la confirmation qu'aucune poursuite ne serait engagée relativement à l'exercice des droits de chasse et de pêche garantis par le Traité. Se fondant sur ces assurances, les Tsartlip ont convenu avec Doug Turner, agent principal chargé de l'exécution de la loi, service des agents de conservation de l'île de Vancouver, qu'en cas d'inculpation d'un bénéficiaire du Traité relativement à la chasse nocturne,

that the hunter in question was a member of the Saanich Nation, the hunter would be released. This arrangement, it appears, ended with Mr. Turner's retirement in 1996.

celui-ci téléphonerait à M. Turner. Le chasseur en question serait remis en liberté dès que son appartenance à la Nation saanich aurait été confirmée à M. Turner. Cette entente aurait, semble-t-il, pris fin avec le départ à la retraite de M. Turner en 1996.

8 In November of that year, not long after Mr. Turner's retirement, a conservation officer was invited to speak at a "rod and gun" club meeting where members expressed dissatisfaction about Indians engaged in night hunting. A decoy operation was promptly organized to trap night hunters, as a result of which Morris and Olsen were arrested and charged. The Tsartlip were not forewarned of the operation and no discussion took place after the charges were laid.

En novembre de la même année, peu après le départ de M. Turner, un agent de conservation a été invité comme conférencier à une réunion d'un club de chasse et pêche, où des membres se sont dits mécontents du fait que des Indiens chassaient la nuit. On a rapidement monté une opération leurre pour piéger les chasseurs nocturnes. C'est ainsi que MM. Morris et Olsen ont été arrêtés et inculpés. Les Tsartlip n'ont pas été prévenus de la tenue de l'opération, et il n'y a eu aucune discussion après les mises en accusation.

9 The trial in Provincial Court lasted five days. Morris and Olsen raised their rights under the Treaty as a general defence to the charges. The conservation officer acknowledged that safety concerns are inversely proportionate to the remoteness and density of the population.

Le procès à la Cour provinciale a duré cinq jours. MM. Morris et Olsen ont invoqué, comme moyen de défense général contre les accusations, les droits que leur confère le Traité. L'agent de conservation a reconnu que les préoccupations relatives à la sécurité sont inversement proportionnelles à l'éloignement et à la densité de la population.

10 Morris and Olsen led evidence to the effect that night hunting is part of the Tsartlip tradition and has been carried on in safety for generations. They also introduced evidence that the particular night hunt for which they were charged was not dangerous. Morris and Olsen were caught by provincial conservation officers using a mechanical black-tailed deer decoy. The decoy was set up on unoccupied lands 20 metres off a gravel road. It was, one of the conservation officers testified, a spot chosen for its safety. Officer Gerald Brunham explained the choice of site as follows:

MM. Morris et Olsen ont présenté la preuve que la chasse nocturne fait partie de la tradition des Tsartlip et qu'elle est pratiquée de façon sécuritaire depuis des générations. Ils ont aussi produit des éléments de preuve établissant que la chasse nocturne particulière faisant l'objet de leur inculpation n'était pas dangereuse. Ils se sont fait prendre par des agents de conservation provinciaux, qui se sont servis d'un leurre mécanique en forme de cerf à queue noire. Le leurre était installé sur des terres inoccupées, à 20 m d'une route en gravier. Selon le témoignage d'un des agents de conservation, l'endroit était choisi pour ses caractéristiques sécuritaires. L'agent Gerald Brunham a expliqué ainsi le choix de l'emplacement :

[TRADUCTION]

Q Were there any residences in that vicinity?

Q Y avait-il des résidences dans ce voisinage?

A Not within two kilometres.

R Aucune dans un rayon de deux kilomètres.

. . .

. . .

Q And you chose that particular [hunting] site because of safety aspects?

A Yes.

Q So would it be accurate to say that there were no private property, no campers, no dwellings within the range that a bullet would travel?

A Yes.

Q And you chose that specific hillside so that if a bullet did go through your decoy it would go into a hill and into the trees?

A That's right.

The trial judge found that “night hunting with illumination was one of the various methods employed by the Tsartlip [people] from time immemorial” ([1999] B.C.J. No. 3199 (QL), at para. 19). However, despite the evidence that night hunting by Tsartlip hunters had yet to result in an accident, he nonetheless concluded that Morris and Olsen did not have a treaty right to hunt at night because hunting at night with an illuminating device was “inherently unsafe” (para. 25).

They were both convicted of hunting during prohibited hours contrary to s. 27(1)(d), and Olsen was convicted of discharging a firearm at wildlife from a motor vehicle contrary to s. 28(1). However, despite his conclusion that night hunting was inherently unsafe, the trial judge acquitted the appellants on the count of hunting without reasonable consideration for the lives, safety or property of other persons (s. 29). As well, the trial judge conditionally stayed the charges of hunting with the use or aid of a light or illuminating device contrary to s. 27(1)(e), based on the rule in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729.

The convictions based on the prohibition of night hunting (s. 27(1)(d)) were upheld by a summary conviction appeal judge ([2002] 4 C.N.L.R. 222, 2002 BCSC 780) and by the majority in

Q Et vous avez choisi cet endroit précis pour ses caractéristiques sécuritaires?

R Oui.

Q N'est-il pas exact qu'à cet endroit il n'y avait pas de propriété privée, pas de campement, pas d'habitation dans le rayon de la trajectoire d'une balle?

R Oui.

Q Et vous avez choisi ce versant précisément pour que la balle qui traverserait le leurre aboutisse dans une colline et dans les arbres?

R C'est exact.

Selon le juge du procès, [TRADUCTION] « la chasse nocturne à l'aide d'une source lumineuse est l'une des diverses méthodes employées par les Tsartlip depuis des temps immémoriaux » ([1999] B.C.J. No. 3199 (QL), par. 19). Toutefois, malgré la preuve que la chasse nocturne pratiquée par les Tsartlip n'avait encore causé aucun accident, le juge a statué que MM. Morris et Olsen ne disposaient d'aucun droit conféré par traité qui leur permet de chasser la nuit, car la chasse nocturne à l'aide d'une source lumineuse est [TRADUCTION] « intrinsèquement dangereuse » (par. 25).

Ils ont tous deux été reconnus coupables d'avoir, en contravention de l'al. 27(1)d), chassé pendant les heures interdites, et M. Olsen a été reconnu coupable d'avoir, en violation du par. 28(1), déchargé une arme à feu sur un animal sauvage à partir d'un véhicule à moteur. Cependant, malgré sa conclusion que la chasse nocturne était intrinsèquement dangereuse, le juge du procès a acquitté les appelants relativement à l'accusation d'avoir chassé sans égard raisonnable pour la vie, la sécurité ou les biens d'autrui (art. 29). Il a aussi ordonné la suspension conditionnelle des procédures concernant l'accusation d'avoir chassé à l'aide d'une lampe ou autre source lumineuse en violation de l'al. 27(1)e), selon la règle énoncée dans *Kienapple c. La Reine*, [1975] 1 R.C.S. 729.

Les déclarations de culpabilité fondées sur l'interdiction de chasser la nuit (al. 27(1)d)) ont été confirmées par un juge d'appel des poursuites sommaires ([2002] 4 C.N.L.R. 222, 2002 BCSC 780) et

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the Court of Appeal for British Columbia, with Lambert J.A. dissenting ((2004), 25 B.C.L.R. (4th) 45, 2004 BCCA 121). The only provisions at issue in the appeal before us are s. 27(1)(d) and (e).

2. Analysis

14 The analytical framework in which to consider this case can be divided into two parts. The first step is to determine whether the impugned provisions of the *Wildlife Act* impair a treaty right. This entails characterizing the scope of the treaty right claimed by Morris and Olsen and delineating any limits on that right. We acknowledge at the outset that there is no treaty right to hunt dangerously. Thus s. 29 of the *Wildlife Act*, which prohibits hunting or trapping “without reasonable consideration for the lives, safety or property of other persons”, is a limit that does not impair the treaty rights of aboriginal hunters and trappers. At issue are the limits imposed by s. 27(1)(d) and (e). In our view these prohibitions, presented as safety measures in relation to the Tsartlip, are overbroad and infringe the treaty right to hunt.

15 The second step is to analyse whether the impugned provisions of the *Wildlife Act* are valid and applicable under the constitutional division of powers in ss. 91 and 92 of the *Constitution Act, 1867* and under s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5. In our view, because paras. (d) and (e) of s. 27(1) are inconsistent with the Treaty, they do not apply to Morris and Olsen either directly, of their own force, as provincial law, or as incorporated federal law under s. 88 of the *Indian Act*.

2.1 *Evolution of the Treaty Right*

16 Between 1850 and 1854, 14 treaties were concluded with bands living on Vancouver Island. These came to be known as the Douglas Treaties, named after James Douglas, Governor of the Colony of Vancouver Island at the time. The Treaty

par les juges majoritaires de la Cour d’appel de la Colombie-Britannique, le juge Lambert étant dissident ((2004), 25 B.C.L.R. (4th) 45, 2004 BCCA 121). Les seules dispositions en litige en l’espèce sont les al. 27(1)(d) et e).

2. Analyse

Le cadre d’analyse de la présente espèce peut être scindé en deux parties. La première étape consiste à décider si les dispositions contestées de la *Wildlife Act* portent atteinte à un droit issu d’un traité. Pour ce faire, il faut définir la portée du droit issu d’un traité invoqué par MM. Morris et Olsen et ainsi que les limites de ce droit. Nous reconnaissons d’emblée qu’aucun traité ne confère le droit de chasser dangereusement. Ainsi, l’art. 29 de cette loi, lequel interdit de chasser ou de piéger [TRADUCTION] « sans égard raisonnable pour la vie, la sécurité ou les biens d’autrui », constitue une limite qui ne porte pas atteinte aux droits conférés par traité aux chasseurs et piégeurs autochtones. La question en litige est celle des limites imposées par les al. 27(1)(d) et e). À notre avis, ces interdictions, présentées comme des mesures de sécurité pour les Tsartlip, ont une portée trop générale et portent atteinte au droit de chasse issu d’un traité.

La seconde étape consiste à déterminer la validité et l’applicabilité des dispositions contestées de la *Wildlife Act*, selon le partage constitutionnel des compétences prévu aux art. 91 et 92 de la *Loi constitutionnelle de 1867* et selon l’art. 88 de la *Loi sur les Indiens*, L.R.C. 1985, ch. I-5. À notre avis, étant donné que les al. 27(1)(d) et e) sont incompatibles avec le Traité, ils ne s’appliquent pas à MM. Morris et Olsen, que ce soit directement d’eux-mêmes comme règles de droit provinciales, ou encore comme règles de droit fédérales incorporées par l’effet de l’art. 88 de la *Loi sur les Indiens*.

2.1 *Évolution du droit issu d’un traité*

Entre 1850 et 1854, 14 traités ont été conclus avec des bandes vivant sur l’île de Vancouver. On a fini par les appeler Traités de Douglas, en l’honneur de James Douglas, gouverneur de la colonie de l’île de Vancouver à l’époque. Le Traité, à lui

alone covers approximately 22,000 hectares situated on lands that are partly uninhabited and partly inhabited.

In exchange for the surrender by the Saanich of their lands on Vancouver Island, the Crown made a number of commitments to them, including the following guarantee:

[I]t is . . . understood that we [the Saanich Tribe] are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly. [Emphasis added.]

Each of the 14 treaties contained this commitment in the same formulation.

The language of the Treaty stating “we are at liberty to hunt over the unoccupied lands” exemplifies the lean and often vague vocabulary of historic treaty promises. McLachlin J., dissenting on other grounds, stated in *R. v. Marshall*, [1999] 3 S.C.R. 456 (“*Marshall No. 1*”), at para. 78, that “[t]he goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed”. This means that the promises in the treaty must be placed in their historical, political, and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time.

The Douglas Treaties were the reflections of oral agreements reduced to writing by agents of the Crown. The historical background to these treaties has been ably documented by the B.C. Court of Appeal in three decisions: see *R. v. White* (1964), 50 D.L.R. (2d) 613; *R. v. Bartleman* (1984), 55 B.C.L.R. 78; and *Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79. This historical context reveals an overriding intention that the methods by which the Saanich traditionally hunted be brought within the Treaty’s protection.

First, it was in the interest of all parties to preserve traditional hunting and fishing practices among the Tsartlip and other Douglas Treaty

seul, couvre une superficie d’environ 22 000 hectares s’étendant sur des terres qui sont en partie inhabitées et en partie habitées.

En contrepartie des terres cédées par les Saanich sur l’île de Vancouver, la Couronne a pris certains engagements envers eux, notamment le respect de la garantie suivante :

[TRADUCTION] [I]l est [. . .] entendu que nous [les Saanich] avons toute liberté pour chasser sur les terres inoccupées et pêcher comme autrefois. [Nous soulignons.]

Cet engagement figurait selon le même libellé dans chacun des 14 traités.

La formulation « nous avons toute liberté pour chasser sur les terres inoccupées » qui figure dans le Traité donne un exemple de la pauvreté et du caractère souvent vague des expressions utilisées dans le cadre d’un traité historique. Dans *R. c. Marshall*, [1999] 3 R.C.S. 456 (« *Marshall n° 1* »), par. 78, la juge McLachlin, dissidente pour d’autres motifs, a affirmé que « [l]’interprétation des traités a pour objet de choisir, parmi les interprétations possibles de l’intention commune, celle qui concilie le mieux les intérêts des deux parties à l’époque de la signature ». Cela veut dire qu’il faut placer dans leurs contextes historique, politique et culturel les promesses figurant dans le traité afin de dégager l’intention commune des parties et les intérêts qu’elles voulaient concilier à l’époque.

Les Traités de Douglas sont le fruit d’ententes verbales que les représentants de la Couronne ont couchées par écrit. La Cour d’appel de la Colombie-Britannique a bien documenté le contexte historique de ces traités dans trois arrêts : voir *R. c. White* (1964), 50 D.L.R. (2d) 613; *R. c. Bartleman* (1984), 55 B.C.L.R. 78; et *Saanichton Marina Ltd. c. Claxton* (1989), 36 B.C.L.R. (2d) 79. Ce contexte historique atteste l’intention prépondérante de protéger par le Traité les modes de chasse traditionnels des Saanich.

Premièrement, il était dans l’intérêt de toutes les parties de préserver les modes de chasse et de pêche traditionnels chez les Tsartlip et d’autres

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bands. As Lambert J.A. stated in *Bartleman*, at p. 90:

[A]t the time of the treaties, it was a concern of the colonial government not to disturb the Indian people in their traditional food-gathering activities. It was in the interest of the government of the colony of Vancouver Island and of the Indians that the Indians should be able to support themselves in their traditional ways.

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The interests of the colonial government in preserving the traditional Tsartlip way of life were a reflection of the economic and demographic realities of the region, including concerns for the safety and security of the small number of settlers. Norris J.A. summarized these imperatives as follows in *White*, at p. 657:

[I]t was at the time of Douglas particularly important for the maintenance of law and order that Indian rights be respected and interpreted broadly in favour of the Indians, not merely for the due administration of law, but also for the safety of the settlers who constituted a minority of, at the most, 1,000 persons, there being 30,000 Indians on Vancouver Island alone, apart from the warlike tribes to the north, who always constituted a raiding threat and against whom the maintenance of friendship with the local Indians afforded a measure of security.

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Second, the historical record discloses that Governor Douglas represented to the Indian peoples with whom he entered into treaties that the treaties would secure for them the right to continue their pre-treaty hunting practices. In a letter to the Colonial Secretary dated May 16, 1850, Douglas stated the following:

I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over the unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country. [Emphasis added.]

(See *White*, at p. 651.)

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Douglas wrote a similar confirmation to the Speaker and members of the House of Assembly of British Columbia, advising them that:

bandes visées par les Traités de Douglas. Le juge Lambert a affirmé dans *Bartleman*, p. 90 :

[TRADUCTION] [À] l'époque des traités, le gouvernement colonial veillait à ne pas perturber les Indiens dans leurs activités de subsistance traditionnelles. C'était dans l'intérêt du gouvernement de la colonie de l'île de Vancouver et des Indiens que ceux-ci puissent subvenir à leurs besoins selon leur mode de vie traditionnel.

L'intérêt du gouvernement colonial à préserver le mode de vie traditionnel des Tsartlip reflétait les réalités économiques et démographiques de la région, y compris les préoccupations concernant la sécurité des colons, qui étaient en faible nombre. Le juge Norris a résumé ces impératifs dans *White*, p. 657 :

[TRADUCTION] [À] l'époque de Douglas, il était particulièrement important pour le maintien de l'ordre public que les droits des Indiens soient respectés et interprétés libéralement en leur faveur, non seulement pour l'application régulière de la loi, mais aussi pour la sécurité des colons, qui n'étaient qu'une petite minorité d'au plus 1 000 personnes, alors qu'il y avait 30 000 Indiens dans l'île de Vancouver uniquement, sans compter les tribus guerrières du Nord de l'île, qui représentaient une menace d'incursion constante et contre lesquels les liens d'amitié avec les Indiens de la région assuraient une certaine sécurité.

Deuxièmement, le dossier historique révèle que le gouverneur Douglas a fait comprendre aux peuples indiens avec qui il concluait des traités que ceux-ci leur garantiraient le droit de continuer à chasser comme auparavant. Dans la lettre qu'il a adressée au secrétaire aux Affaires coloniales le 16 mai 1850, M. Douglas a écrit :

[TRADUCTION] J'ai informé les indigènes qu'ils ne seraient pas inquiétés dans la possession de leurs villages et de leurs prés enclos, qui sont de faible étendue, et qu'ils avaient toute liberté pour chasser sur les terres inoccupées et pêcher en jouissant de la même liberté que lorsqu'ils étaient les seuls occupants du pays. [Nous soulignons.]

(Voir *White*, p. 651.)

M. Douglas a écrit une confirmation similaire au président et aux députés de l'Assemblée législative de la Colombie-Britannique :

[The Indians] were to be protected in their original right of fishing on the Coasts and in the Bays of the Colony, and of hunting over all unoccupied Crown Lands: and they were also to be secured in the enjoyment of their village sites and cultivated fields.

(*Bartleman*, at p. 89)

These external acknowledgments by Douglas are significant where, as here, the treaty was concluded orally and subsequently reduced to writing. The oral promises made when the treaty was agreed to are as much a part of the treaty as the written words: see *Marshall No. 1*, at para. 12.

The promises made by Douglas confirm that the parties intended the Treaty to include the full panoply of hunting practices in which the Tsartlip people had engaged before they agreed to relinquish control over their lands on Vancouver Island.

One of those practices was night hunting. The trial judge acknowledged the “considerable body of evidence supporting the fact that night hunting has been an accepted practice of the Tsartlip people from pre-treaty days to the present” (para. 18). His most significant finding about night hunting was that it includes, and always has included, hunting with the aid of illuminating devices:

[N]ight hunting with illumination was one of the various methods employed by the Tsartlip people from time immemorial. [para. 19]

This finding reflected the evidence of Tom Sampson, a member of the Tsartlip Indian Band who had hunted for 56 of his 65 years. He described the various ways illumination was historically used in night hunting, including:

... a carbide light, it was what the coal miners used to use, and prior to that we used — in fishing, we used the hollowed out part of our canoe and we used pitch from a tree, the stumps we would cut out and shape and put in front of the canoe as a light for hunting and fishing.

The relevant provision of this Treaty, as previously noted, states that the Tsartlip “are at liberty

[TRADUCTION] Il fallait assurer [aux Indiens] la protection de leur droit originaire de pêcher sur les côtes et dans les baies de la Colonie, et de chasser sur toutes les terres inoccupées de la Couronne; il fallait aussi leur garantir la jouissance de leurs villages et champs cultivés.

(*Bartleman*, p. 89)

Ces confirmations de M. Douglas à des tiers sont d'importance dans les cas où, comme en l'espèce, le traité a été conclu oralement et subséquemment couché par écrit. Les promesses verbales lors de la conclusion du traité font autant partie du traité que le texte écrit : voir *Marshall n° 1*, par. 12.

Les promesses de M. Douglas confirment l'intention des parties d'englober dans le Traité toute la panoplie des pratiques de chasse auxquelles s'adonnaient les Tsartlip avant d'accepter de renoncer au contrôle de leurs terres sur l'île de Vancouver.

L'une de ces pratiques est la chasse nocturne. Le juge du procès a admis [TRADUCTION] « l'existence de nombreux éléments de preuve confirmant que la chasse nocturne est reconnue aux Tsartlip aussi bien avant qu'après le Traité » (par. 18). Sa conclusion la plus importante au sujet de la chasse nocturne est qu'elle se pratique, aujourd'hui comme toujours, à l'aide d'une source lumineuse :

[TRADUCTION] La chasse nocturne à l'aide d'une source lumineuse est l'une des diverses méthodes employées par les Tsartlip depuis des temps immémoriaux. [par. 19]

Cette conclusion reflète le témoignage de Tom Sampson, un membre de la bande indienne des Tsartlip qui a passé 56 années des 65 années de sa vie à chasser. Il a décrit les diverses façons dont la source lumineuse était traditionnellement employée pour la chasse nocturne, notamment :

[TRADUCTION] ... une lampe à carbure, comme celles qu'utilisaient les mineurs, et avant cela, nous utilisions — pour la pêche, nous utilisions la partie concave de notre canot ainsi que de la résine d'arbres et des bâtons que nous coupions, façonnions et mettions devant le canot pour servir de lumière pour la chasse et la pêche.

Comme nous l'avons déjà mentionné, selon la disposition pertinente du Traité, les Tsartlip ont

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to hunt over the unoccupied lands; and to carry on [their] fisheries as formerly”. There is no dispute, at least for the purposes of this case, that the words “as formerly” apply to both the hunting and fishing clauses.

29 As McLachlin J. stated in *Marshall No. 1*, at para. 78, these words “must be given the sense which they would naturally have held for the parties at the time”. She also said that “[t]reaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories”. Even on a literal construction, the language of the Treaty supports the view that the right to hunt “as formerly” means the right to hunt according to the methods used by the Tsartlip at the time of and before the Treaty. This would obviously include those methods the Tsartlip have used in hunting “from time immemorial”.

30 From 1852 to the present, the tools used by the Tsartlip in hunting at night have evolved. From sticks with pitch to spotlights and from canoes to trucks, the tools and methods employed in night hunting have changed over time. These changes do not diminish the rights conferred by the Treaty. The right of the Tsartlip to hunt at night with illuminating devices has of necessity evolved from its pre-treaty tools to its current implements. As McLachlin C.J. observed in *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, at para. 25:

... treaty rights are not frozen in time. Modern peoples do traditional things in modern ways. The question is whether the modern trading activity in question represents a logical evolution from the traditional trading activity at the time the treaty was made Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology.

31 This approach has led the Court in other cases to acknowledge, for example, that hunting with a rifle and ammunition is the current form of an evolving right whose origins were hunting with a bow and

[TRANSLATION] « toute liberté pour chasser sur les terres inoccupées et pêcher comme autrefois ». Nul ne conteste, du moins pour les besoins du présent pourvoi, que le terme « comme autrefois » s’applique tant au membre de phrase concernant la pêche qu’à celui concernant la chasse.

Comme la juge McLachlin l’a affirmé dans *Marshall n° 1*, par. 78, « [i]l faut donner au texte du traité le sens que lui auraient naturellement donné les parties à l’époque » et « [l]es traités doivent recevoir une interprétation libérale, et toute ambiguïté doit profiter aux signataires autochtones ». Même interprété littéralement, le texte du Traité permet de confirmer que le droit de chasser « comme autrefois » signifie le droit de chasser selon les méthodes utilisées par les Tsartlip au moment du Traité et dans la période qui l’a précédé. Il est évident que les méthodes de chasse employées par les Tsartlip « depuis des temps immémoriaux » en font partie.

Depuis 1852, les outils utilisés par les Tsartlip pour la chasse nocturne ont évolué. Des bâtons enduits de résine aux projecteurs et des canots aux camions, les outils et méthodes employés pour la chasse nocturne ont changé avec le temps. Toutefois, ces changements n’enlèvent rien aux droits conférés par le Traité. Le droit des Tsartlip de chasser la nuit à l’aide d’une source lumineuse a nécessairement évolué depuis les outils employés avant le Traité jusqu’aux instruments actuels. Comme l’a fait observer la juge en chef McLachlin dans *R. c. Marshall*, [2005] 2 R.C.S. 220, 2005 CSC 43, par. 25 :

... les droits issus de traités ne sont pas figés dans le temps. Les activités traditionnelles sont maintenant pratiquées de façon moderne. Il s’agit d’établir si l’activité commerciale actuelle en cause procède de l’évolution logique du commerce traditionnel pratiqué au moment du traité [. . .] L’évolution logique suppose le même type d’activité, exercée dans l’économie moderne par des moyens modernes. On évite ainsi de restreindre indûment les droits ancestraux simplement du fait des changements économiques ou technologiques.

Ce point de vue a fait en sorte que, dans d’autres affaires, la Cour a reconnu, par exemple, que la chasse à la carabine représente la forme actuelle d’un droit dont les origines remontent à la chasse

arrow (*Simon v. The Queen*, [1985] 2 S.C.R. 387), and that a treaty right to erect a log cabin for hunting purposes flows from the former use of mossy lean-to shelters (*R. v. Sundown*, [1999] 1 S.C.R. 393).

The evidence in this case makes clear that the use of guns, spotlights, and motor vehicles reflects the current state of the evolution of the Tsartlip's historic hunting practices. Morris testified at trial that the Tsartlip used to hunt at night with

what they called torch lamps, and I heard this story told to me by our older hunters, that they used sticks with pitch on the end of them to do the same kind of hunt [but that the Tsartlip had] moved into these new tools of the spotlight and of the gun, where it's made it easier for us to hunt. And then we use our vehicles instead of walking or paddling a canoe.

This evidence reveals that the weapons, means of transportation and illuminating devices used in hunting have become more modern. But changes in method do not change the essential character of the practice, namely, night hunting with illumination. What was preserved by the Treaty and brought within its protection was hunting at night with illuminating devices, not hunting at night with a particular *kind* of weapon and source of illumination. This conclusion is dictated by the common intentions of the parties to the Treaty, as distilled from the context in which the Treaty was entered into. The purpose of the hunting clause was to preserve the traditional Tsartlip way of life, including methods of gathering food. It was, in addition, designed to benefit the settlers, whose interests at the time lay in friendship with the Indian majority on Vancouver Island.

Each of these interests could best be met by simultaneously ensuring both the protection of the settlers and the continuation of the hunting methods traditionally used by the Tsartlip. The common intention which best reconciles the interests of the parties is one that brings a right to

à l'arc (*Simon c. La Reine*, [1985] 2 R.C.S. 387) et que le droit issu d'un traité de construire une cabane en rondins pour la chasse découle de l'utilisation antérieure d'abris en appentis recouverts de mousse (*R. c. Sundown*, [1999] 1 R.C.S. 393).

La preuve en l'espèce établit clairement que l'emploi de fusils, de projecteurs et de véhicules à moteur reflète l'état actuel de l'évolution des modes de chasse traditionnels des Tsartlip. M. Morris a dit dans son témoignage que les Tsartlip chassaient la nuit à l'aide de

[TRADUCTION] ce qu'ils appelaient des torches, et ce sont nos aînés qui chassaient qui m'ont raconté cette histoire — qu'ils pratiquaient le même type de chasse à l'aide de bâtons dont l'extrémité était trempée dans la résine, [mais que les Tsartlip ont] par la suite utilisé de nouveaux outils comme le projecteur et le fusil, grâce auxquels il est maintenant plus facile pour nous de chasser. Et maintenant nous nous déplaçons à l'aide de nos véhicules au lieu de le faire à pied ou en canot.

Cette preuve révèle que les armes ainsi que les moyens de transport et d'éclairage employés pour la chasse sont devenus plus modernes. Toutefois, l'évolution des méthodes ne change pas le caractère essentiel de la pratique, à savoir la chasse nocturne à l'aide d'une source lumineuse. C'est la chasse pratiquée la nuit à l'aide d'une source lumineuse qui est préservée et protégée par le Traité, et non la chasse pratiquée la nuit avec un *type* particulier d'arme et de source lumineuse. Cette conclusion est dictée par l'intention commune des parties au Traité, telle qu'elle se dégage du contexte dans lequel celui-ci a été conclu. La disposition relative à la chasse avait pour but de préserver le mode de vie traditionnel des Tsartlip, y compris leurs moyens de subsistance. Elle visait également à rendre service aux colons, qui à l'époque avaient intérêt à être amis avec les Indiens, groupe majoritaire sur l'île de Vancouver.

La meilleure façon de servir chacun de ces intérêts était de veiller simultanément à la protection des colons et au maintien des méthodes de chasse traditionnellement employées par les Tsartlip. L'intention commune qui concilie le mieux les intérêts des parties est celle qui fait entrer dans le

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hunt as they always had within the ambit of the Treaty. This includes the right to hunt at night with illumination.

35 We agree, as stated earlier, that it could not have been within the common intention of the parties that the Tsartlip would be granted a right to hunt dangerously, since no treaty confers on its beneficiaries a right to put human lives in danger. This limitation on the treaty right flows from the interest of all British Columbians in personal safety. It is also confirmed by the language of the Treaty itself, which restricts hunting to “unoccupied lands”, away from any town or settlement. British Columbia is a very large province, and it cannot plausibly be said that a night hunt with illumination is unsafe everywhere and in all circumstances, even within the treaty area at issue in this case.

36 This Court stated in *R. v. Marshall*, [1999] 3 S.C.R. 533 (“*Marshall No. 2*”), at para. 37, that “regulations that do no more than reasonably define the . . . treaty right in terms that can be administered by the regulator and understood by the . . . community that holds the treaty rights do not impair the exercise of the treaty right” (emphasis deleted). As well, as noted in *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 89, “reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food”.

37 The question, therefore, is how to identify and define internal limits on a treaty right. The consensual nature of treaty rights and their specific origin and structure dictate that a respectful approach be adopted. Individual statutory provisions have to be evaluated to determine whether, based on the available historical evidence, they are consistent with the common intention of the parties to the treaty.

champ d’application du Traité le droit de chasse que les Tsartlip ont toujours eu. Ce droit comprend le droit de chasser la nuit à l’aide d’une source lumineuse.

Comme nous l’avons mentionné plus haut, nous reconnaissons que l’intention commune des parties ne pouvait pas être d’accorder aux Tsartlip le droit de chasser dangereusement puisque aucun traité ne confère à ses bénéficiaires le droit de mettre en danger des vies humaines. Cette limitation du droit issu du traité découle de l’intérêt des Britanno-Colombiens à ce que leur sécurité personnelle ne soit pas menacée. Elle est aussi confirmée par le texte du Traité lui-même, qui restreint la chasse aux [TRADUCTION] « terres inoccupées », loin des villes ou des peuplements. La Colombie-Britannique est une province très vaste, et on ne peut affirmer de façon plausible que la chasse nocturne à l’aide d’une source lumineuse est dangereuse partout et dans toutes les circonstances, même dans la région qui est visée par le Traité et qui est en cause en l’espèce.

Dans *R. c. Marshall*, [1999] 3 R.C.S. 533 (« *Marshall n° 2* »), par. 37, la Cour a énoncé, qu’« un règlement qui se contente de définir raisonnablement le droit issu de traité [. . .] d’une manière qui puisse à la fois être administrée par l’organe chargé de sa réglementation et être comprise par la communauté [. . .] titulaire du droit en question ne porte pas atteinte à l’exercice de ce droit » (soulignement omis). De même, comme il est indiqué dans *R. c. Badger*, [1996] 1 R.C.S. 771, par. 89, « un règlement raisonnable, destiné à assurer la sécurité des individus, ne porte pas atteinte aux droits — ancestraux ou issus de traités — de chasser pour se nourrir ».

Il s’agit donc de savoir comment reconnaître et définir les limites intrinsèques d’un droit issu d’un traité. La nature consensuelle des droits issus de traités ainsi que leur origine et leur structure particulières commandent une attitude respectueuse. Il faut évaluer chaque disposition législative pour déterminer si, compte tenu de la preuve historique, elle est conforme à l’intention commune des parties au traité.

In our view, the best reconciliation of the parties' intentions is one that preserves as much as possible the ancient practices the Tsartlip would have understood as forming part of their "liberty to hunt" under the Treaty, subject only to the limit that they do not have a right to put lives or property at risk. Thus, at the very least, the safety limitation in the Treaty should not be drawn so broadly as to exclude *all* night hunting. It could not have been within the common intention of the parties to completely ban night hunting, which was a long-accepted method of hunting for food.

Nor can it be said that such a blanket exclusion should now be implied as a matter of law. If a night hunt is dangerous in particular circumstances, it can (and should) be prosecuted under s. 29. Here, the appellants were acquitted of dangerous hunting. The implicit limitation found by our colleagues the Chief Justice and Fish J. has a scope that interferes with the time-honoured right instead of allowing for the right to be exercised subject only to principled limitations. Protected methods of hunting cannot, without more, be wholly prohibited simply because in some circumstances they could be dangerous. All hunting, regardless of the time of day, has the potential to be dangerous.

The blanket prohibition of s. 27(1)(d) and (e) applies, of course, throughout British Columbia, including the vast regions of the interior. Much of the north of the province is uninhabited except by aboriginal people, and there are areas where even they are seen only occasionally. To conclude that night hunting with illumination is dangerous everywhere in the province does not accord with reality and is not, with respect, a sound basis for limiting the treaty right.

2.2 *Constitutional Division of Powers*

Having found that the Tsartlip's treaty rights include the right to hunt at night and with

La meilleure façon de concilier les intentions des parties est celle qui permet de préserver le plus possible les pratiques de chasse anciennes que les Tsartlip considéraient comme faisant partie du droit de chasser en « toute liberté » garanti par le Traité, sous réserve seulement de ne pas mettre en danger la vie ou la propriété d'autrui. Par conséquent, il faut au moins éviter d'interpréter de façon trop large la limitation en matière de sécurité prévue dans le Traité, au point d'exclure *totale*ment la chasse nocturne. L'intention commune des parties ne pouvait pas être d'interdire complètement la chasse nocturne, méthode de chasse de subsistance reconnue depuis longtemps.

On ne peut pas non plus affirmer qu'une interdiction générale devrait maintenant être implicite en droit. Si la chasse nocturne est dangereuse dans certaines circonstances, elle peut (et devrait) faire l'objet de poursuites en vertu de l'art. 29. En l'espèce, les appelants ont été acquittés relativement à la chasse dangereuse. La limite implicite dont l'existence est admise par nos collègues la Juge en chef et le juge Fish entrave, par sa portée, l'exercice du droit consacré depuis longtemps au lieu de permettre qu'il soit exercé sous réserve seulement de limites rationnelles. On ne peut se contenter d'interdire complètement l'utilisation de méthodes de chasse protégées par traité du simple fait que dans certains cas elles pourraient être dangereuses. Toute forme de chasse, quel que soit le moment de la journée, est potentiellement dangereuse.

L'interdiction générale prévue aux al. 27(1)d) et e) s'applique, naturellement, dans toute la Colombie-Britannique, y compris les vastes régions de l'intérieur. La partie nord de la province est principalement inhabitée, sauf par des Autochtones, et il y a des régions où, même eux, on ne les voit qu'à l'occasion. Conclure que la chasse nocturne à l'aide d'une source lumineuse est dangereuse partout dans la province ne cadre pas avec la réalité et, soit dit en tout respect, n'est pas une raison valable pour limiter le droit issu d'un traité.

2.2 *Partage constitutionnel des compétences*

Ayant conclu que les droits conférés par traité aux Tsartlip comprennent le droit de chasser la nuit

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illumination, we must now determine whether the impugned provisions of the *Wildlife Act* are nevertheless applicable from the perspective of the constitutional division of powers in ss. 91 and 92 of the *Constitution Act, 1867*. By virtue of s. 91(24), Parliament has exclusive power to make laws in relation to “Indians, and Lands reserved for the Indians”. Provincial laws whose “pith and substance” relates to this head of power are *ultra vires* and invalid (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 67). However, provincial laws of general application that affect Indians only incidentally and are enacted under a provincial head of power will be found to be *intra vires* and valid.

et à l’aide d’une source lumineuse, nous devons maintenant examiner la question de savoir si les dispositions contestées de la *Wildlife Act* peuvent quand même s’appliquer dans l’optique du partage constitutionnel des compétences prévu aux art. 91 et 92 de la *Loi constitutionnelle de 1867*. En vertu du par. 91(24), le Parlement a le pouvoir exclusif de légiférer sur les questions concernant « [l]es Indiens et les terres réservées pour les Indiens ». Les lois provinciales qui, de par leur caractère véritable, relèvent de ce chef de compétence constituent un excès de pouvoir et sont donc invalides (*Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)*, [2002] 2 R.C.S. 146, 2002 CSC 31, par. 67). Toutefois, les lois provinciales d’application générale qui sont adoptées selon un chef de compétence provincial et dont les effets à l’égard des Indiens ne sont qu’accessoires sont dans la limite des pouvoirs et sont donc valides.

42 In this case, there is no question that the relevant provisions of the *Wildlife Act* are valid provincial legislation under s. 92(13) of the *Constitution Act, 1867*, which refers to Property and Civil Rights in the Province. However, where a valid provincial law impairs “an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians” (*Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, at p. 1047), it will be inapplicable to the extent of the impairment. Thus, provincial laws of general application are precluded from impairing “Indianness”. (See, for example, *Dick v. The Queen*, [1985] 2 S.C.R. 309, at p. 326.)

En l’espèce, il ne fait aucun doute que les dispositions pertinentes de la *Wildlife Act* sont des mesures législatives provinciales valides qui relèvent de la catégorie propriété et droits civils dans la province prévue au par. 92(13) de la *Loi constitutionnelle de 1867*. Cependant, les lois provinciales valides ne s’appliqueront pas si elles portent atteinte à une « partie intégrante de la compétence fédérale principale sur les Indiens et les terres réservées aux Indiens » (*Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d’Amérique*, [1980] 1 R.C.S. 1031, p. 1047). Ainsi, les lois provinciales d’application générale ne peuvent pas porter atteinte à l’« indianité ». (Voir, par exemple, *Dick c. La Reine*, [1985] 2 R.C.S. 309, p. 326.)

43 Treaty rights to hunt lie squarely within federal jurisdiction over “Indians, and Lands reserved for the Indians”. As noted by Dickson C.J. in *Simon*, at p. 411:

Les droits de chasse issus de traités relèvent clairement de la compétence fédérale sur « [l]es Indiens et les terres réservées pour les Indiens ». Comme l’a fait remarquer le juge Dickson dans *Simon*, p. 411 :

It has been held to be within the exclusive power of Parliament under s. 91(24) of the *Constitution Act, 1867*, to derogate from rights recognized in a treaty agreement made with the Indians.

On a jugé que le Parlement a le pouvoir exclusif, en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*, de déroger à certains droits reconnus dans un traité conclu avec les Indiens.

This Court has previously found that provincial laws of general application that interfere with treaty rights to hunt are inapplicable to particular Aboriginal peoples. (See, for example, *Simon*, at pp. 410-11; *Sundown*, at para. 47.) Where such laws are inapplicable because they impair “Indianness”, however, they may nonetheless be found to be applicable by incorporation under s. 88 of the *Indian Act*.

2.3 Section 88 of the Indian Act

Section 88 reflects Parliament’s intention to avoid the effects of the immunity imposed by s. 91(24) by incorporating certain provincial laws of general application into federal law. Section 88 reads as follows:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

But as the opening words of this provision demonstrate, Parliament has expressly declined to use s. 88 to incorporate provincial laws where the effect would be to infringe treaty rights. And this Court held in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 86, that one of the purposes of s. 88 is to accord “federal statutory protection to aboriginal treaty rights”. Thus, on its face, s. 88 cannot be used to incorporate into federal law provincial laws that conflict with the terms of any treaty.

The clear language of this treaty exception in s. 88 is qualified by statements in this Court’s jurisprudence that the provinces may regulate treaty rights under certain circumstances. In *Marshall No. 2*, at para. 24, for example, this Court held that

La Cour a déjà jugé inapplicables à certains peuples autochtones des lois provinciales d’application générale qui portent atteinte aux droits de chasse issus de traités. (Voir, par exemple, *Simon*, p. 410-411, et *Sundown*, par. 47.) Par ailleurs, les lois provinciales d’application générale qui sont inapplicables parce qu’elles touchent à l’« indianité » peuvent néanmoins être jugées applicables si elles sont incorporées au droit fédéral par l’effet de l’art. 88 de la *Loi sur les Indiens*.

2.3 Article 88 de la Loi sur les Indiens

L’article 88 reflète l’intention du législateur d’éviter les effets de l’exclusivité que commande le par. 91(24), en incorporant au droit fédéral certaines lois provinciales d’application générale. L’article 88 dispose :

88. Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d’application générale et en vigueur dans une province sont applicables aux Indiens qui s’y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou règlement administratif pris sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou sous son régime.

Mais, comme l’indique le membre de phrase au début de cette disposition, le législateur a expressément refusé de recourir à l’art. 88 pour incorporer au droit fédéral des lois provinciales dans les cas où il en résulterait une atteinte à des droits issus de traités. Et dans *R. c. Côté*, [1996] 3 R.C.S. 139, par. 86, la Cour a statué que l’un des objets de l’art. 88 est d’accorder « une protection de nature législative fédérale aux droits issus de traités des autochtones ». Ainsi, on ne peut, de prime abord, recourir à l’art. 88 pour incorporer au droit fédéral des lois provinciales incompatibles avec des traités.

Les termes clairs de l’exception relative aux traités prévue à l’art. 88 sont nuancés par des énoncés figurant dans la jurisprudence de la Cour, selon lesquels les provinces peuvent dans certaines circonstances réglementer les droits issus de traités. Dans *Marshall n° 2*, par. 24, par exemple, la Cour a affirmé :

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the federal and provincial governments [have the authority] within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives [Emphasis added.]

That statement must of course be read in the context of the particular right under consideration in *Marshall No. 1*, namely a commercial right of access to resources harvested (and traded) from the outset by aboriginals in common with non-aboriginal inhabitants. After Confederation, some of the resources came to be regulated federally (e.g. the fishery), while others were regulated provincially (e.g. those harvested by trapping). In the case of the provincially regulated resources, the Court was not prepared to read the treaty right as requiring that access to them for purposes of *commercial* exploitation be subject to parallel and potentially conflicting federal and provincial oversight. That is not this case, which requires us to consider the more general question of what degree of provincial legislative interference with a non-commercial treaty right will trigger the s. 88 protection of treaty rights. Further consideration of the Court's position with respect to treaty rights of a commercial nature should be left for a case where it is directly in issue.

[Les] gouvernements fédéral et provinciaux [ont le pouvoir] de réglementer, dans les limites de leurs champs respectifs de compétences législatives, l'exercice du droit issu du traité, sous réserve du fait que la Constitution exige que les restrictions imposées à l'exercice de ce droit soient justifiées pour des raisons de conservation ou pour d'autres objectifs d'intérêt public réels et impérieux . . . [Nous soulignons.]

Il faut bien sûr interpréter cet énoncé dans le contexte du droit particulier dont il est question dans *Marshall n° 1*, à savoir le droit d'accéder à des fins commerciales aux ressources qui, dès le contact, étaient exploitées (récoltées et échangées) en commun par des Autochtones et des non-Autochtones. Après la Confédération, certaines des ressources ont fini par être réglementées par le fédéral (p. ex. la pêche) et d'autres par la province (p. ex. le piégeage). Dans le cas des ressources réglementées par la province, la Cour n'était pas disposée à interpréter le droit issu d'un traité comme s'il exigeait que l'accès à ces ressources à des fins *commerciales* soit soumis parallèlement à deux contrôles susceptibles d'entrer en conflit : celui du fédéral et celui de la province. La situation est différente en l'espèce. Ici, nous devons nous demander, de façon plus générale, quel degré d'ingérence législative provinciale dans l'exercice d'un droit issu d'un traité à des fins non commerciales déclenche la protection conférée aux droits issus de traités par l'art. 88. Il est préférable de trancher la question des droits de nature commerciale issus de traités lorsqu'elle se posera directement dans une autre affaire.

47 Where, as in this case, non-commercial rights are in issue, a distinction must be drawn between insignificant interference with the exercise of the treaty right and *prima facie* infringement of the right.

48 Regarding insignificant interference, this Court considered in *Côté* whether a provincial regulation requiring the payment of a small access fee for entry into a controlled harvest zone infringed a treaty right to fish. The fee was not revenue generating, but was intended to pay for the ongoing maintenance of roads and facilities within the controlled zone. Lamer C.J. held that this provincial

Lorsque sont en jeux des droits de nature non commerciale, comme c'est le cas en l'espèce, il faut faire une distinction entre l'ingérence négligeable dans l'exercice du droit issu d'un traité et l'atteinte à première vue à ce droit.

En ce qui concerne l'ingérence négligeable, dans *Côté*, la Cour s'est demandé si un règlement provincial exigeant le paiement d'un minime droit d'entrée dans une zone d'exploitation contrôlée portait atteinte à un droit de pêche issu d'un traité. Le droit d'entrée ne générait pas de revenus, mais était destiné à l'entretien régulier des routes et des installations dans la zone contrôlée. Le juge en

regulation “impose[d] a modest financial burden on the exercise of th[e] alleged treaty right” (para. 88), thereby representing an insignificant interference with a treaty right, and consequently did not infringe that right.

In contrast in *Badger* this Court considered that a licensing scheme that imposed conditions as to the “hunting method, the kind and numbers of game, the season and the permissible hunting area” (para. 92) infringed the appellants’ treaty right to hunt. Cory J., writing for the majority, held that this licensing scheme constituted a *prima facie* infringement of the appellants’ treaty right to hunt, since it “denie[d] to holders of treaty rights . . . the very means of exercising those rights” and was found to be “in direct conflict with the treaty right” (para. 94).

Insignificant interference with a treaty right will not engage the protection afforded by s. 88 of the *Indian Act*. This approach is supported both by *Côté* and by *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. rejected the idea that “anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement” (para. 91 (emphasis added)). Therefore, provincial laws or regulations that place a modest burden on a person exercising a treaty right or that interfere in an insignificant way with the exercise of that right do not infringe the right.

A *prima facie* infringement, however, will trigger the s. 88 treaty right protection. In determining what constitutes a *prima facie* infringement of a treaty right, it is helpful to consider the Court’s jurisprudence on this point. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1112, Dickson C.J. and La Forest J. listed three questions that may assist in this determination:

First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the

chef Lamer a statué que ce règlement provincial « assujetti[ssait] l’exercice d[u] droit issu de traité à une modeste obligation financière » (par. 88) et qu’il s’agissait donc d’une ingérence négligeable dans l’exercice d’un droit issu d’un traité et qu’il n’y avait pas atteinte à ce droit.

Par contre, dans *Badger*, la Cour a considéré qu’un régime de délivrance de permis imposant des conditions relatives aux « méthodes de chasse, au type de gibier, au nombre de prises ainsi qu’aux périodes de chasse et aux zones où celle-ci est autorisée » (par. 92) portait atteinte au droit de chasse garanti par traité aux appelants. Le juge Cory, au nom de la majorité, a statué que ce régime de délivrance de permis constituait à première vue une atteinte à leur droit puisqu’il « priv[ait] les personnes qui sont titulaires de droits issus de traité [. . .] des moyens mêmes d’exercer ces droits » et était « en contradiction directe avec le droit prévu au Traité » (par. 94).

L’ingérence négligeable dans l’exercice d’un droit issu d’un traité ne déclenchera pas la protection prévue par l’art. 88 de la *Loi sur les Indiens*. Cette affirmation trouve appui à la fois dans *Côté* et dans *R. c. Nikal*, [1996] 1 R.C.S. 1013, où le juge Cory a rejeté l’idée que « tout ce qui [. . .] entrave ou [. . .] gêne l’exercice [de ces droits], ne serait-ce que de façon négligeable, constitue à première vue une atteinte » (par. 91 (nous soulignons)). Par conséquent, les lois ou règlements provinciaux qui imposent une obligation modeste à quiconque exerce un droit issu d’un traité ou qui entravent de façon négligeable l’exercice d’un droit issu d’un traité ne portent pas atteinte à ce droit.

Une atteinte à première vue fera toutefois intervenir la protection que l’art. 88 confère aux traités. Pour déterminer ce qui constitue une atteinte à première vue à un droit issu d’un traité, il est utile d’examiner la jurisprudence de la Cour sur ce point. Dans *R. c. Sparrow*, [1990] 1 R.C.S. 1075, p. 1112, le juge en chef Dickson et le juge La Forest ont énuméré trois questions qui peuvent aider dans cette tâche :

Premièrement, la restriction est-elle déraisonnable? Deuxièmement, le règlement est-il indûment rigoureux?

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

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As Lamer C.J. pointed out in *R. v. Gladstone*, [1996] 2 S.C.R. 723, care should be taken, in considering these questions, not to import an element of justification when attempting to identify an infringement. He stated the following, at para. 43:

The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

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Essentially, therefore, a *prima facie* infringement requires a "meaningful diminution" of a treaty right. This includes anything but an insignificant interference with that right. If provincial laws or regulations interfere insignificantly with the exercise of treaty rights, they will not be found to infringe them and can apply *ex proprio vigore* or by incorporation under s. 88.

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The protection of treaty rights in s. 88 of the *Indian Act* applies where a conflict between a provincial law of general application and a treaty is such that it amounts to a *prima facie* infringement. Where a provincial law of general application is

Troisièmement, le règlement refuse-t-il aux titulaires du droit le recours à leur moyen préféré de l'exercer?

Comme l'a signalé le juge en chef Lamer dans *R. c. Gladstone*, [1996] 2 R.C.S. 723, dans l'examen de ces questions, il faut veiller à ne pas importer des éléments de justification dans la détermination de la violation. Il a fait remarquer au par. 43 :

Il est possible que le critère relatif à l'atteinte formulé dans *Sparrow* semble, de prime abord, intrinsèquement contradictoire. D'une part, suivant ce critère, les appelants ont simplement à établir l'existence d'une atteinte à première vue à leurs droits pour démontrer la violation de ces droits, ce qui tend à indiquer que toute diminution appréciable des droits des appelants constitue une violation pour l'application de cette analyse. D'autre part, les questions auxquelles les tribunaux doivent répondre, en vertu de ce critère, pour déterminer s'il y a eu atteinte font entrer en jeu des notions comme le caractère déraisonnable ou « indûment » rigoureux de la mesure en cause, notions qui tendent à indiquer qu'il faut établir davantage qu'une diminution appréciable pour prouver l'atteinte. Cette contradiction intrinsèque est cependant plus apparente que réelle. Les questions posées par notre Cour dans *Sparrow* ne définissent pas le concept de l'atteinte à première vue, mais mettent uniquement en exergue certains facteurs qui indiquent qu'une telle atteinte a été commise. Le simple fait qu'on réponde par la négative à l'une de ces questions n'empêche pas le tribunal de conclure à l'existence d'une atteinte à première vue. Cette réponse négative n'est qu'un des facteurs que le tribunal doit prendre en considération pour déterminer s'il y a eu atteinte à première vue.

Essentiellement, une atteinte à première vue implique donc une « diminution appréciable » d'un droit issu d'un traité. Elle n'a rien à voir avec une ingérence négligeable dans l'exercice de ce droit. Les lois ou règlements provinciaux qui entravent de façon négligeable l'exercice de droits issus de traités ne seront pas considérés comme portant atteinte à ces droits et peuvent s'appliquer d'eux-mêmes ou par voie d'incorporation au droit fédéral par l'effet de l'art. 88.

La protection des droits issus de traités prévue par l'art. 88 de la *Loi sur les Indiens* s'applique lorsque le conflit entre une loi provinciale d'application générale et un traité est tel qu'il équivaut à une atteinte à première vue. Si l'on conclut

found to conflict with a treaty in a way that constitutes a *prima facie* infringement, the protection of treaty rights prevails and the provincial law cannot be incorporated under s. 88.

Where a *prima facie* infringement of a treaty right is found, a province cannot rely on s. 88 by using the justification test from *Sparrow* and *Badger* in the context of s. 35(1) of the *Constitution Act, 1982*, as alluded to by Lamer C.J. in *Côté*, at para. 87. The purpose of the *Sparrow/Badger* analysis is to determine whether an infringement by a government acting within its constitutionally mandated powers can be justified. This justification analysis does not alter the division of powers, which is dealt with in s. 88. Therefore, while the *Sparrow/Badger* test for infringement may be useful, the framework set out in those cases for determining whether an infringement is justified does not offer any guidance for the question at issue here.

3. Application to This Case

There is no treaty right to hunt dangerously. Thus, the prohibition against hunting “without reasonable consideration for the lives, safety or property of other persons” set out in s. 29 of the *Wildlife Act* is a limit that does not infringe the Tsartlip’s treaty right to hunt. As stated earlier, the requirement to hunt safely was clearly within the common intention of the parties to the Treaty, as reflected by the language of the Treaty itself, which restricts hunting to “unoccupied lands”. Where a treaty beneficiary is proven to have hunted dangerously, the Treaty does not provide a defence to charges brought under s. 29.

However, based on an understanding of the common intention of the parties to the Treaty, the Tsartlip’s treaty right includes the right to hunt at night with illumination, with the modern incarnation of their ancestral method, namely the use of firearms.

qu’une loi provinciale d’application générale entre en conflit avec un traité d’une manière qui constitue une atteinte à première vue, la protection des droits issus de traités prévaut et la loi provinciale ne peut être incorporée au droit fédéral par l’effet de l’art. 88.

Les provinces à qui on reproche une atteinte à première vue à un droit issu d’un traité ne peuvent invoquer l’art. 88 en ayant recours au critère de justification applicable dans le contexte du par. 35(1) de la *Loi constitutionnelle de 1982*, énoncé dans *Sparrow* et *Badger*, comme l’a laissé entendre le juge en chef Lamer dans *Côté*, par. 87. L’analyse élaborée dans ces deux arrêts vise à déterminer si la violation par un gouvernement, agissant dans les limites des pouvoirs que lui confère la Constitution, peut se justifier. L’analyse de la justification ne change pas le partage de ces pouvoirs, qui est l’objet de l’art. 88. C’est pourquoi, malgré l’utilité que peut revêtir le critère énoncé dans *Sparrow* et *Badger* en matière de violation, le cadre d’analyse établi dans ces arrêts ne saurait nous guider ici.

3. Application aux faits de l’espèce

Aucun traité ne confère le droit de chasser dangereusement. Ainsi, l’interdiction de chasser [TRADUCTION] « sans égard raisonnable pour la vie, la sécurité ou les biens d’autrui » prévue à l’art. 29 de la *Wildlife Act* constitue une limite qui ne porte pas atteinte au droit de chasse conféré par traité aux Tsartlip. Comme nous l’avons mentionné plus haut, il ne fait pas de doute que, d’après le texte du Traité lui-même, qui restreint la chasse aux « terres inoccupées », l’intention commune des parties était d’exiger que la chasse se pratique de façon sécuritaire. Lorsqu’il est prouvé qu’un bénéficiaire du Traité a pratiqué la chasse de façon dangereuse, le Traité ne lui fournit aucune défense contre des accusations portées en vertu de l’art. 29.

Cependant, selon notre interprétation de l’intention commune des parties au Traité, le droit que celui-ci confère aux Tsartlip comprend le droit de chasser la nuit à l’aide d’une source lumineuse en utilisant ce qui constitue l’incarnation moderne de leurs armes de chasse ancestrales, à savoir les armes à feu.

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The legislative prohibition set out in s. 27(1)(d) and (e) of the *Wildlife Act* is absolute, and it applies without exception to the whole province, including the most northern regions where hours of daylight are limited in the winter months and populated areas are few and far between. The Legislature has made no attempt to prohibit only those specific aspects or geographic areas of night hunting that are unsafe by, for example, banning hunting within a specified distance from a highway or from residences. The impugned provisions are overbroad, inconsistent with the common intention of the parties to the treaties, and completely eliminate a chosen method of exercising their treaty right.

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We respectfully disagree with our colleagues the Chief Justice and Fish J. that nothing short of a total ban on night hunting can address safety concerns. We believe that it would be possible to identify uninhabited areas where hunting at night would not jeopardize safety. This finding is supported by the evidence in this case that the Tsartlip's practice of night hunting with illuminating devices has never been known to have resulted in an accident, and that the conservation officers, in setting up the location for their mechanical decoy, were easily able to locate an area where night hunting could be practised safely. These facts amply demonstrate how something less than an absolute prohibition on night hunting can address the concern for safety.

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We have no difficulty concluding, therefore, that the categorical ban on night hunting and hunting with illumination constitutes a *prima facie* infringement of a treaty right. A categorical prohibition clearly constitutes more than an insignificant interference with a treaty right. Although provincial laws of general application that are inapplicable to aboriginal people can be incorporated into federal law under s. 88 of the *Indian Act*, this cannot happen where the effect would be to infringe treaty rights. Because paras. (d) and (e) of s. 27(1) of the *Wildlife Act* constitute a *prima*

L'interdiction prévue aux al. 27(1)d) et e) de la *Wildlife Act* est absolue et s'applique sans exception à l'ensemble de la province, y compris les régions les plus au nord où les heures de clarté sont limitées en hiver et où les secteurs très peuplés sont rares. Le législateur n'a pas tenté d'interdire uniquement les aspects de la chasse nocturne qui sont dangereux ou d'interdire ce mode de chasse dans les zones où il serait dangereux, par exemple, en interdisant la chasse à une certaine distance des routes ou des habitations. Les dispositions contestées ont une portée trop générale, elles sont incompatibles avec l'intention commune des parties aux traités, et elles écartent complètement le moyen choisi pour exercer le droit issu du Traité.

Soit dit en tout respect, nous ne saurions souscrire à l'opinion de nos collègues la Juge en chef et le juge Fish que seule une interdiction absolue de chasser la nuit permet de répondre aux préoccupations en matière de sécurité. Nous estimons qu'il serait possible de recenser les secteurs inhabités où la chasse nocturne ne compromettrait pas la sécurité. Cette conclusion s'appuie sur la preuve fournie en l'espèce, selon laquelle la chasse nocturne à l'aide d'une source lumineuse que pratiquent les Tsartlip n'a, autant que l'on sache, provoqué aucun accident, et les agents de conservation, pour l'installation des leurres mécaniques, ont pu facilement trouver un endroit où la chasse nocturne pouvait se pratiquer sans danger. Tous ces éléments montrent bien que, sans aller jusqu'à l'interdiction absolue, il est possible de répondre aux préoccupations en matière de sécurité.

Par conséquent, nous n'avons aucune difficulté à conclure que l'interdiction absolue de chasser la nuit et celle de chasser à l'aide d'une source lumineuse constituent des atteintes à première vue à un droit issu d'un traité. Une interdiction absolue est manifestement davantage qu'une ingérence négligeable dans l'exercice d'un droit issu d'un traité. Certes, les lois provinciales d'application générale qui ne s'appliquent pas aux Autochtones peuvent être incorporées au droit fédéral par l'effet de l'art. 88 de la *Loi sur les Indiens*, mais ce n'est pas le cas s'il s'ensuit une atteinte à des droits issus de traités.

facie infringement, they cannot be incorporated under s. 88 of the *Indian Act*.

For these reasons, we would allow the appeal, set aside the convictions and enter acquittals.

The reasons of McLachlin C.J. and Bastarache and Fish JJ. were delivered by

THE CHIEF JUSTICE AND FISH J. (dissenting) —

I

Ivan Morris and Carl Olsen were caught in a trap set by conservation officers to catch hunters who violate the law.

There is no dispute that Mr. Morris and Mr. Olsen violated a provincial ban on hunting at night with a firearm. The appellants argue that the ban does not apply to them in virtue of an aboriginal treaty signed in 1852. The Crown, however, argues that the treaty conveys no right to hunt dangerously, and asserts that this justifies a total ban on night hunting.

We conclude that the treaty right to hunt is subject to an internal limitation which excludes dangerous hunting. We further conclude that hunting at night with a firearm, as trial courts across the country have held, is hazardous and validly prohibited on that ground by provincial legislation of general application. In the result, we find that a provincial ban on night hunting with a firearm does not affect the appellants' treaty right to hunt.

With respect to those who are of a different view, we would therefore dismiss the appeal and affirm the convictions of both appellants.

Étant donné que les al. 27(1)d) et e) de la *Wildlife Act* constituent des atteintes à première vue, ils ne peuvent être incorporés au droit fédéral par l'effet de l'art. 88 de la *Loi sur les Indiens*.

Pour ces motifs, nous sommes d'avis d'accueillir le pourvoi, d'annuler les déclarations de culpabilité et d'inscrire des acquittements.

Version française des motifs de la juge en chef McLachlin et des juges Bastarache et Fish rendus par

LA JUGE EN CHEF ET LE JUGE FISH (dissidents) —

I

Ivan Morris et Carl Olsen sont tombés dans le piège tendu par des agents de conservation aux chasseurs qui contreviennent à la loi.

Nul ne conteste que MM. Morris et Olsen ont enfreint l'interdiction provinciale de chasser la nuit avec une arme à feu. Les appelants font valoir que l'interdiction ne s'applique pas à eux en raison d'un traité ancestral signé en 1852. Le ministère public soutient cependant que le traité ne confère aucun droit de chasser dangereusement et affirme qu'il est donc justifié d'interdire complètement la chasse nocturne.

Nous concluons que le droit de chasse issu d'un traité comporte une limite intrinsèque qui exclut la chasse dangereuse. Nous concluons également, comme des tribunaux d'instance inférieure partout au pays, que la chasse nocturne avec une arme à feu est dangereuse et que c'est donc à juste titre que les lois provinciales d'application générale l'interdisent. Par conséquent, nous estimons que l'interdiction provinciale de chasser la nuit avec une arme à feu ne porte pas atteinte au droit de chasse conféré par traité aux appelants.

Par conséquent, malgré tout le respect que nous avons pour ceux qui pensent le contraire, nous sommes d'avis de rejeter le pourvoi et de confirmer les déclarations de culpabilité des appelants.

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II

66 On the evening of November 28, 1996, the appellants were driving in the woods when they spotted what they took for a deer. Morris, the driver, stopped the vehicle to allow Olsen to shoot at the deer from the passenger seat. The rifle was then passed by Olsen to Morris across two children who were also in the front seat. Morris himself then fired two shots from outside the vehicle.

67 The appellants had in fact been shooting a decoy with reflecting eyes set up by conservation officers to trap illegal hunters. They were charged with the following offences under the *British Columbia Wildlife Act*, S.B.C. 1982, c. 57: (1) hunting wildlife with a firearm during prohibited hours (s. 27(1)(d)); (2) hunting wildlife by the use or with the aid of a light or illuminating device (s. 27(1)(e)); (3) hunting without reasonable consideration for the lives, safety or property of other persons (s. 29); and (4) discharging a firearm at wildlife from a motor vehicle (Olsen only) (s. 28(1)).

68 They argued that they enjoy a right to hunt under the terms of the North Saanich Treaty. That treaty was entered into by the ancestors of the Tsartlip Indian Band and James Douglas, Chief Factor of the Hudson's Bay Company and Governor of the Colony of Vancouver Island at the time, and is generally referred to for that reason as the "Douglas Treaty".

69 There is no dispute that the appellants are covered by the Douglas Treaty. It was admitted at trial that they are both Indians within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, and that they have ancestral ties to the Tsartlip Indian Band, a member of the Saanich First Nation. It was admitted as well that the ancestors of the Tsartlip Indian Band were signatories to the Douglas Treaty and that the Douglas Treaty is a treaty within the meaning of s. 88 of the *Indian Act* and s. 35(1) of the *Constitution Act*, 1982.

II

Dans la soirée du 28 novembre 1996, les appelants circulaient en voiture dans le bois lorsqu'ils ont cru apercevoir un cerf. M. Morris, qui était au volant, a arrêté le véhicule pour permettre à M. Olsen, assis du côté du passager, de tirer sur le cerf. M. Olsen a ensuite passé la carabine à M. Morris, par-dessus deux enfants également assis sur la banquette avant. Puis, M. Morris a lui-même tiré deux coups de feu de l'extérieur du véhicule.

Les appelants ont en fait tiré sur un leurre — aux yeux réfléchissant la lumière — que des agents de conservation avaient installé pour piéger les braconniers. Ils ont été inculpés des infractions suivantes prévues par la loi de la Colombie-Britannique *Wildlife Act*, S.B.C. 1982, ch. 57 : (1) avoir chassé un animal sauvage avec une arme à feu pendant les heures d'interdiction (al. 27(1)d)); (2) avoir chassé un animal sauvage à l'aide d'une lampe ou autre source lumineuse (al. 27(1)e)); (3) avoir chassé sans égard raisonnable pour la vie, la sécurité ou les biens d'autrui (art. 29); et (4) avoir déchargé une arme à feu sur un animal sauvage à partir d'un véhicule à moteur (uniquement M. Olsen) (par. 28(1)).

Ils soutiennent qu'ils bénéficient d'un droit de chasse en vertu du Traité de Saanich nord. Celui-ci a été conclu par les ancêtres de la bande indienne des Tsartlip et James Douglas, commandant de la Compagnie de la Baie d'Hudson et gouverneur de la colonie de l'île de Vancouver à l'époque, et c'est pour cette raison qu'on l'appelle généralement « Traité de Douglas ».

Nul ne conteste que le Traité de Douglas s'applique aux appelants. Au procès, il a été admis qu'ils étaient tous deux des Indiens au sens de la *Loi sur les Indiens*, L.R.C. 1985, ch. I-5, et qu'ils avaient des liens ancestraux avec la bande indienne des Tsartlip, membre de la Première Nation saanich. Il a également été admis que les ancêtres de la bande des Tsartlip avaient signé le Traité de Douglas et que celui-ci est un traité au sens de l'art. 88 de la *Loi sur les Indiens* et du par. 35(1) de la *Loi constitutionnelle de 1982*.

The outcome of this appeal therefore turns entirely on the nature and extent of the right to hunt that may be set up in virtue of the Douglas Treaty against the application of provincial hunting laws of general application, such as the law that concerns us here.

III

At trial, Higinbotham Prov. Ct. J. concluded that all of the elements of the offences of hunting with a firearm during prohibited hours and hunting by the use or with the aid of a light or illuminating device contrary to s. 27(1)(d) and (e) of the *Wildlife Act* had been proven beyond a reasonable doubt: [1999] B.C.J. No. 3199 (QL), at para. 24. In his view the appellants had failed to establish that the Douglas Treaty protected them from prosecution under those provisions. He reached this conclusion by applying *R. v. Sparrow*, [1990] 1 S.C.R. 1075, where the Court set out an infringement/justification framework for determining whether an impugned statute passes constitutional muster.

With the Crown's consent, Higinbotham Prov. Ct. J. conditionally stayed the proceedings with respect to hunting wildlife by the use or with the aid of a light or illuminating device because of the rule against multiple convictions arising from the same delict (*Kienapple v. The Queen*, [1975] 1 S.C.R. 729) and we have not been asked to revisit this matter.

Higinbotham Prov. Ct. J. declined to convict the appellants on the charge of hunting without reasonable consideration for the lives, safety or property of other persons for two reasons: First, because he was not satisfied that the Crown's specific allegations in respect of this count had been made out; and second, because he could not "rely solely on the evidence that night hunting is inherently unsafe to record a conviction on this count" (para. 25), since this evidence had already founded the appellants' convictions under s. 27(1)(d).

L'issue du présent pourvoi dépend donc entièrement de la nature et de l'étendue du droit de chasse qui, en vertu du Traité de Douglas, est susceptible d'être soustrait à l'application des lois provinciales d'application générale en matière de chasse, comme la loi dont il est question en l'espèce.

III

Au procès, le juge Higinbotham, de la Cour provinciale, a conclu que tous les éléments des infractions de chasse avec une arme à feu pendant les heures d'interdiction et de chasse à l'aide d'une lampe ou autre source lumineuse en violation des al. 27(1)(d) et e) de la *Wildlife Act* avaient été établis hors de tout doute raisonnable ([1999] B.C.J. No. 3199 (QL), par. 24). À son avis, les appelants n'avaient pas réussi à démontrer que le Traité de Douglas les protégeait contre toute poursuite intentée en vertu de ces dispositions. Il a tiré cette conclusion en appliquant l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075, où la Cour a établi un cadre relatif à l'atteinte et à la justification permettant de déterminer si la loi contestée est constitutionnelle.

Avec le consentement du ministère public, le juge Higinbotham a ordonné la suspension conditionnelle des procédures concernant l'accusation d'avoir chassé un animal sauvage à l'aide d'une lampe ou autre source lumineuse, en raison de la règle interdisant les déclarations de culpabilité multiples relativement au même délit (*Kienapple c. La Reine*, [1975] 1 R.C.S. 729), et on n'a pas demandé à la Cour de réexaminer cette question.

Le juge Higinbotham n'a pas, pour deux raisons, déclaré les appelants coupables d'avoir chassé sans égard raisonnable pour la vie, la sécurité ou les biens d'autrui. Premièrement, il n'était pas convaincu que le ministère public ait établi le bien-fondé de ses allégations à cet égard; deuxièmement, il ne pouvait pas [TRADUCTION] « se fonder uniquement sur la preuve que la chasse nocturne est intrinsèquement dangereuse pour prononcer une déclaration de culpabilité relativement à ce chef d'accusation » (par. 25), étant donné que cette preuve avait déjà servi de fondement à la condamnation des appelants en vertu de l'al. 27(1)(d).

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74 Higinbotham Prov. Ct. J. did, however, convict Mr. Olsen of discharging a firearm at wildlife from a motor vehicle contrary to s. 28(1) of the *Wildlife Act*.

75 Mr. Olsen and Mr. Morris appealed to the Supreme Court of British Columbia, where Singh J. held that to exercise a treaty or aboriginal right without due regard or consideration for public safety is not a reasonable exercise of that right: [2002] 4 C.N.L.R. 222, 2002 BCSC 780. He therefore concluded, without recourse to the *Sparrow* test, that the *Wildlife Act* did not conflict with or impact on the treaty right. As a result, he found that the appellants were in fact subject to the *Wildlife Act*, which he accepted as valid provincial legislation of general application aimed at ensuring safety.

76 The appellants further appealed to the Court of Appeal of British Columbia, where each of the three justices who heard the appeal wrote separate reasons: (2004), 25 B.C.L.R. (4th) 45, 2004 BCCA 121.

77 Thackray J.A. held that because s. 27(1) of the *Wildlife Act* prohibits only hunting at night and not the right to hunt itself, it was a law of general application that applied to Indians of its own force and effect (or, as is sometimes said, “*ex proprio vigore*”).

78 Huddart J.A. concluded that the appellants did not establish that night hunting was an element of the aboriginal right to hunt “integral to the distinctive culture” of the Tsartlip (para. 213). In her view, the *Wildlife Act* prohibition on night hunting therefore did not violate the core hunting right protected by the treaty.

79 Lambert J.A. dissented. He held that the *Wildlife Act* affected Indian laws, customs, traditions and practices in relation to hunting for food and ceremonial purposes and therefore “str[uck] at the core of Indianness” (para. 18). In his view, the core of Indianness encompasses within it the

Le juge Higinbotham a cependant déclaré M. Olsen coupable d’avoir fait feu sur un animal sauvage à partir d’un véhicule à moteur en violation du par. 28(1) de la *Wildlife Act*.

MM. Olsen et Morris ont interjeté appel devant la Cour suprême de la Colombie-Britannique, où le juge Singh a statué que l’exercice d’un droit ancestral ou issu d’un traité sans égard pour la sécurité publique ne constitue pas un exercice raisonnable de ce droit ([2002] 4 C.N.L.R. 222, 2002 BCSC 780). Il a donc conclu, sans recourir au critère établi dans *Sparrow*, que la *Wildlife Act* n’entraîne pas en conflit avec le droit issu d’un traité et n’avait par ailleurs aucune incidence sur lui. De ce fait, il a déclaré les appelants assujettis à la *Wildlife Act*, reconnaissant qu’il s’agissait d’une loi provinciale d’application générale qui est valide et destinée à assurer la sécurité.

Les appelants ont ensuite interjeté appel devant la Cour d’appel de la Colombie-Britannique, où les trois juges saisis de l’appel ont rédigé des motifs distincts ((2004), 25 B.C.L.R. (4th) 45, 2004 BCCA 121).

Selon le juge Thackray, comme le par. 27(1) de la *Wildlife Act* n’interdit que la chasse nocturne et non la chasse en tant que tel, il s’agit d’une loi d’application générale qui s’applique d’elle-même (*ex proprio vigore*) aux Indiens.

Selon la juge Huddart, les appelants n’ont pas établi que la chasse nocturne était une composante du droit ancestral de chasser qui fait [TRADUCTION] « partie intégrante de la culture distinctive » des Tsartlip (para. 213). À son avis, l’interdiction de chasser la nuit qui est prévue par la *Wildlife Act* ne porte donc pas atteinte au droit de chasse fondamental garanti par le traité.

Dans ses motifs dissidents, le juge Lambert a conclu que la *Wildlife Act* a une incidence sur les lois, coutumes, traditions et pratiques indiennes pour ce qui est de la chasse à des fins alimentaires et rituelles et qu’en conséquence elle [TRADUCTION] « touche à l’essentiel de l’indianité » (par. 18). À

right to hunt for food by the Indians' own preferred means.

Accordingly, Lambert J.A. found that the *Wildlife Act* prohibitions do not apply of their own force to members of the Tsartlip Indian Band because only federal legislation can strike at the core of Indianness, except where provincial legislation is incorporated into federal law ("invigorated") by s. 88 of the *Indian Act*.

With respect to s. 88 of the *Indian Act*, Lambert J.A. found that the initial words "[s]ubject to the terms of any treaty" meant "that the treaty, properly interpreted, cannot be impinged on or affected [in its exercise] by the statutory provision" (para. 31). He went on to find that the *Wildlife Act* prohibitions were in direct conflict with the treaty right and therefore s. 88 could not be used to incorporate the impugned provisions of the *Wildlife Act*.

IV

For the reasons that follow, we conclude that the impugned ban on night hunting with a firearm is valid provincial legislation that applies to the appellants. The relevant provisions of the *Wildlife Act* prohibit unsafe hunting practices, which is in pith and substance a matter within the legislative jurisdiction of the provinces. They do not conflict with federal legislation and the doctrine of paramountcy therefore has no application. Finally, the right to hunt protected by the Douglas Treaty is subject to an internal limit: It does not include the right to hunt in an inherently hazardous manner. Or, put differently, the right to hunt under the treaty must be exercised reasonably and hunting practices that are inherently hazardous are antithetical to the reasonable exercise of the right to hunt. The impugned provision of the *Wildlife Act* regulates this internal limit. Since the regulation of dangerous hunting falls outside the scope of the treaty right to hunt, no treaty right is engaged. As there is no aboriginal right asserted, and as the law does not otherwise go

son avis, l'essentiel de l'indianité comporte le droit des Indiens de chasser pour se nourrir en recourant à leur moyen préféré.

Le juge Lambert a donc conclu que les interdictions prévues par la *Wildlife Act* ne s'appliquent pas d'elles-mêmes aux membres de la bande indienne des Tsartlip parce que seules les lois fédérales peuvent toucher à l'essentiel de l'indianité, sauf si la loi provinciale est incorporée au droit fédéral (« revigorée ») par l'art. 88 de la *Loi sur les Indiens*.

Pour ce qui est de l'art. 88 de la *Loi sur les Indiens*, selon le juge Lambert, le membre de phrase « [s]ous réserve des dispositions de quelque traité » au début de la disposition signifie que [TRADUCTION] « la juste interprétation du traité commande que la disposition législative n'ait aucune incidence sur lui ni ne lui porte atteinte » (par. 31). Il a ensuite conclu que les interdictions prévues par la *Wildlife Act* entrent directement en conflit avec le droit issu d'un traité et que l'art. 88 ne peut donc servir à incorporer au droit fédéral les dispositions contestées de la *Wildlife Act*.

IV

Pour les motifs qui suivent, nous concluons que l'interdiction contestée de chasser la nuit avec une arme à feu constitue une mesure législative provinciale valide applicable aux appelants. Les dispositions pertinentes de la *Wildlife Act* interdisent les pratiques de chasse dangereuses, laquelle interdiction, de par son caractère véritable, relève de la compétence législative des provinces. Elles ne sont pas incompatibles avec la législation fédérale, et la règle de la prépondérance n'est donc pas applicable. Enfin, le droit de chasse protégé par le Traité de Douglas comporte une limite intrinsèque : il n'inclut pas le droit de chasser de façon dangereuse en soi. En d'autres termes, le droit de chasse conféré par traité doit être exercé de façon raisonnable, et les pratiques de chasse intrinsèquement dangereuses sont l'antithèse de l'exercice raisonnable du droit de chasse. La disposition contestée de la *Wildlife Act* régit cette limite intrinsèque. Étant donné que la réglementation des pratiques de chasse dangereuses ne relève pas du champ

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to Indianness, the law applies *ex proprio vigore* and does not need to be incorporated by s. 88 in order to apply to Indians.

d'application du droit de chasse issu d'un traité, aucun droit issu d'un traité n'est en jeu. Comme aucun droit ancestral n'est invoqué et que la mesure législative ne touche pas autrement à l'indianité, elle s'applique d'elle-même et n'a pas besoin d'être incorporée au droit fédéral par l'art. 88 pour s'appliquer aux Indiens.

V

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83 Section 91(24) of the *Constitution Act, 1867* gives Parliament exclusive legislative authority over “Indians, and Lands reserved for the Indians”. Aboriginal and treaty rights fall squarely within Parliament’s jurisdiction under s. 91(24).

Le paragraphe 91(24) de la *Loi constitutionnelle de 1867* confère au Parlement l'autorité législative exclusive en ce qui concerne « [l]es Indiens et les terres réservées pour les Indiens ». Les questions concernant les droits ancestraux et les droits issus de traités relèvent clairement de la compétence du Parlement prévue au par. 91(24).

84 Although s. 91(24) attributes exclusive jurisdiction over “Indians” and “Lands reserved for the Indians” to Parliament, valid provincial legislation normally applies to aboriginal persons. It is well established that “First Nations are not enclaves of federal power in a sea of provincial jurisdiction” (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 66).

Bien que le par. 91(24) confère au Parlement la compétence exclusive à l'égard des « Indiens » et des « terres réservées pour les Indiens », les lois provinciales valides s'appliquent normalement aux Autochtones. Il est bien établi que « les Premières nations ne sont pas des enclaves du pouvoir fédéral dans une mer de compétences provinciales » (*Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)*, [2002] 2 R.C.S. 146, 2002 CSC 31, par. 66).

85 The validity of a provincial enactment is a condition precedent to its application to aboriginal Canadians. A provincial law that does not fall within a provincial head of power is invalid and of no force or effect. Provincial legislation that, in pith and substance, relates to “Indians” or “Lands reserved for the Indians” — or any other matter within exclusive federal jurisdiction — is *ultra vires*. However, provincial legislation that merely has an incidental effect on a federal head of power is *intra vires*: *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55, at para. 14. Such incidental effects are without relevance for constitutional purposes (*ibid.*). For instance, in the aboriginal context, provincial traffic legislation applies on reserves (see *R. v. Francis*, [1988] 1 S.C.R. 1025).

La validité d'un texte législatif provincial est une condition préalable à son application aux Canadiens autochtones. Une loi provinciale qui ne relève pas d'un chef de compétence provincial est invalide et inopérante. Une loi provinciale qui, de par son caractère véritable, porte sur les « Indiens » et les « terres réservées pour les Indiens » — ou sur toute autre question relevant de la compétence fédérale exclusive — constitue un excès de pouvoir. Par contre, une loi provinciale qui n'a qu'un effet accessoire sur un chef de compétence fédéral est dans la limite des pouvoirs : *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S. 585, 2003 CSC 55, par. 14. De tels effets accessoires n'ont pas d'importance sur le plan constitutionnel (*ibid.*). Par exemple, dans le contexte autochtone, les textes législatifs provinciaux régissant la

Valid provincial laws of this type apply *ex proprio vigore* to aboriginal Canadians.

Determination of the pith and substance of an enactment requires an examination of its purpose as well as its legal and practical effects: *Kitkatla*, at paras. 53 and 54. Drawing on Chief Justice Dickson's reasons in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, LeBel J. set out in *Kitkatla*, at para. 58, the proper approach for determining the pith and substance of provincial legislation:

1. Do the impugned provisions intrude into a federal head of power, and to what extent?
2. If the impugned provisions intrude into a federal head of power, are they nevertheless part of a valid provincial legislative scheme?
3. If the impugned provisions are part of a valid provincial legislative scheme, are they sufficiently integrated with the scheme?

The *Wildlife Act* falls in pith and substance within the province's powers. It is not directed at a federal head, like Indians, but more generally at safety, a matter within provincial power. The impugned ban on night hunting is an integrated part of a broader provincial scheme applicable to all British Columbians and aimed at assuring the safety of the province's hunters and residents.

It follows that the impugned provision applies to the appellants, unless it is excluded by one of the exceptions to the general rule that valid provincial laws of general application apply to aboriginal Canadians. Provincial laws will not apply to Indians if they conflict with federal legislation or engage the doctrine of interjurisdictional immunity.

Under the paramouncy doctrine, valid provincial legislation will be rendered inoperative if it enters into an operational conflict with valid federal legislation. Such conflict will exist if

circulation sont applicables dans les réserves (voir *R. c. Francis*, [1988] 1 R.C.S. 1025). Les règles de droit provinciales valides de ce type s'appliquent d'elles-mêmes aux Canadiens autochtones.

Pour déterminer le caractère véritable d'un texte législatif, il faut examiner son objet ainsi que ses effets sur les plans juridique et pratique : *Kitkatla*, par. 53-54. S'inspirant des motifs du juge en chef Dickson dans *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641, le juge LeBel a énoncé, dans *Kitkatla*, par. 58, la démarche à suivre pour déterminer le caractère véritable d'une loi provinciale :

1. Les dispositions contestées empiètent-elles sur une compétence fédérale et dans quelle mesure?
2. Si les dispositions contestées empiètent sur une compétence fédérale, font-elles néanmoins partie d'un régime législatif provincial valide?
3. Si les dispositions contestées font partie d'un régime législatif provincial valide, y sont-elles suffisamment intégrées?

La *Wildlife Act* relève, de par son caractère véritable, des pouvoirs de la province. Elle ne vise pas un chef de compétence fédéral, comme les Indiens, mais porte plus généralement sur la sécurité, matière de compétence provinciale. L'interdiction contestée concernant la chasse nocturne fait partie intégrante d'un régime provincial plus vaste applicable à tous les Britanno-Colombiens et visant à assurer la sécurité des chasseurs et des résidents de la province.

Il s'ensuit que la disposition contestée s'applique aux appelants, à moins d'être exclue par l'une des exceptions à la règle générale selon laquelle les lois provinciales d'application générale valides s'appliquent aux Canadiens autochtones. Les lois provinciales ne s'appliquent pas aux Indiens si elles sont incompatibles avec des lois fédérales ou font intervenir la règle de l'exclusivité des compétences.

Selon la règle de la prépondérance, une loi provinciale valide devient inopérante en cas de conflit d'application avec une loi fédérale valide. Il existe un tel conflit lorsqu'il est impossible de

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simultaneous compliance with both provincial and federal legislation is impossible or if the provincial legislation displaces or frustrates the federal legislative purpose (*Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13). There is some debate as to the order in which the doctrine of paramountcy and the doctrine of interjurisdictional immunity should be considered by a court, particularly where s. 88 of the *Indian Act* is at issue: see K. Wilkins, “Of Provinces and Section 35 Rights” (1999), 22 *Dal. L.J.* 185. We do not find it necessary to resolve that debate in this case, since there is no conflicting federal legislation on hunting; accordingly, the paramountcy doctrine does not apply.

respecter simultanément les textes législatifs provincial et fédéral ou lorsque la loi provinciale supprime la loi fédérale ou entrave la réalisation de son objet (*Rothmans, Benson & Hedges Inc. c. Saskatchewan*, [2005] 1 R.C.S. 188, 2005 CSC 13). La question de l’ordre dans lequel le tribunal doit examiner la règle de la prépondérance et celle de l’exclusivité des compétences a donné lieu à un certain débat, surtout lorsque l’art. 88 de la *Loi sur les Indiens* est en jeu : voir K. Wilkins, « Of Provinces and Section 35 Rights » (1999), 22 *Dal. L.J.* 185. Nous ne jugeons pas nécessaire de régler ce débat en l’espèce, car il n’existe pas de loi fédérale sur la chasse qui soit incompatible et la règle de la prépondérance ne s’applique donc pas.

90 Under the doctrine of interjurisdictional immunity, valid provincial legislation is constitutionally inapplicable to the extent that it intrudes or touches upon core federal legislative competence over a particular matter. Thus, exclusive federal jurisdiction under s. 91(24) protects “core Indianness” from provincial intrusion: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 177. Valid provincial legislation which does not touch on “core Indianness” applies *ex proprio vigore*. If a law does go to “core Indianness” the impugned provincial legislation will not apply unless it is incorporated into federal law by s. 88 of the *Indian Act*.

Selon la règle de l’exclusivité des compétences, les lois provinciales valides sont constitutionnellement inapplicables dans la mesure où elles empiètent ou ont une incidence sur la compétence législative fédérale fondamentale à l’égard d’une matière en particulier. Ainsi, la compétence fédérale exclusive prévue au par. 91(24) protège l’« essentiel de l’indianité » contre les empiètements provinciaux : *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, par. 177. Les lois provinciales valides qui ne touchent pas à l’« essentiel de l’indianité » s’appliquent d’elles-mêmes. La loi provinciale contestée qui porte sur l’essentiel de l’indianité est inapplicable à moins d’être incorporée au droit fédéral par l’art. 88 de la *Loi sur les Indiens*.

91 Indian treaty rights and aboriginal rights have been held to fall within the protected core of federal jurisdiction: *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 411; *Delgamuukw*, at para. 178. It follows that provincial laws of general application do not apply *ex proprio vigore* to the hunting activities of Indians that are protected by a treaty.

Il a été décidé que les droits — ancestraux ou issus de traités — des Indiens font partie des éléments fondamentaux relevant de la compétence fédérale : *Simon c. La Reine*, [1985] 2 R.C.S. 387, p. 411; *Delgamuukw*, par. 178. Par conséquent, les lois provinciales d’application générale ne s’appliquent pas d’elles-mêmes aux activités de chasse des Indiens protégées par traité.

92 If, however, a provincial law of general application does not affect a treaty right, and does not otherwise touch upon core Indianness, that law applies *ex proprio vigore*, without recourse to s. 88. Legislation that falls outside the internal limits on the treaty right that the parties to the treaty would

Toutefois, la loi provinciale d’application générale qui ne touche ni à un droit issu d’un traité ni autrement à l’essentiel de l’indianité s’applique d’elle-même, sans qu’il soit nécessaire de recourir à l’art. 88. N’empièteraient pas sur le droit issu d’un traité les mesures législatives qui outrepassent

have understood and intended would not encroach on the treaty right.

Many aboriginal and treaty rights are subject to internal limits. In *R. v. Marshall*, [1999] 3 S.C.R. 456 (“*Marshall No. 1*”), and *R. v. Marshall*, [1999] 3 S.C.R. 533 (“*Marshall No. 2*”), the Court held that the treaty right to trade for necessities was subject to an internal limit to a catch that would produce a moderate livelihood. In similar fashion, safety may operate as an implicit or definitional limit on aboriginal or treaty rights. In *R. v. Badger*, [1996] 1 S.C.R. 771, Cory J. wrote, at para. 89, that:

... reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food. Similarly these regulations do not infringe the hunting rights guaranteed by Treaty No. 8 as modified by the *NRTA*.

In *R. v. Sundown*, [1999] 1 S.C.R. 393, the Court held that “there [is] no inconsistency in principle between a treaty right to hunt and the statutory requirement that the right be exercised in a manner that ensured the safety of the hunter and of others” (Cory J., for the Court, at para. 41, citing *Myran v. The Queen*, [1976] 2 S.C.R. 137, at pp. 141-42; see also *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 460; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282, at p. 289; and *Simon*, at p. 403).

Provincial legislation may apply to matters included within “core Indianness” if it is incorporated by s. 88 of the *Indian Act*, which provides:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

ses limites intrinsèques que les parties au traité auraient comprises et envisagées.

De nombreux droits — ancestraux ou issus de traités — comportent des limites intrinsèques. Dans *R. c. Marshall*, [1999] 3 R.C.S. 456 (« *Marshall n° 1* »), et *R. c. Marshall*, [1999] 3 R.C.S. 533 (« *Marshall n° 2* »), la Cour a décidé que le droit — issu d’un traité — de commercer pour se procurer le nécessaire était intrinsèquement limité par la quantité de prises permettant de s’assurer une subsistance convenable. De même, la sécurité peut constituer une limite implicite — ou fondée sur la définition — des droits ancestraux ou issus de traités. Dans *R. c. Badger*, [1996] 1 R.C.S. 771, par. 89, le juge Cory a écrit :

... qu’un règlement raisonnable, destiné à assurer la sécurité des individus, ne porte atteinte aux droits — ancestraux ou issus de traités — de chasser pour se nourrir. Il ne porte pas non plus atteinte aux droits de chasse garantis par le Traité n° 8 et modifiés par la *Convention*.

Dans *R. c. Sundown*, [1999] 1 R.C.S. 393, la Cour a affirmé qu’« il n’y [a], en principe, aucune incompatibilité entre un droit de chasse issu de traité et l’obligation que fai[t] la loi que ce droit soit exercé d’une manière qui ne compromette pas la sécurité du chasseur lui-même et celle d’autrui » (le juge Cory, au nom de la Cour, par. 41, citant *Myran c. La Reine*, [1976] 2 R.C.S. 137, p. 141-142; voir aussi *R. c. Sutherland*, [1980] 2 R.C.S. 451, p. 460; *Moosehunter c. La Reine*, [1981] 1 R.C.S. 282, p. 289; et *Simon*, p. 403).

Les lois provinciales peuvent s’appliquer à des matières faisant partie de l’« essentiel de l’indianité » si elles sont incorporées au droit fédéral par l’art. 88 de la *Loi sur les Indiens*, qui prévoit :

88. Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d’application générale et en vigueur dans une province sont applicables aux Indiens qui s’y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou règlement administratif pris sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou sous son régime.

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96 The Court clarified the effect of s. 88 of the *Indian Act* in *Dick v. The Queen*, [1985] 2 S.C.R. 309. The Court noted that for the purposes of s. 88 there are two categories of provincial laws: (1) laws which can be applied to Indians without touching their Indianness; and (2) laws which cannot apply to Indians without regulating them *qua* Indians (pp. 326-27). The first category of provincial laws applies to Indians without any constitutional difficulty. The second category cannot apply to Indians by reason of the doctrine of interjurisdictional immunity. It is to this second category of provincial legislation that s. 88 of the *Indian Act* is directed. Thus, s. 88 incorporates provincial laws of general application that are otherwise constitutionally inapplicable to Indians — laws that are precluded from applying to Indians by the doctrine of interjurisdictional immunity because they affect core Indianness, a matter under federal jurisdiction.

97 However, as may be readily observed from its text, s. 88 does not incorporate all provincial laws that are otherwise inapplicable by reason of the doctrine of interjurisdictional immunity. Section 88 operates, *inter alia*, “[s]ubject to the terms of any treaty”. In other words, s. 88 cannot incorporate a provincial law that conflicts with a treaty right.

98 What type or degree of conflict is required between a provincial law of general application and a treaty to engage the treaty exception’s protection? On the authorities, an insignificant burden on a treaty right is not enough: see, for example, *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 88. At the other end of the spectrum, a more searching “unjustified infringement” test would be inappropriate: Section 88 was adopted in 1951 (S.C. 1951, c. 29), more than 30 years before the emergence of the concepts of justification associated with s. 35 of the *Constitution Act*, 1982 were introduced.

99 In our view, a *prima facie* infringement test best characterizes the degree of conflict required to engage the protection of the treaty exception.

La Cour a clarifié l’effet de l’art. 88 de la *Loi sur les Indiens* dans *Dick c. La Reine*, [1985] 2 R.C.S. 309, où elle a classé les lois provinciales en deux catégories pour l’application de l’art. 88 : (1) celles qui peuvent être appliquées aux Indiens sans qu’il soit porté atteinte à leur indianité; (2) celles qui ne peuvent pas s’appliquer à eux sans les toucher en tant qu’Indiens (p. 326-327). La première catégorie s’applique aux Indiens sans difficulté d’ordre constitutionnel. La seconde ne peut s’appliquer à eux en raison de la règle de l’exclusivité des compétences. C’est cette seconde catégorie de lois que vise l’art. 88 de la *Loi sur les Indiens*. Ainsi, il incorpore au droit fédéral les lois provinciales d’application générale qui autrement seraient constitutionnellement inapplicables aux Indiens — des lois qui, en raison de la règle de l’exclusivité des compétences, ne peuvent s’appliquer aux Indiens parce qu’elles touchent à l’essentiel de l’indianité, matière de compétence fédérale.

Cependant, comme il ressort clairement de son libellé, l’art. 88 n’incorpore pas au droit fédéral toutes les lois provinciales qui seraient autrement inapplicables en raison de la règle de l’exclusivité des compétences. Il est notamment applicable « [s]ous réserve des dispositions de quelque traité ». Autrement dit, il ne peut incorporer une loi provinciale qui entre en conflit avec un droit issu d’un traité.

Quel type ou degré d’incompatibilité doit-il y avoir entre une loi provinciale d’application générale et un traité pour que s’applique la protection assurée par l’exception relative aux traités? Selon la jurisprudence, une restriction négligeable d’un droit issu d’un traité n’est pas suffisante : voir, par exemple, *R. c. Côté*, [1996] 3 R.C.S. 139, par. 88. À l’autre extrémité du spectre, le critère plus strict de l’« atteinte injustifiée » serait inapproprié : l’art. 88 a été adopté en 1951 (S.C. 1951, ch. 29), soit plus de 30 ans avant l’apparition des concepts de justification associés à l’art. 35 de la *Loi constitutionnelle de 1982*.

À notre avis, le critère de l’atteinte à première vue décrit le mieux le degré de conflit requis pour que s’applique la protection assurée par

Legislation that places no real burden on the treaty right does not constitute a *prima facie* infringement and would not trigger the treaty exception. Legislation which engages the internal limits of a treaty right does not affect the treaty right at all, and therefore, *a fortiori*, does not constitute a *prima facie* infringement.

On this basis, provincial regulatory authority over Indian treaty rights may be summarized as follows:

1. Provincial laws directed at the regulation of treaty rights are *ultra vires*;
2. Valid provincial laws of general application that do not affect or infringe treaty rights apply to Indians either:

(a) *ex proprio vigore*; or

(b) through incorporation under s. 88, if they nevertheless touch upon core Indianness in some other manner;

Valid provincial laws that fall outside of the scope of the treaty right, by virtue of an internal limit on the treaty right, do not go to “core Indianness”, and thus apply *ex proprio vigore*. They do not need to be incorporated by s. 88; and

3. Valid provincial laws of general application that constitute a *prima facie* infringement of treaty rights trigger the treaty exception in s. 88 and are constitutionally inapplicable. Provincial laws that impose only an insignificant burden on a treaty right (see *Côté*) do not trigger that exception and are therefore incorporated by s. 88.

l’exception relative aux traités. La loi qui n’impose pas de restrictions réelles à un droit issu d’un traité ne constitue pas une violation à première vue et ne déclenche pas l’application de cette exception. La loi qui met en jeu les limites intrinsèques d’un droit issu d’un traité ne touche nullement à ce droit et ne constitue donc pas, à plus forte raison, une violation à première vue.

Compte tenu de ce qui précède, on peut résumer comme suit le pouvoir réglementaire provincial à l’égard des droits conférés par traité aux Indiens :

1. Les lois provinciales visant à réglementer des droits issus de traités constituent un excès de pouvoir.
2. Les lois provinciales d’application générale valides qui ne touchent pas ou ne portent pas atteinte aux droits issus de traités s’appliquent aux Indiens :

a) soit d’elles-mêmes;

b) soit par voie d’incorporation au droit fédéral par l’art. 88, si elles touchent néanmoins de quelque autre manière à l’essentiel de l’indianité.

Les lois provinciales valides qui ne relèvent pas du champ d’application d’un droit issu d’un traité, en raison d’une limite intrinsèque de ce droit, ne touchent pas à l’« essentiel de l’indianité » et s’appliquent donc d’elles-mêmes. Elles n’ont pas besoin d’être incorporées au droit fédéral par l’art. 88.

3. Les lois provinciales d’application générale valides qui portent atteinte à première vue à des droits issus de traités déclenchent l’application de l’exception relative aux traités prévue par l’art. 88 et sont constitutionnellement inapplicables. Les lois provinciales qui n’imposent que des restrictions négligeables à un droit issu d’un traité (voir *Côté*) ne déclenchent pas l’application de cette exception et l’art. 88 ne peut donc les incorporer au droit fédéral.

VI

101 Having already concluded that the impugned legislation falls under a valid provincial head of power and does not conflict with any federal legislation, we must now determine whether it goes to “core Indianness”. If it does, it applies as a result of incorporation under s. 88; if not, the law applies *ex proprio vigore*. The appellants’ claim that night hunting does go to Indianness is based on their right to hunt under the Douglas Treaty. In order to determine, then, whether the ban applies to them *ex proprio vigore*, we must ascertain the scope and extent of the right to hunt enshrined in that treaty.

102 The treaty right is set out in para. 2 of the Douglas Treaty, which reads:

It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

103 This case proceeded on the Crown’s concession that the words “as formerly” modified the “liberty to hunt over the unoccupied lands” as well as the “liberty . . . to carry on our fisheries”. In our view, this branch of the matter merits little discussion: The scope of the right to hunt under the Douglas Treaty is not at all dependant on the Crown’s concession.

104 For ease of reference, we recall here the findings below.

105 In the Court of Appeal, Lambert J.A. defined the appellants’ treaty right as the right to hunt for food and ceremonial purposes according to the Indians’ preferred means in accordance with their own laws, customs, traditions and practices, and the safety practices which regulate the manner of hunting (para. 49). Huddart J.A. found that the treaty protected only those rights that are “integral to the distinctive culture” of the Tsartlip (para. 208) and that night hunting, while a traditional practice of

VI

Comme nous avons déjà conclu que la mesure législative contestée relève d’un chef de compétence provincial valide et qu’elle n’entre en conflit avec aucune loi fédérale, nous devons maintenant déterminer si elle touche à l’« essentiel de l’indianité ». Si c’est le cas, elle s’applique par voie d’incorporation par l’art. 88; sinon elle s’applique d’elle-même. La prétention des appelants que la chasse nocturne touche effectivement à l’indianité repose sur le droit de chasse que leur confère le Traité de Douglas. Alors, pour déterminer si l’interdiction s’applique à eux d’elle-même, nous devons délimiter la portée et l’étendue du droit de chasse issu d’un traité qui est consacré dans ce traité.

Le droit en cause issu du Traité de Douglas est énoncé au par. 2 :

[TRADUCTION] Toutefois, il est bien entendu que la terre elle-même, ces exceptions minimales étant faites, devient la propriété pleine et entière des Blancs à perpétuité. Il est également entendu que nous avons toute liberté pour chasser sur les terres inoccupées et pêcher comme autrefois.

Le débat en l’espèce partait du principe que le ministère public avait concédé que le terme « comme autrefois » modifie à la fois « chasser sur les terres inoccupées » et « pêcher ». Nous estimons qu’il ne vaut pas la peine de s’attarder sur ce volet : la portée du droit de chasse prévu par le Traité de Douglas ne dépend aucunement de la concession faite par le ministère public.

Par souci de commodité, nous reproduisons ici les conclusions des instances inférieures.

À la Cour d’appel, le juge Lambert a défini le droit que le traité confère aux appelants comme étant le droit de chasser à des fins alimentaires et rituelles avec le moyen préféré des Indiens, en conformité avec leurs propres lois, coutumes, traditions et pratiques, et selon les pratiques sécuritaires qui régissent les méthodes de chasse (par. 49). Selon la juge Huddart, le traité ne protège que les droits qui font [TRADUCTION] « partie intégrante de la culture distinctive des Tsartlip » (par. 208),

convenience, is not part of the core right to hunt protected by the treaty. Singh J. of the British Columbia Supreme Court held that the Douglas Treaty protected a right to hunt as well as the methods and means of hunting. He held nonetheless that the treaty right does not contemplate or, still less, confer a right to hunt dangerously, there being an implicit limitation to the treaty right that prevents unsafe hunting.

We prefer the interpretation of Singh J. In our respectful view, Huddart J.A.'s approach tends to blur the distinction between an aboriginal right and a treaty right and Lambert J.A.'s interpretation disregards the internal safety limitations to which that right is necessarily subject.

The scope of a treaty right and its internal limits is essentially a matter of treaty interpretation, which in turn refers us back to the intention of the parties to the treaty. "The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed" (*Marshall No. 1*, at para. 78, *per* McLachlin J. (as she then was), dissenting on other grounds).

When the Douglas Treaty was signed, hunting at night was not uncommon. Nor was it particularly dangerous. It would not have been surprising had both the Crown and the North Saanich aboriginals contemplated that the aboriginals would continue to hunt at night. At the time, this practice did not pose the same dangers as it does today (which dangers will be explained in detail below). And the parties may not have even had reason to anticipate that the dangers would grow. But they could not have believed that the right to hunt included a right to hunt dangerously. To impute that belief to them would do injustice to both parties and, would in addition, defy common sense.

et la chasse nocturne, quoique pratiquée traditionnellement pour des raisons de commodité, ne fait pas partie du droit fondamental de chasser garanti par le traité. Le juge Singh, de la Cour suprême de la Colombie-Britannique, a jugé que le Traité de Douglas protégeait autant le droit de chasser que les méthodes et moyens utilisés pour la chasse. Il a néanmoins conclu que le droit issu du traité ne suppose pas et, encore moins, ne confère pas le droit de chasser dangereusement, car il est implicitement restreint dans le but d'empêcher la chasse dangereuse.

Nous privilégions l'interprétation du juge Singh. Soit dit en tout respect, nous estimons que l'approche adoptée par la juge Huddart tend à estomper la distinction entre un droit ancestral et un droit issu d'un traité, et que l'interprétation du juge Lambert ne tient pas compte des limites intrinsèques — en matière de sécurité — que comporte nécessairement ce droit.

La détermination de la portée d'un droit issu d'un traité et de ses limites intrinsèques est essentiellement une question d'interprétation du traité, qui, à son tour, nous renvoie à l'intention des parties au traité. « L'interprétation des traités a pour objet de choisir, parmi les interprétations possibles de l'intention commune, celle qui concilie le mieux les intérêts des deux parties à l'époque de la signature » (*Marshall n^o 1*, par. 78, la juge McLachlin (maintenant Juge en chef), dissidente pour d'autres motifs).

Au moment de la signature du Traité de Douglas, la chasse nocturne n'était pas inhabituelle, ni particulièrement dangereuse. Personne n'aurait été étonné si la Couronne et les Autochtones de Saanich nord avaient envisagé de permettre aux Autochtones de continuer à chasser la nuit. À l'époque, cette pratique ne présentait pas les mêmes dangers qu'aujourd'hui (lesquels seront précisés plus loin). Et les parties n'avaient peut-être même aucune raison de prévoir que les dangers s'accroîtraient. Mais elles ne pouvaient pas croire que le droit de chasser comprenait le droit de chasser dangereusement. Ce serait une injustice à leur égard de leur prêter cette croyance et ce serait, en plus, contraire au bon sens.

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- 109 We use the phrase “hunting dangerously” or “hunting in an unsafe manner” or like expressions in this decision to signify hunting in a manner or under conditions that involve an inherent and especially elevated risk to the lives and safety of others.
- Nous employons l’expression « chasser dangereusement » ou d’autres expressions similaires dans les présents motifs pour parler de la chasse se faisant d’une manière ou dans des conditions qui comportent un risque particulièrement élevé pour la vie et la sécurité d’autrui.
- 110 In our view, the parties to the Douglas Treaty must have understood that the right to hunt did not carry with it a right to hunt in an unsafe manner. They must have understood as well that the Crown did not abdicate its interests or its responsibilities in this regard. The Crown was preoccupied by the need to secure the safety of the settlers. Hunting in an unsafe manner could not have been thought to serve the interests of the aboriginals any more than the interests of the Crown. To find that the Douglas Treaty enshrined a right to hunt in an unsafe manner is plainly irreconcilable with the third *Marshall* principle: Treaties must be interpreted in a manner that best reconciles the interests of the parties to it.
- À notre avis, les parties au Traité de Douglas devaient comprendre que le droit de chasser n’englobe pas le droit de chasser dangereusement. Elles devaient également comprendre que la Couronne ne renonçait pas à ses intérêts ni à ses responsabilités à cet égard. Celle-ci était préoccupée par la nécessité d’assurer la sécurité des colons. Personne n’aurait pu penser que la chasse dangereuse sert les intérêts des Autochtones ou ceux de la Couronne. Conclure que le Traité de Douglas consacre le droit de chasser dangereusement est tout simplement incompatible avec le troisième principe énoncé dans *Marshall* : les traités doivent être interprétés de la manière qui concilie le mieux les intérêts des parties.
- 111 On this point, we find the reasoning of the New Brunswick Court of Appeal in *R. v. Paul* (1993), 142 N.B.R. (2d) 55, in relation to an aboriginal treaty right to hunt next to private dwellings, particularly compelling:
- Sur ce point, nous trouvons particulièrement convaincant le raisonnement adopté par la Cour d’appel du Nouveau-Brunswick dans *R. c. Paul* (1993), 142 R.N.-B. (2^e) 55, relativement au droit de chasse issu d’un traité qui est exercé près des habitations :
- In my view, Mr. Paul’s treaty rights must be considered in the context of their exercise. Lamer J., as he then was, said in *Sioui* at p. 1072 that he “could not believe that the Hurons ever believed that the *Treaty* [of 1760] ever gave them the right to cut down trees in a garden as part of their right to carry on their customs”. Similarly, and unlike the trial judge, who said that “status Indians” may exercise their treaty rights even in a manner that “is inherently dangerous”, I cannot believe that the Indians of the St. John ever believed that they could exercise the rights given them in the *Treaty of Boston* of 1725 in an unsafe manner. . . . [para. 18]
- [TRADUCTION] À mon avis, les droits issus de traités dont jouit M. Paul doivent être examinés à la lumière de leur exercice. À la page 1072 de l’arrêt *Sioui*, le juge Lamer (tel était alors son titre) a dit qu’il ne pouvait « pas croire que les Hurons aient jamais cru que le *Traité* [de 1760] leur accordait le droit de couper des arbres dans le jardin d’une maison en vertu de leur droit d’exercer leurs coutumes ». De la même façon, et à la différence du juge du procès qui a dit que les « Indiens inscrits » peuvent exercer leurs droits issus de traités même d’une manière qui est « dangereu[se] en soi », je ne peux pas croire que les Indiens de la rivière Saint John aient jamais cru qu’ils pouvaient exercer les droits qui leur sont accordés par le *Traité de Boston* de 1725 de façon dangereuse. . . . [par. 18]
- 112 The ninth principle of treaty interpretation laid down in *Marshall No. 1* further supports this conclusion: “Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are
- Le neuvième principe d’interprétation des traités énoncé dans *Marshall n° 1* étaye, lui aussi, cette conclusion : « Les droits issus de traités des peuples autochtones ne doivent pas être interprétés de façon

not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise.” (para. 78)

The appellants argue that using the ninth principle to restrict rather than expand the scope of a treaty right would “turn this [principle] on its head”.

As will be more fully explained below, since 1852, the dangers of night hunting have been amplified with the development of modern weaponry. In our view, treaty rights are not impervious to changes of this sort. They do not evolve in a social, environmental or technological vacuum. A right to hunt is not transformed into a right to hunt in an unsafe manner by disregarding unforeseen dangers or new risks.

Quite the contrary, the ninth principle simply acknowledges that treaties must be interpreted in a manner that contemplates their exercise in modern society. Just as the methods and means of exercising the right should not be frozen in time, neither should the government’s legitimate safety concerns. Adapting the exercise of treaty rights to modern weaponry without adapting the corollary legitimate safety concerns would lead to unacceptable results. One cannot reasonably focus on the former and turn a blind eye to the latter.

In *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, this Court held that only the logical evolution of a pre-treaty practice will attract treaty protection. In that case, the evidence showed only a pre-treaty practice of some limited trade in wood products. This evidence was insufficient to establish a treaty right to engage in commercial logging. McLachlin C.J., for the majority, described the standard in these terms:

statique ou rigide. Ils ne sont pas figés à la date de la signature. Les tribunaux doivent les interpréter de manière à permettre leur exercice dans le monde moderne. » (par. 78)

Les appelants prétendent que le recours au neuvième principe pour restreindre la portée d’un droit issu d’un traité, au lieu de l’élargir, reviendrait à inverser ce principe.

Comme il sera expliqué plus en détail plus loin, depuis 1852 les dangers de la chasse nocturne s’amplifient avec le développement des armes modernes. À notre avis, les droits issus de traités ne sont pas imperméables aux changements de cette nature. Ils n’évoluent pas dans un vide social, environnemental ou technologique. Le droit de chasser ne se transforme pas en droit de chasser de façon dangereuse, sans qu’il soit tenu compte de dangers imprévus ou de nouveaux risques.

Bien au contraire, le neuvième principe reconnaît simplement que l’interprétation des traités doit tenir compte de l’exercice des droits en question dans la société moderne. Tout comme les méthodes et moyens employés pour l’exercice des droits ne sont pas figés dans le temps, les préoccupations légitimes du gouvernement en matière de sécurité ne doivent pas l’être non plus. Adapter l’exercice des droits issus de traités au contexte des armes modernes sans adapter son corollaire — les préoccupations légitimes en matière de sécurité — entraînerait des résultats inacceptables. On ne pourrait raisonnablement insister sur le premier élément et fermer les yeux sur le second.

Dans *R. c. Marshall*, [2005] 2 R.C.S. 220, 2005 CSC 43, la Cour a statué que seule l’évolution logique d’une pratique préalable au traité peut bénéficier de la protection du traité. Dans cette affaire, la preuve révèle seulement la pratique d’un commerce de produits du bois relativement restreint avant la conclusion du traité. Cette preuve n’est pas suffisante pour permettre d’établir l’existence d’un droit issu d’un traité qui permet l’exploitation forestière à l’échelle commerciale. Au nom de la Cour, la juge en chef McLachlin a décrit la norme applicable en ces termes :

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Of course, treaty rights are not frozen in time. Modern peoples do traditional things in modern ways. The question is whether the modern trading activity in question represents a logical evolution from the traditional trading activity at the time the treaty was made; *Marshall 2*, at para. 20. Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology. But the activity must be essentially the same. “While treaty rights are capable of evolution within limits, . . . their subject matter . . . cannot be wholly transformed” (*Marshall 2*, at para. 19). [para. 25]

117 In our view, when the same sort of activity carried on in the modern economy by modern means is inherently dangerous, that dangerous activity will not be a logical evolution of the treaty right.

118 It is true, as the appellants assert, that the treaty protects from encroachment the means and methods of its exercise, such as: timing of the hunt (*R. v. White* (1965), 52 D.L.R. (2d) 481 (S.C.C.), aff’g (1964), 50 D.L.R. (2d) 613 (B.C.C.A.); “season, method [and] limit” of the hunt (*Sutherland*, at p. 460); “method, timing and extent” of the hunt (*Badger*, at para. 90)).

119 However, the fact that the treaty protects the means and methods of hunting does not negate the internal limit on the right: the treaty hunting right does not include the right to hunt in a manner that endangers the safety of the hunter or others. Because dangerous hunting falls outside the scope of the protected treaty right, the province is free to regulate in this area. The issue of safety was not addressed in *Prince v. The Queen*, [1964] S.C.R. 81, and that case’s reference to night hunting should not be understood without reference to the subsequent jurisprudence of this Court with respect to safety, including *Myran*, which dealt specifically with the proper interpretation of *Prince*.

Certes, les droits issus de traités ne sont pas figés dans le temps. Les activités traditionnelles sont maintenant pratiquées de façon moderne. Il s’agit d’établir si l’activité commerciale actuelle en cause procède de l’évolution logique du commerce traditionnel pratiqué au moment du traité : *Marshall 2*, par. 20. L’évolution logique suppose le même type d’activité, exercée dans l’économie moderne par des moyens modernes. On évite ainsi de restreindre indûment les droits ancestraux simplement du fait des changements économiques ou technologiques. Il faut cependant que l’activité demeure fondamentalement la même. « Bien que les droits issus de traités soient dans certaines limites capables d’évolution [. . .] leur objet ne peut [. . .] être transformé du tout au tout » (*Marshall 2*, par. 19). [par. 25]

À notre avis, lorsqu’une activité du même type, exercée dans l’économie moderne avec des moyens modernes, est intrinsèquement dangereuse, cette activité dangereuse ne pourra être considérée comme étant l’évolution logique du droit issu d’un traité.

Certes, comme l’affirment les appelants, le traité protège contre l’empiétement les moyens et méthodes utilisés pour l’exercice d’un droit issu d’un traité, par exemple pour tout ce qui touche à la période de chasse (*R. c. White* (1965), 52 D.L.R. (2d) 481 (C.S.C.), conf. (1964), 50 D.L.R. (2d) 613 (C.A.C.-B.), « aux saisons, aux méthodes [et] à la limite de prise » (*Sutherland*, p. 460) ainsi qu’aux modes et périodes de chasse, et à l’ampleur de la chasse (*Badger*, par. 90)).

Cependant, le fait que le traité protège les moyens et méthodes de chasse n’écarte pas la limite intrinsèque du droit : le droit de chasse issu d’un traité ne comporte pas le droit de chasser d’une manière qui mette en danger la sécurité du chasseur ou d’autrui. Étant donné que la chasse dangereuse ne relève pas d’un droit protégé par traité, la province est libre de réglementer ce domaine. Dans *Prince c. The Queen*, [1964] R.C.S. 81, la question de la sécurité n’a pas été abordée et il ne faut pas interpréter l’affaire, lorsqu’il est fait mention de la chasse nocturne, sans tenir compte de la jurisprudence subséquente de la Cour relativement à la question de sécurité, notamment *Myran*, où la Cour traitait précisément de la juste interprétation de *Prince*.

In *Myran*, Dickson J. (as he then was), speaking for the Court, explained the interplay between “means and methods” jurisprudence and safety this way:

I think it is clear from *Prince* . . . that an Indian of the Province is free to hunt or trap game in such numbers, at such times of the year, by such means or methods and with such contrivances, as he may wish, provided he is doing so in order to obtain food for his own use and on unoccupied Crown lands or other lands to which he may have a right of access. But that is not to say that he has the right to hunt dangerously and without regard for the safety of other persons in the vicinity. *Prince* . . . deals with “method”. Neither that case nor those which preceded it dealt with the protection of human life. I agree with what was said in the present case by Mr. Justice Hall in the Court of Appeal for Manitoba:

In the present case the governing statute is *The Wildlife Act*, *supra*, and in particular Sec. 41(1) thereof. Section 10(1) under which the accused were charged does not restrict the type of game, nor the time or method of hunting, but simply imposes a duty on every person of hunting with due regard for the safety of others. Does that duty reduce, detract or deprive Indians of the right to hunt for food on land to which they have a right of access? If one regards that right in absolute terms the answer is clearly in the affirmative; but is that the case? Surely the right to hunt for food as conferred or bestowed by the agreement and affirmed by the statute cannot be so regarded. Inherent in the right is the quality of restraint, that is to say that the right will be exercised reasonably. Section 10(1) is only a statutory expression of that concept, namely that the right will be exercised with due regard for the safety of others, including Indians. [pp. 141-42]

The overarching principle, now firmly entrenched in our jurisprudence, is that public safety enjoys preeminent status in matters of this kind. Or to use the words of *Myran*, the right must be exercised reasonably.

VII

We have concluded that the treaty right to hunt upon which the appellants rely in this case is subject to the internal limit that it cannot be exercised in a manner that is dangerous to the safety of the hunter or others. This is a general description of the limitation. We must still determine how this internal limit may be validly expressed in the

Dans *Myran*, le juge Dickson (plus tard Juge en chef), au nom de la Cour, a expliqué l'interaction entre la jurisprudence traitant des « moyens et méthodes » et la question de sécurité en ces termes :

L'arrêt *Prince* [. . .] montre bien qu'un Indien est libre de chasser ou de piéger le gibier autant qu'il le désire, quand il le désire et par les moyens qu'il choisit à condition que ce soit pour se nourrir personnellement et sur des terres inoccupées de la Couronne ou auxquelles il a un droit d'accès. Toutefois, il n'a pas le droit de chasser dangereusement au mépris de la sécurité des gens du voisinage. L'arrêt *Prince* [. . .] traite des moyens permis. Ni cet arrêt ni ceux qui l'ont précédé n'ont traité de la protection de la vie humaine. Je suis d'accord avec ce qu'a dit le juge Hall à la Cour d'appel du Manitoba dans la présente cause :

[TRADUCTION] La loi applicable est [la] *Wildlife Act*, *supra*, notamment l'art. 41(1). L'art. 10(1), en vertu duquel les accusés ont été inculpés ne restreint pas le type de gibier, le temps ou la méthode de chasse, il impose seulement l'obligation de chasser en ayant égard à la sécurité d'autrui. Cette prescription est-elle une restriction ou une atteinte au droit des Indiens de chasser pour leur nourriture sur les terres auxquelles ils ont un droit d'accès? Si l'on prend ce droit en termes absolus, la réponse est clairement affirmative; mais est-ce le cas? Non, le droit de chasser pour se nourrir, conféré ou attribué par l'accord et ratifié par la loi, ne peut pas être vu de cette façon. Il y a une restriction inhérente au droit, il faut l'exercer raisonnablement. L'article 10(1) n'est que l'énoncé législatif de ce concept, à savoir que le droit sera exercé en ayant égard à la sécurité d'autrui, y compris celle des Indiens. [p. 141-142]

Selon ce principe prépondérant, solidement ancré dans notre jurisprudence, la sécurité publique prévaut dans ce genre d'affaire. Ou bien, pour reprendre les termes employés dans *Myran*, il faut exercer ce droit raisonnablement.

VII

Nous avons conclu que le droit de chasse issu d'un traité invoqué par les appelants en l'espèce comporte la limite intrinsèque qu'il ne peut être exercé d'une manière dangereuse pour le chasseur ou autrui. C'est là une description générale de la limitation. Il reste maintenant à déterminer comment cette limite intrinsèque peut être valablement

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regulatory context. Are the courts limited to case-by-case after the fact inquiries into whether a particular hunter on a particular occasion exercised the treaty right to hunt unsafely? Or can the province pass legislation or adopt regulations that define the limits of the right in a way that can be administered and understood by the aboriginal community?

123 The answer to this question is found in this Court's jurisprudence, which affirms the right of the province to determine and direct in advance the limits of a treaty right in a particular regulatory context, provided it does so reasonably. As Cory J., writing for the majority in *R. v. Nikal*, [1996] 1 S.C.R. 1013, stated:

It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. . . . The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. . . . Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. [Emphasis added; para. 92.]

124 Similarly, in *Marshall No. 1*, the Court, after concluding that the treaty right to fish was inherently limited to quantities reasonably expected to produce a moderate livelihood, stated:

Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard. [Emphasis in original; para. 61.]

The Court reaffirmed the province's right to define the reasonable limits of treaty rights through regulation in *Marshall No. 2*, stating:

exprimée dans le contexte de la réglementation. Les tribunaux sont-ils réduits à procéder au cas par cas pour décider, après examen des faits, si un chasseur en particulier a, à une occasion donnée, exercé de façon dangereuse le droit de chasse issu d'un traité? Ou les provinces peuvent-elles, par des lois ou des règlements, définir les limites du droit d'une manière qui puisse être administrée et comprise par la collectivité autochtone?

La réponse à cette question réside dans la jurisprudence de la Cour, laquelle confirme le droit des provinces d'établir et de régir au préalable les limites d'un droit issu d'un traité dans un contexte de réglementation particulier, pourvu qu'elles le fassent de façon raisonnable. Comme l'a dit le juge Cory, au nom de la majorité dans *R. c. Nikal*, [1996] 1 R.C.S. 1013 :

Il a fréquemment été déclaré que les droits n'existent pas dans l'abstrait et que les droits d'un individu ou d'un groupe sont nécessairement limités par les droits d'autrui. [. . .] Le gouvernement doit, en dernier ressort, être capable d'établir ou de régir la façon dont ces droits devraient interagir. La liberté absolue d'exercer un droit, même un droit ancestral protégé par la *Charte* ou garanti par la Constitution, n'a jamais été reconnue ni voulue. [. . .] La liberté absolue, sans restriction aucune, implique nécessairement la liberté de vivre en marge des lois. Un tel concept est inacceptable dans notre société. [Nous soulignons; par. 92.]

Dans la même veine, après avoir conclu que le droit de pêche issu d'un traité était intrinsèquement limité par le nombre de prises dont il est raisonnable de s'attendre à ce qu'il permette de s'assurer une subsistance convenable, la Cour a affirmé dans *Marshall n° 1* :

Des limites de prises, dont il serait raisonnable de s'attendre à ce qu'elles permettent aux familles mi'kmaq de s'assurer une subsistance convenable selon les normes d'aujourd'hui, peuvent être établies par règlement et appliquées sans porter atteinte au droit issu du traité. Un tel règlement respecterait ce droit et *ne* constituerait pas une atteinte qui devrait être justifiée suivant la norme établie dans l'arrêt *Badger*. [En italique dans l'original; par. 61.]

La Cour a réaffirmé dans *Marshall n° 2* le droit de la province de définir par règlement les limites raisonnables des droits issus de traités :

... regulations that do no more than reasonably *define* the Mi'kmaq treaty right in terms that can be administered by the regulator and understood by the Mi'kmaq community that holds the treaty rights do not impair the exercise of the treaty right ... [Underlining added; para. 37.]

These holdings are consistent with this Court's assertion in *Myran* that the treaty right must be exercised in a reasonable manner. Reasonable regulatory restrictions, including blanket prohibitions, which address legitimate safety concerns, will not infringe the treaty right.

The question before us is thus whether the province's ban on night hunting constitutes a reasonable exercise of the province's power to regulate the internal safety limit on the appellants' treaty right. Or, put differently, is this ban a reasonable way, in the regulatory context of the Province of British Columbia, to articulate the internal safety limitation on the treaty right to hunt?

The trial judge found that it was. He stated:

[I]t is undeniably true that the Province of British Columbia has taken a firm and consistent attitude against night hunting, based upon the advice from conservation officers, that the practice is inherently unsafe. Certainly the evidence in this case supports such a finding. It is night hunting that brings added and unacceptable danger, according to the evidence. The evidence establishes that it is dangerous to permit the use of high-powered rifles in the dark, and to leave it to individual hunters to use their common sense to minimize those risks in the face of a sudden opportunity to kill game.

. . .

[I]t is apparent that the use of lights at night brings a new set of problems, even as it eliminates others. Most important, it brings the problem of tunnel vision, where the hunter becomes so focussed on the illuminated target, he tends to fail to be sufficiently aware of the periphery of his view, or even the background. This leads to a significant risk of accidental injury to persons or property. I do not question that proper training and

... un règlement qui se contente de *définir* raisonnablement le droit issu de traité des Mi'kmaq d'une manière qui puisse à la fois être administrée par l'organe chargé de sa réglementation et être comprise par la communauté mi'kmaq titulaire du droit en question ne porte pas atteinte à l'exercice de ce droit ... [Nous soulignons; par. 37.]

Ces conclusions sont compatibles avec l'affirmation de la Cour dans *Myran* selon laquelle le droit issu d'un traité doit être exercé de manière raisonnable. Les restrictions réglementaires raisonnables, y compris les interdictions générales, qui ont trait à des préoccupations légitimes en matière de sécurité ne porteront pas atteinte au droit issu d'un traité.

La Cour doit donc déterminer si l'interdiction de la province concernant la chasse nocturne constitue un exercice raisonnable de son pouvoir de réglementer la limite intrinsèque — en matière de sécurité — du droit conféré par traité aux appelants. Autrement dit, est-ce que, dans le contexte de la réglementation en Colombie-Britannique, cette interdiction constitue une façon raisonnable d'exprimer la limite intrinsèque — en matière de sécurité — du droit de chasse issu d'un traité?

Voici ce qu'a dit le juge du procès :

[TRADUCTION] [O]n ne saurait nier que l'opposition de la Colombie-Britannique à la chasse nocturne a été ferme et constante, suivant les conseils des agents de conservation selon lesquels cette pratique est intrinsèquement dangereuse. La preuve en l'espèce étaye certainement cette conclusion. Selon la preuve, c'est la chasse nocturne qui accroît le danger et le rend inacceptable. Il ressort de la preuve qu'il est dangereux d'autoriser l'usage de carabines de haute puissance dans l'obscurité et de se fier au bon sens des chasseurs pour minimiser ces risques devant la chance qu'ils ont soudainement de tuer un gibier.

. . .

[L]e recours à des lampes la nuit engendre manifestement de nouveaux problèmes, même s'il en élimine d'autres. Le problème le plus grave est celui du rétrécissement concentrique du champ visuel : l'attention du chasseur est tellement centrée sur la cible éclairée par la source lumineuse que sa vision périphérique tend à lui échapper, tout comme l'arrière-plan. Ce problème entraîne un grand risque de blessures accidentelles à

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other measures can be taken to reduce the risk, but we do not live in a perfect world. The statutory provision is directed at the issue of safety, and is reasonable on its face as a measure to help ensure that needless risk is avoided. [paras. 11 and 13]

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These findings, shared by trial and appellate courts across the country, are manifestly reasonable. See *R. v. Seward* (1999), 171 D.L.R. (4th) 524 (B.C.C.A.); *R. v. Bernard* (2002), 200 N.S.R. (2d) 352, 2002 NSCA 5, leave to appeal refused, [2002] 3 S.C.R. vi; *R. v. Pariseau*, [2003] 2 C.N.L.R. 260 (Que. C.A.); *R. v. Southwind*, [1991] O.J. No. 3612 (QL) (Prov. Div.); *R. v. King*, [1996] O.J. No. 5458 (QL) (Prov. Div.); *R. v. Harris*, [1998] B.C.J. No. 1016 (QL) (Prov. Ct.); *R. v. Ice*, [2000] O.J. No. 5857 (QL) (C.J.); *R. v. Stump*, [2000] 4 C.N.L.R. 260 (B.C. Prov. Ct.); *R. v. Barlow* (2000), 228 N.B.R. (2d) 289 (Q.B.), leave to appeal refused, [2001] N.B.J. No. 145 (QL), 2001 NBCA 44; *Turner v. Manitoba* (2001), 160 Man. R. (2d) 256, 2001 MBCA 207; *R. v. Augustine* (2001), 232 N.B.R. (2d) 313 (Q.B.), leave to appeal refused, [2001] N.B.J. No. 190 (QL), 2001 NBCA 57; *R. v. Maurice*, [2002] 2 C.N.L.R. 273, 2002 SKQB 68; *R. v. Pitawanakwat*, [2004] O.J. No. 2075 (QL), 2004 ONCJ 50; *R. v. Yapput*, [2004] O.J. No. 5055 (QL), 2004 ONCJ 318. For the opposing view see: *R. v. Maple*, [1982] 2 C.N.L.R. 181 (Sask. Prov. Ct.); *R. v. Machimity*, [1996] O.J. No. 4365 (QL) (Prov. Div.); and *R. v. Polches* (2005), 289 N.B.R. (2d) 72, 2005 NBQB 137.

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The conclusion that a ban on night hunting is a reasonable exercise of the Province's regulatory power in defining the internal limit on the treaty right flows naturally and logically from the defining feature of nighttime — that is, darkness. The evidence at trial was more than sufficient to establish that one's ability to identify objects, estimate distances and observe background and surrounding items is greatly diminished in the dark, posing a real danger to other members of the public.

autrui ou de dommages accidentels à des biens. Je ne doute pas qu'une formation pertinente et d'autres mesures permettent de réduire le risque, mais la perfection n'est pas de ce monde. La disposition législative vise la sécurité et, à première vue, elle constitue une mesure raisonnable pour éviter que des risques inutiles se produisent. [par. 11 et 13]

Ces conclusions, auxquelles se rallient des tribunaux de première instance et d'appel partout au pays, sont manifestement raisonnables. Voir *R. c. Seward* (1999), 171 D.L.R. (4th) 524 (C.A.C.-B.); *R. c. Bernard* (2002), 200 N.S.R. (2d) 352, 2002 NSCA 5, demande d'autorisation de pourvoi refusée, [2002] 3 R.C.S. vi; *R. c. Pariseau*, [2003] 2 C.N.L.R. 260 (C.A. Qué.); *R. c. Southwind*, [1991] O.J. No. 3612 (QL) (Div. prov.); *R. c. King*, [1996] O.J. No. 5458 (QL) (Div. prov.); *R. c. Harris*, [1998] B.C.J. No. 1016 (QL) (C. prov.); *R. c. Ice*, [2000] O.J. No. 5857 (QL) (C.J.); *R. c. Stump*, [2000] 4 C.N.L.R. 260 (C. prov. C.-B.); *R. c. Barlow* (2000), 228 R.N.-B. (2^e) 289 (B.R.), demande d'autorisation de pourvoi refusée, [2001] A.N.-B. n^o 145 (QL), 2001 NBCA 44; *Turner c. Manitoba* (2001), 160 Man. R. (2d) 256, 2001 MBCA 207; *R. c. Augustine* (2001), 232 R.N.-B. (2^e) 313 (B.R.), demande d'autorisation de pourvoi refusée, [2001] A.N.-B. n^o 190 (QL), 2001 NBCA 57; *R. c. Maurice*, [2002] 2 C.N.L.R. 273, 2002 SKQB 68; *R. c. Pitawanakwat*, [2004] O.J. No. 2075 (QL), 2004 ONCJ 50; *R. c. Yapput*, [2004] O.J. No. 5055 (QL), 2004 ONCJ 318. Pour l'opinion contraire, voir : *R. c. Maple*, [1982] 2 C.N.L.R. 181 (C. prov. Sask.); *R. c. Machimity*, [1996] O.J. No. 4365 (QL) (Div. prov.); et *R. c. Polches* (2005), 289 R.N.-B. (2^e) 72, 2005 NBQB 137.

La conclusion que l'interdiction de la chasse nocturne est l'exercice raisonnable du pouvoir de réglementation de la province pour définir la limite intrinsèque du droit issu d'un traité découle naturellement et logiquement de la caractéristique déterminante de la nuit : l'obscurité. Par ailleurs, la preuve produite au procès suffit amplement pour établir que la capacité de reconnaître des objets, d'évaluer les distances et d'observer les éléments situés à l'arrière-plan et en périphérie est grandement réduite dans l'obscurité, ce qui présente un danger réel pour les autres membres du public.

This added danger to hunting causes the risks associated with hunting at nighttime with a firearm to be unacceptably high. The *Wildlife Act* prohibition is a reasonable response to a real danger.

In *Seward*, the British Columbia Court of Appeal put it succinctly:

The introduction of rifles has significantly heightened the danger of hunting. Not just the hunters, but anyone within a mile radius of a hunter is at risk. This is especially so at night when the fact of darkness transforms a dangerous endeavour into a hazardous one. It does not matter that an individual might be able to hunt at night without injuring anyone, the fact is that the possibility of death or injury is increased when visibility is decreased and one or more hunters are in the woods. [para. 47]

The impugned legislation thus regulates an area which lies entirely outside the treaty right to hunt. It therefore does not conflict at all with the treaty right. No aboriginal right is asserted, and absent a conflicting treaty or aboriginal right, reasonable provincial safety regulation of dangerous hunting practices cannot be said to intrude upon “core Indianness”. It follows that the *Wildlife Act* prohibition on night hunting with a firearm is a valid provincial law applicable to the appellants *ex proprio vigore* and without recourse to s. 88.

We are not persuaded by the appellants’ submission that the provincial power to legislate with respect to safety is restricted to the ability to prohibit unsafe hunting in a *general* manner. If provinces can prohibit “unsafe hunting”, there is no reason why they should be precluded from identifying particular practices that are unsafe. This falls within the power of the provinces to reasonably regulate the internal limits on treaty rights, affirmed in *Marshall No. 1* and *No. 2* and *Sundown*.

Ce danger qui s’ajoute à ceux de la chasse fait que les risques associés à la chasse nocturne avec une arme à feu atteignent un niveau trop élevé pour être acceptables. L’interdiction prévue par la *Wildlife Act* représente une solution raisonnable pour éviter un danger réel.

Dans *Seward*, la Cour d’appel de la Colombie-Britannique a déclaré succinctement :

[TRADUCTION] L’introduction de carabines a fortement accru les dangers de la chasse. Ce ne sont pas seulement les chasseurs qui sont exposés aux risques; c’est aussi toute personne qui se trouve dans un rayon d’un mille autour du chasseur. Cela est d’autant plus vrai la nuit, où l’obscurité ajoute un élément de hasard. Peu importe qu’une personne soit capable de chasser la nuit sans blesser qui que ce soit, il demeure que le risque de décès ou de blessures s’accroît lorsque la visibilité est réduite et qu’il y a plusieurs chasseurs dans le bois. [par. 47]

La mesure législative contestée régit donc un champ complètement différent de celui visé par le droit de chasse issu d’un traité. Elle n’entre donc pas du tout en conflit avec le droit issu d’un traité. Aucun droit ancestral n’est invoqué et, en l’absence d’un droit ancestral ou issu d’un traité incompatible, on ne peut affirmer qu’une réglementation provinciale raisonnable en matière de sécurité qui vise les pratiques de chasse dangereuses empiète sur l’« essentiel de l’indianité ». Il s’ensuit que l’interdiction prévue par la *Wildlife Act* de chasser la nuit avec une arme à feu constitue une mesure législative provinciale valide qui s’applique d’elle-même aux appelants, sans qu’il ne soit nécessaire de recourir à l’art. 88.

Nous ne sommes pas convaincus par l’argument des appelants que le pouvoir d’une province de légiférer en matière de sécurité se limite à sa capacité d’interdire, de façon *générale*, la chasse dangereuse. Si les provinces peuvent interdire la « chasse dangereuse », il n’y a pas de raison qu’elles ne puissent pas désigner certaines pratiques comme étant dangereuses. Cette fonction relève du pouvoir des provinces de réglementer de façon raisonnable les limites intrinsèques des droits issus de traités, confirmé dans *Marshall n° 1* et *n° 2* et *Sundown*.

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134 Finally, we offer two brief observations concerning the joint reasons of Justices Deschamps and Abella.

135 First, in their view, the question on this appeal is the extent to which, if at all, provinces may validly interfere with treaty rights. With respect, we only reach that question if the impugned provincial legislation is first found to affect a treaty right. In this case, we are agreed that the Douglas Treaty does not confer a right to hunt dangerously. This renders hypothetical the question posed by our colleagues.

136 Second, Justices Deschamps and Abella find that a ban on hunting with a modern firearm at night is overly broad. They believe that the Douglas Treaty countenances only more limited prohibitions. In our respectful view, this constraint undermines the objective of legislation relating to a hunting practice which courts have consistently found inherently involves an unacceptable and elevated risk to the public.

137 The constitutional questions in the present appeal were stated as follows:

1. Do ss. 27(1)(d) and (e) of the *Wildlife Act*, S.B.C. 1982, c. 57, constitutionally apply of their own force to the appellants in view of Parliament's exclusive legislative authority under s. 91(24) of the *Constitution Act, 1867*?
2. If not, do ss. 27(1)(d) and (e) of the *Wildlife Act*, S.B.C. 1982, c. 57, nonetheless apply to the appellants by virtue of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5?

138 Since the proceedings relating to s. 27(1)(e) were conditionally stayed and no objection was made on appeal, it is not necessary for purposes of this appeal to assess the constitutionality of s. 27(1)(e).

139 With respect to s. 27(1)(d), the first question should be answered in the affirmative. Having

Enfin, deux brèves observations concernant les motifs conjoints des juges Deschamps et Abella.

Premièrement, à leur avis, il s'agit de savoir en l'espèce dans quelle mesure, le cas échéant, les provinces peuvent valablement intervenir dans les questions des droits issus de traités. Soit dit en tout respect, nous estimons que, pour répondre à cette question, il faut d'abord établir que la mesure législative provinciale contestée porte atteinte à un droit issu d'un traité. En l'espèce, nous sommes d'accord pour dire que le Traité de Douglas ne confère pas le droit de chasser dangereusement. Cela rend hypothétique la question posée par nos collègues.

Deuxièmement, les juges Deschamps et Abella estiment que l'interdiction de chasser la nuit avec une arme à feu moderne est d'une portée trop large. À leur avis, le Traité de Douglas tolère seulement des interdictions plus limitées. À notre humble avis, cette restriction compromet la réalisation de l'objectif de tout texte législatif concernant une pratique de chasse dont les tribunaux ont, de façon constante, considéré qu'elle comporte un risque inacceptable et élevé pour le public.

Les questions constitutionnelles posées en l'espèce sont ainsi formulées :

1. Les alinéas 27(1)d) et e) de la *Wildlife Act*, S.B.C. 1982, ch. 57, sont-ils constitutionnellement applicables d'eux-mêmes aux appelants, compte tenu de la compétence législative exclusive que le par. 91(24) de la *Loi constitutionnelle de 1867* confère au Parlement?
2. Dans la négative, les al. 27(1)d) et e) de la *Wildlife Act*, S.C.B. 1982, ch. 57, s'appliquent-ils néanmoins aux appelants par l'effet de l'art. 88 de la *Loi sur les Indiens*, L.R.C. 1985, ch. I-5?

Étant donné la suspension conditionnelle des procédures fondées sur l'al. 27(1)e) et l'absence d'objection en appel, il n'est pas nécessaire, dans le cadre du présent pourvoi, d'évaluer la constitutionnalité de l'al. 27(1)e).

En ce qui concerne l'al. 27(1)d), il faut répondre par l'affirmative à la première question. Vu la

concluded that s. 27(1)(d) of the *Wildlife Act* is a reasonable law of general application directed at safety that does not engage the appellants' treaty rights, and which applies *ex proprio vigore*, it is not necessary to answer the second question.

For these reasons, we would dismiss the appeal.

Appeal allowed, McLACHLIN C.J. and BASTARACHE and FISH JJ. dissenting.

Solicitors for the appellants: Mandell Pinder, Vancouver.

Solicitor for the respondent: Ministry of the Attorney General, Victoria.

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

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

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

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

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

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

Solicitor for the intervener the Eagle Village First Nation (Migizy Odenaw): Diane Soroka Barrister and Solicitor Inc., Westmount.

Solicitors for the intervener the Red Rock Indian Band: Duboff Edwards Haight & Schachter, Winnipeg.

Solicitors for the intervener Conseil de la Nation huronne-wendat: Langlois Kronström Desjardins, Québec.

conclusion que l'al. 27(1)d) de la *Wildlife Act* est une disposition d'application générale raisonnable visant la sécurité qui n'entre pas en conflit avec les droits conférés par le traité aux appelants et qui s'applique d'elle-même, il n'est pas nécessaire de répondre à la seconde question.

Pour ces motifs, nous sommes d'avis de rejeter le pourvoi.

Pourvoi accueilli, la juge en chef McLACHLIN et les juges BASTARACHE et FISH sont dissidents.

Procureurs des appelants : Mandell Pinder, Vancouver.

Procureur de l'intimée : Ministère du Procureur général, Victoria.

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

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

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

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Procureur général du Nouveau-Brunswick, Fredericton.

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

Procureur de l'intervenant le procureur général de l'Alberta : Alberta Justice, Calgary.

Procureurs de l'intervenante la Première Nation de Eagle Village (Migizy Odenaw) : Diane Soroka Barrister and Solicitor Inc., Westmount.

Procureurs de l'intervenante la bande indienne de Red Rock : Duboff Edwards Haight & Schachter, Winnipeg.

Procureurs de l'intervenant le Conseil de la Nation huronne-wendat : Langlois Kronström Desjardins, Québec.

Solicitors for the intervener Te'mexw Treaty Association: Cook Roberts, Victoria.

Solicitors for the intervener Chief Allan Claxton: Woodward and Co., Victoria.

Solicitors for the intervener Chief Roger William: Rosenberg & Rosenberg, Vancouver.

Procureurs de l'intervenante Te'mexw Treaty Association : Cook Roberts, Victoria.

Procureurs de l'intervenant le chef Allan Claxton : Woodward and Co., Victoria.

Procureurs de l'intervenant le chef Roger William : Rosenberg & Rosenberg, Vancouver.

Jerry Benjamin Nikal *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of British Columbia, the Attorney General for Alberta, the Alliance of Tribal Councils, Delgamuukw et al., the Fisheries Council of British Columbia, the Canadian National Railway Company, the BC Fisheries Survival Coalition and the BC Wildlife Federation *Interveners*

INDEXED AS: R. v. NIKAL

File No.: 23804.

1995: November 30; 1996: April 25.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Indians — Aboriginal rights — Fishing rights — Appellant charged with fishing without a licence — Whether licensing scheme infringing appellant's aboriginal rights and therefore not applying to him — Constitution Act, 1982, ss. 35(1), 52 — British Columbia Fishery (General) Regulations, SOR/84-248, s. 4(1).

Appellant is a native charged with fishing without a licence contrary to s. 4(1) of the *British Columbia Fishery (General) Regulations*. Native persons, although required to have a licence, were entitled to a free permit to fish for salmon in the manner they preferred. Appellant had been gaffing salmon in the Bulkley River where it flows through his reserve. He took the position that the licensing scheme infringed his aboriginal rights as provided in s. 35(1) of the *Constitution Act, 1982* and was therefore inapplicable. He further contended that the river is, at this point, part of his reserve so that only

Jerry Benjamin Nikal *Appellant*

c.

Sa Majesté la Reine Intimée

et

Le procureur général de la Colombie-Britannique, le procureur général de l'Alberta, l'Alliance of Tribal Councils, Delgamuukw et autres, le Fisheries Council of British Columbia, la Compagnie des chemins de fer nationaux du Canada, la BC Fisheries Survival Coalition et la BC Wildlife Federation *Intervenants*

RÉPERTORIÉ: R. c. NIKAL

N° du greffe: 23804.

1995: 30 novembre; 1996: 25 avril.

Présents: le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Indiens — Droits ancestraux — Droits de pêche — Appellant accusé d'avoir pêché sans permis — Le régime de délivrance de permis viole-t-il les droits ancestraux de l'appellant et est-il par conséquent inapplicable à ce dernier? — Loi constitutionnelle de 1982, art. 35(1), 52 — Règlement de pêche général de la Colombie-britannique, DORS/84-248, art. 4(1).

L'appellant, un autochtone, a été accusé d'avoir pêché sans permis, contrairement au par. 4(1) du *Règlement de pêche général de la Colombie-Britannique*. Même s'ils étaient tenus de détenir un permis, les autochtones avaient le droit d'obtenir, sans frais, un permis les autorisant à pêcher le saumon de la manière qu'ils préféraient. L'appellant avait pris du saumon à la gaffe dans la rivière Bulkley, là où elle traverse sa réserve. L'appellant a fait valoir que le régime de délivrance de permis porte atteinte aux droits ancestraux qui lui sont garantis par le par. 35(1) de la *Loi constitutionnelle de 1982* et qu'il est donc inapplicable. Il a également affirmé que, à cet endroit, la rivière fait partie de sa réserve et que, en conséquence, seul s'appliquait le règlement administratif de

the band by-law, which allowed band members unrestricted fishing in the river, applied.

Appellant was acquitted at trial and the acquittals were upheld by the Summary Conviction Appeal Judge. The acquittals were set aside by the Court of Appeal. The constitutional question before this Court queried whether s. 4(1) of the Regulations and licences issued under it were of no force or effect with respect to the appellant in the circumstances by reason of the aboriginal rights protected by s. 35 of the *Constitution Act, 1982*. In essence, two issues are raised: (1) whether the band's fishing by-law applies to the Bulkley River where it flows through the band's reserve, and (2) whether the licence requirement under s. 4(1) of the Regulations infringes the appellant's aboriginal rights contrary to s. 35.

Held (L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be allowed.

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: Historical documents available to the public were relied on. All parties had an opportunity to review and make submissions pertaining to them.

The Crown did not intend to grant an exclusive fishery to the band when it created the reserve. Reserve commissioners were not given authority to bind the Crown and were instructed not to assign fishing rights irrevocably and absolutely. The Crown's policy against the granting of exclusive fisheries to the Indians was often and forcefully stated. No evidence supported the position that the Department of Indian Affairs had intended to grant the bands exclusive fisheries but the Department of Marine and Fisheries overrode this intention in an inter-departmental jurisdiction dispute. Notwithstanding the band's claim that it was misled as to the grant of an exclusive fishery, the facts surrounding this particular grant considered in light of the expressed general policy indicate an intention to allot only the land of the reserve and not the river.

The portion of the river flowing through the reserve (with the reserve on both sides) does not form part of the reserve through operation of the doctrine of *ad medium filum aquae* to non-navigable water. This doctrine, assuming without deciding that it should apply in Canada, does not apply for three reasons. First, it only applies to non-navigable rivers and the Bulkley River, taking into account its entire length, should be consid-

la bande, qui accorde aux membres de la bande un droit de pêche illimité dans la rivière.

L'appellant a été acquitté au procès. La cour d'appel des poursuites sommaires a confirmé les acquittements, qui ont par la suite été infirmés par la Cour d'appel. La question constitutionnelle soumise à notre Cour est de savoir si le par. 4(1) du Règlement et les permis délivrés sous son régime sont, dans les circonstances, inopérants à l'égard de l'appellant en raison des droits ancestraux protégés par l'art. 35 de la *Loi constitutionnelle de 1982*. Essentiellement, deux questions sont soulevées: (1) Le règlement administratif de pêche de la bande s'applique-t-il à la rivière Bulkley, là où elle traverse la réserve de la bande? (2) L'obligation de détenir un permis prévue au par. 4(1) du Règlement porte-t-elle atteinte aux droits ancestraux de l'appellant, contrevenant ainsi à l'art. 35?

Arrêt (les juges L'Heureux-Dubé et McLachlin sont dissidentes): Le pourvoi est accueilli.

Le juge en chef Lamer et les juges La Forest, Sopinka, Gonthier, Cory, Iacobucci et Major: Des documents historiques auxquels le public a accès ont été invoqués. Toutes les parties ont eu la possibilité de les examiner et de faire des observations à leur égard.

La Couronne n'avait pas l'intention d'accorder de pêche exclusive à la bande lorsqu'elle a créé la réserve. Les commissaires des réserves n'étaient pas habilités à lier la Couronne et avaient reçu instruction de ne pas céder de droits de pêche de manière irrévocable et absolue. La politique de la Couronne interdisant l'attribution de pêcheries exclusives aux Indiens a été affirmée de façon catégorique à maintes reprises. Aucun élément de preuve n'étayait la thèse que le ministère des Affaires indiennes entendait accorder des pêcheries exclusives aux Indiens mais que le ministère de la Marine et des Pêcheries avait fait obstacle à cette volonté, dans le cadre d'un conflit de compétences entre ministères. Même si la bande a fait valoir qu'elle avait été amenée à croire qu'on lui accordait une pêche exclusive, examinés à la lumière de la politique générale déclarée, les faits de cette attribution indiquent que l'intention était d'accorder uniquement les terres de la réserve et non la rivière.

La partie de la rivière qui traverse la réserve (et qui est ainsi bordée des deux côtés par la réserve) ne fait pas partie de la réserve par l'application de la doctrine *ad medium filum aquae* aux eaux non navigables. À supposer, sans toutefois se prononcer sur la question, qu'elle s'applique au Canada, cette doctrine ne s'applique pas en l'espèce pour trois raisons. Premièrement, elle ne s'applique qu'aux rivières non navigables, et la rivière

ered to be navigable. Secondly, when the reserve was created at common law the fishery was a right severable from the title to the river bed. Ownership of the river bed had no effect on the fishery as the Crown specifically refused to grant an exclusive fishery to the band. Thirdly, even if the presumption could be said to apply, it was rebutted in light of the evidence that the Crown never allotted nor intended to allot the river bed to the band.

The onus of establishing a *prima facie* infringement of an aboriginal right rests on the person claiming that right. The existence and the extent of the aboriginal right must first be established. The right established was to fish for food and ceremonial purposes and to provide members of the band with fish necessary for personal food and ceremonial needs but no position was taken as to whether the right extends beyond that. The appellant had no right not to comply with the directions of the Department of Fisheries and Oceans.

A *prima facie* infringement of an aboriginal right does not necessarily occur if something should affect that right. Rights do not exist in a vacuum and the ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom without any restriction is not an acceptable concept in our society.

The aboriginal right to fish must be balanced against the need to conserve the fishery stock. This right cannot automatically deny the ability of the government to set up a licensing scheme or program as part of a conservation program since the right's exercise depends on the continued existence of the resource.

Only aboriginal peoples can exercise aboriginal rights. The nature and scope of these rights will frequently be dependant upon membership in particular bands who have established particular rights in specific localities. In this context, a licence may be the least intrusive way of establishing the existence of an individual's aboriginal right as well as preventing non-aboriginals from exercising aboriginal rights.

Conditions of the licence can infringe the rights guaranteed by s. 35 of the *Constitution Act, 1982*. The test

Bulkley, si on la considère dans son ensemble, devrait être considérée comme une rivière navigable. Deuxièmement, lorsque la réserve a été créée, en vertu de la common law, la pêche était séparable du titre relatif au lit de la rivière. Le titre sur le lit de la rivière n'a produit aucun effet à l'égard de la pêche, étant donné que la Couronne a expressément refusé d'accorder à la bande une pêche exclusive. Troisièmement, même s'il était possible d'affirmer que la présomption s'applique, elle a été réfutée compte tenu de la preuve que la Couronne n'a jamais accordé le lit de la rivière à la bande ni eu l'intention de le faire.

Il incombe à la personne revendiquant un droit ancestral d'établir qu'il a été porté atteinte à première vue à ce droit. L'existence et la portée du droit ancestral doivent d'abord être établies. Le droit qui a été établi était celui de pêcher à des fins alimentaires et rituelles et de fournir à d'autres membres de la bande le poisson nécessaire pour satisfaire leurs besoins alimentaires et rituels, mais aucune opinion n'a été exprimée quant à savoir si ce droit a une portée plus large. L'appelant n'avait pas le droit de ne pas se conformer aux ordres du ministère des Pêches et des Océans.

Il n'y a pas nécessairement atteinte à première vue à un droit ancestral si quelque chose entrave l'exercice de ce droit. Les droits n'existent pas dans l'abstrait et les droits d'un individu ou d'un groupe sont nécessairement limités par les droits d'autrui. Le gouvernement doit, en dernier ressort, être capable d'établir ou de régir la façon dont ces droits devraient interagir. La liberté absolue, sans restriction aucune, est un concept inacceptable dans notre société.

Il faut mettre en équilibre le droit ancestral de pêcher et la nécessité de conserver les ressources halieutiques. Ce droit ne peut automatiquement priver le gouvernement de la capacité de mettre sur pied un régime ou programme de délivrance de permis faisant partie d'un programme de conservation, car l'exercice du droit en question dépend de la survie de ces ressources.

Seuls les peuples autochtones peuvent exercer des droits ancestraux. La nature et la portée de ces droits dépendent fréquemment de l'appartenance à une bande particulière ayant établi l'existence de certains droits dans une localité donnée. Dans ce contexte, un permis peut constituer le moyen le moins attentatoire d'établir l'existence du droit ancestral d'un individu et d'empêcher les non-autochtones d'exercer des droits ancestraux.

Les conditions prévues par le permis peuvent constituer une atteinte aux droits garantis par l'art. 35 de la

established in *Sparrow* requires: (1) an assessment of whether the legislation in question has the effect of interfering with an existing aboriginal right, and if so, whether that effect represents a *prima facie* infringement of s. 35(1); and, (2) a determination of whether the limitation is unreasonable, imposes an undue hardship or denies holders of the right the preferred means of exercising the right. The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

The licence, as distinct from its conditions, does not constitute an infringement of s. 35(1). The simple requirement of a licence is not in itself unreasonable; rather, it is necessary for the exercise of the right itself. A licence which is freely and readily available cannot be considered an undue hardship for that term implies more than mere inconvenience. The licence by itself, without its conditions, cannot affect the preferred means of exercising the right since it is nothing more than a form of identification.

The government must justify those conditions of a licence which on their face infringe the s. 35 right to fish. The infringing conditions of the 1986 licence are: (i) the restriction to fishing for food only; (ii) the notations providing that fishing time was subject to change by public notice and that Indian food fishing outside set dates must be licensed by the Provincial Fish and Wildlife Conservation Officer; (iii) the restriction to fishing for the fisher and his or her family only; and (iv) the restriction to fishing for salmon only. These conditions are *prima facie* infringements of the appellant's aboriginal rights: (i) to determine band members who will receive the fish for ultimate consumption; (ii) to select the use (food, ceremonial or religious) of the fish; (iii) to fish for steelhead; and, (iv) to choose the period of time to fish in the river. Other terms of the licence could be infringements if they contradicted the appellant's aboriginal rights. These terms provide for: (i) the prescribed waters in which fishing can take place; (ii) the type of gear which can be used; and, (iii) the fishing times and days. Non-enforcement does not result in these conditions being valid. The holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of the right.

Loi constitutionnelle de 1982. Le critère énoncé dans l'arrêt *Sparrow* exige: (1) qu'on détermine si la loi en question a pour effet de porter atteinte à un droit ancestral existant et, dans l'affirmative, si elle constitue une violation à première vue du par. 35(1); (2) qu'on détermine si la restriction est déraisonnable, indûment rigoureuse ou prive les titulaires du droit de recourir à leur moyen préféré de l'exercer. C'est à l'individu ou au groupe qui conteste la mesure législative qu'il incombe de prouver qu'il y a eu atteinte à première vue.

Le permis lui-même, par opposition aux conditions dont il est assorti, ne constitue pas une atteinte au par. 35(1). La simple obligation d'être titulaire d'un permis n'est pas en soi déraisonnable, mais au contraire nécessaire à l'exercice du droit lui-même. Un permis gratuit et facile à obtenir ne peut être considéré comme étant une mesure indûment rigoureuse, car ces mots impliquent plus qu'un simple inconvénient. Le permis lui-même, indépendamment de ses conditions, ne peut gêner l'exercice du droit par les moyens préférés puisqu'il n'est rien d'autre qu'un moyen d'identification.

Le gouvernement est tenu de justifier les conditions prévues par un permis qui, à la simple lecture de leur texte, portent atteinte au droit de pêche garanti par l'art. 35. Les conditions attentatoires du permis de 1986 sont les suivantes: (i) la pêche ne peut être pratiquée qu'à des fins alimentaires; (ii) les remarques indiquant que la période de pêche peut être modifiée par avis public et que les Indiens qui pratiquent la pêche à des fins alimentaires en dehors de périodes déterminées doivent détenir un permis délivré par l'agent provincial de conservation de la faune et du poisson; (iii) le pêcheur ne peut pratiquer la pêche que pour lui-même et sa famille; (iv) seule la pêche au saumon peut être pratiquée. Ces conditions constituent à première vue des atteintes aux droits ancestraux de l'appelant: (i) de désigner les membres de la bande qui recevront le poisson pour le consommer en bout de ligne; (ii) de décider à quelles fins (alimentaires, rituelles ou religieuses) sera utilisé le poisson; (iii) de pêcher la truite arc-en-ciel; (iv) de décider à quel moment pêcher dans la rivière. Le permis est assorti d'autres conditions qui pourraient être attentatoires si elles entraient en conflit avec les droits ancestraux de l'appelant. Ces conditions concernent: (i) la désignation des eaux où la pêche peut être pratiquée; (ii) le type d'engins de pêche pouvant être utilisés; (iii) les jours et les heures de pêche. Le fait qu'elles ne soient pas appliquées n'a pas pour effet de rendre ces conditions valides. Le titulaire d'un droit constitutionnel n'a pas, pour jouir de la protection de ce droit, à compter que le ministère public fera montre de retenue dans l'exercice de son pouvoir discrétionnaire de poursuivre.

Sparrow set out questions to be addressed in determining if an infringement of aboriginal or treaty rights could be justified: (1) whether there was a valid legislative objective; and if so (2) whether the honour of the Crown and the special trust relationship and the responsibility of the government vis-à-vis aboriginals was at stake. Further questions might arise depending on the circumstances of the inquiry: whether there had been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation was available, and whether the aboriginal group in question had been consulted with respect to the conservation measures being implemented. The concept of reasonableness forms an integral part of the *Sparrow* test for justification.

Reasonableness must come into play in aspects of information and consultation. Regulations pertaining to conservation may have to be enacted expeditiously, however, if a crisis is to be avoided. The nature of the situation will have to be taken into account.

The government adduced no evidence to justify the conditions of the licence and accordingly did not meet its onus to do so. The licence and its integral conditions are an indivisible whole. The conditions, even if they could be considered separately, were not severable.

Per L'Heureux-Dubé and McLachlin JJ. (dissenting): The requirement of a licence did not constitute a *prima facie* infringement of the appellant's constitutionally protected right to fish for food.

The issue before the Court was whether the act of licensing *per se* was unconstitutional and not whether the conditions attached to the licence were unconstitutional. The charge of failing to obtain a validly required licence must be distinguished from breach of one of the conditions of the licence. The invalidity of licence conditions does not excuse a person from obtaining the licence required by law even if the conditions are "integral" to the licence.

Cases Cited

By Cory J.

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Keewatin Power Co. v. Kenora (Town)* (1906), 13 O.L.R.

Ont été énoncées, dans *Sparrow*, les questions qu'il faut examiner pour déterminer s'il est possible de justifier une atteinte à des droits ancestraux ou issus de traités. (1) Existe-t-il un objectif législatif régulier? Si oui, (2) l'honneur de Sa Majesté ainsi que les rapports spéciaux de fiduciaire et la responsabilité du gouvernement envers les autochtones sont-ils en jeu? D'autres questions peuvent également se soulever, selon les circonstances de l'enquête. En tentant d'obtenir le résultat souhaité, a-t-on porté le moins possible atteinte à des droits? Une juste indemnisation est-elle prévue en cas d'expropriation? Le groupe d'autochtones en question a-t-il été consulté au sujet des mesures de conservation mises en œuvre? Le concept du caractère raisonnable fait partie intégrante du critère de justification établi dans l'arrêt *Sparrow*.

Le caractère raisonnable doit entrer en jeu pour ce qui est des aspects qui concernent l'information et la consultation. Cependant, il est possible que des règlements en matière de conservation doivent être pris rapidement afin d'éviter une crise. Il faudra tenir compte de la nature de la situation.

Le gouvernement n'a présenté aucune preuve susceptible de justifier les conditions fixées par le permis, et il ne s'est donc pas acquitté du fardeau qui lui incombe. Le permis et les conditions qui en font partie intégrante forment un tout indivisible. Même si elles pouvaient être considérées séparément, les conditions ne seraient pas dissociables.

Les juges L'Heureux-Dubé et McLachlin (dissidentes): L'obligation d'obtenir un permis de pêche ne constitue pas à première vue une atteinte au droit de pêcher pour se nourrir qui est garanti à l'appelant par la Constitution.

La Cour était saisie de la question de savoir si le fait de délivrer des permis est en soi inconstitutionnel et non si les conditions dont est assorti le permis sont inconstitutionnelles. Il faut établir une distinction entre l'accusation de ne pas détenir le permis valablement requis et celle d'enfreindre une des conditions du permis. L'invalidité des conditions prévues par un permis ne dispense pas une personne de l'obligation d'obtenir le permis requis par la loi, même si ces conditions font «partie intégrante» du permis.

Jurisprudence

Citée par le juge Cory

Arrêts appliqués: *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Keewatin Power Co. c. Kenora (Town)* (1906), 13

237; **considered:** *Flewelling v. Johnston* (1921), 59 D.L.R. 419; **referred to:** *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97, rev'g [1991] 3 W.W.R. 97; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Re Coleman and Attorney-General for Ontario* (1983), 143 D.L.R. (3d) 608; *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732, 122 E.R. 274; *Holford v. Bailey* (1846), 8 Q.B. 1000, 115 E.R. 1150, rev'd on other grounds (1850), 13 Q.B. 426, 116 E.R. 1325; *R. v. Agawa* (1988), 65 O.R. (2d) 505; *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Sharma*, [1993] 1 S.C.R. 650; *R. v. Bob* (1991), 88 Sask. R. 302; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Norton v. Shelby County*, 118 U.S. 425 (1886); *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161.

By McLachlin J. (dissenting)

Schachter v. Canada, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Act respecting the extension and application of "The Fisheries Act," to and in the Provinces of British Columbia, Prince Edward Island and Manitoba, S.C. 1874, c. 28.
British Columbia Fishery (General) Regulations, SOR/84-248, s. 4(1).
Canadian Charter of Rights and Freedoms, ss. 1, 6(1).
Constitution Act, 1982, ss. 35(1), 52.
English Law Ordinance, 1867, S.B.C. 1867, No. 70, s. 2 [now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 2].
Fisheries Act, R.S.C., 1985, c. F-14 (formerly R.S.C. 1970, c. F-14).
Fisheries Act, S.C. 1868, c. 60.
Gitksan-Wet'suwet'en Indian Fishing By-Law, SOR/86-612, ss. 2, 3, 4.
Indian Act, R.S.C., 1985, c. I-5, s. 81(1)(o) [am. c. 32 (1st Supp.), s. 15(3)] (formerly R.S.C. 1970, c. I-6 [am. S.C. 1985, c. 27, s. 15.1(2)]).
North-West Territories Act, R.S.C. 1886, c. 50, s. 11.

Authors Cited

Coulson, H. J. W., and Urquhart A. Forbes. *The Law relating to Waters*, 2nd ed. London: Sweet and Maxwell, 1902.

O.L.R. 237; **arrêt examiné:** *Flewelling c. Johnston* (1921), 59 D.L.R. 419; **arrêts mentionnés:** *Delgamuukw c. British Columbia*, [1993] 5 W.W.R. 97, inf. [1991] 3 W.W.R. 97; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3; *Re Coleman and Attorney-General for Ontario* (1983), 143 D.L.R. (3d) 608; *Marshall c. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732, 122 E.R. 274; *Holford c. Bailey* (1846), 8 Q.B. 1000, 115 E.R. 1150, inf. pour d'autres motifs (1850), 13 Q.B. 426, 116 E.R. 1325; *R. c. Agawa* (1988), 65 O.R. (2d) 505; *R. c. Bain*, [1992] 1 R.C.S. 91; *R. c. Sharma*, [1993] 1 R.C.S. 650; *R. c. Bob* (1991), 88 Sask. R. 302; *Schachter c. Canada*, [1992] 2 R.C.S. 679; *Norton c. Shelby County*, 118 U.S. 425 (1886); *Air Canada c. Colombie-Britannique*, [1989] 1 R.C.S. 1161.

Citée par le juge McLachlin (dissidente)

Schachter c. Canada, [1992] 2 R.C.S. 679.

Lois et règlements cités

Acte concernant l'extension et l'application de «l'Acte des Pêcheries» aux provinces de la Colombie-Britannique, de l'Île-du-Prince-Édouard et de Manitoba, S.C. 1874, ch. 28.
Acte des Pêcheries, S.C. 1868, ch. 60.
Acte des territoires du Nord-Ouest, S.R.C. 1886, ch. 50, art. 11.
Charte canadienne des droits et libertés, art. 1, 6(1).
English Law Ordinance, 1867, S.B.C. 1867, No. 70, art. 2 [maintenant *Law and Equity Act*, R.S.B.C. 1979, ch. 224, art. 2].
Gitksan-Wet'suwet'en Indian Fishing By-Law, DORS/86-612, art. 2, 3, 4.
Loi constitutionnelle de 1982, art. 35(1), 52.
Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 81(1)(o) [mod. ch. 32 (1^{er} suppl.), art. 15(3)] (auparavant S.R.C. 1970, ch. I-6 [mod. S.C. 1985, ch. 27, art. 15.1(2)]).
Loi sur les pêches, L.R.C. (1985), ch. F-14 (auparavant *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14).
Règlement de pêche général de la Colombie-Britannique, DORS/84-248, art. 4(1).

Doctrine citée

Coulson, H. J. W., and Urquhart A. Forbes. *The Law relating to Waters*, 2nd ed. London: Sweet and Maxwell, 1902.

La Forest, Gérard V. *Water Law in Canada — The Atlantic Provinces*. Ottawa: Information Canada, 1973.

APPEAL from a judgment of the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 245, [1993] 5 W.W.R. 629, [1993] 4 C.N.L.R. 117, 33 B.C.A.C. 18, 54 W.A.C. 18, allowing the Crown's appeal from a decision of the British Columbia Supreme Court (1990), 51 B.C.L.R. (2d) 247, [1991] 2 W.W.R. 359, [1991] 1 C.N.L.R. 162, 5 C.R.R. (2d) 118, upholding the acquittal of the accused by Smyth Prov. Ct. J., [1989] 4 C.N.L.R. 143, on a charge of fishing without a licence. Appeal allowed, L'Heureux-Dubé and McLachlin JJ. dissenting.

Peter R. Grant, David Paterson and Peter W. Hutchins, for the appellant.

S. David Frankel, Q.C., and *Cheryl J. Tobias*, for the respondent.

Paul J. Pearlman, for the intervener the Attorney General of British Columbia.

Robert J. Normey, for the intervener the Attorney General for Alberta.

Arthur C. Pape, for the intervener the Alliance of Tribal Councils.

Michael Jackson, for the interveners Delgamuukw et al.

J. Keith Lowes, for the intervener the Fisheries Council of British Columbia.

Patrick G. Foy, for the intervener the Canadian National Railway Company.

Christopher Harvey, Q.C., for the interveners the BC Fisheries Survival Coalition and the BC Wildlife Federation.

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. was delivered by

La Forest, Gérard V. *Water Law in Canada — The Atlantic Provinces*. Ottawa: Information Canada, 1973.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1993), 80 B.C.L.R. (2d) 245, [1993] 5 W.W.R. 629, [1993] 4 C.N.L.R. 117, 33 B.C.A.C. 18, 54 W.A.C. 18, qui a accueilli l'appel du ministère public contre une décision de la Cour suprême de la Colombie-Britannique (1990), 51 B.C.L.R. (2d) 247, [1991] 2 W.W.R. 359, [1991] 1 C.N.L.R. 162, 5 C.R.R. (2d) 118, qui avait confirmé l'acquittement de l'accusé par le juge Smyth de la Cour provinciale, [1989] 4 C.N.L.R. 143, relativement à une accusation d'avoir pêché sans permis. Pourvoi accueilli, les juges L'Heureux-Dubé et McLachlin sont dissidentes.

Peter R. Grant, David Paterson et Peter W. Hutchins, pour l'appelant.

S. David Frankel, c.r., et *Cheryl J. Tobias*, pour l'intimée.

Paul J. Pearlman, pour l'intervenant le procureur général de la Colombie-Britannique.

Robert J. Normey, pour l'intervenant le procureur général de l'Alberta.

Arthur C. Pape, pour l'intervenante l'Alliance of Tribal Councils.

Michael Jackson, pour les intervenants Delgamuukw et autres.

J. Keith Lowes, pour l'intervenant le Fisheries Council of British Columbia.

Patrick G. Foy, pour l'intervenante la Compagnie des chemins de fer nationaux du Canada.

Christopher Harvey, c.r., pour les intervenantes la BC Fisheries Survival Coalition et la BC Wildlife Federation.

Version française du jugement du juge en chef Lamer et des juges La Forest, Sopinka, Gonthier, Cory, Iacobucci et Major rendu par

CORY J. — The appellant is a Wet'suwet'en Indian of the Moricetown Band. He lives in the village of Moricetown which is within the boundaries of Moricetown Reserve No. 1. The reserve comprises lands on both sides of the Bulkley River. On July 20 and 23, 1986, officers of the Department of Fisheries and Oceans watched the appellant gaff salmon in the Bulkley River at Moricetown. When he was asked for his licence he stated that he did not have one. He was then charged with fishing without a licence contrary to s. 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248. The Regulations provided that Indian people were entitled to a free permit to fish for salmon in the manner they preferred.

LE JUGE CORY — L'appelant, Indien Wet'suwet'en de la bande de Moricetown, vit dans le village de Moricetown, qui se trouve à l'intérieur des limites de la réserve n° 1 de Moricetown. La réserve se compose de terres situées des deux côtés de la rivière Bulkley. Les 20 et 23 juillet 1986, des agents du ministère des Pêches et des Océans ont observé l'appelant en train de prendre du saumon à la gaffe dans la rivière Bulkley à Moricetown. Lorsqu'ils lui ont demandé d'exhiber son permis, il leur a répondu qu'il n'en avait pas. Il a alors été accusé d'avoir pêché sans permis, contrairement au par. 4(1) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248. Ce règlement indiquait que les Indiens avaient le droit d'obtenir, sans frais, un permis les autorisant à pêcher le saumon de la manière qu'ils préféraient.

The appellant took the position that the *Fisheries Act*, R.S.C., 1985, c. F-14 (formerly R.S.C. 1970, c. F-14), and Regulations did not apply to him as the licensing scheme infringed his aboriginal rights as provided in s. 35(1) of the *Constitution Act, 1982*. The section is found in Part II of that Act, entitled "Rights of the Aboriginal Peoples of Canada", and reads:

L'appelant a fait valoir que la *Loi sur les pêches*, L.R.C. (1985), ch. F-14 (auparavant la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14), et son règlement d'application, ne s'appliquaient pas à lui puisque le régime de délivrance de permis portait atteinte aux droits ancestraux qui lui sont garantis par le par. 35(1) de la *Loi constitutionnelle de 1982*. Cette disposition, qui se trouve dans la partie II, intitulée «Droits des peuples autochtones du Canada», est ainsi rédigée:

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

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

The appellant further contended that the Bulkley River is, at this point, part of the Moricetown Reserve and that as a result he was bound solely by the band by-law as it pertains to fishing in the river.

L'appelant a également affirmé que, à cet endroit, la rivière Bulkley fait partie de la réserve de Moricetown et que, en conséquence, il était assujéti uniquement au règlement administratif de la bande, pour ce qui concerne la pêche dans la rivière.

At trial on May 29, 1989, Smyth Prov. Ct. J. acquitted the appellant of the charges. On appeal, the Summary Conviction Appeal Justice Millward J. upheld the acquittals, but on different grounds. On further appeal to the British Columbia Court of Appeal, a majority of the court (Lambert and Hutcheon J.J.A. dissenting) set aside the acquittals and entered convictions on the charges.

Au procès, le 29 mai 1989, le juge Smyth de la Cour provinciale a acquitté l'appelant des accusations portées contre lui. En appel, le juge d'appel Millward des poursuites sommaires a confirmé les acquittements, mais pour des motifs différents. Par la suite, la Cour d'appel de la Colombie-Britannique, à la majorité (les juges Lambert et Hutcheon étant dissidents), a annulé les acquittements et inscrit des déclarations de culpabilité à l'égard des accusations.

Issues

By order of the Chief Justice the following constitutional question was stated:

Is s. 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in July of 1986, and licences issued thereunder, of no force or effect with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

The appellant and respondent have agreed that two issues are raised in this appeal. The first is whether the fishing by-law of the Moricetown Band applies to the Bulkley River at Moricetown. The second is whether the licence requirement under s. 4(1) of the *British Columbia Fishery (General) Regulations* infringes the appellant's aboriginal rights, contrary to s. 35.

The Band By-Law

Section 81(1)(o) of the *Indian Act*, R.S.C., 1985, c. I-5 (formerly R.S.C. 1970, c. I-6), provides:

81.(1) The council of a band may make by-laws... for any or all of the following purposes, namely,

(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve.

Pursuant to that provision, the Moricetown Band Council passed a by-law which provided in part as follows:

Gitksan-Wet'suwet'en Indian Fishing By-Law, SOR/86-612

2. The following definitions apply in this By-Law:

Questions en litige

Sur ordonnance du Juge en chef, la question constitutionnelle suivante a été formulée:

Le paragraphe 4(1) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248, tel qu'il se lisait en juillet 1986, et les permis délivrés en vertu de ce paragraphe sont-ils, dans les circonstances de la présente affaire, inopérants à l'égard de l'appelant en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'il invoque?

L'appelant et l'intimée ont convenu qu'il y a deux questions en litige dans le présent pourvoi. Premièrement, le règlement administratif de pêche de la bande de Moricetown s'applique-t-il à la rivière Bulkley, à la hauteur de Moricetown? Deuxièmement, l'obligation de détenir un permis prévue au par. 4(1) du *Règlement de pêche général de la Colombie-Britannique* porte-t-elle atteinte aux droits ancestraux de l'appelant, contrevenant ainsi à l'art. 35?

Le règlement administratif de la bande

L'alinéa 81(1)o) de la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5 (auparavant S.R.C. 1970, ch. I-6), est ainsi rédigé:

81. (1) Le conseil d'une bande peut prendre des règlements administratifs [...] pour l'une ou l'ensemble des fins suivantes:

o) la conservation, la protection et la régie des animaux à fourrure, du poisson et du gibier de toute sorte dans la réserve [«on the reserve»].

Conformément à cette disposition, le conseil de bande de Moricetown a pris un règlement administratif prévoyant en partie ce qui suit:

Gitksan-Wet'suwet'en Indian Fishing By-Law, DORS/86-612

[TRADUCTION] 2. Les définitions qui suivent s'appliquent au présent règlement administratif.

r) "Waters of the Bands" means all water, waterways, rivers or streams which are located upon, or within boundaries of the reserves set aside for the use and benefit of the Moricetown Band.

3. This By-Law applies in respect and over all waters of the Band.

4. a) Gitksan-Wet'suwet'en persons are permitted to engage in fishing in waters of the Bands at any time and by any means. . . .

Whether or not the by-law could be applied to the Bulkley River will depend on whether that river forms part of the reserve.

Reasons of the Courts Below

Trial, [1989] 4 C.N.L.R. 143

8 Smyth Prov. Ct. J. began by considering the band's by-law. He noted that the Crown had conceded that if the by-law applied to the Bulkley River, it would take priority over the *Fisheries Act* and the Regulations. Section 81(1)(o) of the *Indian Act* authorized the band to make by-laws for the "preservation, protection and management of . . . fish . . . on the reserve". The key issue was therefore the interpretation of the expression "on the reserve". He held, at p. 146, that this expression authorized the band to make by-laws not only in relation to fisheries which were a geographical part of the reserve, but also in relation to "waters that are merely touching, against or at the reserve". Since the Bulkley River touched the Moricetown Reserve, the band's by-law would apply to the river and the appellant could rely on the by-law as a defence to the charges against him. On this ground, Smyth Prov. Ct. J. acquitted the appellant.

Supreme Court of British Columbia (1990), 51 B.C.L.R. (2d) 247

9 Millward J. found that Smyth Prov. Ct. J. erred in his interpretation of the expression "on the reserve". He held that the expression could not be

r) «eaux des bandes» Toute l'eau, y compris les voies d'eau, rivières ou ruisseaux se trouvant dans les réserves mises de côté au profit et à l'usage de la bande de Moricetown ou à l'intérieur des limites de ces réserves [«upon, or within boundaries of the reserves»].

3. Le présent règlement administratif s'applique à toutes les eaux de la bande.

4. a) Les Gitksan-Wet'suwet'en sont autorisés à pêcher dans les eaux des bandes en tout temps et par tous moyens. . . .

Le règlement administratif ne sera applicable à la rivière Bulkley que si celle-ci fait partie de la réserve.

Motifs des juridictions inférieures

Première instance, [1989] 4 C.N.L.R. 143

Le juge Smyth de la Cour provinciale a d'abord examiné le règlement administratif de la bande. Le ministère public, a-t-il signalé, a concédé que, s'il s'appliquait à la rivière Bulkley, ce règlement aurait priorité sur la *Loi sur les pêches* et le règlement. L'alinéa 81(1)o) de la *Loi sur les Indiens* autorise la bande à prendre des règlements administratifs pour la «conservation, la protection et la régie . . . du poisson . . . dans la réserve [«on the reserve»]». La question clé était par conséquent l'interprétation de l'expression «on the reserve». Le juge a statué, à la p. 146, que cette expression autorisait la bande à prendre des règlements administratifs à l'égard non seulement des pêcheries faisant géographiquement partie de la réserve, mais également des [TRADUCTION] «eaux qui ne font que toucher à la réserve». Comme la rivière Bulkley touchait à la réserve de Moricetown, le règlement administratif de la bande s'appliquait à la rivière et l'appellant pouvait l'invoquer comme moyen de défense à l'égard des accusations portées contre lui. Pour ce motif, le juge Smyth a acquitté l'appellant.

La Cour suprême de la Colombie-Britannique (1990), 51 B.C.L.R. (2d) 247

Le juge Millward a conclu que le juge Smyth avait mal interprété l'expression «on the reserve». Il a jugé que cette expression ne pouvait être inter-

read so as to include land outside the boundaries of the reserve. Since the bed of the Bulkley River is not a geographic part of the Moricetown Reserve he found that the by-law did not apply to it, and thus the appellant could not rely upon it.

Millward J. then examined the food fishing licensing regime as a whole and concluded that it constituted a *prima facie* infringement of the appellant's aboriginal right. He then turned to the question of whether this infringement could be justified. He noted that the licensing regime was enacted pursuant to the valid legislative objectives of conservation and management. He observed that because salmon are particularly vulnerable to overfishing, the management of the salmon fishery must be directed by an objective, central organization. He found that the conservation and management concerns justified the imposition of a licensing scheme on all fishers including aboriginals.

Turning to the specific licensing scheme in question, Millward J. considered whether it was rationally connected to the goals of conservation and management. He noted that licences are free, do not restrict the amount of fish which may be caught and impose only minimal conditions on the manner of catching the fish. However, he found that in 1986 the salmon stocks near Moricetown were healthy and there was no need for any conservation steps to be taken in that year.

The Department of Fisheries and Oceans argued that the licensing system was important because it allowed it to exert some control over the fishery if conservation measures were required in the future. Millward J. found the licensing scheme to be lacking in several aspects. First he pointed out that since aboriginal peoples must be given priority in the allocation of salmon, conservation measures should be directed first at other users, such as sport fishers. Second, using licences only to keep track of those who can fish achieves little, and simply provides the Department with the number of people that are fishing with a licence. Third, the licensing scheme does not aid in determining the

prétée comme visant des terres situées à l'extérieur des limites de la réserve. Puisque le lit de la rivière Bulkley ne fait pas géographiquement partie du territoire de la réserve de Moricetown, le règlement administratif ne s'y appliquait pas et ne pouvait donc être invoqué par l'appellant.

Le juge Millward a ensuite examiné l'ensemble du régime de délivrance de permis de pêche de subsistance et conclu que celui-ci constituait à première vue une atteinte au droit ancestral de l'appellant. Puis il s'est demandé si cette atteinte pouvait être justifiée. Il a souligné que ce régime avait été établi en conformité avec les objectifs législatifs réguliers de conservation et de gestion. Il a également fait remarquer que, comme le saumon est particulièrement vulnérable à la surpêche, la gestion de cette pêche doit relever d'une organisation centrale et objective. Il a conclu que les considérations de conservation et de gestion justifiaient l'imposition d'un régime de délivrance de permis à tous les pêcheurs, y compris aux autochtones.

Passant à l'examen du régime de délivrance de permis en cause, le juge Millward s'est demandé si celui-ci avait un lien rationnel avec les objectifs de conservation et de gestion. Il a signalé que les permis sont gratuits, qu'ils ne limitent pas le nombre de prises autorisées et qu'ils n'imposent que des conditions minimales quant aux méthodes de pêche. Cependant, il a conclu que, en 1986, les stocks de saumon près de Moricetown étaient abondants, de sorte qu'aucune mesure de conservation ne s'imposait cette année-là.

Le ministère des Pêches et des Océans a prétendu que le régime de délivrance de permis est important car il lui permet d'exercer une certaine surveillance sur les pêcheries, au cas où des mesures de conservation seraient nécessaires dans le futur. Le juge Millward a conclu que ce régime comportait des lacunes à plusieurs égards. Premièrement, a-t-il noté, puisque les peuples autochtones doivent se voir accorder la priorité dans la répartition du saumon, les mesures de conservation devraient d'abord viser d'autres utilisateurs, tels les pêcheurs sportifs. Deuxièmement, le fait d'utiliser uniquement les permis pour savoir qui peut pêcher ne donne pas grand-chose et ne renseigne le

harvest rates of the fishery since it does not specify how many fish may be caught. Moreover, several alternatives to licensing are available to ensure that fishers receive information about the fishery (i.e., newspaper announcements). In short, the licensing scheme could not be justified either on the basis that it was necessary for information gathering or on the basis that it was necessary for information dissemination.

British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 245

Macfarlane J.A. (Taggart J.A. concurring)

Macfarlane J.A. began by observing that the appellant was not simply asserting an aboriginal right to fish for food. Rather, he was asserting an aboriginal right of self-regulation in relation to the salmon fishery. In his view, the existence of the right of self-regulation would be inconsistent with the judgment in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, where it was recognized that the Crown could regulate aboriginal rights. Moreover, in *Sparrow* it was decided that not all regulations of an aboriginal right constituted *prima facie* infringement of that right. A regulation must constitute an unreasonable limitation or impose undue hardship in order for it to infringe an aboriginal right. Macfarlane J.A. concluded at p. 257:

... the requirement that an Indian hold a licence does not constitute a *prima facie* infringement of an aboriginal right. Licensing is a natural part of a centralized scheme to manage fisheries in order to ensure conservation and to achieve a proper allocation of the resource. It is a simple means of determining where and by whom fishing is done and it may provide data necessary to properly manage the resource. Licensing is reasonable and does not cause undue hardship. The licence is free, and available to all band members. It does not deny a

ministère que sur le nombre de personnes qui pêchent munies d'un permis. Troisièmement, le régime de délivrance de permis ne permet pas de déterminer l'ampleur de la récolte dans la pêche, puisqu'il ne précise pas le nombre de poissons pouvant être pris. En outre, plusieurs autres moyens que la délivrance de permis pourraient être utilisés pour assurer la diffusion aux pêcheurs de renseignements sur la pêche (p. ex. des annonces dans les journaux). Bref, le régime de délivrance de permis n'a pu être justifié par le fait qu'il était nécessaire soit pour recueillir de l'information, soit pour en communiquer.

La Cour d'appel de la Colombie-Britannique (1993), 80 B.C.L.R. (2d) 245

Le juge Macfarlane (aux motifs duquel le juge Taggart a souscrit)

Le juge Macfarlane de la Cour d'appel a d'abord signalé que l'appelant ne revendiquait pas simplement un droit ancestral de pêcher à des fins de subsistance, mais plutôt un droit ancestral d'autoréglementation en ce qui concerne la pêche au saumon. De l'avis du juge, l'existence de ce droit d'autoréglementation serait incompatible avec l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075, où il a été reconnu que la Couronne pouvait réglementer des droits ancestraux. En outre, dans *Sparrow*, il a été décidé que les mesures de réglementation d'un droit ancestral ne constituent pas toutes à première vue une atteinte à ce droit. La réglementation doit imposer une restriction déraisonnable ou être indûment rigoureuse pour porter atteinte à un tel droit. Voici ce qu'a conclu le juge Macfarlane à cet égard, à la p. 257:

[TRADUCTION] ... l'obligation faite aux Indiens de détenir un permis ne constitue pas à première vue une atteinte à un droit ancestral. La délivrance de permis est un élément naturel d'un régime centralisé de gestion des pêcheries visant à assurer la conservation de la ressource et à la répartir adéquatement. Il s'agit d'un moyen simple de déterminer où la pêche est pratiquée et par qui, et d'un moyen susceptible de fournir des données nécessaires à la gestion judicieuse de la ressource. La délivrance de permis est une mesure raisonnable, qui n'est pas indûment rigoureuse. Le permis est gratuit et tous les membres de la bande peuvent en obtenir un.

right to fish; it is a small part of the regulation of fishing.

Macfarlane J.A. then considered whether the actual terms of the licence constituted a *prima facie* infringement of the aboriginal right. Although the licence limited fishing activities, Macfarlane J.A. could not characterize these limitations as unreasonable or unduly harsh. Had the appellant obtained a licence, he could have done exactly what he was doing when charged. In the circumstances, there was no *prima facie* infringement.

Macfarlane J.A. then rejected the appellant's argument that the band's by-law afforded him a defence. He found that the by-law had no application outside of the reserve and that the river was outside of the reserve. The appellant could not rely on the principle of *ad medium filum aquae* since in Macfarlane J.A.'s view, the Crown never intended to include the bed of the Bulkley River in the reserve allotted to the Moricetown Band. He found this was demonstrated by the acreage of the allotment and by the firm and consistent rejection by the province and Canada of native claims to foreshore rights.

Finally, the creation of the Moricetown Reserve did not involve a conveyance of land, nor did it result in title's being vested in the band. Therefore, a common law property concept which depends on ownership, such as *ad medium filum aquae*, has no relevance with respect to reserves.

Wallace J.A. (concurring in the result)

In Wallace J.A.'s view, the imposition of a licensing requirement is not, *per se*, an infringement of aboriginal fishing rights. The federal government has the constitutional power to regulate fisheries, and the elders of the Moricetown Band do not have an aboriginal right to excuse band members from complying with federal laws and

La délivrance de permis ne nie pas le droit de pêcher; elle n'est qu'une petite partie de la réglementation de la pêche.

Le juge Macfarlane s'est ensuite demandé si les conditions mêmes du permis constituaient à première vue une atteinte au droit ancestral. Même si le permis limitait les activités de pêche, le juge Macfarlane n'a pu qualifier ces restrictions de déraisonnables ou d'indûment rigoureuses. Si l'appelant s'était procuré un permis, il aurait pu faire exactement ce qu'il faisait au moment de l'infraction. Dans ces circonstances, il n'y avait à première vue aucune atteinte.

Le juge Macfarlane a ensuite écarté l'argument de l'appelant que le règlement administratif de la bande offrait à ce dernier un moyen de défense. Il a conclu que le règlement administratif ne s'appliquait pas à l'extérieur de la réserve et que la rivière se trouvait à l'extérieur de celle-ci. L'appelant ne pouvait invoquer le principe *ad medium filum aquae* (jusqu'au milieu du cours d'eau) puisque, de l'avis du juge Macfarlane, la Couronne n'avait jamais eu l'intention d'inclure le lit de la rivière Bulkley dans la réserve attribuée à la bande de Moricetown. Il a conclu que ce fait était établi par la superficie accordée et par le refus constant et catégorique opposé par la province et le Canada aux revendications des autochtones relativement aux droits sur l'estran.

Enfin, la création de la réserve de Moricetown n'a donné lieu ni à une cession de terres, ni à la dévolution d'un titre à la bande. Par conséquent, un concept du droit des biens en common law tel le principe *ad medium filum aquae*, qui dépend du droit de propriété, n'a aucune pertinence en ce qui concerne les réserves.

Le juge Wallace (qui a souscrit au résultat)

De l'avis du juge Wallace, l'imposition de l'obligation de détenir un permis n'est pas en soi une atteinte aux droits de pêche ancestraux. La Constitution autorise le gouvernement fédéral à réglementer les pêcheries, et les anciens de la bande de Moricetown ne possèdent pas de droit ancestral leur permettant de dispenser les membres

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regulations respecting fisheries. Wallace J.A. stated that he found himself in agreement with Macfarlane J.A.'s conclusion that licensing *per se* did not constitute a *prima facie* infringement of the right to fish for food, nor did the conditions of this particular licence.

de la bande de se conformer aux lois et règlements du gouvernement fédéral concernant les pêches. Le juge Wallace a déclaré qu'il était d'accord avec la conclusion du juge Macfarlane que la délivrance de permis ne constituait pas en soi une atteinte à première vue au droit de pêcher à des fins de subsistance, pas plus que ne l'étaient les conditions dont était assorti le permis en cause.

18 Wallace J.A. then went on to reject the application of the *ad medium filum aquae* principle on the basis that the Bulkley River is navigable and that the principle has no application to navigable rivers. He found that the proper test for the navigability of a river requires a consideration of the river in its entirety.

Le juge Wallace a ensuite écarté l'application du principe *ad medium filum aquae* pour le motif que la rivière Bulkley est une rivière navigable et que ce principe ne s'applique pas à de telles rivières. Il a conclu que, en vertu du critère applicable pour déterminer la navigabilité d'une rivière, il faut considérer celle-ci dans son ensemble.

Lambert J.A. (dissenting)

Le juge Lambert (dissident)

19 Lambert J.A. began his reasons by dealing with the band's by-law. He found that the Bulkley River was not within the geographic boundaries of the Moricetown Reserve, was therefore not "on the reserve", and *ad medium filum aquae* could not be used to extend the reserve boundaries to include the river. As a result, a defence based on the application of the band's by-law could not succeed.

Dans ses motifs, le juge Lambert a d'abord analysé le règlement administratif de la bande. Il a conclu que la rivière Bulkley ne se trouvait pas dans les limites géographiques de la réserve de Moricetown, qu'elle ne se trouvait donc pas «on the reserve» et qu'on ne pouvait invoquer le principe *ad medium filum aquae* pour élargir les limites de la réserve de façon à inclure la rivière dans celle-ci. En conséquence, le moyen de défense fondé sur l'application du règlement administratif de la bande ne pouvait être accueilli.

20 He did, however, state that while the river was not within the reserve, the Moricetown Band nevertheless has an aboriginal title to the exclusive possession, use and enjoyment of the reserve land and to the Bulkley River fishery. Lambert J.A., relying on his reasons in *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.), found that the band had the right of self-government and self-regulation in relation to this fishery, but that this was an internal right and did not extend beyond the bounds of the reserve.

Il a toutefois déclaré que, même si la rivière ne se trouvait pas à l'intérieur de la réserve, la bande de Moricetown avait néanmoins un titre ancestral lui conférant la possession, l'utilisation et la jouissance exclusives des terres de la réserve et de la pêcherie dans la rivière Bulkley. S'appuyant sur les motifs qu'il avait prononcés dans *Delgamuukw c. British Columbia*, [1993] 5 W.W.R. 97 (C.A.C.-B), le juge Lambert a conclu que, à l'égard de cette pêcherie, la bande avait un droit fondé sur l'autonomie gouvernementale et l'auto-réglementation, mais qu'il s'agissait d'un droit interne, qui ne s'étendait pas au-delà des limites de la réserve.

21 Lambert J.A. then considered whether the food fishing licensing requirement infringed the appellant's aboriginal right, and if so, whether it could

Le juge Lambert s'est ensuite demandé si l'obligation d'obtenir un permis de pêche de subsistance portait atteinte au droit ancestral de l'accusé, et,

be justified pursuant to the *Sparrow* test. He observed that the appellant was asserting an aboriginal right to fish which was not dependent on holding a licence. He found that licensing was an external imposition on the right. In his view, it was a *prima facie* interference with the appellant's fishing rights to require as a precondition to the exercise of these rights that he fill out forms, answer questions, and wait until a licence was granted.

On the question of justification, Lambert J.A. recognized the importance of having a single, central organization to coordinate the conservation and management of fish resources. The scheme administered by such an organization might well require licensing to ensure reporting and to enforce catch limitations. However, in 1986 the federal government did not recognize aboriginal fishing rights other than that related to food. There was no recognition of the right to sell salmon nor of the rights of self-regulation and self-government. In that context, the licensing system as it operated in 1986 was not consistent with the true rights of the Moricetown Band. Regardless of the objectives of the scheme, the manner of putting it into effect and carrying it out without the cooperation of the Moricetown Band was contrary to the principles set out in *Sparrow*, *supra*. Lambert J.A. added that the requirement of holding a licence is not justified by conservation goals.

Hutcheon J.A. (dissenting)

Hutcheon J.A. observed that the conditions of the food fishing licences are not at issue in this case. The real issue is whether the requirement of a licence infringed the appellant's aboriginal right to fish. In Hutcheon J.A.'s view, it was implicit in *Sparrow* that a licensing requirement is not, *per se*, a violation of aboriginal fishing rights. *Sparrow* is, therefore, authority for the proposition that a licensing regime is within the legislative power of

dans l'affirmative, si cette atteinte pouvait être justifiée conformément au critère formulé dans l'arrêt *Sparrow*. Il a rappelé que l'appellant revendiquait un droit de pêche ancestral qui ne dépendait pas de l'obtention d'un permis. L'obtention d'un permis, a-t-il conclu, était une obligation imposée de l'extérieur en vue de l'exercice de ce droit. À son avis, le fait d'exiger de l'appellant, comme préalable à l'exercice de ses droits de pêche, qu'il remplisse des formulaires, réponde à des questions et attende qu'on lui délivre un permis constituait à première vue une atteinte à ces droits.

Relativement à la question de la justification, le juge Lambert a reconnu qu'il est important que les activités de conservation et de gestion des ressources halieutiques soient coordonnées par une organisation centrale unique. Le régime administré par une telle organisation pourrait fort bien exiger l'obtention de permis afin d'assurer la déclaration des prises et le respect des limites applicables à cet égard. Cependant, en 1986, le gouvernement fédéral n'a pas reconnu d'autres droits de pêche ancestraux que ceux liés à la pêche de subsistance. Il n'a reconnu ni le droit de vendre du saumon, ni les droits d'autoréglementation et d'autonomie gouvernementale. Dans ce contexte, le régime de délivrance de permis appliqué en 1986 n'était pas compatible avec les droits véritables de la bande de Moricetown. Indépendamment des objectifs du régime, la manière dont il était mis en œuvre et appliqué, sans la coopération de la bande de Moricetown, était contraire aux principes énoncés dans l'arrêt *Sparrow*, précité. Le juge Lambert a ajouté que l'obligation de détenir un permis n'était pas justifiée par des objectifs de conservation.

Le juge Hutcheon (dissident)

Le juge Hutcheon a rappelé que les conditions prévues par les permis de pêche de subsistance ne sont pas en litige en l'espèce. La véritable question est de savoir si l'obligation de détenir un permis portait atteinte au droit de pêche ancestral de l'appellant. De l'avis du juge Hutcheon, il découlait implicitement de l'arrêt *Sparrow* que cette obligation ne viole pas en soi les droits de pêche ancestraux. L'arrêt *Sparrow* étaye donc la thèse que

the federal government and is not itself an infringement of the aboriginal right to fish.

l'établissement d'un régime de permis relève du pouvoir de légiférer du gouvernement fédéral et ne constitue pas en soi une atteinte au droit de pêche ancestral.

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On the issue of the band's fishing by-law, Hutcheon J.A. agreed with Millward J. that the *Indian Act* only authorizes fishing by-laws related to waterways within the geographic boundaries of a reserve. Thus, the question is whether the Bulkley River is within the Moricetown reserve. He held that in this case, the principle of *ad medium filum aquae* created a presumption that the Bulkley River was within the reserve because it is non-tidal and non-navigable. This presumption was not rebutted, and the appellant could rely on the by-law as a defence.

Quant au règlement administratif de pêche de la bande, le juge Hutcheon a dit être d'accord avec le juge Millward que la *Loi sur les Indiens* autorise seulement la prise de règlements administratifs de pêche visant les eaux qui se trouvent à l'intérieur des limites géographiques des réserves. Ainsi, la question est de savoir si la rivière Bulkley se trouve à l'intérieur de la réserve de Moricetown. Il a conclu que, en l'espèce, le principe *ad medium filum aquae* faisait naître la présomption que la rivière Bulkley se trouve à l'intérieur de la réserve, puisqu'elle est un cours d'eau sans marée et non navigable. Cette présomption n'ayant pas été réfutée, l'appelant pouvait invoquer le règlement administratif comme moyen de défense.

Analysis

Analyse

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In order to determine whether the band by-law applies to the Bulkley River, it will be necessary to consider and resolve a number of questions. At the outset it must be emphasized that a consideration of the by-law raises the question of whether an exclusive right to fish in the Bulkley River at Moricetown was granted to the band. This is very different and distinct from the aboriginal right to fish for food and ceremonial purposes which is given constitutional recognition and protection by s. 35 of the *Constitution Act, 1982*. Obviously if an exclusive right to fish was granted to the band, the by-law would be valid and applicable to the Bulkley River in its passage through the reserve.

Pour déterminer si le règlement administratif de la bande s'applique à la rivière Bulkley, il sera nécessaire d'examiner et de trancher un certain nombre de questions. D'entrée de jeu, il convient de souligner que l'examen du règlement administratif soulève la question de savoir si un droit exclusif de pêcher dans la rivière Bulkley, à la hauteur de Moricetown, a été accordé à la bande. Il s'agit d'un droit très différent du droit ancestral de pêcher à des fins alimentaires et rituelles, qui est constitutionnellement reconnu et protégé par l'art. 35 de la *Loi constitutionnelle de 1982*. Il va de soi que si un droit de pêche exclusif avait été accordé à la bande, le règlement administratif serait valide et s'appliquerait à la rivière Bulkley, à l'endroit où elle traverse la réserve.

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At the outset I would confirm that I have read and relied upon some of the historical documents filed by the intervener Canadian National Railway Company. The appellant objected to any use being made of these documents. I cannot accept that position. First, all parties have had an opportunity to review the documents and make submissions pertaining to them. Further these are all documents of a historical nature that can be found in the public archives. They are available for use by all mem-

Avant tout, je tiens à confirmer que j'ai lu certains des documents historiques déposés par l'intervenante, la Compagnie des chemins de fer nationaux du Canada, et que je me suis fondé sur eux. L'appelant s'est opposé à toute utilisation de ces documents. Je ne peux accepter cette position. D'une part, toutes les parties ont eu l'occasion d'examiner ces documents et de présenter des observations à leur égard. D'autre part, comme ce sont tous des documents de nature historique figu-

bers of the public. Lamer J. (as he then was) spoke of such documents in clear and convincing tones in *R. v. Sioui*, [1990] 1 S.C.R. 1025. He wrote at p. 1050:

I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervenor or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge.

Did the Crown Intend to Include the Fishery in the Allotment of Moricetown Indian Reserve No.1 to the Wet'suwet'en Band?

The General Policy of the Crown

In this case much has been said as to the general practice of the Crown in allocating reserves to native peoples. Evidence as to a general practice may be particularly helpful in determining the scope or extent of native rights. The relevant evidence is sometimes lost and that which remains must be carefully placed in context so that its true significance is neither distorted nor lost.

The historical evidence as to the standard practice of the Crown can be conveniently divided into pre- and post-Confederation periods. This evidence, taken from documents in the public archives, demonstrates that in both periods there was a clear and specific Crown policy of refusing to grant, in perpetuity, exclusive rights to fishing grounds. The Crown would, however, grant exclusive licences or leases over particular areas for a fixed period of time. Obviously this practice was far from an absolute assignment of a fishery right.

Pre-Confederation

There are numerous examples of statements by the Crown, both in British Columbia and in the

rant dans les archives publiques, toute personne peut les consulter. Dans *R. c. Sioui*, [1990] 1 R.C.S. 1025, le juge Lamer (maintenant juge en chef) s'est exprimé en termes clairs et convaincants au sujet des documents de cette nature. À la page 1050, il a écrit ceci:

Je considère que tous les documents auxquels je ferai référence, que mon attention y ait été attirée par l'intervenante ou à la suite de mes recherches personnelles, sont des documents de nature historique sur lesquels je suis autorisé à me fonder en vertu de la notion de connaissance judiciaire.

La Couronne avait-elle l'intention d'inclure la pêcherie dans la réserve indienne n° 1 de Moricetown lorsqu'elle a attribué celle-ci à la bande Wet'suwet'en?

La politique générale de la Couronne

Dans la présente affaire, la pratique générale de la Couronne en ce qui concerne l'attribution des réserves aux peuples autochtones a été discutée en long et en large. La preuve concernant cette pratique peut s'avérer particulièrement utile pour apprécier la portée ou l'étendue des droits des autochtones. La preuve directement pertinente est parfois perdue, auquel cas celle qui reste doit être prudemment mise en contexte afin que son sens véritable ne soit ni dénaturé, ni perdu.

Il est commode de scinder la preuve historique relative à la pratique ordinaire de la Couronne en deux périodes: la période préconfédérative et la période postconfédérative. Cette preuve, tirée de documents figurant dans les archives publiques, démontre qu'au cours de ces deux périodes la Couronne a toujours eu pour politique claire et précise de refuser d'accorder à perpétuité des droits exclusifs sur des secteurs de pêche. Cependant, elle accordait, à l'égard de secteurs donnés, des licences ou des baux exclusifs pour des périodes déterminées. Il va de soi que cette pratique était loin de constituer une cession à titre absolu d'un droit sur une pêcherie.

Période préconfédérative

Il existe de nombreux cas où, tant en Colombie-Britannique que dans la province du Canada, la

Province of Canada, that the firm policy of the Crown was to treat Indians in the same manner as non-Indians with respect to the allocation of fishing grounds for commercial use. There are also clear statements that this policy involved a rejection of claims to exclusive use or control of any public waters for the purposes of fishing. An example is the statement of Governor Douglas, made in 1860 during a major address concerning the Indians on the mainland of British Columbia. He stated:

I also explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support; and that they might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the colony; and that on their becoming registered free miners they might dig and search for gold, and hold mining claims on the same terms precisely as other miners: in short, I strove to make them conscious that they were recognized members of the commonwealth. . . . [Emphasis by underlining added.]

(Dispatch of Governor Douglas to the Secretary of State for the Colonies, cited in *Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97, at p. 255. (Italics added by McEachern C.J.))

An even earlier example of the same concept is expressed in a letter dated April 16, 1845 from W. H. Draper, Attorney General, Province of Canada to J. M. Higginson, Superintendent General of Indian Affairs, Province of Canada. The Attorney General wrote:

Sir

In reply to your reference of the 10th February last calling for my opinion whether a fishery in the waters of Lake Huron around and adjacent to certain islands which are within the British territory, but have not been formally ceded to the Crown by the Indians, is to be considered the property of the Crown or of these

Couronne a déclaré qu'elle avait pour politique bien arrêtée de traiter de la même manière les Indiens et les non-Indiens en ce qui concerne l'attribution de secteurs de pêche à des fins commerciales. On trouve également des déclarations indiquant clairement que cette politique impliquait le rejet des revendications visant l'exclusivité de l'utilisation ou du contrôle de toute étendue d'eaux publiques à des fins de pêche. Les propos suivants, tenus par le gouverneur Douglas, en 1860, au cours d'une importante allocution concernant les Indiens de la partie continentale de la Colombie Britannique, sont un exemple d'une telle déclaration:

[TRADUCTION] *Je leur ai aussi expliqué que les magis-
trats avaient reçu comme instructions de jalonner et de
réserver à l'usage et au profit des Indiens tous les vil-
lages qu'ils habitaient et les champs qu'ils cultivaient,
ainsi que toutes les terres qu'ils étaient en mesure de
cultiver ou qui étaient nécessaires pour assurer leur
subsistance; je les ai aussi informés qu'ils pouvaient
exercer librement leur droit de pêcher dans les lacs et
les rivières, et celui de chasser dans toutes les terres
inoccupées de la Couronne dans la colonie; et qu'ils
pouvaient, une fois devenus mineurs autorisés inscrits,
prospecter pour chercher de l'or et détenir des claims
miniers exactement aux mêmes conditions que les autres
mineurs. Bref, je me suis efforcé de leur faire prendre
conscience du fait qu'ils étaient reconnus comme des
membres du commonwealth. . . .* [Je souligne.]

(Dépêche du gouverneur Douglas au Secrétaire d'État aux colonies, citée dans *Delgamuukw c. British Columbia*, [1991] 3 W.W.R. 97, à la p. 255. (Italiques ajoutées par le juge en chef McEachern.))

On trouve une expression encore plus ancienne du même concept dans une lettre datée du 16 avril 1845, que W. H. Draper, procureur général de la province du Canada, a transmise à J. M. Higginson, surintendant général des Affaires indiennes, province du Canada. Le procureur général a écrit ceci:

[TRADUCTION] Monsieur,

En réponse à votre envoi du 10 février dernier, dans lequel vous me demandiez si une pêcherie se trouvant dans les eaux du lac Huron et adjacente à certaines îles faisant partie du territoire britannique, mais qui n'ont pas été officiellement cédées à la Couronne par les Indiens, doit être considérée comme appartenant à la

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Indians, I have the honor to report my opinion, that the right to fish in public navigable waters in Her Majesty's dominions is a common public right — not a regal franchise — and I do not understand any claim the Indians can have to its exclusive enjoyment. [Emphasis added.]

(National Archives of Canada, Record Group 10, Volume 612, p. 215.)

These two passages indicate that the intention and policy of the Crown was to guarantee full public access to the fisheries, and to reject any exclusive claims to fishing grounds. The policy permitted the Indians to exercise their right to fish but did not accord them any special status.

In England, it has been accepted that since the *Magna Carta*, the Crown has no power apart from statute to grant a several or exclusive fishery to anyone. See Gérard V. La Forest, *Water Law in Canada — The Atlantic Provinces* (1973), at p. 196. Thus in refusing to grant an exclusive fishery to the Indians, the federal government was following historical precedent.

An examination of the early Fisheries Acts of the Province of Canada and the first *Fisheries Act* of the new Dominion, the *Fisheries Act*, S.C. 1868, c. 60, confirms this same policy of exercising only limited powers. The Act gave the government the right to grant exclusive leases and licences to fishing grounds, but there was no provision in the Act for the permanent alienation of fishing rights to private parties.

This pre-Confederation policy is also set out in the 1866 opinion of James Cockburn, Solicitor General of the Province of Canada. He stated:

With reference . . . to the claim of the Indians to exclusive fishing rights, my opinion is that they have no other or larger rights over the public waters of this Province than those which belong at Common Law to Her Majesty's subjects in general.

Couronne ou aux Indiens. J'ai le plaisir de vous informer que, à mon avis, le droit de pêche dans les eaux publiques navigables dans les dominions de Sa Majesté est un droit public général et non une franchise royale, et je ne vois pas comment les Indiens peuvent en revendiquer la jouissance exclusive. [Je souligne.]

(Archives nationales du Canada, Fonds d'archives fédérales 10, volume 612, p. 215.)

Ces deux passages indiquent que l'intention et la politique de la Couronne étaient d'assurer à la population le libre accès aux pêcheries et de rejeter toute revendication de l'exclusivité des secteurs de pêche. Cette politique permettait aux Indiens d'exercer leur droit de pêche, mais elle ne leur accordait aucun statut particulier.

En Angleterre, il est admis que, depuis la *Magna Carta*, la Couronne n'a pas le pouvoir, sauf celui prévu par un texte de loi, d'accorder à quiconque une pêcherie individuelle ou exclusive. Voir Gérard V. La Forest, *Water Law in Canada — The Atlantic Provinces* (1973), à la p. 196. Par conséquent, en refusant d'accorder aux Indiens une pêcherie exclusive, le gouvernement fédéral suivait un précédent historique.

La lecture des premières lois sur les pêcheries de la province du Canada et de la première loi en la matière du nouveau dominion, l'*Acte des Pêcheries*, S.C. 1868, ch. 60, confirme cette politique qui consistait à n'exercer que des pouvoirs limités. L'Acte habilitait le gouvernement à accorder des licences et des baux exclusifs visant des secteurs de pêche, mais aucune de ses dispositions ne pourvoyait à l'aliénation permanente de droits de pêche à des intérêts privés.

Cette politique préconfédérative est également exposée dans l'avis donné en 1866 par James Cockburn, solliciteur général de la province du Canada:

[TRADUCTION] En ce qui concerne . . . la revendication par les Indiens de droits de pêche exclusifs, je suis d'avis qu'ils n'ont, sur les eaux publiques de la province, ni droits supplémentaires ni droits plus étendus que ceux qui appartiennent en common law aux sujets de Sa Majesté en général.

... I should say that without an Act of Parliament ratifying such reservation, no exclusive right could thereby be gained by the Indians, as the Crown could not by any Treaty or act of its own (previous to the recent Statute) grant an exclusive privilege in favour of Individuals over public rights, such as this, in respect of which the Crown only holds as trustee for the general public.

(Memorandum *in re* 23 January, 1866 memorandum of W. F. Whitcher (Head of Fisheries Branch, Department of Crown Lands, Province of Canada), 8 March, 1866 in File No. 4/1866, Department of Justice, Ottawa, Ontario.)

Post-Confederation

The policy of refusing to grant exclusive fisheries was maintained in the post-Confederation period. It is clear that the same understanding of the policy which existed in the Provinces of Canada and British Columbia before Confederation continued subsequently. For example, on December 17, 1875, W. F. Whitcher, Dominion Commissioner of Fisheries, sent a Department of Marine and Fisheries Circular to Fishery Overseers which stated, in part that:

Certain circumstances ... render it desirable to direct your attention to the exact legal status of Indians in respect of the Fishery Laws.

Fisheries in all the public navigable waters of Canada belong *prima facie* to the public, and are administered by the Crown under Act of Parliament. ... Indians enjoy no special liberty as regards either the places, times, or methods of fishing. They are entitled only to the same freedom as whitemen, and are subject to precisely the same laws and regulations.

There seems to be an impression in some quarters, that exclusive control of fishings in connection with Indian properties belongs to the resident Indians, and that they are at liberty to remove the fishing gear of

... je tiens à préciser que, sans une loi fédérale ratifiant une telle réservation de droits, aucun droit exclusif ne pouvait être acquis ainsi par les Indiens, car la Couronne ne pouvait, que ce soit par traité ou de son propre chef (avant l'adoption de la récente loi) accorder à des individus un privilège exclusif sur des droits publics, comme celui dont il est question en l'espèce, qu'elle ne détient qu'à titre de fiduciaire pour le grand public.

(Note de service concernant celle datée du 23 janvier 1866 émanant de W. F. Whitcher (chef de la direction des pêcheries, ministère des Terres de la Couronne, province du Canada), 8 mars 1866, dossier n° 4/1866, ministère de la Justice, Ottawa (Ontario).)

Période postconfédérative

La politique de refus d'accorder des pêcheries exclusives a continué d'être appliquée au cours de la période postconfédérative. Il est manifeste que la conception que l'on avait de la politique en vigueur dans la province du Canada et celle de la Colombie-Britannique avant la Confédération est demeurée la même par la suite. Ainsi, le 17 décembre 1875, W. F. Whitcher, commissaire fédéral des pêcheries, a fait parvenir aux superviseurs des pêcheries une circulaire du ministère de la Marine et des Pêcheries, dans laquelle on pouvait lire notamment ce qui suit:

[TRADUCTION] En raison de certaines circonstances [...] il est souhaitable d'attirer votre attention sur le statut juridique exact des Indiens à l'égard des lois sur les pêcheries.

Les pêcheries dans toutes les eaux publiques navigables au Canada appartiennent, jusqu'à preuve du contraire, au public, et elles sont administrées par la Couronne en vertu d'une loi fédérale [...] Les Indiens ne bénéficient d'aucune liberté spéciale quant aux lieux où ils peuvent pêcher, aux périodes au cours desquelles ils peuvent le faire et aux méthodes qu'ils peuvent utiliser. Ils jouissent uniquement des mêmes libertés que les Blancs et ils sont assujettis exactement aux mêmes lois et règlements.

Dans certains milieux, on semble avoir l'impression que, pour ce qui concerne les biens-fonds des Indiens, le contrôle des pêcheries appartient exclusivement aux Indiens qui habitent ces biens-fonds, et que ces derniers

Whitemen who resort to these fisheries under leases or licences granted by the Crown.

This impression is alike erroneous, mischievous and unfortunate. No such exceptional power exists. . . .

(National Archives of Canada, Record Group 10, Volume 1972, File No. 5530.)

It should be noted that this circular properly refers to the "administration", that is to say, the regulation by the Government of Canada of fisheries in navigable waters. The Bulkley River is a navigable waterway both above and below the Moricetown Reserve and, for the reasons which appear later, is therefore to be considered navigable at the Reserve.

The letter of W. F. Whitcher, Dominion Commissioner of Fisheries to E. A. Meredith, Deputy Minister of the Interior, of January 20, 1876, indicates that the situation in British Columbia was very much a concern of Federal officials. He wrote:

Having submitted to the Minister the text of the correspondence which has taken place on the subject of fishing rights claimed by Indians. . . I am desired by him to acknowledge the prompt attention bestowed on this matter by the Department of the Interior, and the satisfactory settlement effected. This difficulty, thus fortunately concluded, was such as might at any moment have become extremely troublesome. It was more necessary therefore to deal with it decisively at its present stage, rather than to delay until its existence should produce further misapprehensions affecting these public properties, particularly in the younger provinces of the Dominion, inhabited largely by Indians and half-breeds, where the Government may be soon called upon to apply the fishery laws.

. . . it is believed that the cordial co-operation of the Departments in respect of the fishing privileges which exist in the vicinity of Indian Reserves, and the occupation of fishing stations connected therewith, under a uniform system of licence, will ensure to the Indians free and exclusive use of fishery grounds ample for their necessities. . . . [Emphasis added.]

sont libres d'enlever les engins de pêche des Blancs qui utilisent ces pêcheries en vertu de baux ou licences accordés par la Couronne.

Cette impression est à la fois erronée, malveillante et malheureuse. Un tel pouvoir extraordinaire n'existe pas. . . .

(Archives nationales du Canada, Fonds d'archives fédérales 10, volume 1972, n° de dossier 5530.)

Il y a lieu de signaler que cette circulaire parle à juste titre de l'«administration» des pêcheries, en d'autres termes de la réglementation par le gouvernement canadien des pêcheries dans les eaux navigables. La rivière Bulkley est une voie navigable en amont et en aval de la réserve de Moricetown et, pour les motifs prononcés plus loin, elle doit donc être considérée comme étant navigable à la hauteur de la réserve.

La lettre adressée par W. F. Whitcher, commissaire fédéral des pêcheries, à E. A. Meredith, sous-ministre de l'Intérieur, le 20 janvier 1876, indique que la situation en Colombie-Britannique préoccupait grandement les représentants fédéraux. Il a écrit ceci:

[TRADUCTION] Le ministre a pris connaissance de la correspondance concernant les droits de pêche revendiqués par les Indiens [. . .] et me prie de vous faire part de la diligence accordée à cette question par le ministère de l'Intérieur, ainsi que du règlement satisfaisant qui a été conclu. Ce problème, heureusement réglé, aurait pu devenir extrêmement embarrassant. Il était plus que nécessaire de le régler d'une façon décisive dès maintenant, plutôt que d'attendre qu'il engendre d'autres malentendus au sujet de ces biens publics, notamment dans les nouvelles provinces du Dominion, qui sont habitées surtout par des Indiens et des Métis et où le gouvernement pourrait bien devoir appliquer sous peu les lois régissant les pêcheries.

. . . on estime qu'une coopération cordiale entre les ministères relativement aux privileges de pêche à proximité des réserves indiennes, ainsi que l'occupation des postes de pêche reliés à l'exercice de ces privilèges, le tout dans le cadre d'un régime uniforme de délivrance de licences, assureront aux Indiens l'usage libre et exclusif des pêcheries, et permettront de répondre amplement à leurs besoins . . . [Je souligne.]

(National Archives of Canada, Record Group 10, Volume 1972, File No. 5530.)

(Archives nationales du Canada, Fonds d'archives fédérales 10, volume 1972, n° de dossier 5530.)

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The younger provinces of the Dominion referred to were obviously the provinces of British Columbia, Manitoba, and Prince Edward Island, to which the *Fisheries Act* would be extended only a few months later: *An Act respecting the extension and application of "The Fisheries Act," to and in the Provinces of British Columbia, Prince Edward Island and Manitoba*, S.C. 1874, c. 28. Accordingly, when Reserve Commissioners were appointed a few months later with the mandate to allocate reserves in British Columbia, they were certainly not either specifically authorized or by inference empowered to grant exclusive rights in the fishery.

Les nouvelles provinces du Dominion dont il est question sont de toute évidence la Colombie-Britannique, le Manitoba et l'Île-du-Prince-Édouard, auxquelles serait élargie l'application de l'Acte des Pêcheries quelques mois plus tard à peine: *Acte concernant l'extension et l'application de «l'Acte des Pêcheries» aux provinces de la Colombie-Britannique, de l'Île-du-Prince-Édouard et de Manitoba*, S.C. 1874, ch. 28. Par conséquent, lorsque des commissaires des réserves ont, quelques mois plus tard, été nommés et chargés d'attribuer des réserves en Colombie-Britannique, ils n'étaient certainement pas autorisés, ni explicitement ni implicitement, à accorder des droits exclusifs sur les pêcheries.

The Mandate of the Reserve Commissioners

Le mandat des commissaires des réserves

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The appellant contended that the Reserve Commissioners, as representatives of the Crown, were given the authority to bind the Crown, and to assign fishing rights irrevocably and absolutely. This position is contrary to both the general policy statements made by the Crown and the specific instructions provided to Commissioners. In a letter from D. C. Scott, Deputy Superintendent General of Indian Affairs, to D. H. MacDowall, Commissioner, Royal Commission on Indian Affairs for the Province of British Columbia, dated May 2, 1916, it was stated:

L'appelant a fait valoir que, en tant que représentants de la Couronne, les commissaires des réserves étaient habilités à lier celle-ci et à céder des droits de pêche de manière irrévocable et absolue. Cette thèse est contraire tant aux énoncés de politique générale de la Couronne qu'aux instructions précises données aux commissaires. Dans une lettre datée du 2 mai 1916 et transmise à D. H. MacDowall, commissaire, Commission royale sur les Affaires indiennes pour la province de la Colombie-Britannique, D. C. Scott, surintendant général adjoint des Affaires indiennes, a écrit ceci:

... I do not think that former Commissioners could grant special fishing privileges as distinct from fishing stations and reserves. The Department has no record of confirmation of such by the Department of Marine and Fisheries.

[TRADUCTION] ... je ne crois pas que les anciens commissaires pouvaient accorder des privilèges de pêche particuliers outre ceux relatifs aux postes de pêche et aux réserves. Le ministère n'a dans ses dossiers aucune confirmation de l'attribution de tels privilèges par le ministère de la Marine et des Pêcheries.

... I cannot find that Mr. O'Reilly had power to grant any fishing privileges whatever.

... il est impossible de conclure que M. O'Reilly avait le pouvoir d'accorder quelque privilège de pêche que ce soit.

(National Archives of Canada, Record Group 10, Volume 3822, File No. 59335-1.)

(Archives nationales du Canada, Fonds d'archives fédérales 10, volume 3822, n° de dossier 59335-1.)

Earlier statements confirm this view. For example, in 1890, Robert Sedgewick, Deputy Minister of Justice stated:

I have examined all the papers in connection with the matter. The Indian Reserve Commissioner appears to have power to mark out reserves, but it does not appear that the Governor in Council, or any other authority ever gave or purported to give him authority to deal with the right of fishery.

I have therefore to state that the Indian Reserve Commissioner has not the power to set apart for the exclusive use of the Indians any of the waters of British Columbia.

(R. Sedgewick, Deputy Minister of Justice, to John Tilton, Deputy Minister of Fisheries, August 15, 1890 in National Archives of Canada, Record Group 10, Volume 3828, File No. 60926.)

And in 1897, J. D. McLean, Secretary, Department of Indian Affairs, stated:

As to fishing rights in British Columbia it should be stated that under the arrangement come to with the Government of that Province in 1876, by which reserves were to be set aside for the Indians, no special mention was made of fishing privileges; but the Reserve Commissioner has from time to time allotted Indians certain fisheries, and the Department of Marine & Fisheries has been advised of these, and asked to confirm them; but, so far as the correspondence shows, that Department has not confirmed them, and has objected to exclusive fishing privileges being granted to Indians as against white people.

(Memorandum, November 26, 1897, in National Archives of Canada, Record Group 10, Volume 3909, File No. 107297-3.)

It was argued by the appellant that these statements only represent the view of the Department of Marine and Fisheries. It was the appellant's position that the Department of Indian Affairs intended to grant exclusive fisheries to the Indians, but that this was overridden by the Department of Marine and Fisheries in what amounted to an inter-

Des déclarations antérieures confirment cette opinion. Par exemple, en 1890, Robert Sedgewick, sous-ministre de la Justice, avait affirmé ceci:

[TRADUCTION] J'ai examiné tous les documents se rapportant à cette question. Le commissaire des réserves indiennes paraît avoir le pouvoir de jalonner des réserves, mais il ne semble pas que le gouverneur en conseil ou quelque autre autorité ait, à quelque moment que ce soit, investi ou voulu investir le commissaire du pouvoir de traiter du droit aux pêcheries.

Je dois donc affirmer que le commissaire des réserves indiennes n'a pas le pouvoir de mettre de côté, pour l'usage exclusif des Indiens, quelque étendue d'eau de la Colombie-Britannique.

(R. Sedgewick, sous-ministre de la Justice, à John Tilton, sous-ministre des Pêcheries, 15 août 1890, Archives nationales du Canada, Fonds d'archives fédérales 10, volume 3828, n° de dossier 60926.)

En outre, en 1897, J. D. McLean, Secrétaire, ministère des Affaires indiennes, a dit ceci:

[TRADUCTION] Quant aux droits de pêche en Colombie-Britannique, il y a lieu de souligner que, dans l'entente conclue avec le gouvernement de cette province en 1876 et en vertu de laquelle des réserves devaient être mises de côté pour les Indiens, il n'est fait aucune mention particulière des privilèges de pêche. Cependant, le commissaire des réserves a, à l'occasion, attribué certaines pêcheries aux Indiens; le ministère de la Marine et des Pêcheries a été informé de ces attributions et prié de les confirmer. Or, d'après ce qui ressort de la correspondance, il ne les a pas confirmées et s'est opposé à ce que des privilèges exclusifs de pêche soient accordés aux Indiens et non aux Blancs.

(Note de service datée du 26 novembre 1897, Archives nationales du Canada, Fonds d'archives fédérales 10, volume 3909, n° de dossier 107297-3.)

L'appelant a soutenu que ces déclarations représentaient uniquement le point de vue du ministère de la Marine et des Pêcheries. Il a plaidé que le ministère des Affaires indiennes entendait accorder des pêcheries exclusives aux Indiens, mais que le ministère de la Marine et des Pêcheries avait fait obstacle à cette volonté, dans le cadre de ce qui

departmental dispute as to jurisdiction. This position, however, is not supported by the evidence.

constituait un conflit de compétences entre ministères. La preuve n'étaye toutefois pas cette thèse.

The evidence does indicate that efforts were made by the Department of Indian Affairs to protect traditional Indian fishing grounds from being leased exclusively to non-native fishers. This is far different from assigning exclusive title to those fishing grounds to the Indians. The difference between these positions was consistently acknowledged by the Department of Indian Affairs.

Cependant, la preuve indique que le ministère des Affaires indiennes a effectivement déployé des efforts pour protéger les secteurs de pêche traditionnels des Indiens, afin qu'ils ne soient pas loués exclusivement à des pêcheurs non autochtones. Cela est bien différent de la cession aux Indiens du titre exclusif sur ces secteurs de pêche. La différence entre ces positions a constamment été admise par le ministère des Affaires indiennes.

This policy is reflected in a letter from Frank Pedley, Deputy Superintendent General of Indian Affairs, to the Indian Commissioner for Manitoba and the North West Territories, dated February 8, 1906:

Cette politique ressort d'une lettre datée du 8 février 1906, transmise par le surintendant général adjoint des Affaires indiennes, Frank Pedley, au commissaire des Affaires indiennes pour le Manitoba et les Territoires du Nord-Ouest:

The Department has come to the conclusion that generally speaking, and unless under very exceptional circumstances the proper policy to pursue will be to let the Indians stand on the same footing as the settlers in so far as concerns the use of the waters, and to confine its efforts to endeavouring, where considered necessary, to secure stations on land to afford access to the waters, a system which it may be remarked appears to work well in the Province of British Columbia, and to resist efforts should any be made to compel the Indians to pay fees for licences to fish for domestic as distinguished from commercial purposes. [Emphasis added.]

[TRADUCTION] Le ministère est arrivé à la conclusion que, de façon générale, sauf circonstances très exceptionnelles, la politique qu'il convient de suivre est de traiter les Indiens de la même façon que les colons en ce qui concerne l'utilisation des eaux, et que le ministère devrait uniquement s'efforcer, lorsque la chose est jugée nécessaire, d'établir des postes visant à permettre l'accès à ces eaux, système qui, peut-on le signaler, paraît bien fonctionner en Colombie-Britannique, en plus de résister à toute démarche qui pourrait être tentée en vue de contraindre les Indiens à payer des droits pour obtenir des permis de pêche à des fins familiales par opposition à commerciales. [Je souligne.]

(National Archives of Canada, Record Group 10, Volume 6972, File No. 774/20-2 Part 1.)

(Archives nationales du Canada, Fonds d'archives fédérales 10, volume 6972, n° de dossier 774/20-2, partie 1.)

The claim of the Indians to exclusive fishing grounds had been made on numerous occasions but had been consistently rejected. This was expressed in the letter of opinion of the Solicitor General of the Province of Canada in 1866, referred to earlier. In a letter dated April 5, 1898 from E. E. Prince, Dominion Commissioner of Fisheries, to the Minister of Marine and Fisheries, the Commissioner referred to this opinion as settling the issue of native legal claims to exclusive fisheries throughout the country. He specifically stated:

Les Indiens avaient, à de nombreuses occasions, revendiqué des secteurs de pêche exclusifs, mais leurs revendications avaient constamment été rejetées. Ce point de vue avait été exprimé dans la lettre faisant état de l'avis donné en 1866 par le solliciteur général de la province du Canada et qui a été mentionnée précédemment. Dans une lettre datée du 5 avril 1898 et adressée au ministre de la Marine et des Pêcheries, le commissaire fédéral des pêcheries, E. E. Prince, a renvoyé à cet avis, affirmant qu'il tranchait la question des revendications, en droit, par les autochtones, de pêcheries exclusives partout au pays. Il a explicitement déclaré:

With respect to the alleged differences between this Department and the Department of Indian Affairs respecting the claims urged by the Indians to fishery privileges it is necessary to recall the circumstances that 15 or 16 years ago a number of communications passed between the two Departments, resulting in certain definite conclusions which appeared to finally decide and render unnecessary in the future any new inquiry. This Department has consistently adhered to the conclusions referred to, in its policy regarding Indian fishing.

In order to make the matter clear, I quote from a report dated July 11th 1876 by the late Mr. Whitcher, Commissioner of Fisheries: -

After much inconvenience and many conflicting actions the disputed points were referred to the notice of the Law Officers of the Crown. Their decision, dated 8th March 1866 was adverse to the pretensions made on behalf of the Indians. A certified copy of said opinion was lodged with the Indian Bureau.

The position laid down by the Law Officers of the Crown has been consistently adhered to by this Department, and in a communication addressed to the Minister of the Interior on January 30th 1882, the Minister of Marine and Fisheries (Hon. A. W. McLelan) once more set forth clearly and definitely the matter, stating that this Department acts on the legal advice of the Law Officers of the Crown as recorded in the Department "which is in effect that fishing rights in public waters cannot be made exclusive except under the express sanction of Parliament, and that Indians are entitled to use the public fisheries only on the same conditions as whitemen, subject to the Fisheries Act and Fishery Regulations. . . ." [Emphasis added.]

(National Archives of Canada, Record Group 10, Volume 3909, File No. 107297-3.)

The Specific Allotment of the Moricetown Reserve

The Crown policy against the granting of exclusive fisheries to the Indians had been forcefully stated and often repeated. The band argued alternatively that it was misled into believing that it was, in fact, being given an exclusive fishery. However,

[TRADUCTION] En ce qui concerne les divergences de vue qui existeraient entre notre ministère et celui des Affaires indiennes relativement aux revendications par les Indiens de privilèges relatifs aux pêcheries, il faut rappeler qu'il y a 15 ou 16 ans de cela il y a eu entre les deux ministères échange de communications, ayant abouti à certaines conclusions bien précises qui ont paru régler la question une fois pour toute et rendre inutile toute autre enquête. Dans sa politique relative à la pêche par les Indiens, notre ministère a invariablement adhéré aux conclusions dont il est question.

Afin d'éclaircir la question, je cite un rapport daté du 11 juillet 1876 et émanant du regretté M. Whitcher, commissaire des pêcheries:

Après maints inconvénients et de nombreuses mesures contradictoires, les points en litige ont été soumis aux conseillers juridiques de la Couronne. Leur décision, datée du 8 mars 1866, est défavorable aux prétentions avancées pour le compte des Indiens. Une copie certifiée conforme de l'avis en question a été déposée auprès du Bureau des Indiens.

Notre ministère a constamment souscrit à la position formulée par les conseillers juridiques de la Couronne; dans une lettre adressée au ministre de l'Intérieur le 30 janvier 1882, le ministre de la Marine et des Pêcheries (l'honorable A. W. McLelan) a une fois de plus énoncé de façon claire et nette la question, déclarant que notre ministère se conforme à l'avis formulé par les conseillers juridiques de la Couronne qui a été déposé au ministère et «suivant lequel les droits de pêche dans les eaux publiques ne peuvent être rendus exclusifs qu'avec l'aval exprès du Parlement et que les Indiens n'ont le droit d'utiliser les pêcheries publiques qu'aux mêmes conditions que les Blancs et sous réserve de l'Acte des pêcheries et de son règlement d'application. . . » [Je souligne.]

(Archives nationales du Canada, Fonds d'archives fédérales 10, volume 3909, n° de dossier 107297-3.)

L'attribution spécifique de la réserve de Moricetown

La politique de la Couronne interdisant l'attribution de pêcheries exclusives aux Indiens avait été affirmée de façon catégorique à maintes reprises. Subsidièrement, la bande a fait valoir qu'elle avait été amenée à croire qu'on lui accordait, dans les

when the facts surrounding this particular grant are considered in light of the expressed general policy, they clearly indicate an intention to allot only the land of the reserve and not the river.

The Directions to Commissioner O'Reilly

45 In terms of the instructions Commissioner O'Reilly received, his duties were expressed as:

...ascertaining accurately the requirements of the Indian Bands in that Province [British Columbia], to whom lands have not been assigned by the late Commission, and allotting suitable lands to them for tillage and grazing purposes. [Emphasis added.]

(Federal Order in Council of July 19, 1880. Canada. Privy Council. Order in Council No. 1334/1880 in National Archives of Canada, Record Group 2, Series 1.)

46 These instructions were later modified, but the principle that the ultimate decision as to the allocation of fishing grounds remained with the Department of Marine and Fisheries never changed. Thus, on December 20, 1881 the Superintendent General of Indian Affairs wrote to A. W. McLelan, Acting Minister of Marine and Fisheries and stated:

I have the honor to inform you that Judge O'Reilly having been last year appointed Commr. for allotting lands as Reserves in British Columbia for occupation by the Indian Bands and Tribes of that Province I considered it expedient and proper to instruct him, while engaged in assigning these lands, to mark off the fishing grounds which should be kept for the exclusive use of the Indians and he is following those instructions.

It is desirable that the fisheries recommended for allotment to the Indians be not otherwise disposed of without the consent of this Department being first obtained.

(National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

faits, une pêcherie exclusive. Toutefois, examinés à la lumière de la politique générale déclarée, les faits de cette attribution indiquent clairement que l'intention était d'accorder uniquement les terres de la réserve et non la rivière.

Les instructions données au commissaire O'Reilly

Suivant les instructions qu'a reçues le commissaire O'Reilly, voici quelles étaient ses fonctions:

[TRADUCTION] ...déterminer avec précision les besoins des bandes indiennes de la province [Colombie-Britannique] auxquelles l'ancien commissaire n'a pas attribué de terres, et [...] leur attribuer des terres propres à la culture et au pâturage. [Je souligne.]

(Décret fédéral du 19 juillet 1880. Canada. Conseil privé. Décret n° 1334/1880, aux Archives nationales du Canada, Fonds d'archives fédérales 2, série 1.)

Ces instructions ont par la suite été modifiées, mais le principe que la décision finale concernant l'attribution de secteurs de pêche appartenait au ministère de la Marine et des Pêcheries est demeuré inchangé. Ainsi, le 20 décembre 1881, le surintendant général des Affaires indiennes a écrit ce qui suit à A. W. McLelan, ministre suppléant de la Marine et des Pêcheries:

[TRADUCTION] J'ai l'honneur de vous informer que le juge O'Reilly, qui, l'an dernier, a été nommé commissaire chargé d'attribuer les terres qui serviront à l'établissement de réserves en Colombie-Britannique et seront occupées par les bandes et les tribus indiennes de cette province, j'ai jugé utile et approprié de lui donner instruction de déterminer, dans le cours de l'attribution des terres en question, les secteurs de pêche qui devraient être réservés à l'usage exclusif des Indiens, et il suit ces instructions.

Il est souhaitable que les pêcheries dont l'attribution aux Indiens est recommandée ne soient pas aliénées de quelque autre manière sans le consentement préalable de notre ministère.

(Archives nationales du Canada, Fonds d'archives fédérales 10, volume 3766, n° de dossier 32876.)

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The instructions referred to were also given to Indian Commissioners in Manitoba, Keewatin and the Northwest Territories, and they state that the Commissioners are to ascertain what fishing grounds should be reserved in order that application might be made to the Department of Marine and Fisheries to have those areas secured for the use of the Indians. These instructions reveal that Commissioner O'Reilly was not given the authority to allot an exclusive fishery, and that the most he could do was make recommendations.

In response to being informed that Indian Commissioners were receiving such instructions, and making such recommendations, the Acting Minister of Marine and Fisheries made it clear that his department would not act on any such recommendation. He reiterated the position of his department and informed the Department of Indian Affairs that:

... fishing rights in public waters cannot be made exclusive excepting under the express sanction of Parliament, and that Indians are entitled to use the public fisheries only on the same conditions as white men, subject to the *Fisheries Act* and Fishery Regulations. The mere assignment of these fishery privileges by Indian Agents, or the abstention of this Department from otherwise disposing of them — which there was no intention to do pending careful consideration of all the circumstances of each case — could not legally exclude the public from fishing therein.

(A. W. McLelan, Acting Minister of Marine and Fisheries, to Sir John A. Macdonald, Superintendent General of Indian Affairs, January 30, 1882, in National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

Accordingly, when assessing what Commissioner O'Reilly did, it is important to understand the existing limitations on what he could do. The powers of Commissioner O'Reilly and his instructions are perhaps best summarized in the following extract from a letter written by Lawrence Vankoughnet, Deputy Superintendent General of

Les instructions dont il est fait mention, qui ont également été données aux commissaires des Indiens pour le Manitoba, le Keewatin et les Territoires du Nord-Ouest, indiquent que les commissaires devaient déterminer les secteurs de pêche qui devaient être réservés en vue de la présentation de demandes au ministère de la Marine et des Pêcheries visant à garantir aux Indiens l'usage des secteurs en question. Ces instructions révèlent que le commissaire O'Reilly n'était pas habilité à accorder des pêcheries exclusives et qu'il pouvait tout au plus faire des recommandations.

Après avoir été informé que les commissaires des Indiens recevaient de telles instructions et formulaient des recommandations de cette nature, le ministre suppléant de la Marine et des Pêcheries a clairement indiqué que son ministère ne donnerait pas suite à de telles recommandations. Il a réitéré la position de son ministère et informé celui des Affaires indiennes de ce qui suit:

[TRADUCTION]... les droits de pêche dans les eaux publiques ne peuvent être rendus exclusifs qu'avec l'aval exprès du Parlement et les Indiens n'ont le droit d'utiliser les pêcheries publiques qu'aux mêmes conditions que les Blancs et sous réserve de l'*Acte des pêcheries* et de son règlement d'application. Il n'est pas possible, en droit, d'interdire au public de pêcher dans ces eaux du seul fait que ces privilèges de pêche auraient été cédés par les agents des Indiens ou du fait que notre ministère ne les a pas aliénés de quelque autre façon — ce qu'il n'avait aucune intention de faire avant d'avoir examiné de manière approfondie toutes les circonstances propres à chaque cas.

(A. W. McLelan, ministre suppléant de la Marine et des Pêcheries, à Sir John A. Macdonald, surintendant général des Affaires indiennes, 30 janvier 1882, aux Archives nationales du Canada, Fonds d'archives fédérales 10, volume 3766, n° de dossier 32876.)

En conséquence, lorsqu'on apprécie ce qu'a fait le commissaire O'Reilly, il importe de bien comprendre les limites qu'il devait respecter. C'est probablement le passage suivant d'une lettre qu'a écrite Lawrence Vankoughnet, surintendant général adjoint des Affaires indiennes, à Sir John A. Macdonald, qui cumulait alors les fonctions de sur-

Indian Affairs, to Sir John A. Macdonald, who was then Superintendent General of Indian Affairs as well as Prime Minister. In the letter, dated February 27, 1882, the Deputy Superintendent states:

With regard to the authority under which Mr. O'Reilly acted in designating fishing stations which it might be advisable to have reserved for Indian Bands in British Columbia . . . the Reserve Commissioner had been instructed while engaged in assigning lands to Indian Bands in that Province, to mark off the fishing grounds which should be kept for their exclusive use, and the Acting Minister was informed that it would be desirable that the fisheries "recommended" for allotment to the Indians should not be otherwise disposed of without the consent of this Department having been first obtained. . . . The designation of these fishing limits as being desirable for the exclusive use of Indian Bands, no more assigns the fishing grounds thus designated to them permanently, without the consent of the Government having been obtained, than does Mr. O'Reilly's allotment of Indian Reserve lands assign the latter to the same Indians without similar approval.

Mr. O'Reilly's allotments are only recommendatory; and may be curtailed or increased; as, after consultation and mature deliberation by the Officers of the Department of Marine and Fisheries and the Department of Indian Affairs, may be considered advisable. [Emphasis in original.]

(National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

The Statements of Commissioner O'Reilly

Commissioner O'Reilly was clearly instructed that his role was limited to making recommendations. In light of these instructions it is apparent that his statements and actions do not disclose an attempt to grant control of the fishery. Rather, at most, they represent a recommendation that a fishery be allotted.

On the day before Commissioner O'Reilly recommended the allotment of Moricetown Indian

intendant général des Affaires indiennes et de premier ministre, qui résume le mieux les pouvoirs du commissaire O'Reilly et les instructions qu'il avait reçues. Dans sa lettre datée du 27 février 1882, le surintendant adjoint a déclaré ce qui suit:

[TRADUCTION] En ce qui concerne le pouvoir en vertu duquel M. O'Reilly a agi pour désigner les postes de pêche qu'il était peut-être souhaitable de réserver pour les bandes indiennes de la Colombie-Britannique, [. . .] le commissaire des réserves avait reçu instruction de déterminer, dans le cours de l'attribution des terres aux bandes indiennes de cette province, les secteurs de pêche qui devaient être réservés à leur usage exclusif; le ministre suppléant a été avisé qu'il serait souhaitable que les pêcheries dont l'attribution aux Indiens est «recommandée» ne soient pas aliénées de quelque autre manière sans le consentement préalable de notre ministère. [. . .] La détermination de ces territoires de pêche, dont il est jugé souhaitable de réserver l'usage exclusif aux bandes indiennes, n'a pas davantage pour effet de céder de façon permanente à ces bandes les secteurs de pêche ainsi désignés, sans le consentement du gouvernement, que ne le fait l'attribution des terres formant les réserves indiennes par M. O'Reilly aux mêmes Indiens sans cette approbation.

Les attributions de terres faites par M. O'Reilly ne sont que des recommandations, qui peuvent faire l'objet de diminutions ou d'augmentations, si, après consultations et délibérations approfondies, les fonctionnaires du ministère de la Marine et des Pêcheries et du ministère des Affaires indiennes jugent la chose souhaitable. [Je souligne.]

(Archives nationales du Canada, Fonds d'archives fédérales 10, volume 3766, n° de dossier 32876.)

Les déclarations du commissaire O'Reilly

Le commissaire O'Reilly a clairement reçu des instructions lui indiquant que son rôle se limitait à formuler des recommandations. À la lumière de ces instructions, il est évident que ses déclarations et ses actions ne révèlent aucune tentative d'accorder le contrôle de la pêcherie. Au contraire, elles constituent tout au plus une recommandation en faveur de l'attribution d'une pêcherie.

La veille de sa recommandation favorable à l'attribution de la réserve indienne n° 1 de Morice-

Reserve No. 1 (Lach-kal-tsap), he made the following statements to the band in a discussion concerning the allotment of the reserve:

The Gov. is anxious land shd be set apart for you as it has been in the rest of B.C. A reserve when made protects the land from trespass by others, but the Indian still has the right to hunt, fish or gather berries outside. The Gov. does not wish to confine you on the reserve. . . .

Later in the same discussion he stated that:

I never make a promise without seeing the land I am reserving. The reserve will be for the tribe, not for individuals. Allotments may be made by the Agent. Surveyors will be sent to define the exact boundaries, and plans will be sent to the Chiefs. [Emphasis added.]

(Transcript of meeting with Chief Le goul, two other Chiefs, Fr. Morris & Commissioner, September 18, 1891.)

These comments reveal that Commissioner O'Reilly made it apparent that he was not making the final decision with respect to the reserve boundaries, and that in any event he was concerned with reserving the land, not the fishery.

His position was made still clearer in his conversations with the neighbouring Indians of New Kitseguela, about 30 miles downstream from Moricetown, less than two weeks after the allotment of the Moricetown Reserve. Commissioner O'Reilly stated:

I hope you will not ask an unreasonable extent of country, but only for that which would be useful to you. It is not necessary that the berrying or hunting grounds shd be reserved. It would be an impossibility to define them as you go over hundreds of miles. You will not be confined to the reserves, but can hunt, fish or gather berries where you will as heretofore. [Emphasis added.]

He continued:

town (Lach-kal-tsap), le commissaire O'Reilly a fait les déclarations suivantes à la bande, au cours d'une discussion concernant l'attribution de la réserve:

[TRADUCTION] Le gouvernement tient à ce que des terres soient mises de côté à votre intention comme ce fut le cas dans le reste de la Colombie-Britannique. La création d'une réserve permet de protéger les terres qui la composent contre les intrus, mais les Indiens conservent toutefois le droit de chasser, de pêcher ou de cueillir des baies à l'extérieur de celle-ci. Le gouvernement ne souhaite pas vous confiner à la réserve . . .

Plus tard, durant la même discussion, il a déclaré ceci:

[TRADUCTION] Je ne fais jamais de promesse sans avoir vu les terres que je réserve. La réserve est destinée à la tribu et non aux individus. L'agent peut attribuer les terres. Des arpenteurs seront envoyés pour établir les limites exactes, et les plans seront transmis aux chefs. [Je souligne.]

(Transcription de la réunion avec le chef Le goul, deux autres chefs, le père Morris et le commissaire, le 18 septembre 1891.)

Il ressort de ces commentaires que le commissaire O'Reilly a clairement indiqué qu'il ne prenait pas la décision finale relativement aux limites de la réserve et que, de toute façon, son rôle était de réserver les terres, non la pêche.

Moins de deux semaines après l'attribution de la réserve de Moricetown, il a précisé davantage sa position au cours de ses conversations avec les Indiens de New Kitseguela, à environ 30 milles en aval de Moricetown. Le commissaire O'Reilly a dit ceci:

[TRADUCTION] J'espère que vous ne demanderez pas une étendue déraisonnable de territoire, mais plutôt uniquement ce qui vous est utile. Il n'est pas nécessaire de réserver des territoires de cueillette de baies et de chasse. Il serait impossible de délimiter de tels territoires puisque vous parcourez des centaines de milles. Vous ne serez pas confinés aux réserves, vous pourrez chasser, pêcher ou cueillir des baies où vous le voulez, comme vous l'avez fait jusqu'à maintenant. [Je souligne.]

Il a poursuivi ainsi:

You not only have good land, you have a good salmon river at your door, and good hunting and berrying mountains close at hand. When the reserves are defined the land belongs exclusively to the Indians. [Emphasis added.]

[TRADUCTION] Non seulement avez-vous de bonnes terres, mais vous avez également tout près une rivière riche en saumon et, à portée de la main, des montagnes qui regorgent de gibier et de baies. Une fois les réserves délimitées, le territoire appartient alors exclusivement aux Indiens. [Je souligne.]

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Commissioner O'Reilly certainly believed the reserve consisted of the land but not the river. His concern was to reserve a fishing station on the bank of the river and not with reserving control of the fishery itself. This is made clear later in the conversation, when in response to a request for the reservation of a portion of the stream, Commissioner O'Reilly stated:

I cannot see the necessity of making such a large reserve. You cannot use it. It is necessary you shd have timber, and that I will give you, and your village and agricultural land, but it is not necessary to give you seven miles of fishing ground, that cannot be used by anyone else. [Emphasis added.]

Il ne fait pas de doute que le commissaire O'Reilly estimait que la réserve était constituée des terres mais non de la rivière. Il tenait à réserver un poste de pêche sur la berge de la rivière, non à réserver le contrôle de la pêcherie même. Cela ressort clairement de la réponse qu'il a donnée, plus tard dans la conversation, lorsqu'on lui a demandé de réserver une partie du cours d'eau:

[TRADUCTION] Je ne vois pas la nécessité d'établir une si vaste réserve. Vous ne pourrez pas l'utiliser. Vous avez besoin de bois, ce que je vous donnerai, ainsi que de votre village et de terres agricoles, mais il n'est pas nécessaire de vous donner un secteur de pêche de sept milles qui ne pourrait être utilisé par personne d'autre. [Je souligne.]

(Transcript of O'Reilly Commission Meeting at New Kitseguela, September 30, 1891. National Archives of Canada, Record Group 10, Volume 3571, File 126, pt. A; Provincial Archives of British Columbia microfilm reel B-274.)

(Transcription de la réunion du commissaire O'Reilly à New Kitseguela, 30 septembre 1891. Archives nationales du Canada, Fonds d'archives fédérales 10, volume 3571, dossier 126, partie A; Archives provinciales de la Colombie-Britannique, bobine de microfilm B-274.)

Was an Exclusive Fishery Included in the Grant?

Y-a-t-il eu attribution d'une pêcherie exclusive?

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The Minutes of Decision of Commissioner O'Reilly, dated September 19, 1891 referred to the allotment of the Moricetown Reserve in the following terms:

Lach kal tsap, a reserve of twelve hundred and ninety (1290) acres, situated on the Hagwilget river about 35 [miles] southeast of Hazelton.

Commencing on the right bank of the Hagwilget river at a Poplar tree marked Indian reserve and running East ninety (90) chains; thence North one hundred and twenty (120) chains; thence West one hundred and twenty (120) chains; thence South one hundred and twenty (120) chains; and thence East thirty (30) chains to the place of commencement.

Dans le procès-verbal de la décision du commissaire O'Reilly, en date du 19 septembre 1891, il est fait état de l'attribution de la réserve de Moricetown dans les termes suivants:

[TRADUCTION] Lach kal tsap, réserve de mille deux cent quatre-vingt-dix (1290) acres, située le long de la rivière Hagwilget, à environ 35 [milles] au sud-est de Hazelton.

Commencant sur la rive droite de la rivière Hagwilget, à l'endroit où se trouve un peuplier sur lequel est inscrit réserve indienne, et vers l'est sur une distance de quatre-vingt-dix (90) chaînes; de là, cent vingt (120) chaînes vers le nord; de là, cent vingt (120) chaînes vers l'ouest; de là, cent vingt (120) chaînes vers le sud; et de là, trente (30) chaînes vers l'est, jusqu'au point de départ.

(Indian Lands Registry (Registry No. B-64652), Department of Indian and Northern Affairs, Hull, P.Q.)

The appellant urged that this metes and bounds description was clear and cogent evidence that Commissioner O'Reilly intended that the Reserve include the Hagwilget River and with it an exclusive fishery.

It is true that the metes and bounds description does not exclude the river. Yet, it must be remembered that the Commissioner had explained to the Indians, that this was only a rough allocation of land which would later be more accurately surveyed. More importantly, with regard to the alleged allotment of an exclusive fishery, it is certainly significant that the letter from Commissioner O'Reilly of January 21, 1892 forwarding the Minutes of Decision makes no mention of any fisheries being reserved for the Indians.

Commissioner O'Reilly did refer to a fishery adjacent to the proposed reserve in his report to the Superintendent General of Indian Affairs on March 26, 1892. When, on May 13, 1892, the Deputy Superintendent General of Indian Affairs sent a copy of the recommended allotment of the Moricetown Reserve and others to the Department of Marine and Fisheries, he asked that the fishing grounds adjacent to the reserves be reserved for the Indians who had been allocated the lands adjacent to those fishing grounds. This request confirms that Indian Affairs understood its powers and that of its Commissioners to be limited to the allocation of land to the Indians, and that any allocation of fishing grounds would have to be approved by the Department of Marine and Fisheries.

When the Department of Marine and Fisheries forwarded the request for fishing grounds to the Dominion Inspector of Fisheries in British Columbia for comment, that official stated:

(Registre des terres indiennes (n° B-64652), ministère des Affaires indiennes et du Nord canadien, Hull (Qc).)

L'appelant a prétendu avec insistance que cette description par mesurage et délimitation était une preuve claire et convaincante que le commissaire O'Reilly entendait que la réserve comprenne la rivière Hagwilget et avec elle une pêcherie exclusive.

Bien qu'il soit vrai que cette description par mesurage et délimitation n'exclut pas la rivière, il faut néanmoins rappeler que, comme le commissaire l'avait expliqué aux Indiens, il ne s'agissait que d'une attribution approximative de terres, qui serait par la suite arpentée de façon plus précise. Fait plus important en ce qui concerne la prétendue attribution d'une pêcherie exclusive, il est certes significatif que la lettre datée du 21 janvier 1892 du commissaire O'Reilly, accompagnant le procès-verbal de sa décision, ne renferme aucune mention de quelque pêcherie que ce soit réservée en faveur des Indiens.

Le commissaire O'Reilly a effectivement fait état d'une pêcherie adjacente à la réserve proposée dans son rapport au surintendant général des Affaires indiennes le 26 mars 1892. Lorsque, le 13 mai 1892, le surintendant général adjoint des Affaires indiennes a fait parvenir au ministère de la Marine et des Pêcheries une copie de la recommandation d'attribuer la réserve de Moricetown et d'autres réserves, il a demandé que les secteurs de pêche adjacents aux réserves soient réservés aux Indiens à qui avaient été attribuées les terres adjacentes à ces secteurs. Cette demande confirme que le ministère des Affaires indiennes comprenait que ses pouvoirs et ceux de ses commissaires se limitaient à l'attribution de terres aux Indiens, et que toute attribution de secteurs de pêche devait être approuvée par le ministère de la Marine et des Pêcheries.

Lorsque le ministère de la Marine et des Pêcheries a transmis la demande de secteurs de pêche à l'inspecteur fédéral des pêcheries en Colombie-Britannique afin d'obtenir ses commentaires, ce dernier a répondu ceci:

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I beg to respectfully, but in the strongest way possible to recommend that no salmon fishing grounds be reserved for the use of Indians.

[TRADUCTION] Je recommande respectueusement, mais de la façon la plus vigoureuse possible, qu'aucun secteur de pêche au saumon ne soit réservé pour l'usage des Indiens.

In my opinion the Dept. of Fisheries should not grant, or acknowledge any exclusive rights of Indians to any waters in British Columbia.

À mon avis, le ministère des Pêcheries ne devrait ni accorder ni reconnaître aux Indiens de droits exclusifs sur quelque étendue d'eau en Colombie-Britannique.

(John McNab, Dominion Inspector of Fisheries, British Columbia, to William Smith, Deputy Minister of Marine and Fisheries, May 26, 1892 in Indian Lands Registry (Registry No. B-64648), Department of Indian and Northern Affairs, Hull, P.Q.)

(John McNab, inspecteur fédéral des Pêcheries, Colombie-Britannique, à William Smith, sous-ministre de la Marine et des Pêcheries, 26 mai 1892, Registre des terres indiennes (n° B-64648), ministère des Affaires indiennes et du Nord canadien, Hull (Qc).)

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This letter was in turn forwarded to Indian Affairs by the Department of Marine and Fisheries on June 4, 1892. In reply, R. Sinclair of the Department of Indian Affairs wrote the Minister of Marine and Fisheries to ask whether he concurred with the recommendation of the Inspector of Fisheries not to allocate salmon fishing grounds to the Indians. In this letter of June 9, 1892 he reiterated that the Department of Indian Affairs claimed no right to allot fishery reserves to the Indians, and that it was for the Department of Marine and Fisheries to decide whether any or all of the recommended allotments of fishing grounds was to be approved.

Cette lettre a à son tour été transmise aux Affaires indiennes par le ministère de la Marine et des Pêcheries le 4 juin 1892. En réponse, R. Sinclair, du ministère des Affaires indiennes, a écrit au ministre de la Marine et des Pêcheries pour lui demander s'il était d'accord avec la recommandation de l'inspecteur des Pêcheries de ne pas attribuer aux Indiens de secteurs de pêche au saumon. Dans cette lettre du 9 juin 1892, il a réitéré que le ministère des Affaires indiennes ne prétendait aucunement avoir le droit d'attribuer des réserves de pêche aux Indiens, et qu'il appartenait au ministère de la Marine et des Pêcheries de décider si toutes les attributions de secteurs de pêche recommandées ou certaines seulement devaient être approuvées.

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The clear reply of the Deputy Minister of Marine and Fisheries on July 14, 1892 was that his Department would not sanction any reservation of fishing grounds. He repeated the long-standing position of the Department that exclusive fisheries would not be granted, and suggested instead that:

Le 14 juillet 1892, le sous-ministre de la Marine et des Pêcheries a clairement répondu que son ministère ne sanctionnerait aucune réservation de secteurs de pêche. Il a répété la position de longue date du ministère qu'aucune pêcherie exclusive ne serait accordée, et il a plutôt proposé ceci:

... it would be far better to have such waters as you may deem to be necessary for the support and maintenance of these Indians, licensed to them under similar conditions as licenses are issued to other Bands of Indians in Ontario. This would place them on a footing of equality with White fishermen, and enable them to dispose of their fish in the same manner as the latter do.

[TRADUCTION] ... il me semble de loin préférable que les étendues d'eau que vous estimez nécessaires à la subsistance de ces Indiens leur soient accordées au moyen de licences assorties de conditions semblables à celles qui sont imposées à d'autres bandes indiennes de l'Ontario. Ils seraient ainsi sur un pied d'égalité avec les pêcheurs blancs et ils pourraient disposer de leur poisson de la même manière que ces derniers.

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(William Smith, Deputy Minister of Marine and Fisheries, to Deputy Superintendent General of Indian Affairs, July 14, 1892 in Indian Lands Registry (Registry No. B-64648), Department of Indian and Northern Affairs, Hull, P.Q.)

The only conclusion which can be reached on this evidence is that there was never any intention on the part of the Crown to allot an exclusive fishery for the Moricetown Band.

The Application of the Ad Medium Filum Aquae Presumption

The appellant argued that the intention of the Crown to allot fishery rights to the band as part of the reserve was to a large extent irrelevant in this case. The basis for the argument is that the Crown only intended to reserve the fishery in navigable waters, and that in non-navigable waters, which the appellant contends includes the Bulkley River at the reserve, the presumption *ad medium filum aquae* applies, and accordingly the river surrounded, as it is on both sides by the reserve, would be presumptively part of the reserve.

Assuming without deciding that the doctrine of *ad medium filum aquae* should apply to Indian Reserves, it is not applicable in this case for three reasons. First, it must be remembered that the doctrine is only applicable in cases where the river forming the boundary is not navigable. The Bulkley River is navigable above and below the Moricetown gorge and should be considered a navigable river. This in itself is a sufficient basis for determining that the river did not form part of the reserve and that the presumption of ownership to the middle of the river cannot arise. Secondly, at the time the reserve was created the English common law provided that the fishery was a right which was severable from the title to the river bed itself. Thus, even if the presumption *ad medium filum aquae* were to apply to pass title to the bed of the river to the band, the presumption has no effect

(William Smith, sous-ministre de la Marine et des Pêcheries, au surintendant général adjoint des Affaires indiennes, 14 juillet 1892, Registre des terres indiennes (n° B-64648), ministère des Affaires indiennes et du Nord canadien, Hull (Qc).)

La seule conclusion qu'il est possible de tirer de cette preuve est que la Couronne n'a jamais eu l'intention d'accorder de pêche exclusive à la bande de Moricetown.

L'application de la présomption ad medium filum aquae

L'appelant a fait valoir que l'intention de la Couronne d'accorder à la bande des droits sur la pêche, en tant que partie de la réserve, est dans une large mesure sans pertinence en l'espèce. À l'appui de cet argument, l'appelant affirme que la Couronne entendait uniquement réserver la pêche dans les eaux navigables, et que, dans les eaux non navigables — la rivière Bulkley étant, de prétendre l'appelant, formée de telles eaux à la hauteur de la réserve —, la présomption *ad medium filum aquae* s'applique, de sorte que, comme la rivière est bordée des deux côtés par la réserve, elle ferait partie de celle-ci par l'effet de la présomption.

À supposer, sans toutefois se prononcer sur la question, que la doctrine *ad medium filum aquae* s'applique aux réserves indiennes, elle ne s'applique cependant pas en l'espèce, et ce pour trois raisons. Premièrement, il faut se rappeler que la doctrine n'est applicable que dans les cas où la rivière qui forme la limite n'est pas navigable. Or, comme la rivière Bulkley est navigable en amont et en aval de la gorge de Moricetown, elle devrait être considérée comme une rivière navigable. En soi, il s'agit d'une raison suffisante pour conclure qu'elle ne fait pas partie de la réserve et que la présomption relative au droit de propriété sur la rivière jusqu'à son milieu ne peut alors naître. Deuxièmement, lorsque la réserve a été créée, la pêche était, en vertu de la common law d'Angleterre, un droit séparable du titre relatif au lit de la rivière. Donc, même si la présomption *ad*

on the fishery as the Crown specifically refused to allot an exclusive fishery to the band. It was the clear intention of the Crown to reserve all of the fishery to itself. It follows that any by-law with respect to fishing would therefore be beyond the band's authority as control of this riparian right remained with the Crown. Thirdly, if the presumption could possibly be said to apply it was rebutted in light of the evidence that the Crown never intended to grant nor did it grant the bed of the river to the band. It will be necessary to say a little more with regard to each of these aspects.

medium filum aquae s'appliquait et transférait à la bande le titre sur le lit de la rivière, elle ne produirait aucun effet à l'égard de la pêche, étant donné que la Couronne a expressément refusé d'accorder à la bande une pêche exclusive. La Couronne avait clairement l'intention de se réserver l'ensemble de la pêche. Il s'ensuit que tout règlement administratif régissant la pêche outrepasserait les pouvoirs de la bande, puisque la Couronne a conservé le contrôle de ce droit riverain. Troisièmement, même s'il était possible d'affirmer que la présomption s'applique, elle a été réfutée compte tenu de la preuve que la Couronne n'a jamais eu l'intention d'accorder le lit de la rivière à la bande et qu'elle ne l'a jamais accordé dans les faits. Il est nécessaire d'explicitier un peu plus chacun de ces aspects.

When Does the *Ad Medium Filum Aquae* Presumption Apply?

Quand la présomption *ad medium filum aquae* s'applique-t-elle?

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In British Columbia, the civil and criminal laws of England were adopted as at November 19, 1858 "so far as the same [were] not by local circumstances inapplicable": *The English Law Ordinance, 1867*, S.B.C. 1867, No. 70, s. 2 (now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 2). Similar language also introduced the common law of England into Manitoba and Alberta, although in other provinces, such as Ontario, no allowance was made for "local circumstances".

En Colombie-Britannique, les lois civiles et criminelles d'Angleterre ont été adoptées, telles qu'elles existaient le 19 novembre 1858, [TRADUCTION] «dans la mesure où elles [n'étaient] pas inapplicables en raison de conditions locales»: *The English Law Ordinance, 1867*, S.B.C. 1867, No. 70, art. 2 (maintenant *Law and Equity Act*, R.S.B.C. 1979, ch. 224, art. 2). Un texte analogue a également introduit la common law d'Angleterre au Manitoba et en Alberta, quoique, dans d'autres provinces, telle l'Ontario, il n'y a pas de réserve fondée sur les «conditions locales».

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As La Forest explained in his book *Water Law in Canada — The Atlantic Provinces*, *supra*, at pp. 241-42, the English rule was that:

Ainsi que La Forest l'a expliqué dans son ouvrage intitulé *Water Law in Canada — The Atlantic Provinces*, *op. cit.*, aux pp. 241 et 242, la règle anglaise était la suivante:

... the owner of land through which a non-tidal stream flows owns the bed of the stream unless it has been expressly or impliedly reserved; and if the stream forms the boundary between lands owned by different persons, each proprietor owns the bed of the river *ad medium filum aquae* — to the centre thread of the stream.

[TRADUCTION] ... le propriétaire d'un bien-fonds traversé par un cours d'eau sans marée est également propriétaire du lit de ce cours d'eau sauf s'il a expressément ou implicitement été réservé; si le cours d'eau délimite des biens-fonds appartenant à des personnes différentes, chacune d'elles est propriétaire du lit de la rivière *ad medium filum aquae* — c'est-à-dire jusqu'à la ligne médiane du cours d'eau.

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While this rule expressed the common law as it existed in England, the courts in western Canada

Bien que cette règle exprimait la common law sur ce point à l'époque en Angleterre, les tribunaux

have not applied this rule to navigable rivers. Thus in the case of *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184 (Man. C.A.), Dennistoun J.A. wrote, at pp. 202-3:

These references to the common law of England indicate clearly to my mind that they are not and never were applicable to conditions in this Province. Here the public right in navigable waters whether under the Hudson's Bay tenure or since 1869 under the title vested in the Crown, was prior to, and superseded all private rights acquired by grant or settlement, upon the banks of a navigable stream. In a country occupied from the earliest days by hunters, trappers, fishers and traders whose main and almost exclusive highways were the rivers and streams, such laws were contrary to the requirements and necessities of the whole community.

The applicability of the common law of England to navigable rivers in respect to the *ad medium* rule may be doubted when it is remembered that the importance of public rights in non-tidal navigable waters was not recognised in England when title to land upon their banks was acquired.

In this country the public right of navigation and of fishery in all navigable waters has always existed and been recognised.

Similarly, in the same year the Alberta Court of Appeal in the case of *Flewelling v. Johnston* (1921), 59 D.L.R. 419, held that the English common law presumption did not apply in the very different circumstances which existed in Canada. In short, the "local circumstances" which existed in Canada rendered the common law inapplicable with respect to navigable rivers. As Beck J.A. stated in his reasons at pp. 422-23:

In *Barthel v. Scotten* (1895), 24 Can. S.C.R. 367, it was held that a grant of land bounded by the bank of a navigable river or an international waterway does not extend *ad medium filum aquae*.

In *re Provincial Fisheries* (1896), 26 Can. S.C.R. 444, Gwynne, J., said that the rule that riparian proprietors

de l'ouest canadien ne l'ont pas appliquée aux rivières navigables. Ainsi, dans l'affaire *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184 (C.A. Man.), le juge Dennistoun a écrit ceci, aux pp. 202 et 203:

[TRADUCTION] À mon avis, ces renvois à la common law d'Angleterre indiquent clairement que ces règles de droit ne s'appliquent pas et ne se sont jamais appliquées aux conditions dans la province. Ici, que ce soit en vertu de la tenure de la Baie d'Hudson ou, depuis 1869, en vertu du titre dévolu à la Couronne, les droits publics sur les eaux navigables ont précédé et remplacé tous droits privés acquis, par concession ou colonisation, à l'égard des rives d'un cours d'eau navigable. Dans un pays occupé dès le départ par des chasseurs, des trappeurs, des pêcheurs et des commerçants, qui avaient pour principales — et pour ainsi dire uniques — voies de transport les rivières et autres cours d'eau, de telles règles de droit étaient contraires aux besoins et aux exigences de la collectivité toute entière.

Il est possible de douter de l'applicabilité de la common law d'Angleterre aux rivières navigables, pour ce qui est de la règle *ad medium*, si on se rappelle que l'importance des droits publics sur les eaux sans marée navigables n'était pas reconnue en Angleterre lorsqu'un titre foncier était acquis à l'égard des rives de ces eaux.

Dans notre pays, le droit du public de naviguer et de pêcher dans toutes les eaux navigables existe, et il est reconnu depuis toujours.

De même, au cours de la même année, dans *Flewelling c. Johnston* (1921), 59 D.L.R. 419, la Cour d'appel de l'Alberta a conclu que la présomption prévue par la common law d'Angleterre ne s'appliquait pas aux conditions fort différentes existant au Canada. Bref, les «conditions locales» qui existaient au Canada rendaient la common law inapplicable aux rivières navigables. Comme le juge Beck l'a écrit dans ses motifs, aux pp. 422 et 423:

[TRADUCTION] Dans l'arrêt *Barthel c. Scotten* (1895), 24 R.C.S. Can. 367, il a été jugé qu'en cas d'attribution d'un bien-fonds délimité par la rive d'une rivière navigable ou d'une voie d'eau internationale, le bien-fonds ainsi attribué ne s'étend pas *ad medium filum aquae*.

In *re Provincial Fisheries* (1896), 26 R.C.S. Can. 444, le juge Gwynne a déclaré que la règle portant que les

own ad medium filum aquae does not apply to the great lakes or navigable rivers.

In *Keewatin Power Co. v. Kenora* (1906), 13 O.L.R. 237, Anglin, J. held, as stated in the head note, that: —

“The restriction of the presumption of the common law, as administered in England, in favour of Crown ownership of the alveus of navigable waters, for the protection of public rights of navigation and fishery therein, to navigable tidal waters, is apparently due to the non-recognition in early times of the necessity of protecting such public rights in other navigable waters, and an acquiescence in the right of riparian owners of land bordering thereon to the bed of such waters ad medium filum aquae; whereas in this Province such public rights in all rivers navigable in fact have been deemed always existent in the Crown ex jure naturae, so that the title in the bed thereof remained in the Crown after it had made grants of land bordering upon the banks of such rivers, the doctrine of ad medium filum aquae not applying thereto.”

This Court has declared in *Rex v. Cyr* (1917), 38 D.L.R. 601, 29 Can. Cr. Cas. 77, 12 Alta. L.R. 320 at p. 325, that where resort is to be had to the common law the applications of its principles are not necessarily to result in same decisions as have been or may be given by the English Courts, but that account must be taken of the different conditions prevailing in this country, not merely physical conditions but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question.

The decision of Anglin, J., was reversed by the Ontario Court of Appeal (1908), 16 O.L.R. 184, but explicitly on the ground of the precise wording of the statute of the Province, R.S.O. 1897, ch. 111, sec. 1, enacting that “In all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England as they stood on the said 15th of October, 1792, as the rule for the decision of the same. . . . except so far as the said laws may have been repealed by any Act of the late Province of Upper Canada . . . still having the force of law in Ontario, or by these Revised Statutes.”

propriétaires riverains sont propriétaires ad medium filum aquae ne s'applique pas aux grands lacs ni aux rivières navigables.

Suivant le texte du sommaire de l'arrêt *Keewatin Power Co. c. Kenora* (1906), 13 O.L.R. 237, le juge Anglin a tiré la conclusion suivante:

«Si la présomption de common law — appliquée en Angleterre et en vertu de laquelle la Couronne est propriétaire du lit des eaux navigables, en vue de la protection des droits publics de navigation et de pêche dans ces eaux — ne vise que les eaux à marée navigables, c'est apparemment parce que, à l'origine, on ne reconnaissait pas la nécessité de protéger ces droits publics dans les autres eaux navigables, et que l'on acceptait que les propriétaires riverains avaient sur le lit de ces eaux un droit ad medium filum aquae; attendu que, dans notre province, ces droits publics dans toutes les rivières navigables ont, dans les faits, toujours été réputés appartenir à la Couronne ex jure naturae, celle-ci a conservé son titre sur le lit des rivières, même après avoir accordé des biens-fonds en bordure de leurs rives, la doctrine ad medium filum aquae ne s'y appliquant pas.»

Notre Cour a déclaré, dans *Rex c. Cyr* (1917), 38 D.L.R. 601, 29 Can. Cr. Cas. 77, 12 Alta. L.R. 320, à la p. 325, que si l'application des principes de common law s'avère nécessaire, elle ne doit pas pour autant donner lieu à des décisions identiques à celles qui ont été rendues par les tribunaux anglais ou qui pourraient l'être; il faut plutôt tenir compte des conditions différentes qui existent dans notre pays, non seulement de la géographie, mais également de l'état général de nos affaires publiques et de l'attitude générale de la collectivité à l'égard de la question soulevée.

La décision du juge Anglin a été infirmée par la Cour d'appel de l'Ontario (1908), 16 O.L.R. 184, mais explicitement sur le fondement du texte même de la disposition législative provinciale pertinente, R.S.O. 1897, ch. 111, art. 1, qui était ainsi rédigée: «Relativement à toute question litigieuse concernant la propriété et les droits civils, on continuera d'avoir recours aux lois d'Angleterre, suivant leur texte au 15 octobre 1792, à titre de règles régissant ce genre de questions [. . .] sauf dans la mesure où les lois en question ont été abrogées soit par une loi de l'ancienne province du Haut-Canada [. . .] toujours en vigueur en Ontario, soit par les présentes lois révisées.»

Beck J.A. then went on to cite s. 11 of the *North-West Territories Act*, R.S.C. 1886, c. 50,

Le juge Beck a ensuite cité l'art. 11 de l'*Acte des territoires du Nord-Ouest*, S.R.C. 1886, ch. 50,

which is to the same effect as s. 2 of the British Columbia *English Law Ordinance Act*. He observed at p. 424:

The words which I have quoted do not appear in the Ontario Act. The quoted word “applicable” means “suitable”, “properly adapted to the conditions of the country”. *Brand v. Griffin* (1908) 1 Alta. L. R. 510, I accept then, for this Province at least the view propounded by Anglin, J. In that view the doctrine that in non-tidal waters prima facie the title to the bordering lands runs ad medium filum aquae is not in force in the Province so far as to affect waters — lakes or rivers — which are in fact navigable. [Emphasis added.]

I am in complete agreement with the reasoning and conclusions of the Manitoba and Alberta Courts of Appeal. The wording of the Manitoba, Alberta, and British Columbia statutes leads inexorably to the conclusion that the decisions of the Manitoba and Alberta Courts of Appeal are correct and applicable to British Columbia.

This conclusion is further supported by the statements of La Forest J. in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 54, where he said:

The common law of England has long been that the public has a right to navigate in tidal waters, but though non-tidal waters may be navigable in fact the public has no right to navigate in them, subject to certain exceptions not material here. Except in the Atlantic provinces, where different considerations may well apply, in Canada the distinction between tidal and non-tidal waters was abandoned long ago; see *In Re Provincial Fisheries* (1896), 26 S.C.R. 444; for a summary of the cases, see my book on *Water Law in Canada* (1973), at pp. 178-80. Instead the rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists. That is the case in Alberta where the Appellate Division of the Supreme Court, applying the *North-West Territories Act*, R.S.C. 1886, c. 50, rightly held in *Flewelling v. Johnston* (1921), 59 D.L.R. 419, that the English rule was not suitable to the conditions of the province. There is

qui est au même effet que l’art. 2 de l’*English Law Ordinance Act* de la Colombie-Britannique. Il a fait l’observation suivante, à la p. 424:

[TRADUCTION] Les termes que j’ai cités ne figurent pas dans la loi de l’Ontario. Le mot «applicable» signifie «approprié», «bien adapté aux conditions existant dans le pays». *Brand c. Griffin* (1908), 1 Alta. L.R. 510. J’adhère donc, à tout le moins pour ce qui est de notre province, à l’opinion exprimée par le juge Anglin. À son avis, la doctrine portant que le titre sur les biens-fonds qui bordent des eaux sans marée s’étend à première vue ad medium filum aquae, ne s’applique pas, dans la province, aux eaux — lacs et rivières — qui dans les faits sont navigables. [Je souligne.]

Je suis en parfait accord avec le raisonnement et les conclusions des cours d’appel du Manitoba et de l’Alberta. Le texte des lois du Manitoba, de l’Alberta et de la Colombie-Britannique amène inexorablement à conclure que les décisions des cours d’appel du Manitoba et de l’Alberta sont correctes et s’appliquent à la Colombie-Britannique.

Cette conclusion est étayée également par les propos du juge La Forest dans l’arrêt *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, à la p. 54, où il a déclaré ceci:

La common law d’Angleterre prévoit depuis longtemps que le public a un droit de navigation dans les eaux de marée; toutefois, bien que les eaux sans marée puissent être navigables, le public n’a pas le droit d’y naviguer, sous réserve de certaines exceptions qui ne sont pas pertinentes en l’espèce. Au Canada, la distinction entre les eaux de marée et les eaux sans marée a été abandonnée il y a longtemps, sauf dans les provinces de l’Atlantique où des considérations différentes pourraient bien s’appliquer; voir l’arrêt *In Re Provincial Fisheries* (1896), 26 R.C.S. 444; pour un sommaire des arrêts applicables, voir mon ouvrage intitulé *Water Law in Canada* (1973), aux pp. 178 à 180. La règle est plutôt la suivante: si les eaux sont navigables, que ce soient des eaux de marée ou sans marée, il existe un droit public de navigation. C’est le cas en Alberta où la Division d’appel de la Cour suprême, dans l’application de l’*Acte des territoires du Nord-Ouest*, S.R.C. 1886, ch. 50, a à bon droit statué dans l’arrêt *Flewelling c. Johnston* (1921), 59 D.L.R. 419, que la règle anglaise ne

no issue between the parties that the Oldman River is in fact navigable.

What is the Correct Test for Navigability, and Is the Bulkley River a Navigable River?

pouvait être appliquée à la province. Les parties ne contestent pas que la rivière Oldman est en fait navigable.

Quel est le critère applicable pour statuer sur la navigabilité, et la rivière Bulkley est-elle une rivière navigable?

It is clear that the *ad medium filum aquae* presumption has no application to navigable rivers in British Columbia. From the earliest times the Courts and legislatures of this country have refused to accept the application of a rule developed in England which is singularly unsuited to the vast non-tidal bodies of water in this country. It is therefore necessary to determine whether the Bulkley River can properly be considered to be a navigable river.

Il est évident que la présomption *ad medium filum aquae* ne s'applique pas aux rivières navigables de la Colombie-Britannique. Dès le départ, les législatures et les tribunaux du Canada ont refusé d'appliquer une règle élaborée en Angleterre et singulièrement peu adaptée à nos vastes étendues d'eau sans marée. Il est par conséquent nécessaire de déterminer si la rivière Bulkley peut, à juste titre, être considérée comme une rivière navigable.

To assess navigability, the entire length of the river from its mouth to the point where its navigability terminates must be considered. On this issue I am in agreement with the reasoning and conclusions of Wallace J.A. in the Court of Appeal. In particular I would adopt the statements of Anglin J. (as he then was) in the case of *Keewatin Power Co. v. Kenora (Town)* (1906), 13 O.L.R. 237 (H.C.). There the navigability of the Winnipeg River was in question. It was a river not unlike the Bulkley River in that various falls and rapids necessitated numerous portages between stretches of good water. Anglin J. wrote at p. 263:

Pour apprécier la navigabilité d'une rivière, il faut examiner tout son cours, de son embouchure jusqu'à l'endroit où la navigabilité prend fin. Sur cette question, je souscris au raisonnement et aux conclusions du juge Wallace de la Cour d'appel. Plus particulièrement, je fais miens les propos formulés par le juge Anglin (plus tard Juge en chef de notre Cour) dans l'affaire *Keewatin Power Co. c. Kenora (Town)* (1906), 13 O.L.R. 237 (H.C.), où il était question de la navigabilité de la rivière Winnipeg. Cette rivière n'était pas sans présenter des similitudes avec la rivière Bulkley, puisqu'elle comportait plusieurs chutes et rapides exigeant de nombreux portages entre les étendues d'eau praticables. Le juge Anglin a écrit ceci, à la p. 263:

But it is argued that in any event the *ad medium* rule should apply to such parts of navigable rivers as are in their natural state non-navigable owing to impediments such as falls or rapids. Such is not my opinion. Once the navigable character of the river is established, up to the point at which navigability entirely ceases the stream must be deemed a public highway, though above that point it is private property: *The Queen v. Robertson*, 6 S.C.R. 52.

[TRADUCTION] Or, l'on soutient que, de toute façon, la règle *ad medium* devrait s'appliquer aux parties des rivières navigables qui, à leur état naturel, ne sont pas navigables en raison d'obstacles tels que des chutes ou des rapides. Je ne suis pas d'accord. Une fois que la navigabilité de la rivière a été établie, celle-ci doit être considérée comme une voie publique jusqu'à l'endroit où sa navigabilité cesse entièrement, même si en amont de ce point elle est une propriété privée: *The Queen c. Robertson*, 6 R.C.S. 52.

The inconvenience which would ensue were the soil of the bed of the same river in alternate stretches vested in the Crown, *juris publici*, and in the riparian owners, *juris privati*, affords strong ground for the belief that the law is not in a condition which would produce such results. Then again, though navigation at the falls in the

Étant donné les problèmes qui découleraient du fait que différentes parties du lit d'une même rivière appartiendraient à la Couronne *juris publici* et aux propriétaires riverains *juris privati*, il y a de fortes raisons de croire que l'état du droit n'est pas tel que cela puisse se produire. Par ailleurs, bien que la navigation soit à

east branch of the Winnipeg river is presently impossible, the engineers say that a canal to overcome the natural obstacle which the falls present is quite possible. Is not the stream even at this point navigable *in posse*? I think it is.

There is judicial authority for the proposition that a natural interruption of navigation in a river, in its general character navigable, does not change its legal characteristics in that respect at the point of interruption, and that riparian owners are not at such point presumed to own the bed *ad medium filum*: *Re State Reservation at Niagara Falls* (1884), 16 Abbott's N. C. (N.Y.) 159, 187; 37 Hun 507, 547-8. [Emphasis added.]

Similarly, Henry J. in *Re Coleman and Attorney-General for Ontario* (1983), 143 D.L.R. (3d) 608 (Ont. H.C.), at p. 614 (cited with approval by Wallace J.A. at the Court of Appeal) found that:

Interruptions to navigation such as rapids on an otherwise navigable stream which may, by improvements such as canals be readily circumvented, do not render the river or stream non-navigable in law at those points. . . .

Finally, La Forest in his book *Water Law in Canada — The Atlantic Provinces*, *supra*, states at p. 181:

Thus the whole of a river or lake may be regarded as navigable even though at some point navigation may be impossible or possible only for small craft by reason of rapids or shoals.

The Bulkley River is navigable both above and below the Moricetown Canyon and should be considered a navigable river. The fact that it is not navigable at the Moricetown gorge cannot alter that conclusion. Since the *ad medium filum aquae* presumption has no application to navigable rivers in British Columbia, it has no application to the Bulkley River in its passage through the Moricetown Reserve. On this basis alone it can be concluded that reserve does not include the river.

l'heure actuelle impossible là où tombent les chutes dans le bras est de la rivière Winnipeg, les ingénieurs affirment qu'un canal pourrait très bien permettre de vaincre cet obstacle naturel. Le cours d'eau n'est-il pas, même à cet endroit, navigable *in posse*? Je crois que oui.

Il existe des décisions permettant d'avancer qu'un obstacle naturel à la navigation sur une rivière qui, de par sa nature générale, est navigable, ne change pas le caractère juridique de cette rivière à l'endroit de l'interruption, et que les propriétaires riverains ne sont pas, à cet endroit, présumés être les propriétaires du lit *ad medium filum*: *Re State Reservation at Niagara Falls* (1884), 16 Abbott's N. C. (N.Y.) 159, 187; 37 Hun 507, 547 et 548. [Je souligne.]

De même, le juge Henry dans l'arrêt *Re Coleman and Attorney-General for Ontario* (1983), 143 D.L.R. (3d) 608 (H.C. Ont.), à la p. 614 (cité et approuvé par le juge Wallace de la Cour d'appel), a conclu ainsi:

[TRADUCTION] Les obstacles à la navigation — des rapides, par exemple — sur un cours d'eau par ailleurs navigable, qui peuvent être facilement contournés au moyen d'améliorations — comme des canaux — ne rendent pas ce cours d'eau non navigable, au sens juridique, à ces endroits. . .

Enfin, La Forest, dans son ouvrage intitulé *Water Law in Canada — The Atlantic Provinces*, *op. cit.*, dit ceci, à la p. 181:

[TRADUCTION] Ainsi, l'ensemble de la rivière ou du lac peut être jugé navigable même si, à un certain endroit, la navigation peut se révéler impossible ou possible uniquement au moyen de petites embarcations en raison de la présence de rapides ou de hauts-fonds.

La rivière Bulkley étant navigable tant en amont qu'en aval du canyon de Moricetown, elle devrait être considérée comme une rivière navigable. Sa non-navigabilité à la gorge de Moricetown ne peut modifier cette conclusion. Étant donné que la présomption *ad medium filum aquae* ne s'applique pas aux rivières navigables en Colombie-Britannique, elle ne s'applique donc pas à la partie de la rivière Bulkley qui traverse la réserve de Moricetown. Pour ce seul motif, il est possible de conclure que la réserve n'inclut pas la rivière.

The Fishery is Separate from Ownership of the Bed

La pêche est dissociable de la propriété du lit

75 The appellant contends that the *ad medium filum aquae* presumption became applicable in British Columbia on November 18, 1858, when the common law of England was explicitly adopted as the law except to the extent that it was inapplicable. Accordingly, it is argued that when the Crown granted land to the Indians it implicitly included the title to the river *ad medium filum aquae*. Where, as in this case, the river is bordered on both sides by the reserve, the principle would act to give title to the entire river bed to the reserve. Accordingly, the river would be "on the reserve", subject only to the Crown's ability to demonstrate that such a grant was not intended. I cannot accept that position.

L'appelant prétend que la présomption *ad medium filum aquae* est devenue applicable en Colombie-Britannique le 18 novembre 1858, date à laquelle la common law d'Angleterre a été explicitement adoptée comme étant le droit en vigueur sauf dans la mesure où elle était inapplicable. Par conséquent, on plaide que, lorsque la Couronne a attribué des terres aux Indiens, elle a implicitement inclus le titre sur la rivière, *ad medium filum aquae*. Dans les cas où, comme en l'espèce, la rivière est bordée des deux côtés par la réserve, l'application du principe aurait pour effet de donner à la réserve le titre sur le lit entier de la rivière. Ainsi, la rivière se trouverait «on the reserve» («dans la réserve»), à moins seulement que la Couronne réussisse à démontrer qu'elle n'avait pas l'intention d'accorder un tel titre. Je ne peux souscrire à cette thèse.

76 To understand why the presumption does not apply requires a review of the common law rules concerning water. H. J. W. Coulson and Urquhart A. Forbes in *The Law relating to Waters* (2nd ed. 1902), at p. 100, explain the application of the *ad medium filum aquae* presumption in the following terms:

Afin de bien comprendre pourquoi la présomption ne s'applique pas, il convient d'examiner les règles de common law relatives aux eaux. H. J. W. Coulson et Urquhart A. Forbes dans *The Law relating to Waters* (2^e éd. 1902), décrivent ainsi l'application de la présomption *ad medium filum aquae*, à la p. 100:

When the lands of two conterminous proprietors are separated from each other by a running non-tidal stream of water, each proprietor is *primâ facie* owner of the soil of the *alveus*, or bed of the river, *ad medium filum aquae*. The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty Where the same person is the proprietor of the ground on both sides of the stream, he is *primâ facie* the proprietor of the whole of the channel. . . .

[TRADUCTION] Les propriétaires de biens-fonds adjacents, séparés par un cours d'eau sans marée, sont jusqu'à preuve du contraire propriétaires du sol de l'*alveus*, ou lit de la rivière, *ad medium filum aquae*. Le sol de l'*alveus*, n'est pas la propriété commune des propriétaires, mais chacun d'eux détient plutôt sa part individuellement [. . .] Lorsque les biens-fonds se trouvant de chaque côté d'un cours d'eau appartiennent à la même personne, celle-ci est, jusqu'à preuve du contraire, propriétaire de tout le lit. . . .

The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river, *usque ad medium filum*, should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question, which negative the possibility of such having been the intention.

La présomption voulant que, dans les cas où un acte de transfert indique que les terres visées sont délimitées par une rivière ce fait témoigne de l'intention de transférer également le lit de la rivière *usque ad medium filum*, peut être repoussée en apportant la preuve de circonstances relatives aux biens-fonds en question réfutant que telle ait pu être l'intention.

One of the rights that flow from this possession of the bed is the right to the fishery. This is explained by the authors, at p. 104, in the following terms:

The right of fishery being a right of property, the presumption is that each owner of land abutting on a non-tidal stream has the right of fishing in front of his land, *usque ad medium filum aquae*; and where a man possesses land on both sides of the water, he has the sole right of fishing.

However, the authors go on to explain that this right of fishery is severable from the title, with the result that the right can be granted to another, or reserved from a grant. As Wightman J. stated in *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732, 122 E.R. 274, at p. 278 E.R.:

... it is clear upon the authorities that the soil of land covered with water may, together with the water and the right of fishery therein, be specially appropriated to a third person, whether he have land or not on the borders thereof or adjacent thereto.

This point is explained very clearly by La Forest in *Water Law in Canada — The Atlantic Provinces*, *supra*, at p. 236, where he states:

Though the right of fishing is usually enjoyed as an incident to the bed, it may of course be transferred to others by lease or licence. Moreover it can be granted, or reserved from a grant, and exist as a separate property right severed from the ownership of the soil.

Clearly the fishery, even where the *ad medium filum aquae* presumption otherwise applies, can be severed from the ownership of the river bed. The evidence presented clearly establishes that there was no intent on the part of the Crown to grant an exclusive fishery. As a result, any grants of title to land adjacent to rivers, navigable or otherwise, must be taken as excluding the fishery, even if it was accepted that the *ad medium filum aquae* presumption was otherwise applicable. The conse-

Un des droits qui découle de la possession du lit est le droit de pêche. Les auteurs expliquent ce droit dans les termes suivants, à la p. 104:

[TRADUCTION] Comme le droit de pêche est un droit de propriété, suivant la présomption, chaque propriétaire d'un bien-fonds attenant à un cours d'eau sans marée a le droit de pêcher à la hauteur de son bien-fonds, *usque ad medium filum aquae*; de plus, si la même personne est propriétaire des biens-fonds se trouvant des deux côtés du cours d'eau, elle possède alors en exclusivité le droit de pêche.

Cependant, les auteurs poursuivent leurs explications en disant que, comme le droit de pêche est séparable du titre, il peut être accordé à quelqu'un d'autre ou encore être réservé dans un acte de transfert. Ainsi que le juge Wightman l'a déclaré dans *Marshall c. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732, 122 E.R. 274, à la p. 278 E.R.:

[TRADUCTION] ... il est évident, à la lumière de la jurisprudence et de la doctrine, que le sol de terres submergées, ainsi que l'eau et le droit d'y pêcher, est susceptible d'appropriation particulière par un tiers, que celui-ci possède ou non des terres bordant le sol en question ou adjacentes à celui-ci.

G. V. La Forest a très clairement expliqué ce point dans *Water Law in Canada — The Atlantic Provinces*, *op. cit.*, à la p. 236, où il écrit:

[TRADUCTION] Bien que l'on jouisse généralement du droit de pêche en tant qu'attribut de la propriété du lit du cours d'eau, ce droit peut évidemment être transféré à des tiers au moyen d'un bail ou d'un permis. De plus, il peut être accordé ou réservé en cas de transfert, et exister en tant que droit de propriété distinct, disjoint de la propriété du sol.

Il va de soi que, même dans les cas où la présomption *ad medium filum aquae* s'applique par ailleurs, la pêcherie peut être disjointe de la propriété du lit de la rivière. La preuve présentée établit clairement que la Couronne n'avait pas l'intention d'accorder de pêcherie exclusive. En conséquence, il faut considérer que la pêcherie n'est pas comprise en cas de cession de tout titre sur un bien-fonds adjacent à une rivière, navigable ou non, même s'il était admis que la présomption

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quence for this appellant is obvious. Even if the *ad medium filum aquae* should make the soil of the river bed part of the reserve, the explicit reservation of the fishery from the grant makes any by-law with respect to the fishery *ultra vires* the band's authority.

The Presumption is Rebutted

Any intent to grant the bed of the river has been conclusively rebutted. It will be remembered that the acreage of the reservation indicates an intention to exclude the river. In addition, the retention of the fishery by the Crown leads to the presumption that the bed of the river was retained by the Crown. As Coulson and Forbes point out at p. 368 in *The Law relating to Waters, supra*, the cases of *Marshall v. Ulleswater Steam Navigation Co., supra*, and *Holford v. Bailey* (1846), 8 Q.B. 1000, 115 E.R. 1150 (reversed in the Exchequer Chamber on other grounds (1850), 13 Q.B. 426, 116 E.R. 1325), stand for the proposition that:

No doubt the allegation of a several fishery, *primâ facie*, imports ownership of the soil, though they are not necessarily united.

ad medium filum aquae était par ailleurs applicable. La conséquence pour l'appelant en l'espèce est évidente. Même si la présomption *ad medium filum aquae* avait pour effet de faire du lit de la rivière une partie de la réserve, la réservation explicite de la pêche dans le transfert rend tout règlement administratif de pêche *ultra vires* des pouvoirs de la bande.

La présomption est réfutée

L'existence de toute intention d'accorder le lit de la rivière a été réfutée de façon décisive. On se rappellera que la superficie de la réserve témoigne de l'intention d'exclure la rivière de celle-ci. En outre, le fait que la Couronne conserve la pêche fait naître la présomption qu'elle a également conservé le lit de la rivière. Comme le soulignent Coulson et Forbes, dans *The Law relating to Waters, op. cit.*, à la p. 368, les arrêts *Marshall c. Ulleswater Steam Navigation Co.*, précité, et *Holford c. Bailey* (1846), 8 Q.B. 1000, 115 E.R. 1150 (infirmer par la Chambre de l'Échiquier pour d'autres motifs (1850), 13 Q.B. 426, 116 E.R. 1325), appuient la thèse suivante:

[TRADUCTION] Il ne fait aucun doute que l'existence d'une pêche distincte implique, à première vue, la propriété du sol, même si ces deux éléments ne sont pas nécessairement réunis.

En conséquence, il semble que les règles de la common law, telles qu'elles existaient à l'époque de l'attribution de la réserve, portent à conclure que la présomption que le titre sur le lit de la rivière serait transmis du fait de l'attribution de la rive a été réfutée. Il ne fait pas de doute que la Couronne avait l'intention de conserver la possession de la pêche. Par conséquent, il est impossible de présumer que l'attribution de la rive incluait le titre sur le lit de la rivière *ad medium filum aquae*. Au contraire, suivant la présomption, le titre sur la pêche suit le titre sur le lit de la rivière. L'appelant n'a pas réussi à démontrer quelque intention ou action de la Couronne réfutant cette présomption.

It may now be helpful to summarize what I consider to be the relevant evidence and the applicable principles of law which determine the first issue.

1. The Crown in all of its manifestations was consistently clear in its statements that no exclusive fishery should be granted to Indian bands in British Columbia. This is consistent with the fact that the Crown had no power to grant an exclusive fishery, and that after Confederation this would involve the grant of provincial property.
2. The correct test for an assessment of navigability is to consider the entire length of the river. A section of the river which is non-navigable in fact does not necessarily render either the river as a whole or that section non-navigable in law if it is found to be substantially navigable throughout. The Bulkley River is navigable both above and below the Moricetown Canyon, and is therefore a navigable river.
3. The presumption *ad medium filum aquae* does not apply on the facts of this case because:
 - a. Correctly considered the river is navigable, and the application of *ad medium filum aquae* to navigable rivers was not adopted into the common law of British Columbia since it was unsuited to local conditions.
 - b. Fishing as a right can be the subject of a separate grant or reservation. On the facts of this case it is clear that the fishery was reserved from the allotment.

It follows that the band by-law does not apply to the Bulkley River.

It is now necessary to determine whether the appellant's s. 35 rights were infringed by the licensing requirement of the Department of Fisheries and Oceans. If they were not, it still must be considered whether the conditions of the licence

Il pourrait être utile, à ce moment-ci, de résumer ce que j'estime être les éléments de preuve pertinents et les principes de droit applicables pour trancher la première question:

1. Chaque fois qu'elle s'est exprimée, la Couronne a toujours clairement indiqué qu'aucune pêche exclusive ne devait être accordée aux bandes indiennes en Colombie-Britannique. Cette constatation est compatible avec le fait que la Couronne n'avait pas le pouvoir d'accorder de pêche exclusive, et qu'après la Confédération, une telle mesure aurait impliqué la cession d'un bien provincial.
2. Le bon critère pour apprécier la navigabilité d'une rivière consiste à considérer ce cours d'eau dans son ensemble. Si une partie de la rivière n'est pas navigable dans les faits, cela n'a pas pour effet de rendre l'ensemble de la rivière ou la partie en question non navigable au sens juridique, s'il est jugé que la rivière est en grande partie navigable sur toute sa longueur. La rivière Bulkley étant navigable tant en amont qu'en aval du canyon de Moricetown, elle est donc une rivière navigable.
3. Compte tenu des faits de l'espèce, la présomption *ad medium filum aquae* ne s'applique pas, et ce pour les raisons suivantes:
 - a. Suivant l'examen approprié, la rivière est navigable; de plus, le principe de l'application de la présomption *ad medium filum aquae* aux rivières navigables n'a pas été adopté dans la common law de la Colombie-Britannique puisque cette règle n'était pas adaptée aux conditions locales.
 - b. Le droit de pêche peut faire l'objet d'une attribution ou réservation distincte. Il ressort clairement des faits de l'espèce que la pêche a été réservée au moment de l'attribution.

Il s'ensuit que le règlement administratif de la bande ne s'applique pas à la rivière Bulkley.

Il est maintenant nécessaire de décider si l'obligation d'obtenir un permis qui est imposée par le ministère des Pêches et des Océans a porté atteinte aux droits garantis à l'appelant par l'art. 35. Dans la négative, il faut ensuite se demander si les con-

infringe the s. 35 rights and if so whether they can be justified.

Was the Appellant's Section 35 Right to Fish for Food Violated by the Licensing Requirement of the Department of Fisheries and Oceans?

Does Licensing Constitute a *Prima Facie* Violation of Section 35?

The appellant contends that the mere requirement of a licence constitutes a *prima facie* infringement of his s. 35 aboriginal rights. This section of the *Constitution Act, 1982* provides:

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

It was held in *Sparrow, supra*, at p. 1112, that the onus of establishing a *prima facie* infringement of an aboriginal right rests on the claimant of that right.

The first step in this process is to establish the existence and the extent of the aboriginal right. I am satisfied that the appellant has successfully demonstrated an aboriginal right to fish for food and ceremonial purposes. The Summary Conviction Appeal Judge, Millward J., specifically found in oral reasons from judgment dated July 12, 1990 that:

... the aboriginal right includes the right to choose the period of time, whether early in the year when the ice is still in the river, or after the end of August, up to a date in September, when steelhead are normally taken, the right to select persons intended to be the recipients of the fish for ultimate consumption, the right to select the purpose for which the fish is to be used, that is, for food or ceremonial or religious purposes, and the method or manner of fishing. ...

(*R. v. Nikal*, [1991] 1 C.N.L.R. 162, at p. 167.)

ditions du permis portent atteinte à ces droits et, si oui, si cette atteinte peut être justifiée.

L'obligation d'obtenir un permis qui est imposée par le ministère des Pêches et des Océans a-t-elle porté atteinte au droit de pêcher pour se nourrir garanti à l'appelant par l'art. 35?

La délivrance de permis constitue-t-elle à première vue une atteinte à l'article 35?

L'appelant prétend que le seul fait d'exiger un permis constitue à première vue une atteinte aux droits ancestraux que lui garantit l'art. 35. Cette disposition de la *Loi constitutionnelle de 1982* prévoit ceci:

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Dans l'arrêt *Sparrow*, précité, à la p. 1112, il a été jugé qu'il incombe à la personne revendiquant un droit ancestral d'établir qu'il a été porté atteinte à première vue à ce droit.

La première étape de cette analyse consiste à établir l'existence et la portée du droit ancestral. Je suis convaincu que l'appelant a réussi à démontrer l'existence d'un droit ancestral de pêcher à des fins alimentaires et rituelles. Le juge d'appel Millward des poursuites sommaires a explicitement conclu ainsi, dans un jugement oral rendu le 12 juillet 1990:

[TRADUCTION] ... le droit ancestral inclut le droit de choisir la période de pêche, que ce soit au début de l'année lorsque la rivière est encore gelée, ou après le mois d'août, jusqu'à une date donnée au mois de septembre, lorsque les truites arc-en-ciel sont normalement prises, le droit de désigner les personnes à qui on entend remettre le poisson pour qu'elles le consomment en bout de ligne, le droit de choisir à quelles fins le poisson servira — savoir à des fins alimentaires, rituelles ou religieuses — et la façon de pêcher ou les méthodes utilisées. ...

(*R. c. Nikal*, [1991] 1 C.N.L.R. 162, à la p. 167.)

This, based on the evidence, is an appropriate finding as to the scope of the aboriginal rights of the Wet'suwet'en people with respect to the fishery

À la lumière de la preuve, il s'agit là d'une conclusion appropriée pour ce qui est de la portée des droits ancestraux du peuple Wet'suwet'en sur la

subject to one qualification. Specifically, the selection of the ultimate recipients of the fish is not an unqualified right. Rather, the evidence adduced went no farther than establishing that the appellant as a Wet'suwet'en had the right to provide to other members of the band those fish that are necessary for their personal food and ceremonial needs. I take no position as to whether the right extends beyond that.

I cannot accept Millward J.'s finding that the appellant has a right not to comply with the directions of the Department of Fisheries and Oceans. This finding is not supported by the evidence, nor is it sustainable in law. Moreover, this conclusion, if not conceded, was not seriously contested by the appellant.

With respect to licensing, the appellant takes the position that once his rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement. It is said that a licence by its very existence is an infringement of the aboriginal right since it infers that government permission is needed to exercise the right and that the appellant is not free to follow his own or his band's discretion in exercising that right.

This position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group is necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (C.A.), at p. 524, are per-

pêcherie, à une réserve près toutefois. En effet, le droit de décider quelles sont les personnes qui recevront le poisson en bout de ligne n'est pas un droit absolu. Au contraire, la preuve présentée a simplement permis d'établir que l'appelant, en tant que Wet'suwet'en, a le droit de fournir à d'autres membres de la bande le poisson nécessaire pour satisfaire leurs besoins alimentaires et rituels. Je n'exprime aucune opinion quant à la question de savoir si ce droit a une portée plus large.

Je ne peux souscrire à la constatation du juge Millward que l'appelant a le droit de ne pas se conformer aux ordres du ministère des Pêches et des Océans. Cette constatation n'est pas étayée par la preuve et elle n'est pas soutenable en droit. En outre, même si l'appelant n'a pas concédé ces conclusions, il ne les a pas sérieusement contestées.

En ce qui concerne le régime de délivrance de permis, l'appelant prétend que, une fois que l'existence de ses droits a été établie, tout ce qui en entrave ou en gêne l'exercice, ne serait-ce que de façon négligeable, constitue à première vue une atteinte. On affirme que l'existence même du permis porte atteinte au droit ancestral en ce qu'elle implique que la permission du gouvernement est nécessaire pour exercer ce droit, et que l'appelant n'est pas libre de s'en remettre au pouvoir discrétionnaire de la bande ou au sien pour l'exercer.

Cette thèse ne peut être fondée. Il a fréquemment été déclaré que les droits n'existent pas dans l'abstrait et que les droits d'un individu ou d'un groupe sont nécessairement limités par les droits d'autrui. La capacité d'exercer des droits individuels ou collectifs est nécessairement restreinte par les droits d'autrui. Le gouvernement doit, en dernier ressort, être capable d'établir ou de régir la façon dont ces droits devraient interagir. La liberté absolue d'exercer un droit, même un droit ancestral protégé par la *Charte* ou garanti par la Constitution, n'a jamais été reconnue ni voulue. L'article premier de la *Charte canadienne des droits et libertés* est peut-être la meilleure illustration de ce principe. La liberté absolue, sans restriction aucune, implique nécessairement la liberté de vivre en marge des lois. Un tel concept est inacceptable dans notre société. Sur ce point, les motifs du juge

suasive and convincing. He recognized the need for a balanced approach to limitations on treaty rights, stating:

... Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society.

93 This conclusion is consistent with the approach to interpreting s. 35 rights as set out in *Sparrow*, *supra*, at p. 1110:

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. [Emphasis added.]

94 This case provides an example of the wisdom of the reasoning referred to in *Sparrow* and *Agawa*. Here, the aboriginal right to fish must be balanced against the need to conserve the fishery stock. The existence of an aboriginal right to fish cannot automatically deny the ability of the government to set up a licensing scheme or program since the exercise of the right itself is dependant on the continued existence of the resource. The very right to fish would in time become meaningless if the government could not enact a licensing scheme which could form the essential foundation of a conservation program.

Blair dans l'arrêt *R. c. Agawa* (1988), 65 O.R. (2d) 505 (Ont.), à la p. 524, sont persuasifs et convainquants. Il y a reconnu la nécessité d'appliquer une analyse équilibrée en matière de restriction des droits issus de traités, déclarant ceci:

[TRADUCTION] ... les droits issus de traités des Indiens ne diffèrent pas de tous les autres droits reconnus par notre système juridique. L'exercice d'un droit par une personne ou un groupe est restreint par les droits d'autrui. Les droits n'existent pas dans l'abstrait et, dans l'exercice de tout droit, il faut trouver un juste équilibre avec les intérêts et les valeurs qui sous-tendent les droits d'autrui. Ce fait est reconnu à l'article premier de la *Charte canadienne des droits et libertés*, qui énonce que toute restriction des droits garantis par la Charte doit être justifiée comme étant raisonnable dans le cadre d'une société libre et démocratique.

Cette conclusion est compatible avec l'approche applicable pour interpréter les droits garantis par l'art. 35, qui a été formulée dans l'arrêt *Sparrow*, précité, à la p. 1110:

La reconnaissance constitutionnelle exprimée dans la disposition en cause permet donc, dans une certaine mesure, de contrôler la conduite du gouvernement et de limiter fortement le pouvoir du législateur. Bien qu'elle ne constitue pas une promesse d'immunité contre la réglementation gouvernementale dans une société qui, au XX^e siècle, devient de plus en plus complexe et interdépendante et où il est nécessaire de protéger et de gérer les ressources épuisables, cette reconnaissance représente un engagement important de la part de la Couronne. [Je souligne.]

La présente affaire illustre bien la sagesse du raisonnement énoncé dans les arrêts *Sparrow* et *Agawa*. En l'espèce, il faut mettre en équilibre le droit ancestral de pêcher et la nécessité de conserver les ressources halieutiques. L'existence d'un droit ancestral de pêcher ne peut automatiquement priver le gouvernement de la capacité de mettre sur pied un régime ou programme de délivrance de permis, car l'exercice du droit lui-même dépend de la survie de ces ressources. Le droit même de pêcher perdrait avec le temps tout son sens si le gouvernement ne pouvait adopter un régime de délivrance de permis susceptible de constituer l'assise essentielle d'un programme de conservation.

It must also be remembered that aboriginal rights, by definition, can only be exercised by aboriginal peoples. Moreover, the nature and scope of aboriginal rights will frequently be dependant upon membership in particular bands who have established particular rights in specific localities. In this context, a licence may be the least intrusive way of establishing the existence of the aboriginal right for the aboriginal person as well as preventing those who are not aboriginals from exercising aboriginal rights.

The situation presented in this case pertaining to s. 35 aboriginal rights is analogous to the mobility rights guaranteed under s. 6(1) of the *Charter*. That section guarantees the right of every citizen of Canada to enter, remain in and leave Canada. This right, by definition, is limited to citizens of Canada, and its enforcement requires some means of identifying Canadian citizens. Accordingly, a requirement that citizens present a passport to enter Canada would not be an infringement of their mobility rights since the passport serves to identify those who can exercise the rights of Canadian citizens.

This is not to say that there are not conditions of the licence which could constitute infringements of s. 35 rights. Even a simple licence could constitute an infringement if it could only be obtained with great difficulty or expense. The test for this assessment has been set out clearly in *Sparrow*, beginning at p. 1111:

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1).

The questions which must be resolved in order to determine whether a *prima facie* infringement has occurred are set out at p. 1112:

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be

Il faut également se rappeler que, par définition, les droits ancestraux ne peuvent être exercés que par les peuples autochtones. En outre, la nature et la portée des droits ancestraux dépendent fréquemment de l'appartenance à une bande particulière ayant établi l'existence de certains droits dans une localité donnée. Dans ce contexte, un permis peut constituer le moyen le moins attentatoire d'établir l'existence du droit ancestral en faveur des autochtones et d'empêcher les non-autochtones d'exercer des droits ancestraux.

La situation qui se présente en l'espèce relativement aux droits ancestraux protégés par l'art. 35 est analogue à la liberté de circulation garantie au par. 6(1) de la *Charte*. Ce paragraphe garantit à tout citoyen canadien le droit de demeurer au Canada, d'y entrer ou d'en sortir. Par définition, ce droit est limité aux citoyens canadiens et, pour en assurer le respect, il est nécessaire d'appliquer certains moyens permettant d'identifier les citoyens canadiens. Par conséquent, exiger des citoyens qu'ils présentent leur passeport pour entrer au Canada ne serait pas une atteinte à leur liberté de circulation, puisque le passeport sert à identifier ceux qui peuvent exercer les droits appartenant aux citoyens canadiens.

Cela ne revient pas à dire que l'une ou l'autre des conditions prévues par le permis ne pourrait pas constituer une atteinte aux droits garantis par l'art. 35. Même un simple permis pourrait constituer une atteinte, s'il n'est possible de l'obtenir qu'à grands frais ou avec beaucoup de difficultés. Le critère applicable pour apprécier l'existence d'une telle atteinte a été énoncé clairement dans l'arrêt *Sparrow*, à partir de la p. 1111:

La première question à poser est de savoir si la loi en question a pour effet de porter atteinte à un droit ancestral existant. Dans l'affirmative, elle constitue une violation à première vue du par. 35(1).

Les questions qu'il faut trancher pour déterminer s'il y a atteinte à première vue sont formulées à la p. 1112:

Pour déterminer si les droits de pêche ont subi une atteinte constituant une violation à première vue du par. 35(1), on doit poser certaines questions. Premièrement,

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asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

la restriction est-elle déraisonnable? Deuxièmement, le règlement est-il indûment rigoureux? Troisièmement, le règlement refuse-t-il aux titulaires du droit le recours à leur moyen préféré de l'exercer? C'est au particulier ou au groupe qui conteste la mesure législative qu'il incombe de prouver qu'il y a eu violation à première vue.

99 Applying these tests to the facts of this case reveals that the licence itself, as distinct from its conditions, does not constitute an infringement of s. 35(1). The simple requirement of a licence is not in itself unreasonable; rather, it is necessary for the exercise of the right itself. Accordingly the first question, is licensing unreasonable, must be answered in the negative.

L'application de ces critères aux faits de l'espèce révèle que le permis lui-même, par opposition aux conditions dont il est assorti, ne constitue pas une atteinte au par. 35(1). La simple obligation d'être titulaire d'un permis n'est pas en soi déraisonnable, mais au contraire nécessaire à l'exercice du droit lui-même. En conséquence, il faut répondre par la négative à la première question, soit celle de savoir si la délivrance de permis est une mesure déraisonnable.

100 The second question is whether the regulation imposes an undue hardship. The term "undue hardship" implies that a situation exists which imposes something more than mere inconvenience. It follows that a licence which is freely and readily available cannot be considered an undue hardship. The situation might be different if, for example, the licence could only be obtained at locations many kilometres away from the reserve and accessible only at great inconvenience or expense.

La seconde question consiste à déterminer si le règlement est indûment rigoureux. Pour qu'une situation soit «indûment rigoureuse», elle doit causer plus qu'un simple inconvénient. Il s'ensuit qu'un permis gratuit et facile à obtenir ne peut être considéré comme étant une mesure indûment rigoureuse. La situation pourrait être différente si, par exemple, il n'était possible de se procurer le permis que dans des endroits situés à de nombreux kilomètres de la réserve et accessibles uniquement à grands frais ou au prix de sérieux inconvénients.

101 The final question is whether the right holder is denied the preferred means of exercising the right. The licence by itself, without its conditions, cannot affect the preferred means of exercising the right since at its most basic it is nothing more than a form of identification. Requiring identification so as to assist fisheries officers in distinguishing rights holders from non-rights-holders cannot be an interference with the preferred means of exercising the right. It follows that the licence itself, without considering its conditions, cannot be said to constitute an infringement of the aboriginal right to fish. Thus the mere requirement of a licence in the circumstances of this case does not amount to an infringement of the appellant's s. 35 rights.

La dernière question est de savoir si le règlement prive le titulaire du droit en cause de la possibilité de recourir à ses moyens préférés pour l'exercer. Le permis lui-même, indépendamment de ses conditions, ne peut gêner l'exercice du droit par les moyens préférés puisque, essentiellement, il n'est rien d'autre qu'un moyen d'identification. Le fait d'obliger les pêcheurs à s'identifier, de façon à permettre aux agents des pêches de distinguer ceux qui sont titulaires du droit de ceux qui ne le sont pas, ne peut constituer une entrave à l'exercice de ce droit par les moyens préférés. Il s'ensuit qu'il est impossible d'affirmer que, indépendamment de ses conditions, le permis lui-même constitue une atteinte au droit ancestral de pêcher. Ainsi, dans les circonstances de l'espèce, le simple fait d'exiger un permis ne constitue pas une atteinte aux droits garantis à l'appelant par l'art. 35.

Indeed as a general rule it can be said that the simple requirement of a licence will seldom constitute a *prima facie* infringement of the s. 35 aboriginal right to fish. If the salmon fishery is to survive, there must be some control exercised by a central authority. It is the federal government which will be required to manage the fishery and see to the improvement and the increase of the stock of that fishery. It is for the federal government to ensure that all users who are entitled to partake of the salmon harvest have the opportunity to obtain an allotment pursuant to the scheme of priorities set out in *Sparrow*. Any system of control must commence with a licensing scheme. It is through the issuing of licences to the various type of users that the department will be able to know at least the numbers of fishers and the categories of those that are fishing. This will provide the first rough basis from which the department can make the estimates necessary to manage the fishery resource. The licence is the essential first step in the preservation and management of this fragile resource. This need to manage the stock goes far further than simply preventing the elimination of the salmon. Management imports a duty to maintain and increase reasonably the resource. The licence assists this duty by providing a means of identification that helps to ensure that only those permitted to do so are fishing in the authorized areas. It serves as a means of control by eliminating those that do not have a licence from fishing.

The Specific Terms of this Licence

Although licensing by itself will not as a rule constitute a *prima facie* infringement of the aboriginal right to fish, the government will be required to justify those conditions of a licence which on their face infringe the s. 35 right to fish. The 1986 licence at issue in this case contains several conditions. Some of these printed on the licence itself are mandatory. Others are completed

De fait, il est possible d'affirmer que, en règle générale, le seul fait d'exiger l'obtention d'un permis constituera rarement une atteinte à première vue au droit ancestral de pêche garanti par l'art. 35. Pour que la pêche au saumon survive, il faut qu'une autorité centrale exerce une certaine forme de surveillance. C'est au gouvernement fédéral qu'il incombera de gérer la pêcherie et de voir à l'amélioration et à l'augmentation des stocks de poisson dans celle-ci. Il appartient au gouvernement fédéral de faire en sorte que tous les utilisateurs ayant droit à une part de la récolte de saumon aient la possibilité de l'obtenir, conformément à l'ordre de priorité établi dans l'arrêt *Sparrow*. Tout mécanisme de surveillance s'appuie normalement sur un régime de délivrance de permis. La délivrance de permis aux différentes catégories d'utilisateurs permet au ministère de savoir à tout le moins combien il y a de pêcheurs dans ces catégories. Par ce moyen, le ministère recueille les données de base à partir desquelles il peut faire les estimations nécessaires à la gestion des ressources de la pêcherie. Le permis est la première étape essentielle en vue de la conservation et de la gestion de cette ressource fragile. La nécessité de gérer les stocks exige beaucoup plus que le simple fait d'empêcher la disparition du saumon. En effet, la gestion emporte l'obligation de maintenir les stocks de cette ressource et de les accroître raisonnablement. Le permis aide à s'acquitter de cette obligation en offrant un moyen d'identification qui permet de veiller à ce que seules les personnes autorisées à le faire pêchent dans les endroits prévus. Il sert de mécanisme de surveillance en empêchant celles qui ne sont pas titulaires d'un permis de pêche de pratiquer cette activité.

Les conditions particulières du permis en question

Bien que, en règle générale, la délivrance de permis ne constitue pas en soi une atteinte à première vue au droit ancestral de pêcher, le gouvernement est tenu de justifier les conditions prévues par un permis qui, à la simple lecture de leur texte, portent atteinte au droit de pêche garanti par l'art. 35. Le permis de 1986, en litige dans le présent cas, comporte plusieurs conditions. Certaines des

by the issuing fishery officer and are discretionary. Of the mandatory conditions printed on the face of the licence, some are clearly *prima facie* infringements of the aboriginal right of the appellant as properly found by the courts below. The infringing conditions are:

- (i) the restriction of fishing to fishing for food only;
- (ii) notes 4 and 5 of the licence, which provide:

- 4. Fishing Time Subject to Change by Public Notice.
- 5. Indian Food Fishing before July 1st and after September 30th must be licenced by the Provincial Fish & Wildlife Conservation Officer.

- (iii) the restriction to fishing for the fisher and his family only;
- (iv) the restriction to fishing for salmon only.

104 These conditions are *prima facie* infringements of the appellant's aboriginal rights, which were specifically and correctly found to include:

- (i) the right to determine who within the band will be the recipients of the fish for ultimate consumption;
- (ii) the right to select the purpose for which the fish will be used, i.e. food, ceremonial, or religious purposes;
- (iii) the right to fish for steelhead;
- (iv) the right to choose the period of time to fish in the river.

Since those conditions of the licence set out above clearly impinge upon these aspects of the appel-

conditions figurant sur le permis ont un caractère obligatoire, alors que d'autres, qui y sont ajoutées par l'agent des pêches qui délivre le permis, ont un caractère discrétionnaire. Parmi les conditions obligatoires figurant sur le permis certaines sont clairement des atteintes à première vue au droit ancestral de l'appellant, comme l'ont à juste titre conclu les juridictions inférieures. Les conditions attentatoires sont les suivantes:

- (i) la pêche ne peut être pratiquée qu'à des fins alimentaires;
- (ii) les remarques 4 et 5 figurant sur le permis, qui sont rédigées ainsi:

[TRANSDUCTION]

- 4. La période de pêche peut être modifiée par avis public.
- 5. Les Indiens qui pratiquent la pêche à des fins alimentaires entre le 30 septembre et le 1^{er} juillet doivent détenir un permis délivré par l'agent provincial de conservation de la faune et du poisson.

- (iii) le pêcheur ne peut pratiquer la pêche que pour lui-même et sa famille;
- (iv) seule la pêche au saumon peut être pratiquée.

Ces conditions constituent à première vue des atteintes aux droits ancestraux de l'appellant, qui ont à juste titre été spécifiquement définis comme incluant les aspects suivants:

- (i) le droit de désigner les membres de la bande qui recevront le poisson pour le consommer en bout de ligne;
- (ii) le droit de décider à quelles fins sera utilisé le poisson, savoir à des fins alimentaires, rituelles ou religieuses;
- (iii) le droit de pêcher la truite arc-en-ciel;
- (iv) le droit de décider à quel moment pêcher dans la rivière.

Comme les conditions du permis décrites précédemment empiètent clairement sur ces aspects des

lant's s. 35 rights, they must constitute *prima facie* infringements.

In addition, there are other terms of the licence which could be infringements if they contradicted the appellant's aboriginal rights. These terms provide for:

- (i) the prescribed waters in which fishing can take place;
- (ii) the type of gear which can be used;
- (iii) the fishing times and days.

With respect to these conditions, whether they will constitute an infringement depends on whether the particular conditions written in by the fishery officer contradict the appellant's s. 35 rights. I would note that Millward J. did find that the appellant's aboriginal rights include the right to determine when fishing will occur and the method and manner of fishing. Accordingly, these conditions may, depending on their terms, infringe the appellant's aboriginal rights.

There was little or no argument directed to the other conditions attached to the licence. Accordingly, I have not reached any conclusions nor made any comments concerning them.

Before turning to the issue of justification, I must address the respondent's argument that these conditions are valid since they were not enforced. I cannot accept this argument. It has long been recognized that the holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of the right. That submission cannot therefore be accepted. See for example *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 103-4. Indeed, counsel for the respondent conceded that there might be some problems with the conditions that were attached to the 1986 licence and reserved his strongest submissions for the position that the requirement of a

droits garantis à l'appelant par l'art. 35, elles doivent constituer à première vue des atteintes à ces droits.

En outre, le permis est assorti d'autres conditions qui pourraient être attentatoires si elles entraînent en conflit avec les droits ancestraux de l'appelant. Ces conditions portent sur les aspects suivants:

- (i) la désignation des eaux où la pêche peut être pratiquée;
- (ii) le type d'engins de pêche pouvant être utilisés;
- (iii) les jours et les heures de pêche.

En ce qui concerne ces conditions, la question de savoir si elles constitueront une atteinte dépend de celle de savoir si les conditions particulières inscrites par l'agent des pêches entrent en conflit avec les droits garantis à l'appelant par l'art. 35. Je tiens à souligner que le juge Millward a bel et bien conclu que les droits ancestraux de l'appelant incluent celui de choisir à quel moment la pêche sera pratiquée, ainsi que la façon de le faire et les méthodes qui seront utilisées. Par conséquent, ces conditions peuvent, selon leur libellé, porter atteinte aux droits ancestraux de l'appelant.

Très peu d'arguments, voire aucun, ont été présentés relativement aux autres conditions assortissant le permis. En conséquence, je n'ai formulé ni observation ni conclusion à leur égard.

Avant d'aborder la question de la justification, je dois examiner l'argument de l'intimée que ces conditions sont valides puisqu'elles n'ont pas été appliquées. Je ne peux accepter cet argument. Il est depuis longtemps reconnu que le titulaire d'un droit constitutionnel n'a pas, pour jouir de la protection de ce droit, à compter que le ministère public fera montre de retenue dans l'exercice de son pouvoir discrétionnaire de poursuivre. Cet argument ne peut donc être retenu. Voir, par exemple, *R. c. Bain*, [1992] 1 R.C.S. 91, aux pp. 103 et 104. De fait, l'avocat de l'intimée a concédé qu'il était possible que les conditions dont était assorti le permis de 1986 soulèvent certains

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licence in itself did not constitute a *prima facie* infringement of the s. 35 aboriginal right to fish. In that submission he was correct.

Justification

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In *Sparrow*, *supra*, it was held, at p. 1113, that in considering whether an infringement of aboriginal or treaty rights could be justified, the following questions should be addressed sequentially:

First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized.

At p. 1114, the next step was set out in this way:

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin*, *supra*. That is, the 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 legislation or action in question can be justified.

Finally, at p. 1119, it was noted that further questions might also arise depending on the circumstances of the inquiry:

These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justifica-

problèmes, et il s'est surtout attaché à plaider que l'obligation de détenir un permis ne constitue pas en soi une atteinte à première vue au droit ancestral de pêche garanti par l'art. 35. Sur ce point, il avait raison.

Justification

Dans *Sparrow*, précité, à la p. 1113, il a été jugé que, pour déterminer s'il est possible de justifier une atteinte à des droits ancestraux ou issus de traités, il faut se poser les questions suivantes, dans l'ordre indiqué:

En premier lieu, il faut se demander s'il existe un objectif législatif régulier. À ce stade, la cour se demanderait si l'objectif visé par le Parlement en autorisant le ministre à adopter des règlements en matière de pêche est régulier. Serait également examiné l'objectif poursuivi par le ministère en adoptant le règlement en cause.

À la page 1114, l'étape suivante a été décrite ainsi:

Si on conclut à l'existence d'un objectif législatif régulier, on passe au second volet de la question de la justification. Ici, nous nous référons au principe directeur d'interprétation qui découle des arrêts *Taylor and Williams* et *Guerin*, précités. C'est-à-dire, l'honneur de Sa Majesté est en jeu lorsqu'Elle transige avec les peuples autochtones. Les rapports spéciaux de fiduciaire et la responsabilité du gouvernement envers les autochtones doivent être le premier facteur à examiner en déterminant si la mesure législative ou l'action en cause est justifiable.

Enfin, à la p. 1119, on a signalé que d'autres questions peuvent également se soulever, selon les circonstances de l'enquête:

Il s'agit notamment des questions de savoir si, en tentant d'obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation est prévue en cas d'expropriation et si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre. On s'attendrait certainement à ce que les peuples autochtones, traditionnellement sensibilisés à la conservation et ayant toujours vécu dans des rapports d'interdépendance avec les ressources naturelles, soient au moins informés relativement à la conception d'un régime approprié de réglementation de la pêche.

Nous ne nous proposons pas de présenter une énumération exhaustive des facteurs à considérer dans l'appré-

tion. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

It can, I think, properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test for justification. For example, in these last questions reasonableness will be a necessary aspect of the inquiry as to justification. For instance, when considering whether there has been as little infringement as possible, the infringement must be looked at in the context of the situation presented. So long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test. The mere fact that there could possibly be other solutions that might be considered to be a lesser infringement should not, in itself, be the basis for automatically finding that there cannot be a justification for the infringement. So too in the aspects of information and consultation the concept of reasonableness must come into play. For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement. This is no more than recognizing that regulations pertaining to conservation may have to be enacted expeditiously if a crisis is to be avoided. On occasion, strict and expeditious conservation measures will have to be taken if potentially catastrophic situations are to be avoided. The nature of the situation will have to be taken into account in assessing the conservation measures taken. The greater the urgency and the graver the situation the more reasonable strict measures may appear.

In the case at bar, the government did not adduce any evidence which might justify the conditions of the licence and accordingly has not met the onus which rests upon it. It follows that the government has failed to justify those conditions

de la justification. Qu'il suffise de souligner que la reconnaissance et la confirmation exigent que le gouvernement, les tribunaux et même l'ensemble des Canadiens soient conscients des droits des peuples autochtones et qu'ils les respectent.

À mon avis, on peut à juste titre inférer que le concept du caractère raisonnable fait partie intégrante du critère de justification établi dans l'arrêt *Sparrow*. Ainsi, dans ces dernières questions, le caractère raisonnable sera un aspect nécessaire de l'analyse de la justification. Par exemple, pour décider si on a porté atteinte le moins possible aux droits en cause, il faut examiner l'atteinte dans le contexte de la situation qui se présente. Dans la mesure où, compte tenu de ces circonstances, il est raisonnablement possible de considérer qu'on a porté atteinte le moins possible aux droits en cause, alors cette atteinte respecte le critère. Le simple fait qu'il pourrait y avoir d'autres solutions susceptibles d'être jugées moins attentatoires ne devrait pas en soi être une raison de conclure automatiquement que l'atteinte ne peut être justifiée. Le concept du caractère raisonnable doit également entrer en jeu pour ce qui est des aspects qui concernent l'information et la consultation. Par exemple, on ne peut se contenter de faire abstraction de la nécessité de diffuser des renseignements ni de l'existence d'une demande de consultation. Dans la mesure où tous les efforts raisonnables ont été déployés pour informer et consulter, on a alors satisfait à l'obligation de justifier. On ne fait là tout au plus que reconnaître la possibilité que des règlements en matière de conservation doivent être pris rapidement afin d'éviter une crise. En effet, des mesures de conservation strictes devront à l'occasion être prises de manière expéditive pour éviter des situations potentiellement catastrophiques. Il faudra tenir compte de la nature de la situation dans l'appréciation des mesures de conservation ainsi prises. Plus la situation sera grave et urgente, plus des mesures strictes paraîtront raisonnables.

En l'espèce, comme le gouvernement n'a présenté aucune preuve susceptible de justifier les conditions fixées par le permis, il ne s'est pas acquitté du fardeau qui lui incombe. Il n'a donc pas justifié les conditions que j'ai mentionnées et

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that I have referred to which infringe the appellant's aboriginal rights.

qui portent atteinte aux droits ancestraux de l'appelant.

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What then is the appropriate disposition of this appeal? It is clear that the federal government may validly require aboriginal people to obtain a fishery licence pursuant to s. 4(1) of the *British Columbia Fishery (General) Regulations*. It is also apparent that at least four of the mandatory conditions of the licence infringe the s. 35(1) rights of the appellant. The conditions make the 1986 licence invalid. They are an integral and essential part of the licence. They stipulate the conditions or terms upon which the licence is issued and the holder may use it. A licence holder is required to abide by the conditions. The licence is issued on that basis. The conditions are unconstitutional. As a result of the conditions the licence is invalid. It follows that there cannot be an offence created of fishing without a licence in 1986. The licence as issued in 1986 pursuant to s. 4(1) of the *British Columbia Fishery (General) Regulations* is as invalid as any other act or regulation which is found to be unconstitutional or *ultra vires*. It has always been held that an invalid act or regulation cannot create an offence. See for example *R. v. Sharma*, [1993] 1 S.C.R. 650, and *R. v. Bob* (1991), 88 Sask. R. 302 (C.A.). This dictates the result that there must be an acquittal.

En conséquence, quel doit être le dispositif du présent pourvoi? Il est évident que le gouvernement fédéral peut valablement obliger les autochtones à se procurer un permis de pêche conformément au par. 4(1) du *Règlement de pêche général de la Colombie-Britannique*. Il est également évident qu'au moins quatre des conditions obligatoires figurant sur le permis portent atteinte aux droits garantis à l'appelant par le par. 35(1). Ces conditions rendent le permis de 1986 invalide. Elles sont une partie intégrante et essentielle de celui-ci. Elles précisent les modalités de délivrance du permis et de son utilisation par le titulaire, qui doit se conformer à ces conditions. Le permis est délivré sur ce fondement. Les conditions en question sont inconstitutionnelles. En raison de ces conditions, le permis est invalide. Il s'ensuit qu'il ne peut y avoir eu création de l'infraction d'avoir pêché sans permis en 1986. Le permis délivré en 1986, conformément au par. 4(1) du *Règlement de pêche général de la Colombie-Britannique*, est invalide au même titre que le serait toute autre mesure législative ou réglementaire jugée inconstitutionnelle ou *ultra vires*. Il a constamment été jugé qu'une mesure législative ou réglementaire invalide ne peut créer d'infraction. Voir, par exemple, *R. c. Sharma*, [1993] 1 R.C.S. 650, et *R. c. Bob* (1991), 88 Sask. R. 302 (C.A.). Cette conclusion commande un acquittement.

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The licence and its integral conditions are so inextricably bound together that they cannot be considered separately. They are part of an indivisible whole. If I am correct in this conclusion it is not necessary to consider whether the conditions are in fact severable. If I am in error, however, on this I would hold that the conditions were not severable. Section 52 of the *Constitution Act, 1982* provides that:

Le permis et les conditions qui en font partie intégrante sont si inextricablement liés qu'ils ne peuvent être examinés séparément. Ils forment un tout indivisible. Si ma conclusion sur ce point est juste, il n'est alors pas nécessaire de décider si les conditions sont, en fait, dissociables. En revanche, si j'ai tort, je suis d'avis que les conditions n'étaient pas dissociables. L'article 52 de la *Loi constitutionnelle de 1982* prévoit ce qui suit:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

In *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 697. Lamer C.J. interpreted the section as meaning:

Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 518:

The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

In my view, when the purpose of this particular licence is considered together with the number of mandatory conditions which infringe the appellant's aboriginal rights, severability can be seen to be an unacceptable option. The invalid conditions are numerous. They are mandatory and form an integral part of the licence itself. The licence required that the conditions be met, which is to say that the holder of the licence was required to comply with its conditions. I cannot see that this licence can be severed from its invalid mandatory conditions. Further, from a practical point of view it is significant that the licences at issue were created and used before the government had the benefit of this Court's judgment in *Sparrow*. Crown counsel advised that as a result these particular licences are no longer in use. Accordingly, a declaration that the entire licence is invalid is appropriate both legally and practically.

There can be no question that an enactment that breaches the Constitution is invalid and cannot impose any enforceable duties. See for example *Norton v. Shelby County*, 118 U.S. 425 (1886), at

Dans l'arrêt *Schachter c. Canada*, [1992] 2 R.C.S. 679, à la p. 697, le juge en chef Lamer a interprété ainsi cette disposition:

Si la partie irrégulière d'une loi peut être isolée, il est conforme aux principes juridiques de déclarer inopérante seulement cette partie. On peut ainsi réaliser autant que possible l'objectif législatif. Toutefois, dans certains cas, la dissociation de la partie fautive sera plus attentatoire à l'objectif législatif que l'annulation possible des dispositions qui ne sont pas fautives, mais qui sont étroitement liées à celles qui le sont. Cette préoccupation se reflète dans l'énoncé classique du critère applicable en cas de dissociation mentionné dans l'arrêt *Attorney-General for Alberta c. Attorney-General for Canada*, [1947] A.C. 503, à la p. 518:

[TRADUCTION] La véritable question qui se pose est de savoir si le reste n'est pas si inextricablement lié à la partie déclarée invalide qu'il ne saurait subsister indépendamment, ou comme on l'a dit parfois, si, après un examen impartial de toute la question, on peut présumer que le législateur n'aurait jamais adopté ce qui subsiste sans adopter la partie qui est ultra vires.

À mon avis, si on examine l'objet du permis en cause en corrélation avec les différentes conditions obligatoires y figurant qui portent atteinte aux droits ancestraux de l'appelant, la dissociation peut être considérée comme une solution inacceptable. Les conditions invalides sont nombreuses. Elles sont obligatoires et font partie intégrante du permis lui-même. Le permis exigeait que ces conditions soient respectées, ce qui revient à dire que son titulaire devait s'y conformer. Je ne vois pas comment ce permis pourrait être dissocié de ses conditions obligatoires invalides. En outre, d'un point de vue pratique, il importe de signaler que les permis en cause ont été créés et utilisés avant que le gouvernement ait pu profiter de l'arrêt de notre Cour dans *Sparrow*. L'avocat du ministère public a indiqué que, par suite de cet arrêt, ce genre de permis n'est plus utilisé. En conséquence, il convient, tant sur le plan juridique que sur le plan pratique, de déclarer le permis au complet invalide.

Il ne saurait faire de doute qu'un texte de loi portant atteinte à la Constitution est invalide et ne peut imposer d'obligations exécutoires. Voir, par exemple, *Norton c. Shelby County*, 118 U.S. 425

p. 442; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1195.

(1886), à la p. 442; *Air Canada c. Colombie-Britannique*, [1989] 1 R.C.S. 1161, à la p. 1195.

117 Accordingly, the appellant must be acquitted of the charge of fishing without a licence contrary to s. 4(1) since the licence conditions infringed his aboriginal rights and the licence was therefore unconstitutional.

En conséquence, l'appelant doit être acquitté de l'accusation d'avoir pêché sans permis, en contravention du par. 4(1), étant donné que les conditions du permis portaient atteinte à ses droits ancestraux, et que le permis était par conséquent inconstitutionnel.

Disposition

Dispositif

118 In the result, the appeal is allowed. The question as to whether the band's fishing by-law applies to the Bulkley River at Moricetown must be answered in the negative. The question as to whether the licence requirement under s. 4(1) is an infringement of the appellant's aboriginal rights contrary to s. 35 must also be answered in the negative. As a result of my answer to these two questions, and for the reasons given above, the constitutional question must be answered as follows:

En conséquence, le pourvoi est accueilli. Il faut répondre non à la question de savoir si le règlement administratif de pêche de la bande s'applique à la rivière Bulkley, à la hauteur de Moricetown. Il faut également répondre non à la question de savoir si l'obligation de détenir un permis qui est prévue au par. 4(1) constitue une atteinte aux droits ancestraux de l'appelant, incompatible avec l'art. 35. Étant donné ma réponse à ces questions, et pour les motifs prononcés précédemment, la question constitutionnelle doit recevoir la réponse suivante:

Question: Is s. 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in July of 1986, and licences issued thereunder, of no force or effect with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

Question: Le paragraphe 4(1) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248, tel qu'il se lisait en juillet 1986, et les permis délivrés en vertu de ce paragraphe sont-ils, dans les circonstances de la présente affaire, inopérants à l'égard de l'appelant en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'il invoque?

Answer: Section 4(1) of the *British Columbia Fishery (General) Regulations* is not invalid by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant. However, the mandatory conditions affixed to the 1986 licence infringe the appellant's aboriginal rights and are not severable and the licence is therefore invalid.

Réponse: Le paragraphe 4(1) du *Règlement de pêche général de la Colombie-Britannique* n'est pas invalide par application de l'art. 52 de la *Loi constitutionnelle de 1982* en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982* invoqués par l'appelant. Toutefois, les conditions obligatoires figurant sur le permis de 1986 portent atteinte aux droits ancestraux de l'appelant et ne sont pas dissociables, de sorte que le permis est invalide.

The order of the Court of Appeal of British Columbia convicting the appellant must be set aside and his acquittal restored. There will be no costs to either party.

The reasons of L'Heureux-Dubé and McLachlin JJ. were delivered by

MCLACHLIN J. (dissenting) — The issue in this case is whether the requirement that the appellant have a licence for fishing was *per se* unconstitutional. I agree with the majority of the Court of Appeal and with Justice Cory in this Court that the requirement of a licence did not constitute a *prima facie* infringement of the appellant's constitutionally protected right to fish for food.

This leaves the issue of whether the conditions attached to the licence are unconstitutional. In my view, this issue is not properly before us. The appellant was not charged with violation of the conditions of the licence, but with fishing without a licence. The trial proceeded on the basis that it was the licensing scheme as a whole which was invalid. The issue, as Hutcheon J.A. stated expressly in the Court of Appeal, was whether the act of licensing *per se* was unconstitutional, not the terms of the particular licence at issue.

This court, *per* Cory J., today endorses the view of the trial judge and the majority of the Court of Appeal below that the state is entitled to impose a licensing scheme on the aboriginal fishing and consequently require that the appellant obtain a licence as a condition of fishing. However, the majority goes on to conclude that because four of the conditions attached to the licence infringe his aboriginal rights, the requirement for the particular licence in this case is unconstitutional and that the appellant's conviction for failure to have a licence must be set aside.

I do not share this conclusion. The fact that four of the conditions are invalid does not excuse the

L'ordonnance de la Cour d'appel de la Colombie-Britannique déclarant l'appelant coupable doit être annulée, et l'acquittement de ce dernier doit être rétabli. Aucune des parties n'aura droit aux dépens.

Version française des motifs des juges L'Heureux-Dubé et McLachlin rendus par

LE JUGE MCLACHLIN (dissidente) — La question en l'espèce est de savoir si l'obligation faite à l'appelant d'obtenir un permis de pêche était en soi inconstitutionnelle. Je suis d'accord avec les juges de la majorité de la Cour d'appel de même qu'avec le juge Cory de notre Cour que cette obligation ne constitue pas à première vue une atteinte au droit de pêcher pour se nourrir qui est garanti à l'appelant par la Constitution.

Il reste à se demander si les conditions dont est assorti le permis sont inconstitutionnelles. À mon avis, nous n'avons pas été saisis de cette question. L'appelant n'a pas été accusé d'avoir enfreint les conditions prévues par le permis, mais plutôt d'avoir pêché sans permis. Au procès, la thèse examinée était que le régime de délivrance de permis dans son ensemble était invalide. La question en litige, ainsi que l'a dit expressément le juge Hutcheon en Cour d'appel, était de savoir si le fait de délivrer des permis, et non les conditions assortissant ces permis, était en soi inconstitutionnel.

Notre Cour, sous la plume du juge Cory, souscrit aujourd'hui à l'opinion du juge de première instance et des juges de la majorité de la Cour d'appel que l'État a le droit d'assujettir à un régime de délivrance de permis les activités de pêche autochtones et, par conséquent, d'exiger de l'appelant qu'il obtienne un permis de pêche. Cependant, la majorité poursuit en concluant que, comme quatre des conditions dont est assorti le permis portent atteinte aux droits ancestraux de l'appelant, l'obligation d'obtenir le permis visé en l'espèce est inconstitutionnelle et la déclaration de culpabilité prononcée contre l'appelant pour avoir pêché sans permis doit être annulée.

Je ne partage pas cette conclusion. Le fait que quatre des conditions prévues soient invalides

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appellant on a charge of fishing without a licence. If the charge had been violation of one of the conditions of the licence, proof that the condition was unconstitutional would have afforded a defence to that charge. But the unconstitutionality of a condition of a licence does not, in my view, absolve the appellant from the need to obtain a licence at all.

n'excuse pas l'appellant relativement à l'accusation d'avoir pêché sans permis. S'il avait été accusé d'avoir enfreint une des conditions du permis, la preuve que la condition en question était inconstitutionnelle aurait constitué un moyen de défense contre cette accusation. Cependant, je suis d'avis que l'inconstitutionnalité d'une condition du permis ne dispense aucunement l'appellant de l'obligation d'obtenir un permis.

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Cory J. asserts that the invalidity of licence conditions excuses a person from obtaining the licence required by law, provided the condition is "integral" to the licence. I cannot accept this proposition. Can a chemical plant be excused from obtaining a licence to emit a polluting chemical merely because it can show that one or more of the conditions imposed by the licence are invalid? Can a person over a certain age be excused from obtaining a licence to drive a motor vehicle merely because he or she deems an age-related restriction to violate the provincial Human Rights Code? I think not. And if we say that the conditions are "integral" to the licence, does the situation change? Again I think not.

Le juge Cory affirme que l'invalidité des conditions prévues par un permis dispense une personne de l'obligation d'obtenir le permis requis par la loi, si ces conditions font «partie intégrante» du permis. Je ne peux accepter cette proposition. Peut-on exempter une entreprise fabriquant des produits chimiques de l'obligation d'obtenir un permis autorisant l'émission d'un polluant chimique simplement parce qu'elle est en mesure d'établir qu'une ou plusieurs des conditions fixées par le permis sont invalides? Peut-on, passé un certain âge, dispenser une personne d'obtenir un permis de conduire simplement parce qu'elle estime que la restriction fondée sur l'âge porte atteinte au code des droits de la personne de la province? Je ne le crois pas. Par ailleurs, le fait de dire que les conditions en cause font «partie intégrante» du permis change-t-il la situation? Encore une fois, je ne le crois pas.

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It is important, in my view, to distinguish between the charge of failing to obtain a licence required by a valid licensing scheme, and breach of one of the conditions of the licence. This appeal presents us with a quasi-criminal offence. The appellant has been charged with failing to obtain a licence required by law. His defence is that the state has no right to require him to obtain a licence. The trial judge, the majority of the Court of Appeal, and this Court unanimously have ruled that the state does have the right to require him to obtain a licence. That issue having been resolved against him, the appellant stands properly convicted of fishing without the required licence.

Il est, à mon sens, important de distinguer entre l'accusation de ne pas détenir le permis requis par un régime valide de délivrance de telles autorisations et celle d'avoir enfreint une des conditions du permis. En l'espèce, nous sommes en présence d'une infraction quasi criminelle. L'appellant a été accusé de ne pas s'être procuré le permis requis par la loi. En défense, il fait valoir que l'État n'a pas le droit de l'obliger à se procurer un permis. Le juge de première instance, la Cour d'appel à la majorité et notre Cour à l'unanimité ont statué que l'État a bel et bien le droit de l'obliger à obtenir un permis. Cette question ayant été tranchée à l'encontre de l'appellant, c'est à juste titre qu'il a été déclaré coupable d'avoir pêché sans le permis requis.

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The situation would have been different had the appellant been charged with violating one of the

La situation aurait été différente si l'appellant avait été accusé d'avoir enfreint une des conditions

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conditions of the licence. It would then have been open to him to raise the defence that the condition he is alleged to have breached is unconstitutional. The constitutionality of the condition would have become the focus of the trial and of the appeals. In the event the condition was found to have been unconstitutional, it would fall. Severance would be automatic. The issue raised in *Schachter v. Canada*, [1992] 2 S.C.R. 679, of whether to strike out a portion or the whole of the licence would not arise. The licence would stand, together with such conditions as remain valid. The right of the state to require a licence for monitoring purposes would remain constitutional.

The position advocated by Cory J. has important practical consequences. Having ruled that the state is entitled to require persons engaged in fishing to obtain licences for the purpose of monitoring the fishery, he would deprive the state of the right to do so where conditions attached to the licence, not put in issue on the facts, fail to pass abstract constitutional scrutiny. Persons who object to conditions of a licence will be encouraged not to apply for a licence, thus undermining the monitoring function of the licensing scheme. The validity of state requirements for licences of all sorts may be called into question. These results are avoided if one confines the decision to the allegation contained in the charge — the failure to obtain a licence.

Jurisprudential considerations also support this approach. Courts determining guilt or innocence of an accused should confine themselves to the issues raised by the charge. The validity of conditions of a licence are better considered in the context of facts which raise them than in the abstract. Similarly, appeal courts reviewing trial decisions are generally well advised to confine themselves to the defences and issues raised in the decisions under review. In the case at bar, the only issue at trial and before the Court of Appeal was the right of the state to require the appellant to obtain a

du permis. Il aurait alors pu plaider, en défense, que la condition qu'on l'accusait d'avoir enfreint était inconstitutionnelle. La constitutionnalité de la condition serait alors devenue l'aspect central du procès et des appels. Si la condition avait été jugée inconstitutionnelle, elle aurait été écartée. La dissociation serait automatique. Ne se poserait alors pas la question, énoncée dans l'arrêt *Schachter c. Canada*, [1992] 2 R.C.S. 679, de savoir s'il y a lieu d'invalidier l'ensemble ou une partie seulement du permis. Le permis subsisterait, de même que les autres conditions toujours valides. Le droit de l'État d'exiger, à des fins de surveillance, l'obtention d'un permis demeurerait constitutionnel.

La thèse préconisée par le juge Cory a des conséquences pratiques importantes. Après avoir statué que, dans le but de surveiller les pêcheries, l'État a le droit d'exiger des personnes qui pratiquent la pêche qu'elles obtiennent un permis, il priverait l'État du droit de le faire dans les cas où des conditions dont est assorti le permis, conditions qui suivant les faits ne sont pas en litige en l'espèce, ne résistent pas à une analyse constitutionnelle abstraite. Cela aurait pour effet d'encourager les personnes qui s'opposent aux conditions d'un permis à ne pas demander ce permis, sapant ainsi le rôle de surveillance du régime de délivrance de permis. La validité des différentes obligations faites par l'État relativement à l'obtention de permis de toutes sortes pourrait être mise en question. Ces conséquences sont évitées si la décision se limite à l'allégation figurant dans l'accusation — savoir l'omission d'obtenir un permis.

Des considérations d'ordre jurisprudentiel appuient également ce point de vue. Les tribunaux appelés à statuer sur la culpabilité ou l'innocence d'un accusé devraient se limiter aux questions soulevées par l'accusation portée. Il est préférable d'examiner la validité des diverses conditions d'un permis dans le contexte de faits donnant lieu à leur application, plutôt que dans l'abstrait. De même, les cours d'appel chargées de contrôler les décisions des tribunaux de première instance sont généralement bien avisées de se confiner aux questions et moyens de défense qui sont soulevés dans

licence. Accordingly, I would prefer to confine this Court's decision to that issue.

ces décisions. En l'espèce, l'unique question en litige au procès et devant la Cour d'appel était le droit de l'État d'obliger l'appelant à obtenir un permis. En conséquence, je préférerais limiter la décision de notre Cour à cette question.

In conclusion, the question before us, as before the courts below, is whether the obligation on the appellant to obtain a licence to fish, whatever its terms, is constitutional. The answer to that question is yes. The appellant freely admits that he did not have the licence that the law validly required. It follows that he was properly convicted of the charge. The issue of whether the conditions of the licence are valid should await a case where their validity arises.

En conclusion, la question dont nous sommes saisis, à l'instar des juridictions inférieures, est de savoir si l'obligation faite à l'appelant d'obtenir un permis de pêche, quelles qu'en soient les conditions, est constitutionnelle. La réponse à cette question est oui. L'appelant admet volontiers qu'il n'avait pas le permis valablement requis par la loi. Il a donc à juste titre été déclaré coupable de l'accusation portée contre lui. La question de savoir si les conditions du permis sont valides devrait être tranchée dans une affaire où elle se souleva.

The constitutional question stated by the Chief Justice was as follows:

Is s. 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in July of 1986, and licences issued thereunder, of no force or effect with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

Voici le texte de la question constitutionnelle formulée par le juge en chef:

Le paragraphe 4(1) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248, tel qu'il se lisait en juillet 1986, et les permis délivrés en vertu de ce paragraphe sont-ils, dans les circonstances de la présente affaire, inopérants à l'égard de l'appelant en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'il invoque?

I would answer the question as follows:

Je répondrais ainsi à cette question:

Section 4(1) of the *British Columbia Fishery (General) Regulations* and licences issued thereunder are not of no force and effect, with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant.

Le paragraphe 4(1) du *Règlement de pêche général de la Colombie-Britannique* et les permis délivrés en vertu de cette disposition ne sont pas, dans les circonstances de la présente affaire, inopérants à l'égard de l'appelant par application de l'art. 52 de la *Loi constitutionnelle de 1982* en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982* invoqués par l'appelant.

I would dismiss the appeal and affirm the conviction.

Je suis d'avis de rejeter le pourvoi et de confirmer la déclaration de culpabilité.

Appeal allowed, L'HEUREUX-DUBÉ and MCLACHLIN JJ. dissenting.

Pourvoi accueilli, les juges L'HEUREUX-DUBÉ et MCLACHLIN sont dissidentes.

Solicitors for the appellant: Hutchins, Soroka, Grant & Paterson, Hazelton.

Procureurs de l'appelant: Hutchins, Soroka, Grant & Paterson, Hazelton.

Solicitor for the respondent: George Thomson, Ottawa.

Solicitors for the intervener the Attorney General of British Columbia: Fuller, Pearlman, Victoria.

Solicitors for the intervener the Attorney General for Alberta: Parlee, McLaws, Calgary.

Solicitors for the intervener the Alliance of Tribal Councils: Mandell, Pinder, Vancouver.

Solicitors for the interveners Delgamuukw et al.: Rush, Crane, Guenther & Adams, Vancouver.

Solicitor for the intervener the Fisheries Council of British Columbia: J. Keith Lowes, Vancouver.

Solicitors for the intervener the Canadian National Railway Company: Ladner Downs, Vancouver.

Solicitors for the interveners the BC Fisheries Survival Coalition and the BC Wildlife Federation: Russell & DuMoulin, Vancouver.

Procureur de l'intimée: George Thomson, Ottawa.

Procureurs de l'intervenant le procureur général de la Colombie-Britannique: Fuller, Pearlman, Victoria.

Procureurs de l'intervenant le procureur général de l'Alberta: Parlee, McLaws, Calgary.

Procureurs de l'intervenante l'Alliance of Tribal Councils: Mandell, Pinder, Vancouver.

Procureurs des intervenants Delgamuukw et autres: Rush, Crane, Guenther & Adams, Vancouver.

Procureur de l'intervenant le Fisheries Council of British Columbia: J. Keith Lowes, Vancouver.

Procureurs de l'intervenante la Compagnie des chemins de fer nationaux du Canada: Ladner Downs, Vancouver.

Procureurs des intervenantes la BC Fisheries Survival Coalition et la BC Wildlife Federation: Russell & DuMoulin, Vancouver.

Ronald Edward Sparrow *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The National Indian Brotherhood / Assembly of First Nations, the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Pacific Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Fishing Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C., the Fisheries Council of British Columbia, the United Fishermen and Allied Workers' Union, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta and the Attorney General of Newfoundland *Interveners*

INDEXED AS: R. v. SPARROW

File No.: 20311.

1988: November 3; 1990: May 31.

Present: Dickson C.J. and McIntyre*, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka J.J.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Aboriginal rights — Fishing rights — Indian convicted of fishing with net larger than permitted by Band's licence — Whether or not net length restriction inconsistent with s. 35(1) of the Constitution Act, 1982 — Constitution Act, 1982, ss. 35(1), 52(1) — Fisheries Act, R.S.C. 1970, c. F-14, s. 34 — British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12, 27(1), (4).

* McIntyre J. took no part in the judgment.

Ronald Edward Sparrow *Appellant*

c.

Sa Majesté la Reine *Intimée*

a

et

La Fraternité des Indiens du Canada / Assemblée des premières nations, la B.C. Wildlife Federation, la Steelhead Society of British Columbia, la Pacific Fishermen's Defence Alliance, Northern Trollers' Association, la Pacific Gillnetters' Association, la Gulf Trollers' Association, la Pacific Trollers' Association, la Prince Rupert Fishing Vessel Owners' Association, la Fishing Vessel Owners' Association of British Columbia, la Pacific Coast Fishing Vessel Owners' Guild, la Prince Rupert Fishermen's Cooperative Association, la Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C., le Fisheries Council of British Columbia, le Syndicat des pêcheurs et travailleurs assimilés, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan, le procureur général de l'Alberta et le procureur général de Terre-Neuve *Intervenants*

RÉPERTORIÉ: R. c. SPARROW

N° du greffe: 20311.

g

1988: 3 novembre; 1990: 31 mai.

Présents: Le juge en chef Dickson et les juges McIntyre*, Lamer, Wilson, La Forest, L'Heureux-Dubé et Sopinka.

h

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

Droit constitutionnel — Droits ancestraux — Droits de pêche — Indien reconnu coupable d'avoir pêché avec un filet plus long que celui autorisé par le permis de la bande — La restriction quant à la longueur du filet est-elle incompatible avec l'art. 35(1) de la Loi constitutionnelle de 1982? — Loi constitutionnelle de 1982, art. 35(1), 52(1) — Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 34 — Règlement de pêche général de la Colombie-Britannique, DORS/84-248, art. 4, 12, 27(1), (4).

* Le juge McIntyre n'a pas pris part au jugement.

Indians — Aboriginal rights — Fishing rights — Interpretation — Indian convicted of fishing with net larger than permitted by Band's licence — Whether or not net length restriction inconsistent with s. 35(1) of Constitution Act, 1982.

Appellant was charged in 1984 under the *Fisheries Act* with fishing with a drift net longer than that permitted by the terms of his Band's Indian food fishing licence. He admitted that the facts alleged constitute the offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

Appellant was convicted. The trial judge found that an aboriginal right could not be claimed unless it was supported by a special treaty and that s. 35(1) of the *Constitution Act, 1982* accordingly had no application. An appeal to County Court was dismissed for similar reasons. The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Its decision was appealed and cross-appealed. The constitutional question before this Court queried whether the net length restriction contained in the Band's fishing licence was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

Held: The appeal and cross-appeal should be dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

Section 35(1) applies to rights in existence when the *Constitution Act, 1982* came into effect; it does not revive extinguished rights. An existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.

The Crown failed to discharge its burden of proving extinguishment. An aboriginal right is not extinguished merely by its being controlled in great detail by the regulations under the *Fisheries Act*. Nothing in the *Fisheries Act* or its detailed regulations demonstrated a clear and plain intention to extinguish the Indian

Indiens — Droits ancestraux — Droits de pêche — Interprétation — Indien reconnu coupable d'avoir pêché avec un filet plus long que celui autorisé par le permis de la bande — La restriction quant à la longueur du filet est-elle incompatible avec l'art. 35(1) de la Loi constitutionnelle de 1982?

En 1984, l'appelant a été accusé, en vertu de la *Loi sur les pêcheries*, d'avoir pêché avec un filet dérivant plus long que celui autorisé par le permis de pêche de subsistance de la bande indienne à laquelle il appartenait. Il a reconnu les faits à l'origine de l'infraction, mais il a soutenu en défense qu'il exerçait un droit ancestral existant de pêcher et que la restriction imposée dans le permis de la bande quant à la longueur du filet était invalide pour cause d'incompatibilité avec le par. 35(1) de la *Loi constitutionnelle de 1982*.

L'appelant a été déclaré coupable. Le juge de première instance a conclu qu'on ne pouvait revendiquer un droit ancestral à moins que celui-ci ne soit étayé par un traité particulier, et que le par. 35(1) de la *Loi constitutionnelle de 1982* ne s'appliquait donc pas. Un appel devant la Cour de comté a été rejeté pour des motifs semblables. La Cour d'appel a statué que les conclusions de fait du juge de première instance étaient insuffisantes pour justifier un acquittement. Son arrêt fait l'objet d'un pourvoi et d'un pourvoi incident. La question constitutionnelle soumise à la Cour est de savoir si la restriction imposée dans le permis de pêche de la bande quant à la longueur des filets est incompatible avec le par. 35(1) de la *Loi constitutionnelle de 1982*.

Arrêt: Le pourvoi et le pourvoi incident sont rejetés. La question constitutionnelle doit être renvoyée en première instance afin de recevoir une réponse conformément à l'analyse exposée dans les présents motifs.

Le paragraphe 35(1) s'applique aux droits qui existaient au moment de l'entrée en vigueur de la *Loi constitutionnelle de 1982*; il ne vient pas rétablir des droits éteints. Un droit ancestral existant ne saurait être interprété de façon à englober la manière précise dont il était réglementé avant 1982. L'expression «droits ancestraux existants» doit recevoir une interprétation souple de manière à permettre à ces droits d'évoluer avec le temps.

Le ministère public ne s'est pas acquitté de son fardeau de prouver l'extinction du droit. Un droit ancestral n'est pas éteint du seul fait que son exercice fasse l'objet d'une réglementation très minutieuse en vertu de la *Loi sur les pêcheries*. Ni la *Loi sur les pêcheries* ni ses règlements d'application détaillés ne font état d'une

aboriginal right to fish. These fishing permits were simply a manner of controlling the fisheries, not of defining underlying rights. Historical policy on the part of the Crown can neither extinguish the existing aboriginal right without clear intention nor, in itself, delineate that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can, however, regulate the exercise of that right but such regulation must be in keeping with s. 35(1).

Section 35(1) of the *Constitution Act, 1982*, at the least, provides a solid constitutional base upon which subsequent negotiations can take place and affords aboriginal peoples constitutional protection against provincial legislative power. Its significance, however, extends beyond these fundamental effects. The approach to its interpretation is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself.

Section 35(1) is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights. The provision is not subject to s. 1 of the *Canadian Charter of Rights and Freedoms*. Any law or regulation affecting aboriginal rights, however, will not automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

Section 35(1) does not explicitly authorize the courts to assess the legitimacy of any government legislation that restricts aboriginal rights. The words "recognition and affirmation", however, incorporate the government's responsibility to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*, but must be read together with s. 35(1). Federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

intention claire et expresse de mettre fin au droit ancestral des Indiens de pêcher. Ces permis de pêche constituaient simplement une façon de contrôler les pêcheries et non de définir des droits sous-jacents. La politique historique de Sa Majesté ne permet pas d'éteindre le droit ancestral existant en l'absence d'intention claire en ce sens ni ne permet en soi de délimiter ce droit. La nature de règlements gouvernementaux ne saurait être déterminante quant au contenu et à la portée d'un droit ancestral existant. La politique gouvernementale peut toutefois réglementer l'exercice de ce droit, mais cette réglementation doit être conforme au par. 35(1).

Le paragraphe 35(1) de la *Loi constitutionnelle de 1982* procure, tout au moins, un fondement constitutionnel solide à partir duquel des négociations ultérieures peuvent être entreprises et accorde aux autochtones une protection constitutionnelle contre la compétence législative provinciale. Son importance va toutefois au-delà de ces effets fondamentaux. La méthode à adopter pour l'interpréter est dérivée des principes généraux d'interprétation constitutionnelle, des principes relatifs aux droits ancestraux et des objets sous-jacents à la disposition constitutionnelle elle-même.

Il y a lieu d'interpréter le par. 35(1) en fonction de l'objet qu'il vise. Une interprétation généreuse et libérale s'impose étant donné que cette disposition vise à confirmer les droits ancestraux. La disposition n'est pas assujettie à l'article premier de la *Charte canadienne des droits et libertés*. Cependant, toute loi ou tout règlement portant atteinte aux droits ancestraux des autochtones ne sera pas automatiquement inopérant en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Un texte législatif qui touche l'exercice de droits ancestraux sera valide s'il satisfait au critère applicable pour justifier une atteinte à un droit reconnu et confirmé au sens du par. 35(1).

Le paragraphe 35(1) n'autorise pas explicitement les tribunaux à apprécier la légitimité d'une mesure législative gouvernementale qui restreint des droits ancestraux. L'expression «reconnaissance et confirmation» comporte cependant la responsabilité qu'a le gouvernement d'agir en qualité de fiduciaire à l'égard des peuples autochtones et implique ainsi une certaine restriction à l'exercice du pouvoir souverain. Les pouvoirs législatifs fédéraux subsistent, y compris le droit de légiférer relativement aux Indiens en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*, mais ces pouvoirs doivent être rapprochés du par. 35(1). Le pouvoir fédéral doit être concilié avec l'obligation fédérale et la meilleure façon d'y parvenir est d'exiger la justification de tout règlement gouvernemental qui porte atteinte à des droits ancestraux.

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The test for justification requires that a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. The inquiry begins with a reference to the characteristics or incidents of the right at stake. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful to avoid the application of traditional common law concepts of property as they develop their understanding of the "*sui generis*" nature of aboriginal rights. While it is impossible to give an easy definition of fishing rights, it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. Is the limitation unreasonable? Does the regulation impose undue hardship? Does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

Here, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the exercise of the natives' right to fish for food. The issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

Le critère de la justification exige qu'un objectif législatif soit réalisé d'une manière qui préserve l'honneur de Sa Majesté et qui soit conforme aux rapports contemporains uniques, fondés sur l'histoire et les politiques, qui existent actuellement entre la Couronne et les peuples autochtones du Canada. La mesure dans laquelle une loi ou un règlement a un effet sur un droit ancestral existant doit être examinée soigneusement de manière à assurer la reconnaissance et la confirmation de ce droit. Le paragraphe 35(1) ne constitue pas une promesse d'immunité contre la réglementation gouvernementale dans la société contemporaine, mais il représente un engagement important de la part de la Couronne. En effet, le gouvernement se voit imposer l'obligation de justifier toute mesure législative qui a un effet préjudiciable sur un droit ancestral protégé par le par. 35(1).

La première question à poser est de savoir si la loi en question a pour effet de porter atteinte à un droit ancestral existant. L'analyse commence par un examen des caractéristiques ou des attributs du droit en question. Les droits de pêche ne sont pas des droits de propriété au sens traditionnel. Il s'agit de droits qui appartiennent à un groupe et qui sont en harmonie avec la culture et le mode de vie de ce groupe. Les tribunaux doivent prendre soin d'éviter d'appliquer les concepts traditionnels de propriété propres à la common law en tentant de saisir la nature «*sui generis*» des droits ancestraux. S'il est impossible de donner une définition simple des droits de pêche, il est crucial de se montrer ouvert au point de vue des autochtones eux-mêmes quant à la nature des droits en cause.

Pour déterminer si les droits de pêche ont subi une atteinte constituant une violation à première vue du par. 35(1), on doit poser certaines questions. La restriction est-elle déraisonnable? Le règlement est-il indûment rigoureux? Le règlement refuse-t-il aux titulaires du droit le recours à leur moyen préféré de l'exercer? C'est au particulier ou au groupe qui conteste la mesure législative qu'il incombe de prouver qu'il y a eu violation à première vue.

En l'espèce, le règlement serait jugé constituer une atteinte à première vue si on concluait qu'il impose une restriction néfaste à l'exercice par les autochtones de leur droit de pêcher à des fins de subsistance. La question en litige n'exige pas simplement qu'on examine si la prise autorisée de poissons a été réduite au-dessous de ce qui est requis pour subvenir aux besoins alimentaires et rituels raisonnables. Le critère nécessite plutôt qu'on se demande si, de par son objet ou son effet, la restriction imposée quant à la longueur des filets porte atteinte inutilement aux intérêts protégés par le droit de pêche.

If a *prima facie* interference is found, the analysis moves to the issue of justification. This test involves two steps. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. The "public interest" justification is so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights. The justification of conservation and resource management, however, is uncontroversial.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified. There must be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource.

Guidelines are necessary to resolve the allocational problems that arise regarding the fisheries. Any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.

The justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. Section 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority and guarantees that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include: whether there has

Si on conclut à l'existence d'une atteinte à première vue, l'analyse porte ensuite sur la question de la justification. Ce critère comporte deux étapes. En premier lieu, il faut se demander s'il existe un objectif législatif régulier. À ce stade, la cour se demanderait si l'objectif visé par le Parlement en autorisant le ministère à adopter des règlements en matière de pêche est régulier. Serait également examiné l'objectif poursuivi par le ministère en adoptant le règlement en cause. La justification fondée sur «l'intérêt public» est si vague qu'elle ne fournit aucune ligne directrice utile et si large qu'elle est inutilisable comme critère applicable pour déterminer si une restriction imposée à des droits constitutionnels est justifiée. La justification de la conservation et de la gestion des ressources ne soulève cependant aucune controverse.

Si on conclut à l'existence d'un objectif législatif régulier, on passe au second volet de la question de la justification: l'honneur de Sa Majesté lorsqu'Elle transige avec les peuples autochtones. Les rapports spéciaux de fiduciaire et la responsabilité du gouvernement envers les autochtones doivent être le premier facteur à examiner en déterminant si la mesure législative ou l'action en cause est justifiable. Il doit y avoir un lien entre la question de la justification et l'établissement de priorités dans le domaine de la pêche. La reconnaissance et la confirmation des droits ancestraux, prévues dans la Constitution, peuvent donner lieu à des conflits avec les intérêts d'autrui étant donné la nature limitée de la ressource.

On a besoin de lignes directrices qui permettront de résoudre les problèmes de répartition de ressources qui surgissent dans le domaine des pêcheries. Dans l'établissement des priorités suite à la mise en œuvre de mesures de conservation valides, il faut accorder la priorité absolue à la pêche par les Indiens à des fins de subsistance.

La norme de justification à respecter est susceptible d'imposer un lourd fardeau à Sa Majesté. Toutefois, la politique gouvernementale relativement à la pêche en Colombie-Britannique commande déjà, et ce, indépendamment du par. 35(1), que, dans l'attribution du droit de prendre du poisson, le droit des Indiens de pêcher à des fins d'alimentation ait la priorité sur les intérêts d'autres groupes d'utilisateurs. Le paragraphe 35(1) exige que Sa Majesté assure que Ses règlements respectent cette attribution de priorité et garantit que les plans de conservation et de gestion réservent aux peuples autochtones un traitement qui assure que leurs droits sont pris au sérieux.

Il y a, dans l'analyse de la justification, d'autres questions à aborder selon les circonstances de l'enquête. Il s'agit notamment des questions de savoir si, en tentant

been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. This list is not exhaustive.

Cases Cited

Applied: *Jack v. The Queen*, [1980] 1 S.C.R. 294; *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360; **considered:** *R. v. Denny* (1990), 55 C.C.C. (3d) 322; *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Eninew, R. v. Bear* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.), *aff'd* (1983), 7 C.C.C. (3d) 443 (Sask. Q.B.); **distinguished:** *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.); **referred to:** *Calder v. Attorney General of British Columbia* (1970), 74 W.W.R. 481 (B.C.C.A.), *aff'd* [1973] S.C.R. 313; *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (Alta. Q.B.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (N.B.Q.B.); *R. v. Agawa* (1988), 28 O.A.C. 201; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.); *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.); *R. v. Wesley*, [1932] 2 W.W.R. 337; *Prince and Myron v. The Queen*, [1964] S.C.R. 81; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.); *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.); *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Kruger v. The Queen*, [1978] 1 S.C.R. 104.

Statutes and Regulations Cited

British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12(1), (2), 27(1), (4).
British Columbia Terms of Union, R.S.C., 1985, App. II, No. 10, art. 13.
Canadian Charter of Rights and Freedoms, ss. 1, 33.
Constitution Act, 1867, ss. 91(12), (24), 109.
Constitution Act, 1930.
Constitution Act, 1982, ss. 35(1), 52(1).
Fisheries Act, R.S.C. 1970, c. F-14, ss. 34, 61(1).
Quebec Boundaries Extension Act, 1912, S.C. 1912, c. 45.

d'obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation est prévue en cas d'expropriation et si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre. Cette énumération n'est pas exhaustive.

Jurisprudence

Arrêts appliqués: *Jack c. La Reine*, [1980] 1 R.C.S. 294; *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360; **arrêts examinés:** *R. v. Denny* (1990), 55 C.C.C. (3d) 322; *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (C.A. Ont.); *R. v. Eninew, R. v. Bear* (1984), 12 C.C.C. (3d) 365 (C.A. Sask.), *conf.* (1983), 7 C.C.C. (3d) 443 (B.R. Sask.); **distinction d'avec l'arrêt:** *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (C.S.C.); **arrêts mentionnés:** *Calder v. Attorney-General of British Columbia* (1970), 74 W.W.R. 481 (C.A.C.-B.), *conf.* [1973] R.C.S. 313; *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (B.R. Alb.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (B.R.N.-B.); *R. v. Agawa* (1988), 28 O.A.C. 201; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (C.P.); *Baker Lake (Hamlet) c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518 (D.P.I.); *R. v. Wesley*, [1932] 2 W.W.R. 337; *Prince and Myron v. The Queen*, [1964] R.C.S. 81; *R. c. Sutherland*, [1980] 2 R.C.S. 451; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (S.C.É.-U.); *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (C.S.C.-B.); *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Kruger c. La Reine*, [1978] 1 R.C.S. 104.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 33.
Conditions de l'adhésion de la Colombie-Britannique, L.R.C. (1985), app. II, n° 10, art. 13.
Loi constitutionnelle de 1867, art. 91(12), (24), 109.
Loi constitutionnelle de 1930.
Loi constitutionnelle de 1982, art. 35(1), 52(1).
Loi de l'extension des frontières de Québec, 1912, S.C. 1912, ch. 45.
Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 34, 61(1).
Proclamation royale de 1763, L.R.C. (1985), app. II, n° 1.

Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.
Wildlife Act, S.B.C. 1966, c. 55.

Authors Cited

- Canada. Department of Indian Affairs and Northern Development. *In All Fairness: A Native Claims Policy—Comprehensive Claims*. Ottawa: 1981.
- Canada. Department of Indian Affairs and Northern Development. *Statement of the Government of Canada on Indian Policy*. Ottawa: 1969.
- Clement, W. H. P. *The Law of the Canadian Constitution*, 3rd ed. Toronto: Carswells, 1916.
- Little Bear, Leroy. "A Concept of Native Title," [1982] 5 *Can. Legal Aid Bul.* 99.
- Lyon, Noel. "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95.
- McNeil, Kent. "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 *Supreme Court L.R.* 255.
- Pentney, William. "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207.
- Sanders, Douglas. "Pre-existing Rights: The Aboriginal Peoples of Canada," in Gerald A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. Toronto: Carswells, 1989.
- Schwartz, Bryan. *First Principles, Second Thoughts: Aboriginal People, Constitutional Reform and Canadian Statecraft*. Montreal: Institute for Research on Public Policy, 1986.
- Slaterry, Brian. "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 *Am. J. of Comp. Law* 361.
- Slaterry, Brian. "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1986), 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, allowing an appeal from a judgment of Lamperson Co. Ct. J., [1986] B.C.W.L.D. 599, dismissing an appeal from conviction by Goulet Prov. Ct. J. Appeal and cross-appeal dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

Règlement de pêche général de la Colombie-Britannique, DORS/84-248, art. 4, 12(1), (2), 27(1), (4).
Wildlife Act, S.B.C. 1966, ch. 55.

a Doctrine citée

- Canada. Ministère des Affaires indiennes et du Nord canadien. *En toute justice: Une politique des revendications des autochtones: revendications globales*. Ottawa: 1981.
- Canada. Ministère des Affaires indiennes et du Nord canadien. *La politique indienne du gouvernement du Canada*. Ottawa: 1969.
- Clement, W. H. P. *The Law of the Canadian Constitution*, 3rd ed. Toronto: Carswells, 1916.
- Little Bear, Leroy. "A Concept of Native Title," [1982] 5 *Can. Legal Aid Bul.* 99.
- Lyon, Noel. "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95.
- McNeil, Kent. "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 *Supreme Court L.R.* 218.
- Pentney, William. "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207.
- Sanders, Douglas. "Pre-existing Rights: The Aboriginal Peoples of Canada," in Gerald A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. Toronto: Carswells, 1989.
- Schwartz, Bryan. *First Principles, Second Thoughts: Aboriginal People, Constitutional Reform and Canadian Statecraft*. Montréal: Institut de recherches politiques, 1986.
- Slaterry, Brian. "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 *Am. J. of Comp. Law* 361.
- Slaterry, Brian. "Understanding Aboriginal Rights" (1987), 66 *R. du B. can.* 727.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (1986), 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, qui a accueilli l'appel interjeté contre un jugement du juge Lamperson de la Cour de comté, [1986] B.C.W.L.D. 599, qui avait rejeté l'appel d'une déclaration de culpabilité prononcée par le juge Goulet de la Cour provinciale. Pourvoi et pourvoi incident rejetés. La question constitutionnelle doit être renvoyée en première instance afin de recevoir une réponse conformément à l'analyse exposée dans les présents motifs.

Marvin R. V. Storrow, Q.C., Lewis F. Harvey and Joanne Lysyk, for the appellant.

Thomas R. Braidwood, Q.C., and James E. Dorsey, for the respondent.

Harry A. Slade, Arthur Pape and Louise Mandell, for the intervener the National Indian Brotherhood / Assembly of First Nations.

Christopher Harvey, for the interveners the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Fishing Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild and the Deep Sea Trawlers' Association of B.C.

J. Keith Lowes, for the intervener the Fisheries Council of British Columbia.

Ian Donald, Q.C., for the intervener the United Fishermen and Allied Workers' Union.

J. T. S. McCabe, Q.C., and Michel Hélie, for the intervener the Attorney General for Ontario.

René Morin and Robert Décary, Q.C., for the intervener the Attorney General of Quebec.

E. Robert A. Edwards, Q.C., and Howard R. Eddy, for the intervener the Attorney General of British Columbia.

Kenneth J. Tyler and Robert G. Richards, for the intervener the Attorney General for Saskatchewan.

Robert J. Normey, for the intervener the Attorney General for Alberta.

S. Ronald Stevenson, for the intervener the Attorney General of Newfoundland.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND LA FOREST J.—This appeal requires this Court to explore for the first time the scope of s. 35(1) of the *Constitution Act*,

Marvin R. V. Storrow, c.r., Lewis F. Harvey et Joanne Lysyk, pour l'appellant.

Thomas R. Braidwood, c.r., et James E. Dorsey, pour l'intimée.

Harry A. Slade, Arthur Pape et Louise Mandell, pour l'intervenante la Fraternité des Indiens du Canada / Assemblée des premières nations.

Christopher Harvey, pour les intervenants la B.C. Wildlife Federation, la Steelhead Society of British Columbia, la Pacific Fishermen's Defence Alliance, Northern Trollers' Association, la Pacific Gillnetters' Association, la Gulf Trollers' Association, la Prince Rupert Fishing Vessel Owners' Association, la Fishing Vessel Owners' Association of British Columbia, la Pacific Coast Fishing Vessel Owners' Guild, la Prince Rupert Fishermen's Cooperative Association, la Co-op Fishermen's Guild et la Deep Sea Trawlers' Association of B.C.

J. Keith Lowes, pour l'intervenant le Fisheries Council of British Columbia.

Ian Donald, c.r., pour l'intervenant le Syndicat des pêcheurs et travailleurs assimilés.

J. T. S. McCabe, c.r., et Michel Hélie, pour l'intervenant le procureur général de l'Ontario.

René Morin et Robert Décary, c.r., pour l'intervenant le procureur général du Québec.

E. Robert A. Edwards, c.r., et Howard R. Eddy, pour l'intervenant le procureur général de la Colombie-Britannique.

Kenneth J. Tyler et Robert G. Richards, pour l'intervenant le procureur général de la Saskatchewan.

Robert J. Normey, pour l'intervenant le procureur général de l'Alberta.

S. Ronald Stevenson, pour l'intervenant le procureur général de Terre-Neuve.

Version française du jugement de la Cour rendu par

LE JUGE EN CHEF ET LE JUGE LA FOREST—Le présent pourvoi nous oblige à examiner pour la première fois la portée du par. 35(1) de la *Loi*

1982, and to indicate its strength as a promise to the aboriginal peoples of Canada. Section 35(1) is found in Part II of that Act, 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.

The context of this appeal is the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the *Fisheries Act*, R.S.C. 1970, c. F-14, and the regulations under that Act. The issue is whether Parliament's power to regulate fishing is now limited by s. 35(1) of the *Constitution Act, 1982*, and, more specifically, whether the net length restriction in the licence is inconsistent with that provision.

Facts

The appellant, a member of the Musqueam Indian Band, was charged under s. 61(1) of the *Fisheries Act* of the offence of fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence. The fishing which gave rise to the charge took place on May 25, 1984 in Canoe Passage which is part of the area subject to the Band's licence. The licence, which had been issued for a one-year period beginning March 31, 1984, set out a number of restrictions including one that drift nets were to be limited to 25 fathoms in length. The appellant was caught with a net which was 45 fathoms in length. He has throughout admitted the facts alleged to constitute the offence, but has defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence is inconsistent with s. 35(1) of the *Constitution Act, 1982* and therefore invalid.

The Courts Below

Goulet Prov. Ct. J., who heard the case, first referred to the very similar pre-*Charter* case of *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.),

constitutionnelle de 1982 et à indiquer la force qu'il peut avoir en tant que promesse faite aux peuples autochtones du Canada. Le paragraphe 35(1), qui se trouve à la partie II de cette loi sous la rubrique «Droits des peuples autochtones du Canada», porte:

35. (1) Les droits existants—ancestraux ou issus de traités—des peuples autochtones du Canada sont reconnus et confirmés.

Le contexte de ce pourvoi est une allégation de violation des conditions du permis de pêche de subsistance des Musqueams, lesquelles conditions sont fixées par la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14, et par ses règlements d'application. La question est de savoir si le pouvoir du Parlement de réglementer la pêche est maintenant restreint par le par. 35(1) de la *Loi constitutionnelle de 1982* et, plus précisément, de savoir si la restriction imposée dans le permis quant à la longueur du filet est incompatible avec cette disposition.

Les faits

L'appellant, un membre de la bande indienne des Musqueams, a été accusé en vertu du par. 61(1) de la *Loi sur les pêcheries* d'avoir pêché avec un filet dérivant plus long que celui autorisé par le permis de pêche de subsistance de la bande indienne. L'infraction remonte au 25 mai 1984 alors que l'appellant pêchait dans le passage Canoe qui fait partie de la zone visée par le permis de la bande. Le permis, délivré pour une période d'un an à compter du 31 mars 1984, établissait un certain nombre de restrictions dont celle qui prévoyait que les filets dérivants ne devaient pas avoir plus de 25 brasses de longueur. L'appellant a été trouvé en possession d'un filet qui avait 45 brasses de longueur. Il a toujours reconnu les faits à l'origine de l'infraction, mais il a soutenu en défense qu'il exerçait un droit ancestral existant de pêcher et que la restriction imposée dans le permis de la bande quant à la longueur du filet était incompatible avec le par. 35(1) de la *Loi constitutionnelle de 1982* et, par conséquent, invalide.

Les décisions des tribunaux d'instance inférieure

Le juge Goulet qui a entendu l'affaire en Cour provinciale a d'abord mentionné une affaire très semblable survenue avant l'adoption de la *Charte*,

where this Court held that the aboriginal right to fish was governed by the *Fisheries Act* and regulations. He then expressed the opinion that he was bound by *Calder v. Attorney-General of British Columbia* (1970), 74 W.W.R. 481 (B.C.C.A.), which held that a person could not claim an aboriginal right unless it was supported by a special treaty, proclamation, contract or other document, a position that was not disturbed because of the divided opinions of the members of this Court on the appeal which affirmed that decision ([1973] S.C.R. 313). Section 35(1) of the *Constitution Act, 1982* thus had no application. The alleged right here was not based on any treaty or other document but was said to have been one exercised by the Musqueam from time immemorial before European settlers came to this continent. He, therefore, convicted the appellant, finding it unnecessary to consider the evidence in support of an aboriginal right.

An appeal to Lamperson J. of the County Court of Vancouver, [1986] B.C.W.L.D. 599, was dismissed for similar reasons.

The British Columbia Court of Appeal (1986), 9 B.C.L.R. (2d) 300, found that the courts below had erred in deciding that they were bound by the Court of Appeal decision in *Calder, supra*, to hold that the appellant could not rely on an aboriginal right to fish. Since the pronouncement of the Supreme Court of Canada judgment, the Court of Appeal's decision has been binding on no one. The court also distinguished *Calder* on its facts.

The court then dealt with the other issues raised by the parties. On the basis of the trial judge's conclusion that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished "from time immemorial", it stated that, with the other circumstances, this should have led to the conclusion that Mr. Sparrow was exercising an existing aboriginal right. It rejected the Crown's contention that the right was no longer existing by reason of its "extinguishment by regulation". An aboriginal right could continue, though regulated.

savoir l'arrêt *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (C.S.C.), où notre Cour a conclu que le droit ancestral de pêcher était régi par la *Loi sur les pêcheries* et ses règlements d'application. Il a ensuite exprimé l'avis qu'il était lié par l'arrêt *Calder v. Attorney General of British Columbia* (1970), 74 W.W.R. 481 (C.A.C.-B.), dans lequel on avait conclu qu'une personne ne peut revendiquer un droit ancestral à moins que celui-ci ne soit étayé par un traité, une proclamation, un contrat ou un autre document particulier, une position qui n'a pas été contredite en raison des opinions partagées des membres de notre Cour qui ont confirmé l'arrêt ([1973] R.C.S. 313). Le paragraphe 35(1) de la *Loi constitutionnelle de 1982* ne s'appliquait donc pas. Le droit invoqué en l'espèce n'était pas fondé sur un traité ou un autre document, mais on a affirmé qu'il était exercé par les Musqueams depuis des temps immémoriaux, bien avant la venue des colons européens sur le continent. Le juge a donc déclaré l'appelant coupable et jugé qu'il n'était pas nécessaire d'examiner la preuve à l'appui de l'existence d'un droit ancestral.

Le juge Lamperson de la Cour de comté de Vancouver, [1986] B.C.W.L.D. 599, a rejeté l'appel pour des motifs semblables.

La Cour d'appel de la Colombie-Britannique (1986), 9 B.C.L.R. (2d) 300, a conclu que les tribunaux d'instance inférieure avaient commis une erreur en décidant qu'ils étaient liés par l'arrêt *Calder*, précité, de la Cour d'appel et que l'appelant ne pouvait invoquer un droit de pêche ancestral. Depuis le jugement de la Cour suprême du Canada, l'arrêt de la Cour d'appel ne lie plus personne. La cour a également distingué les faits de l'affaire *Calder* de ceux du présent pourvoi.

La cour a ensuite examiné les autres questions soulevées par les parties. Se fondant sur la conclusion du juge de première instance que M. Sparrow pêchait dans un territoire ancien de la tribu où ses ancêtres avaient pêché «depuis des temps immémoriaux», la cour a affirmé que, compte tenu des autres circonstances, cet élément aurait dû conduire à la conclusion que M. Sparrow exerçait un droit ancestral existant. Elle a rejeté la prétention de Sa Majesté que le droit n'existait plus en raison de son [TRADUCTION] «extinction par règlement».

The court also rejected textual arguments made to the effect that s. 35 was merely of a preambular character, and concluded that the right to fish asserted by the appellant was one entitled to constitutional protection.

The issue then became whether that protection extended so far as to preclude regulation (as contrasted with extinguishment which did not arise in this case) of the exercise of that right. In its view, the general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. Parliament retained the power to regulate fisheries and to control Indian lands under ss. 91(12) and (24) of the *Constitution Act, 1867* respectively. Reasonable regulations were necessary to ensure the proper management and conservation of the resource, and the regulations under the *Fisheries Act* restrict the right of all persons including Indians. The court observed, at p. 330:

Section 35(1) of the Constitution Act, 1982 does not purport to revoke the power of Parliament to act under Head 12 or 24. The power to regulate fisheries, including Indian access to the fisheries, continues, subject only to the new constitutional guarantee that the aboriginal rights existing on 17th April 1982 may not be taken away.

The court rejected arguments that the regulation of fishing was an inherent aspect of the aboriginal right to fish and that such regulation must be confined to necessary conservation measures. The right had always been and continued to be a regulated right. The court put it this way, at p. 331:

The aboriginal right which the Musqueam had was, subject to conservation measures, the right to take fish for food and for the ceremonial purposes of the band. It was in the beginning a regulated, albeit self-regulated, right. It continued to be a regulated right, and on 17th April 1982, it was a regulated right. It has never been a fixed right, and it has always taken its form from the circumstances in which it has existed. If the interests of the Indians and other Canadians in the fishery are to be protected, then reasonable regulations to ensure the

Un droit ancestral peut toujours exister même s'il est réglementé. La cour a également rejeté des arguments textuels selon lesquels l'art. 35 tenait simplement d'un préambule et elle a conclu que le droit de pêche invoqué par l'appelant pouvait bénéficier d'une protection constitutionnelle.

Il fallait donc alors déterminer si cette protection allait jusqu'à interdire la réglementation (par opposition à l'extinction qui n'a pas été soulevée en l'espèce) de l'exercice de ce droit. De l'avis de la cour, le pouvoir général de réglementer les périodes, les lieux et les méthodes de pêche, y compris la pêche en vertu d'un droit ancestral, existait toujours. Le Parlement a conservé le pouvoir de réglementer les pêcheries et de contrôler les terres réservées aux Indiens en vertu des par. 91(12) et (24) respectivement de la *Loi constitutionnelle de 1867*. Une réglementation raisonnable était nécessaire pour assurer la gestion et la conservation judicieuses des ressources et les règlements pris en application de la *Loi sur les pêcheries* restreignent le droit de tous, y compris les Indiens. La cour fait remarquer, à la p. 330:

[TRADUCTION] Le paragraphe 35(1) de la Loi constitutionnelle de 1982 n'a pas pour but de révoquer le pouvoir que possède le Parlement en vertu des par. 12 ou 24. Le pouvoir de réglementer les pêcheries, y compris l'accès des Indiens aux pêcheries, existe toujours, sous réserve seulement de la nouvelle garantie constitutionnelle que les droits ancestraux existants le 17 avril 1982 ne peuvent être supprimés.

La cour a rejeté les arguments selon lesquels la réglementation de la pêche constituait un aspect inhérent du droit de pêche ancestral et que cette réglementation devait être restreinte aux mesures de conservation nécessaires. Ce droit avait toujours été réglementé et continuait de l'être. Voici comment la cour s'exprime, à la p. 331:

[TRADUCTION] Le droit ancestral des Musqueams était, sous réserve de mesures de conservation, de prendre du poisson à des fins d'alimentation et aux fins rituelles de la bande. À l'origine, le droit était réglementé, bien que autoréglementé. Il a continué d'être réglementé et, le 17 avril 1982, c'était un droit réglementé. Ce droit n'a jamais été figé et sa forme a toujours été fonction des circonstances de son existence. S'il faut protéger les intérêts des Indiens et des autres Canadiens en matière de pêcheries, une réglementation

proper management and conservation of the resource must be continued.

The court then went on to particularize the right still further. It was a right for a purpose, not one related to a particular method. Essentially, it was a right to fish for food and associated traditional band activities:

The aboriginal right is not to take fish by any particular method or by a net of any particular length. It is to take fish for food purposes. The breadth of the right should be interpreted liberally in favour of the Indians. So "food purposes" should not be confined to subsistence. In particular, this is so because the Musqueam tradition and culture involves a consumption of salmon on ceremonial occasions and a broader use of fish than mere day-to-day domestic consumption.

That right, the court added, has not changed its nature since the enactment of the *Constitution Act, 1982*. What has changed is that the Indian food fishery right is now entitled to priority over the interests of other user groups and that that right, by reason of s. 35(1), cannot be extinguished.

The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Observing that the conviction was based on an erroneous view of the law and could not stand, the court further remarked upon the existence of unresolved conflicts in the evidence, including the question whether a change in the fishing conditions was necessary to reduce the catch to a level sufficient to satisfy reasonable food requirements, as well as for conservation purposes.

The Appeal

Leave to appeal to this Court was then sought and granted. On November 24, 1987, the following constitutional question was stated:

Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the *British Columbia Fishery (General) Regulations* and the *Fisheries Act*, R.S.C.

raisonnable s'impose toujours pour assurer la gestion et la conservation judicieuses des ressources.

La cour a poursuivi en précisant ce droit encore davantage. C'était un droit lié à un objet et non à une méthode particulière. Essentiellement, il s'agissait d'un droit de pêche lié à la subsistance et aux activités connexes traditionnelles de la bande:

[TRADUCTION] Le droit ancestral n'est pas de prendre du poisson d'une manière particulière ou au moyen d'un filet d'une longueur particulière. C'est le droit de prendre du poisson à des fins d'alimentation. L'étendue de ce droit devrait être interprétée libéralement en faveur des Indiens. Ainsi, l'expression «à des fins de subsistance» ne devrait pas être restreinte à la survie. Il en est ainsi plus particulièrement parce que, selon la tradition et la culture des Musqueams, on consomme du saumon à l'occasion de cérémonies rituelles et le poisson ne sert pas seulement à la consommation familiale quotidienne.

La cour a ajouté que la nature de ce droit n'avait pas changé depuis l'adoption de la *Loi constitutionnelle de 1982*. Ce qui a changé, c'est que le droit de pêche des Indiens à des fins d'alimentation peut maintenant bénéficier d'une priorité sur les intérêts d'autres groupes qui font usage du poisson et que ce droit, en raison du par. 35(1), ne peut être éteint.

Selon la Cour d'appel, les conclusions de fait du juge de première instance étaient insuffisantes pour justifier un acquittement. Soulignant que la déclaration de culpabilité était fondée sur une conception erronée du droit applicable et ne pouvait être maintenue, la cour a fait d'autres remarques sur l'existence de contradictions non résolues dans la preuve, y compris sur la question de savoir si les conditions de pêche devaient être modifiées pour réduire les prises à un niveau suffisant pour répondre aux demandes raisonnables de nourriture ainsi qu'à des fins de conservation.

Le pourvoi

L'autorisation de pourvoi devant cette Cour a ensuite été demandée et accordée. Le 24 novembre 1987, on a formulé la question constitutionnelle suivante:

La limite de la longueur des filets contenue dans le permis de pêche de subsistance des Indiens de la bande des Musqueams, délivré le 30 mars 1984 conformément au *Règlement de pêche général de la Colombie-Britan-*

1970, c. F-14, inconsistent with s. 35(1) of the *Constitution Act, 1982*?

The appellant appealed on the ground that the Court of Appeal erred (1) in holding that s. 35(1) of the *Constitution Act, 1982* protects the aboriginal right only when exercised for food purposes and permits restrictive regulation of such rights whenever "reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest", and (2) in failing to find the net length restriction in the Band's food fish licence was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

The respondent Crown cross-appealed on the ground that the Court of Appeal erred in holding that the aboriginal right had not been extinguished before April 17, 1982, the date of commencement of the *Constitution Act, 1982*, and in particular in holding that, as a matter of fact and law, the appellant possessed the aboriginal right to fish for food. In the alternative, the respondent alleged, the Court of Appeal erred in its conclusions respecting the scope of the aboriginal right to fish for food and the extent to which it may be regulated, more particularly in holding that the aboriginal right included the right to take fish for the ceremonial purposes and societal needs of the Band and that the Band enjoyed a constitutionally protected priority over the rights of other people engaged in fishing. Section 35(1), the respondent maintained, did not invalidate legislation passed for the purpose of conservation and resource management, public health and safety and other overriding public interests such as the reasonable needs of other user groups. Finally, it maintained that the conviction ought not to have been set aside or a new trial directed because the appellant failed to establish a *prima facie* case that the reduction in the length of the net had unreasonably interfered with his right by preventing him from meeting his food fish requirements. According to the respondent, the Court of Appeal had erred in shifting the

nique et à la Loi sur les pêcheries, S.R.C. 1970, ch. F-14, est-elle incompatible avec le par. 35(1) de la *Loi constitutionnelle de 1982*?

^a L'appellant se pourvoit devant nous pour le motif que, selon lui, la Cour d'appel a commis une erreur (1) en décidant que le par. 35(1) de la *Loi constitutionnelle de 1982* ne protège les droits ancestraux que lorsque ceux-ci sont exercés à des fins d'alimentation et permet une réglementation restrictive de ces droits lorsque [TRADUCTION] «cela est raisonnablement justifié comme nécessaire pour la gestion et la conservation judicieuses des ressources ou dans l'intérêt public», et (2) en refusant de conclure que la limite de la longueur des filets imposée dans le permis de pêche de subsistance de la bande était incompatible avec le par. 35(1) de la *Loi constitutionnelle de 1982*.

Sa Majesté intimée a formé un pourvoi incident pour le motif que la Cour d'appel aurait commis une erreur en décidant que le droit ancestral n'avait pas été éteint avant le 17 avril 1982, date d'entrée en vigueur de la *Loi constitutionnelle de 1982*, et, en particulier, en décidant, en fait et en droit, que l'appellant détenait le droit ancestral de pêcher à des fins de subsistance. Subsidiairement, l'intimée a allégué que la Cour d'appel a commis une erreur dans ses conclusions concernant la portée du droit ancestral de pêcher à des fins de subsistance et la mesure dans laquelle ce droit peut être réglementé, plus particulièrement, en décidant que le droit ancestral comprenait le droit de pêcher à des fins rituelles et sociales de la bande et que la bande bénéficiait d'une priorité, garantie par la Constitution, sur les droits d'autres gens qui s'adonnent à la pêche. Selon l'intimée, le par. 35(1) n'invalidait pas les mesures législatives adoptées à des fins de conservation et de gestion des ressources, de santé et de sécurité publiques et d'autres intérêts publics primordiaux comme les besoins raisonnables des autres groupes qui font usage du poisson. Enfin, elle a soutenu qu'on n'aurait pas dû annuler la déclaration de culpabilité ni ordonner la tenue d'un nouveau procès parce que l'appellant n'a pas prouvé, de façon suffisante à première vue, que la réduction de la longueur des filets avait porté atteinte de façon déraisonnable à

burden of proof to the Crown on the issue before the appellant had established a *prima facie* case.

The National Indian Brotherhood / Assembly of First Nations intervened in support of the appellant. The Attorneys General of British Columbia, Ontario, Quebec, Saskatchewan, Alberta and Newfoundland supported the respondent, as did the B.C. Wildlife Federation and others, the Fisheries Council of British Columbia and the United Fishermen and Allied Workers' Union.

The Regulatory Scheme

The *Fisheries Act*, s. 34, confers on the Governor in Council broad powers to make regulations respecting the fisheries, the most relevant for our purposes being those set forth in the following paragraphs of that section:

34. ...

(a) for the proper management and control of the seacoast and inland fisheries;

(b) respecting the conservation and protection of fish;

(c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;

(e) respecting the use of fishing gear and equipment;

(f) respecting the issue, suspension and cancellation of licences and leases;

(g) respecting the terms and conditions under which a lease or licence may be issued;

Contravention of the Act and the regulations is made an offence under s. 61(1) under which the appellant was charged.

Acting under its regulation-making powers, the Governor in Council enacted the *British Columbia Fishery (General) Regulations*, SOR/84-248. Under these Regulations (s. 4), everyone is, *inter alia*, prohibited from fishing without a licence, and

son droit en l'empêchant de répondre à ses besoins en matière de pêche pour fins d'alimentation. Selon l'intimée, la Cour d'appel a commis une erreur en déplaçant le fardeau de la preuve de manière à l'imposer à Sa Majesté avant que l'appelant n'ait présenté une preuve suffisante à première vue.

La Fraternité des Indiens du Canada / Assemblée des premières nations est intervenue à l'appui de l'appelant. Les procureurs généraux de la Colombie-Britannique, de l'Ontario, du Québec, de la Saskatchewan, de l'Alberta et de Terre-Neuve ont appuyé l'intimée tout comme l'ont fait la B.C. Wildlife Federation et autres, le Fisheries Council of British Columbia et le Syndicat des pêcheurs et travailleurs assimilés.

Le système de réglementation

L'article 34 de la *Loi sur les pêcheries* confère au gouverneur en conseil de larges pouvoirs de réglementation en matière de pêcheries, dont les plus pertinents en l'espèce sont ceux reproduits aux alinéas suivants de cet article:

34. ...

a) concernant la gestion et la surveillance judicieuses des pêches côtières et des pêches de l'intérieur;

b) concernant la conservation et la protection du poisson;

c) concernant la prise, le chargement, le débarquement, la manutention, le transport, la possession et l'écoulement du poisson;

e) concernant l'utilisation des appareils et accessoires de pêche;

f) concernant la délivrance, la suspension et l'annulation des permis et baux;

g) concernant les modalités et conditions auxquelles un permis ou un bail doit être délivré;

Le fait de contrevenir à la Loi et à ses règlements d'application constitue une infraction aux termes du par. 61(1) et c'est en vertu de ce paragraphe que l'appelant a été accusé.

Dans l'exercice de son pouvoir de réglementation, le gouverneur en conseil a adopté le *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248. En vertu de ce règlement (art. 4), il est notamment interdit de pêcher sans

then only in areas and at the times and in the manner authorized by the Act or regulations. That provision also prohibits buying, selling, trading or bartering fish other than those lawfully caught under the authority of a commercial fishing licence. Section 4 reads:

4. (1) Unless otherwise provided in the Act or in any Regulations made thereunder in respect of the fisheries to which these Regulations apply or in the *Wildlife Act* (British Columbia), no person shall fish except under the authority of a licence or permit issued thereunder.

(2) No person shall fish for any species of fish in the Province or in Canadian fisheries waters of the Pacific Ocean except in areas and at times authorized by the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.

(3) No person who is the owner of a vessel shall operate that vessel or permit it to be operated in contravention of these Regulations.

(4) No person shall, without lawful excuse, have in his possession any fish caught or obtained contrary to the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.

(5) No person shall buy, sell, trade or barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing licence issued by the Minister or the Minister of Environment for British Columbia.

The Regulations make provision for issuing licences to Indians or a band "for the sole purpose of obtaining food for that Indian and his family and for the band", and no one other than an Indian is permitted to be in possession of fish caught pursuant to such a licence. Subsections 27(1) and (4) of the Regulations read:

27. (1) In this section "Indian food fish licence" means a licence issued by the Minister to an Indian or a band for the sole purpose of obtaining food for that Indian and his family or for the band.

(4) No person other than an Indian shall have in his possession fish caught under the authority of an Indian food fish licence.

permis, et encore, seulement dans les secteurs, aux heures et de la façon prévus par la Loi ou ses règlements d'application. Cette disposition interdit également d'acheter, de vendre et d'échanger du poisson autre que celui pris légalement en vertu d'un permis de pêche commerciale. L'article 4 prévoit:

4. (1) Sauf disposition contraire de la Loi, de ses règlements d'application concernant les pêches visées par le présent règlement, ou de la loi dite *Wildlife Act* de la Colombie-Britannique, il est interdit à quiconque de pêcher sans détenir un permis, délivré en vertu de l'un des règlements ou lois précités.

(2) Il est interdit, dans les eaux de la province ou les eaux des pêcheries canadiennes de l'océan Pacifique, de pêcher une espèce de poisson en dehors des heures et des secteurs autorisés par la Loi ou ses règlements d'application concernant les pêches visées par le présent règlement.

(3) Il est interdit au propriétaire d'un bateau d'exploiter ou de permettre à quiconque d'exploiter le bateau en contravention du présent règlement.

(4) Il est interdit à quiconque d'avoir en sa possession, sans excuse légitime, du poisson qui a été pris ou obtenu d'une manière non conforme à la Loi ou à ses règlements d'application concernant les pêches visées par le présent règlement.

(5) Il est interdit à quiconque d'acheter, de vendre, d'échanger ou de tenter d'acheter, de vendre ou d'échanger du poisson ou des parties de poisson, autre que du poisson pris légalement aux termes d'un permis de pêche commerciale délivré par le Ministre ou le *Minister of Environment* de la Colombie-Britannique.

Le Règlement prévoit que des permis peuvent être délivrés à un Indien ou à une bande «aux seules fins de l'alimentation de l'Indien ou de sa famille ou de celle de la bande», et que seul un Indien peut avoir en sa possession du poisson pris en vertu d'un tel permis. Les paragraphes 27(1) et (4) du Règlement prévoient:

27. (1) Aux fins du présent article, «permis de pêche de subsistance des Indiens» désigne un permis délivré par le Ministre à un Indien ou à une bande aux seules fins de l'alimentation de l'Indien ou de sa famille ou de celle de la bande.

(4) Il est interdit à quiconque sauf un Indien d'avoir en sa possession du poisson pris en vertu d'un permis de pêche de subsistance des Indiens.

As in the case of other licences issued under the Act, such licences may, by s. 12 of the Regulations, be subjected to restrictions regarding the species and quantity of fish that may be taken, the places and times when they may be taken, the manner in which they are to be marked and, most important here, the type of gear and equipment that may be used. Section 12 reads as follows:

12. (1) Subject to these Regulations and any regulations made under the Act in respect of the fisheries to which these Regulations apply and for the proper management and control of such fisheries, there may be specified in a licence issued under these Regulations

(a) the species of fish and quantity thereof that is permitted to be taken;

(b) the period during which and the waters in which fishing is permitted to be carried out;

(c) the type and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is to be used;

(d) the manner in which fish caught and retained for educational or scientific purposes is to be held or displayed;

(e) the manner in which fish caught and retained is to be marked and transported; and

(f) the manner in which scientific or catch data is to be reported.

(2) No person fishing under the authority of a licence referred to in subsection (1) shall contravene or fail to comply with the terms of the licence.

Pursuant to these powers, the Musqueam Indian Band, on March 31, 1984, was issued an Indian food fishing licence as it had since 1978 "to fish for salmon for food for themselves and their family" in areas which included the place where the offence charged occurred, the waters of Ladner Reach and Canoe Passage therein described. The licence contained time restrictions as well as the type of gear to be used, notably "One Drift net twenty-five (25) fathoms in length".

The appellant was found fishing in the waters described using a drift net in excess of 25 fathoms.

Comme dans le cas des autres permis délivrés en vertu de la Loi, l'art. 12 du Règlement prévoit que ces permis peuvent faire l'objet de restrictions concernant les espèces et les quantités de poisson qui peuvent être prises, les lieux où le poisson peut être pris et les périodes pendant lesquelles il peut l'être, la façon dont le poisson doit être marqué et, qui plus est en l'espèce, le type d'engins et d'équipement qui peuvent être utilisés. L'article 12 se lit ainsi:

12. (1) Sous réserve du présent règlement et des autres règlements établis en vertu de la Loi relativement aux pêches visées par le présent règlement, un permis délivré en vertu du présent règlement peut indiquer, aux fins de la gestion et de la surveillance judicieuses de ces pêches,

a) quelles espèces et quelles quantités de poisson peuvent être prises;

b) dans quelles eaux et pendant quelle période la pêche peut être pratiquée;

c) quel type et quelle quantité d'engins et d'équipement de pêche peuvent être utilisés et de quelle façon ils doivent l'être;

d) de quelle façon le poisson pris et gardé à des fins éducatives ou scientifiques doit être gardé en captivité ou exposé;

e) de quelle façon le poisson pris et gardé doit être marqué et transporté; et

f) de quelle façon les données à caractère scientifique ou concernant les prises doivent être soumises.

(2) Il est interdit à quiconque pêche en vertu d'un permis visé au paragraphe (1) de déroger aux conditions de ce permis.

Conformément à ces pouvoirs, le 31 mars 1984, on a délivré à la bande indienne des Musqueams un permis de pêche de subsistance comme on le faisait depuis 1978 [TRADUCTION] «pour pêcher le saumon aux fins de leur alimentation et de celle de leurs familles» dans des secteurs dont celui où l'infraction reprochée a été commise, les eaux de Ladner Reach et du passage Canoe décrites dans le permis. Le permis comportait des restrictions quant à la période de pêche et quant au type d'engins à utiliser, notamment [TRADUCTION] «Un filet dérivant de vingt-cinq (25) brasses de longueur».

L'appelant a été surpris en train de pêcher dans les eaux décrites précédemment au moyen d'un

He did not contest this, arguing instead that he had committed no offence because he was acting in the exercise of an existing aboriginal right which was recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

Analysis

We will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish. We will then turn to the meaning of "recognized and affirmed", and the impact of s. 35(1) on the regulatory power of Parliament.

"Existing"

The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*. A number of courts have taken the position that "existing" means "being in actuality in 1982": *R. v. Eninew* (1983), 7 C.C.C. (3d) 443 (Sask. Q.B.), at p. 446, aff'd (1984), 12 C.C.C. (3d) 365 (Sask. C.A.) See also *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (Ont. C.A.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (Alta. Q.B.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (N.B.Q.B.); *R. v. Agawa* (1988), 28 O.A.C. 201.

Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. Blair J.A. in *Agawa, supra*, had this to say about the matter, at p. 214:

Some academic commentators have raised a further problem which cannot be ignored. The **Ontario Fishery Regulations** contained detailed rules which vary for different regions in the province. Among other things, the **Regulations** specify seasons and methods of fishing, species of fish which can be caught and catch limits. Similar detailed provisions apply under the comparable

filet dérivant de plus de 25 brasses. Il ne conteste pas ce fait, mais soutient plutôt qu'il n'a commis aucune infraction parce qu'il exerçait alors un droit ancestral existant qui a été reconnu et confirmé par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Analyse

Nous aborderons en premier lieu le sens de l'expression droits ancestraux «existants» ainsi que le contenu et la portée du droit de pêche des Musqueams. Nous examinerons ensuite le sens des mots «reconnus et confirmés» et l'effet du par. 35(1) sur le pouvoir réglementaire du Parlement.

«Existants»

Il ressort clairement du mot «existants» que les droits auxquels s'applique le par. 35(1) sont ceux qui existaient au moment de l'entrée en vigueur de la *Loi constitutionnelle de 1982*. D'où il s'ensuit que cette loi ne vient pas rétablir des droits éteints. Un certain nombre de tribunaux ont adopté le point de vue que le terme «existants» signifie «qui étaient exercés en 1982»: *R. v. Eninew* (1983), 7 C.C.C. (3d) 443 (B.R. Sask.), à la p. 446, conf. (1984), 12 C.C.C. (3d) 365 (C.A. Sask.) Voir également les arrêts *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (C.A. Ont.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (B.R. Alb.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (B.R.N.-B.); *R. v. Agawa* (1988), 28 O.A.C. 201.

De plus, un droit ancestral existant ne saurait être interprété de façon à englober la manière précise dont il était réglementé avant 1982. L'idée que le droit a été figé de cette façon aurait pour effet d'introduire dans la Constitution un ensemble de règlements disparates. Voici ce que le juge Blair de la Cour d'appel affirme à ce sujet dans l'arrêt *Agawa*, précité, à la p. 214:

[TRADUCTION] Certains auteurs ont soulevé un autre problème qui ne peut être ignoré. Le **Règlement de pêche de l'Ontario** comporte des règles détaillées qui varient d'une région à l'autre dans la province. Le **règlement** précise notamment les saisons et les méthodes de pêche, les espèces de poisson qui peuvent être prises et le nombre de prises. Des dispositions détaillées du

fisheries **Regulations** in force in other provinces. These detailed provisions might be constitutionalized if it were decided that the existing treaty rights referred to in s. 35(1) were those remaining after regulation at the time of the proclamation of the **Constitution Act, 1982**.

As noted by Blair J.A., academic commentary lends support to the conclusion that "existing" means "unextinguished" rather than exercisable at a certain time in history. Professor Slaterry, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at pp. 781-82, has observed the following about reading regulations into the rights:

This approach reads into the Constitution the myriad of regulations affecting the exercise of aboriginal rights, regulations that differed considerably from place to place across the country. It does not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory.

See also Professor McNeil, "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 *Supreme Court L.R.* 255, at p. 258 (q.v.); Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207.

The arbitrariness of such an approach can be seen if one considers the recent history of the federal regulation in the context of the present case and the fishing industry. If the *Constitution Act, 1982* had been enacted a few years earlier, any right held by the Musqueam Band, on this approach, would have been constitutionally subjected to the restrictive regime of personal licences that had existed since 1917. Under that regime, the Musqueam catch had by 1969 become minor or non-existent. In 1978 a system of band licences was introduced on an experimental basis which permitted the Musqueam to fish with a 75 fathom

même genre s'appliquent en vertu de **règlements** de pêche comparables en vigueur dans d'autres provinces. Ces dispositions détaillées pourraient être constitutionalisées si l'on décidait que les droits existants issus de traités et mentionnés au par. 35(1) étaient ceux qui subsistaient après avoir été réglementés à l'époque de l'entrée en vigueur de la **Loi constitutionnelle de 1982**.

Comme le souligne le juge Blair, la doctrine tend à étayer la conclusion que le mot «existants» signifie «non éteints» plutôt que «pouvant être exercés à une certaine époque passée». Le professeur Slaterry, dans son article intitulé «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727, aux pp. 781 et 782, fait observer ceci au sujet de l'utilisation de textes réglementaires pour déterminer le sens des droits:

[TRADUCTION] Cette interprétation introduit dans la Constitution une foule de règlements qui portent atteinte à l'exercice des droits des autochtones et qui diffèrent considérablement d'un endroit à l'autre au pays. Elle ne permet aucune distinction entre les règlements applicables à long terme et ceux qui sont adoptés pour faire face à des conditions temporaires, ou entre des restrictions raisonnables et déraisonnables. En outre, elle pourrait exiger l'adoption d'une modification constitutionnelle pour mettre en œuvre des règlements plus sévères que ceux qui existaient le 17 avril 1982. Cette solution ne semble pas satisfaisante.

Voir également l'article du professeur McNeil, intitulé «The Constitutional Rights of the Aboriginal Peoples of Canada» (1982), 4 *Supreme Court L.R.* 255, à la p. 258 (q.v.); Pentney, «The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee» (1988), 22 *U.B.C. L. Rev.* 207.

On perçoit le caractère arbitraire d'une telle interprétation lorsque l'on examine l'histoire récente de la réglementation fédérale dans le contexte de la présente affaire et de l'industrie de la pêche. Si la *Loi constitutionnelle de 1982* avait été adoptée quelques années plus tôt, tout droit détenu par la bande des Musqueams aurait, selon cette interprétation, été soumis constitutionnellement au régime sévère des permis personnels qui existait depuis 1917. Sous ce régime, en 1969, les prises des Musqueams étaient devenues négligeables ou non existantes. En 1978, un système mis sur pied sur une base expérimentale et selon lequel un

net for a greater number of days than other people. Under this regime, from 1977 to 1984, the number of Band members who fished for food increased from 19 persons using 15 boats, to 64 persons using 38 boats, while 10 other members of the Band fished under commercial licences. Before this regime, the Band's food fish requirement had basically been provided by Band members who were licensed for commercial fishing. Since the regime introduced in 1978 was in force in 1982, then, under this approach, the scope and content of an aboriginal right to fish would be determined by the details of the Band's 1978 licence.

The unsuitability of the approach can also be seen from another perspective. Ninety-one other tribes of Indians, comprising over 20,000 people (compared with 540 Musqueam on the reserve and 100 others off the reserve) obtain their food fish from the Fraser River. Some or all of these bands may have an aboriginal right to fish there. A constitutional patchwork quilt would be created if the constitutional right of these bands were to be determined by the specific regime available to each of those bands in 1982.

Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," *supra*, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.

permis était délivré à la bande permettait aux Musqueams de pêcher au moyen d'un filet de 75 brasses pendant une période plus longue que celle applicable aux autres personnes. Sous ce régime, de 1977 à 1984, le nombre de membres de la bande qui ont pêché à des fins de subsistance est passé de 19 personnes utilisant 15 bateaux à 64 personnes utilisant 38 bateaux alors que 10 autres membres de la bande pêchaient en vertu de permis de pêche commerciale. Avant ce régime, c'était essentiellement les membres de la bande qui détenaient un permis de pêche commerciale qui approvisionnaient celle-ci en poisson à des fins de subsistance. Puisque le régime mis en place en 1978 était en vigueur en 1982, alors, en vertu de cette interprétation, la portée et le contenu d'un droit ancestral de pêcher seraient déterminés par les modalités du permis de 1978 de la bande.

Il est également possible de percevoir le caractère inadéquat de cette interprétation sous un autre angle. Quatre-vingt-onze autres tribus d'Indiens comprenant plus de 20 000 personnes (par opposition aux 540 Musqueams qui habitent la réserve et aux 100 autres à l'extérieur de la réserve) s'approvisionnent en poisson pour des fins d'alimentation dans le fleuve Fraser. Peut-être que certaines ou même que toutes ces bandes ont un droit ancestral de pêcher à cet endroit. Un mélémé constitutionnel résulterait si le droit constitutionnel de ces bandes devait être établi en fonction du régime spécifique applicable à chacune d'elles en 1982.

Loin d'être définie selon le régime de réglementation en vigueur en 1982, l'expression «droits ancestraux existants» doit recevoir une interprétation souple de manière à permettre à ces droits d'évoluer avec le temps. Pour reprendre l'expression du professeur Slattery, dans «Understanding Aboriginal Rights,» précité, à la p. 782, le mot «existants» laisse supposer que ces droits sont [TRADUCTION] «confirmés dans leur état actuel plutôt que dans leurs simplicité et vigueur primitives». Il est alors évident qu'il faut rejeter une interprétation de la garantie constitutionnelle énoncée au par. 35(1) qui engloberait des «droits figés».

The Aboriginal Right

We turn now to the aboriginal right at stake in this appeal. The Musqueam Indian Reserve is located on the north shore of the Fraser River close to the mouth of that river and within the limits of the City of Vancouver. There has been a Musqueam village there for hundreds of years. This appeal does not directly concern the reserve or the adjacent waters, but arises out of the Band's right to fish in another area of the Fraser River estuary known as Canoe Passage in the South Arm of the river, some 16 kilometres (about 10 miles) from the reserve. The reserve and those waters are separated by the Vancouver International Airport and the Municipality of Richmond.

The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. Much of the evidence of an aboriginal right to fish was given by Dr. Suttles, an anthropologist, supported by that of Mr. Grant, the Band administrator. The Court of Appeal thus summarized Dr. Suttles' evidence, at pp. 307-308:

Dr. Suttles was qualified as having particular qualifications in respect of the ethnography of the Coast Salish Indian people of which the Musqueams were one of several tribes. He thought that the Musqueam had lived in their historic territory, which includes the Fraser River estuary, for at least 1,500 years. That historic territory extended from the north shore of Burrard Inlet to the south shore of the main channel of the Fraser River, including the waters of the three channels by which that river reaches the ocean. As part of the Salish people, the Musqueam were part of a regional social network covering a much larger area but, as a tribe, were themselves an organized social group with their own name, territory and resources. Between the tribes there was a flow of people, wealth and food. No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others.

Dr. Suttles described the special position occupied by the salmon fishery in that society. The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people,

Le droit ancestral

Nous passons maintenant au droit ancestral présentement en cause. La réserve indienne des Musqueams est située sur la rive nord du fleuve Fraser, près de son embouchure et dans les limites de la ville de Vancouver. Un village de Musqueams y est établi depuis des centaines d'années. Le présent pourvoi ne concerne pas directement la réserve ou les eaux adjacentes, mais découle du droit de la bande de pêcher dans un autre secteur de l'estuaire du fleuve Fraser, appelé passage Canoe, situé dans le bras sud du fleuve, à quelque 16 kilomètres (environs 10 milles) de la réserve. L'aéroport international de Vancouver et la municipalité de Richmond séparent la réserve de ces eaux.

La preuve révèle que les Musqueams vivaient dans la région comme société organisée bien avant la venue des colons européens et que la prise du saumon faisait partie intégrante de leur vie et le demeure encore aujourd'hui. La preuve de l'existence d'un droit de pêche ancestral provient en grande partie de M. Suttles, un anthropologue, dont le témoignage est confirmé par celui de M. Grant, l'administrateur de la bande. Voici comment la Cour d'appel résume le témoignage de M. Suttles, aux pp. 307 et 308:

[TRADUCTION] Monsieur Suttles est reconnu comme ayant des compétences particulières en ce qui concerne l'ethnographie du peuple indien Salish de la côte, composé de plusieurs tribus dont celles des Musqueams. Selon lui, les Musqueams vivent dans leur territoire ancestral, qui comprend l'estuaire du fleuve Fraser, depuis au moins 1 500 ans. Ce territoire ancestral s'étendait de la rive nord du passage Burrard à la rive sud du bras principal du fleuve Fraser et comprenait les eaux des trois bras par lesquels ce fleuve se jette dans l'océan. Parce que les Musqueams faisaient partie du peuple Salish, ils faisaient partie d'un réseau social régional qui s'étendait sur une bien plus grande région mais, comme tribu, ils formaient eux-mêmes un groupe social organisé ayant un nom, un territoire et des ressources en propre. Entre les tribus, il y avait circulation de personnes, de biens et de nourriture. Aucune tribu n'était tout à fait autosuffisante ni n'occupait son territoire à l'exclusion totale des autres.

Monsieur Suttles a décrit la place privilégiée de la pêche au saumon dans cette société. Le saumon était non seulement une source d'alimentation importante, mais encore il jouait un rôle important dans les croyan-

and in their ceremonies. The salmon were held to be a race of beings that had, in "myth times", established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual. Toward the salmon, as toward other creatures, there was an attitude of caution and respect which resulted in effective conservation of the various species.

While the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right, and the evidence was not extensive, the correctness of the finding of fact of the trial judge "that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River for salmon" is supported by the evidence and was not contested. The existence of the right, the Court of Appeal tells us, was "not the subject of serious dispute". It is not surprising, then, that, taken with other circumstances, that court should find, at p. 320, that "the judgment appealed from was wrong in . . . failing to hold that Sparrow at the relevant time was exercising an existing aboriginal right".

In this Court, however, the respondent contested the Court of Appeal's finding, contending that the evidence was insufficient to discharge the appellant's burden of proof upon the issue. It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it.

What the Crown really insisted on, both in this Court and the courts below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the *Fisheries Act*.

The history of the regulation of fisheries in British Columbia is set out in *Jack v. The Queen*, [1980] 1 S.C.R. 294, especially at pp. 308 *et seq.*, and we need only summarize it here. Before the

ces du peuple Salish et leurs cérémonies. On considérait le saumon comme une espèce vivante qui, à une «époque mythique», avait établi des liens avec l'espèce humaine; le saumon devait donc venir chaque année et offrir sa chair aux hommes qui, à leur tour, le traitaient avec respect dans l'accomplissement du rite approprié. À l'égard du saumon, comme à l'égard d'autres créatures, il y avait une attitude de prudence et de respect qui a permis de conserver efficacement les diverses espèces.

Bien que le procès concernant la violation d'une interdiction pénale ne constitue pas le cadre idéal pour déterminer l'existence d'un droit ancestral et bien que la preuve ne soit pas considérable, l'exactitude de la conclusion de fait du juge de première instance portant [TRADUCTION] «que M. Sparrow pêchait dans un territoire ancien de la tribu où ses ancêtres avaient pêché depuis des temps immémoriaux dans cette partie de l'embouchure du fleuve Fraser» est confirmée par la preuve et n'est pas contestée. Selon la Cour d'appel, l'existence de ce droit [TRADUCTION] «n'a pas vraiment été contestée». Il n'est donc pas surprenant que, compte tenu d'autres circonstances, la cour ait conclu, à la p. 320, que [TRADUCTION] «la décision qui fait l'objet de l'appel était erronée parce qu'on [. . .] n'a pas conclu que Sparrow exerçait à l'époque en question un droit ancestral existant».

Devant cette Cour cependant, l'intimée a contesté la conclusion de la Cour d'appel, prétendant que la preuve était insuffisante pour libérer l'appelant de son fardeau de preuve en la matière. Il est vrai qu'en ce qui concerne la période de 1867 à 1961 la preuve est sommaire. Mais la preuve n'a pas été contestée ni contredite devant les tribunaux d'instance inférieure et il y a preuve d'un exercice ininterrompu suffisant du droit pour justifier la conclusion de la Cour d'appel et nous n'y toucherons pas.

Ce sur quoi Sa Majesté a vraiment insisté, devant notre Cour et les tribunaux d'instance inférieure, c'est que le droit de pêche ancestral des Musqueams a été éteint par les règlements pris en vertu de la *Loi sur les pêcheries*.

L'historique de la réglementation des pêcheries en Colombie-Britannique est établi dans l'arrêt *Jack c. La Reine*, [1980] 1 R.C.S. 294, particulièrement aux pp. 308 et suiv., et il nous suffit de le

province's entry into Confederation in 1871, the fisheries were not regulated in any significant way, whether in respect of Indians or other people. The Indians were not only permitted but encouraged to continue fishing for their own food requirements. Commercial and sport fishing were not then of any great importance. The federal *Fisheries Act* was only proclaimed in force in the province in 1876 and the first *Salmon Fishery Regulations for British Columbia* were adopted in 1878 and were minimal.

The 1878 regulations were the first to mention Indians. They simply provided that the Indians were at all times at liberty, by any means other than drift nets or spearing, to fish for food for themselves, but not for sale or barter. The Indian right or liberty to fish was thereby restricted, and more stringent restrictions were added over the years. As noted in *Jack v. The Queen, supra*, at p. 310:

The federal Regulations became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets, then the restriction of fishing to food purposes, then the requirement of permission from the Inspector and, ultimately, in 1917, the power to regulate even food fishing by means of conditions attached to the permit.

The 1917 regulations were intended to make still stronger the provisions against commercial fishing in the exercise of the Indian right to fish for food; see P.C. 2539 of Sept. 11, 1917. The Indian food fishing provisions remained essentially the same from 1917 to 1977. The regulations of 1977 retained the general principles of the previous sixty years. An Indian could fish for food under a "special licence" specifying method, locale and times of fishing. Following an experimental program to be discussed later, the 1981 regulations provided for the entirely new concept of a Band food fishing licence, while retaining comprehensive

résumer en l'espèce. Avant l'entrée de la province dans la Confédération en 1871, il n'existait aucune réglementation appréciable de la pêche pour les Indiens ou pour les autres personnes. Les Indiens étaient non seulement autorisés, mais encouragés à pêcher pour se nourrir. La pêche commerciale et la pêche sportive n'avaient pas encore acquis une grande importance. Ce n'est qu'en 1876 que la loi fédérale, la *Loi sur les pêcheries*, est entrée en vigueur en Colombie-Britannique, et le premier règlement dit *Salmon Fishery Regulations for British Columbia* a été adopté en 1878 et sa portée était très limitée.

C'est en 1878 que les Indiens ont été mentionnés pour la première fois dans le Règlement. Celui-ci prévoyait simplement que les Indiens avaient en tout temps le droit de pêcher pour leur alimentation, mais non pour fins de vente, de troc ou de trafic, par tout moyen sauf le filet dérivant ou le harpon. Le droit ou la liberté des Indiens de pêcher était donc restreint, et des restrictions plus sévères ont été apportées au fil des ans. Tel que souligné dans l'arrêt *Jack c. La Reine*, précité, à la p. 310:

Face à la popularité de la pêche commerciale puis de la pêche sportive, la réglementation fédérale est, avec le temps, devenue de plus en plus sévère à l'égard des Indiens. On a assisté à l'assujettissement croissant de la pêche par les Indiens au contrôle réglementaire. Cela a commencé par la réglementation de l'usage de filets dérivants qui a été suivie d'une restriction du droit de pêche à des fins d'alimentation, puis de l'obligation d'obtenir un permis de l'inspecteur et enfin, en 1917, du pouvoir de réglementer même la pêche à des fins d'alimentation au moyen de conditions spécifiées dans le permis.

Le règlement de 1917 avait pour but de rendre encore plus sévères les dispositions interdisant la pêche commerciale dans l'exercice du droit des Indiens de pêcher à des fins alimentaires; voir C.P. 2539 du 11 septembre 1917. Les dispositions relatives à la pêche de subsistance des Indiens sont demeurées essentiellement les mêmes de 1917 à 1977. Le règlement de 1977 reprenait les principes généraux des soixante dernières années. Un Indien pouvait pêcher à des fins alimentaires en vertu d'un «permis spécial» précisant la méthode, le lieu et les périodes de pêche. À la suite d'un programme expérimental dont il sera question plus

specification of conditions for the exercise of licences.

It is this progressive restriction and detailed regulation of the fisheries which, respondent's counsel maintained, have had the effect of extinguishing any aboriginal right to fish. The extinguishment need not be express, he argued, but may take place where the sovereign authority is exercised in a manner "necessarily inconsistent" with the continued enjoyment of aboriginal rights. For this proposition, he particularly relied on *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.); *Calder v. Attorney-General of British Columbia*, *supra*; *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.); and *Attorney-General for Ontario v. Bear Island Foundation*, *supra*. The consent to its extinguishment before the *Constitution Act, 1982* was not required; the intent of the Sovereign could be effected not only by statute but by valid regulations. Here, in his view, the regulations had entirely displaced any aboriginal right. There is, he submitted, a fundamental inconsistency between the communal right to fish embodied in the aboriginal right, and fishing under a special licence or permit issued to individual Indians (as was the case until 1977) in the discretion of the Minister and subject to terms and conditions which, if breached, may result in cancellation of the licence. The *Fisheries Act* and its regulations were, he argued, intended to constitute a complete code inconsistent with the continued existence of an aboriginal right.

At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished. The distinction to be drawn was carefully explained, in the context of federalism, in the first

loin, le règlement de 1981 portait sur une notion tout à fait nouvelle d'un permis de pêche à des fins de subsistance d'une bande tout en conservant le régime complet des conditions pour l'exercice du permis.

Selon l'avocat de l'intimée, ce sont ces restrictions progressives et la réglementation détaillée du droit de pêche qui ont eu pour effet d'éteindre tout droit de pêche ancestral. Selon lui, il n'est pas nécessaire que l'extinction soit formulée expressément, elle peut avoir lieu lorsque l'autorité souveraine est exercée d'une manière [TRADUCTION] «nécessairement incompatible» avec la jouissance continue de droits ancestraux. À l'appui de cette affirmation, il a surtout invoqué les arrêts *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (C.P.), *Calder c. Procureur général de la Colombie-Britannique*, précité, *Baker Lake (Hamlet) c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518 (D.P.I.), et *Attorney-General for Ontario v. Bear Island Foundation*, précité. Avant l'adoption de la *Loi constitutionnelle de 1982*, le consentement à l'extinction n'était pas requis; le souverain pouvait réaliser son intention non seulement par une loi mais aussi par un règlement valide. De l'avis de l'avocat, en l'espèce, le règlement avait totalement supplanté tout droit ancestral. Il affirme qu'il existe une incompatibilité fondamentale entre le droit collectif de pêche enchâssé dans le droit ancestral, et le droit de pêche en vertu d'un permis spécial ou d'un permis délivré à des Indiens pris individuellement (comme c'était le cas jusqu'en 1977) par le Ministre dans l'exercice de son pouvoir discrétionnaire et sous réserve de conditions qui, si elles étaient violées, pouvaient entraîner l'annulation du permis. Il a poursuivi en affirmant que la *Loi sur les pêcheries* et ses règlements d'application avaient pour but d'établir un code complet incompatible avec l'existence ininterrompue d'un droit ancestral.

En réalité, l'intimé confond dans son argumentation la réglementation et l'extinction. Que l'exercice du droit fasse l'objet d'une réglementation très minutieuse, cela ne signifie pas que ce droit est par le fait même éteint. La distinction à faire a été expliquée soigneusement, dans le contexte du fédé-

fisheries case, *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700. There, the Privy Council had to deal with the interrelationship between, on the one hand, provincial property, which by s. 109 of the *Constitution Act, 1867* is vested in the provinces (and so falls to be regulated *qua* property exclusively by the provinces) and, on the other hand, the federal power to legislate respecting the fisheries thereon under s. 91(12) of that Act. The Privy Council said the following in relation to the federal regulation (at pp. 712-13):

... the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.

In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in *Baker Lake*, *supra*, at p. 568:

Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

See also *Attorney-General for Ontario v. Bear Island Foundation*, *supra*, at pp. 439-40. That in Judson J.'s view was what had occurred in *Calder*, *supra*, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest,

ralisme, dans le premier arrêt portant sur les pêcheries, *Attorney General for Canada v. Attorney General for Ontario*, [1898] A.C. 700. Dans cet arrêt, le Conseil privé devait se pencher sur la corrélation entre, d'une part, les biens situés dans la province, qui, en raison de l'art. 109 de la *Loi constitutionnelle de 1867*, appartiennent aux provinces (et qui, à ce titre, sont réglementés exclusivement par la province) et, d'autre part, le pouvoir fédéral de légiférer en matière de pêcheries en vertu du par. 91(12) de cette loi. Le Conseil privé affirme ceci au sujet de la réglementation fédérale, aux pp. 712 et 713:

[TRADUCTION] ... le pouvoir de légiférer en matière de pêcheries permet en toute logique au législateur titulaire d'un tel pouvoir de toucher dans une certaine mesure aux droits de propriété. Par exemple, une disposition qui fixe la saison où il est permis de pêcher ou le genre d'attirail que l'on peut employer pour pêcher (disposition que, de l'aveu de tous, le Parlement du Dominion a le pouvoir d'adopter) pourrait très sérieusement toucher à l'exercice des droits de propriété et l'étendue, la force et la portée d'une telle loi ressortissent entièrement au Parlement du Dominion. L'idée qu'on puisse abuser du pouvoir de sorte qu'en pratique le droit de propriété soit confisqué ne justifie pas les tribunaux d'imposer des restrictions au pouvoir absolu conféré dans la loi. Il est toujours possible d'abuser du pouvoir suprême de légiférer dans un domaine donné, mais il ne faut pas présumer qu'il sera exercé de façon inadmissible; le cas échéant, le seul recours consiste à s'adresser à l'électorat.

Dans le contexte des droits ancestraux, on pourrait faire valoir qu'avant 1982 un droit ancestral était automatiquement éteint dans la mesure où il était incompatible avec une loi. Comme le juge Mahoney l'a affirmé dans l'arrêt *Baker Lake*, précité, aux pp. 568 et 569:

Une fois qu'une loi a été régulièrement adoptée, il faut lui donner effet; s'il est nécessaire pour lui donner effet d'altérer voire d'abroger entièrement un droit de *common law* alors c'est l'effet que les tribunaux doivent lui donner. Cela est tout aussi vrai d'un titre aborigène que de tout autre droit de *common law*.

Voir également l'arrêt *Attorney-General for Ontario v. Bear Island Foundation*, précité, aux pp. 439 et 440. De l'avis du juge Judson, c'est ce qui s'était produit dans l'affaire *Calder*, précitée, où, selon lui, une série de lois avait mis fin à la volonté d'exercer une souveraineté incompatible

including aboriginal title. But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'". (Emphasis added.) The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

We would conclude then that the Crown has failed to discharge its burden of proving extinguishment. In our opinion, the Court of Appeal made no mistake in holding that the Indians have an existing aboriginal right to fish in the area where Mr. Sparrow was fishing at the time of the charge. This approach is consistent with ensuring that an aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past.

The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.

avec tout intérêt contradictoire, y compris un titre aborigène. Mais le juge Hall a affirmé dans cet arrêt (à la p. 404) «qu'il incombe à l'intimé d'établir que le Souverain voulait éteindre le titre indien, et que cette intention doit être «claire et expresse»». (Nous soulignons.) Le critère de l'extinction qui doit être adopté, à notre avis, est que l'intention du Souverain d'éteindre un droit ancestral doit être claire et expresse.

La *Loi sur les pêcheries* ou ses règlements d'application détaillés ne font état d'aucune intention claire et expresse de mettre fin au droit ancestral des Indiens de pêcher. Le fait qu'une disposition autorisant explicitement les Indiens à pêcher à des fins de subsistance ait pu s'appliquer à tous les Indiens et que la délivrance des permis ait pendant longtemps été discrétionnaire et effectuée sur une base individuelle plutôt que collective n'indique aucunement une intention claire d'éteindre le droit. Ces permis constituaient simplement une façon de contrôler les pêcheries et non de définir des droits sous-jacents.

Nous sommes donc d'avis que le ministère public ne s'est pas acquitté de son fardeau de prouver l'extinction du droit. Nous estimons que la Cour d'appel n'a commis aucune erreur en décidant que les Indiens ont un droit de pêche ancestral existant dans le secteur où M. Sparrow pêchait au moment de l'infraction. Ce point de vue est compatible avec le principe voulant qu'un droit ancestral ne doive pas être défini en fonction des façons dont il a été réglementé dans le passé.

Il nous faut maintenant préciser la portée du droit de pêche existant des Musqueams. D'après la preuve anthropologique produite pour établir l'existence de ce droit, la pêche au saumon a toujours fait partie intégrante de la culture distinctive des Musqueams. Le rôle important qu'elle joue ne se résume pas à la consommation à des fins de subsistance, mais il comprend également la consommation de saumon dans le cadre d'activités rituelles et sociales. Les Musqueams ont toujours pêché pour des raisons liées à leur survie culturelle et matérielle. Comme nous l'avons déjà affirmé, le droit d'agir ainsi peut s'exercer de manière contemporaine.

The British Columbia Court of Appeal in this case held that the aboriginal right was to fish for food purposes, but that purpose was not to be confined to mere subsistence. Rather, the right was found to extend to fish consumed for social and ceremonial activities. The Court of Appeal thereby defined the right as protecting the same interest as is reflected in the government's food fish policy. In limiting the right to food purposes, the Court of Appeal referred to the line of cases involving the interpretation of the Natural Resources Agreements and the food purpose limitation placed on the protection of fishing and hunting rights by the *Constitution Act, 1930* (see *R. v. Wesley*, [1932] 2 W.W.R. 337, *Prince and Myron v. The Queen*, [1964] S.C.R. 81; *R. v. Sutherland*, [1980] 2 S.C.R. 451).

The Court of Appeal's position was attacked from both sides. The respondent for its part, argued that, if an aboriginal right to fish does exist, it does not include the right to take fish for the ceremonial and social activities of the Band. The appellant, on the other hand, attacked the Court of Appeal's restriction of the right to a right to fish for food. He argued that the principle that the holders of aboriginal rights may exercise those rights according to their own discretion has been recognized by this Court in the context of the protection of treaty hunting rights (*Simon v. The Queen*, [1985] 2 S.C.R. 387) and that it should be applied in this case such that the right is defined as a right to fish for any purpose and by any non-dangerous method.

In relation to this submission, it was contended before this Court that the aboriginal right extends to commercial fishing. While no commercial fishery existed prior to the arrival of European settlers, it is contended that the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes. The presence of numerous interveners representing commercial fishing interests, and the suggestion on the facts that the net length restriction is at least

La Cour d'appel de la Colombie-Britannique a décidé en l'espèce que le droit ancestral en cause est celui de pêcher à des fins d'alimentation, mais que ces fins ne doivent pas être restreintes à la simple survie. On a conclu, au contraire, que ce droit s'étend au poisson consommé dans le cadre d'activités sociales et rituelles. La Cour d'appel a ainsi défini le droit comme protégeant le même intérêt que celui que traduit la politique du gouvernement en matière de pêche à des fins de subsistance. En limitant à des fins de subsistance l'exercice de ce droit, la Cour d'appel s'est fondée sur un courant de jurisprudence portant sur l'interprétation des conventions sur les ressources naturelles et sur la restriction relative à la subsistance apportée par la *Loi constitutionnelle de 1930* à la protection des droits de pêche et de chasse (voir *R. v. Wesley*, [1932] 2 W.W.R. 337, *Prince and Myron v. The Queen*, [1964] R.C.S. 81, *R. c. Sutherland*, [1980] 2 R.C.S. 451).

Les deux parties ont contesté la position de la Cour d'appel. D'une part, l'intimée a soutenu que si le droit ancestral de pêcher existe, ce droit ne comprend pas celui de prendre du poisson pour des cérémonies ou des activités sociales de la bande. D'autre part, l'appelant a contesté la restriction apportée par la Cour d'appel au droit de pêcher à des fins de subsistance. Il a soutenu que le principe suivant lequel les titulaires de droits ancestraux peuvent exercer ces droits comme bon leur semble a reçu l'aval de notre Cour dans le contexte de la protection de droits de chasse issus d'un traité (*Simon c. La Reine*, [1985] 2 R.C.S. 387), et qu'il devrait être appliqué dans la présente instance de manière à ce que le droit en question soit défini comme un droit de pêcher à quelque fin que ce soit, au moyen de toute méthode non dangereuse.

En ce qui concerne cet argument, on a soutenu devant notre Cour que le droit ancestral englobe la pêche commerciale. Bien qu'il n'y ait pas eu de pêche commerciale avant l'arrivée des colons européens, on prétend que le troc pratiqué jadis par les Musqueams peut être rétabli sous la forme d'un droit moderne de pêcher à des fins commerciales. La présence de nombreux intervenants représentant les intérêts des pêcheurs commerciaux et l'idée, se dégageant des faits, que la restriction

in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises and tensions increase.

Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish for food for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).

In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's food fishing licence. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes.

"Recognized and Affirmed"

We now turn to the impact of s. 35(1) of the *Constitution Act, 1982* on the regulatory power of Parliament and on the outcome of this appeal specifically.

quant à la longueur des filets est liée, du moins en partie, à l'usage commercial qui est probablement fait du poisson pris en vertu du permis de pêche de subsistance des Musqueams indiquent une possibilité de conflit entre la pêche par des autochtones et la pêche commerciale concurrentielle relativement à un poisson d'une grande valeur économique comme le saumon. Nous reconnaissons l'existence de ce conflit ainsi que la probabilité qu'il s'aggrave à mesure que les quantités de poisson diminuent, que la demande augmente et que les tensions montent.

Depuis plus de cent ans, les règlements gouvernementaux régissant l'exercice du droit des Musqueams de pêcher décrit plus haut ne reconnaissent que le droit de pêcher à des fins de subsistance. Cela peut expliquer la position actuelle. Cependant, non seulement la politique historique de Sa Majesté ne permet pas d'éteindre le droit ancestral existant en l'absence d'intention claire en ce sens, mais elle ne permet pas non plus en soi de délimiter ce droit. La nature de règlements gouvernementaux ne saurait être déterminante quant au contenu et à la portée d'un droit ancestral existant. La politique gouvernementale peut toutefois réglementer l'exercice de ce droit, mais cette réglementation doit être conforme au par. 35(1).

Devant les tribunaux d'instance inférieure, la présente affaire n'a pas été débattue en fonction de l'existence d'un droit ancestral de pêcher à des fins commerciales ou de subsistance. Les débats ont plutôt porté, et portent encore, sur la validité d'une restriction quant à la longueur des filets qui touche le permis de pêche de subsistance de l'appelant. Nous adoptons donc, pour les fins du présent pourvoi, la caractérisation de ce droit donnée par la Cour d'appel et limitons nos motifs au sens de la reconnaissance et de la confirmation constitutionnelles du droit ancestral existant de pêcher à des fins de subsistance et à des fins sociales et rituelles.

«Reconnus et confirmés»

Nous passons maintenant à l'effet du par. 35(1) de la *Loi constitutionnelle de 1982* sur le pouvoir réglementaire du Parlement et, en particulier, sur l'issue du présent pourvoi.

Counsel for the appellant argued that the effect of s. 35(1) is to deny Parliament's power to restrictively regulate aboriginal fishing rights under s. 91(24) ("Indians and Lands Reserved for the Indians"), and s. 91(12) ("Sea Coast and Inland Fisheries"). The essence of this submission, supported by the intervener, the National Indian Brotherhood / Assembly of First Nations, is that the right to regulate is part of the right to use the resource in the Band's discretion. Section 35(1) is not subject to s. 1 of the *Canadian Charter of Rights and Freedoms* nor to legislative override under s. 33. The appellant submitted that, if the regulatory power continued, the limits on its extent are set by the word "inconsistent" in s. 52(1) of the *Constitution Act, 1982* and the protective and remedial purposes of s. 35(1). This means that aboriginal title entails a right to fish by any non-dangerous method chosen by the aboriginals engaged in fishing. Any continuing governmental power of regulation would have to be exceptional and strictly limited to regulation that is clearly not inconsistent with the protective and remedial purposes of s. 35(1). Thus, counsel for the appellant speculated, "in certain circumstances, necessary and reasonable conservation measures might qualify" (emphasis added)—where for example such measures were necessary to prevent serious impairment of the aboriginal rights of present and future generations, where conservation could only be achieved by restricting the right and not by restricting fishing by other users, and where the aboriginal group concerned was unwilling to implement necessary conservation measures. The onus of proving a justification for restrictive regulations would lie with the government by analogy with s. 1 of the *Charter*.

In response to these submissions and in finding the appropriate interpretive framework for s. 35(1), we start by looking at the background of s. 35(1).

L'avocat de l'appellant soutient que l'effet du par. 35(1) est de nier le pouvoir du Parlement de réglementer restrictivement les droits de pêche des autochtones en vertu du par. 91(24) («les Indiens et les terres réservées aux Indiens») et du par. 91(12) («des pêcheries des côtes de la mer et de l'intérieur»). L'essence de cet argument, appuyé par l'intervenante, la Fraternité des Indiens du Canada / Assemblée des premières nations, est que le droit de réglementer fait partie du droit de la bande d'utiliser la ressource comme bon lui semble. Le paragraphe 35(1) n'est pas assujéti à l'article premier de la *Charte canadienne des droits et libertés*, ni à la dérogation législative prévue à l'art. 33. L'appellant fait valoir que si le pouvoir de réglementation continue de s'appliquer, les limites de son étendue sont établies par le terme «incompatibles» contenu au par. 52(1) de la *Loi constitutionnelle de 1982* et les fins protectrices et réparatrices du par. 35(1). Cela signifie qu'un titre aborigène comporte le droit de pêcher au moyen de toute méthode non dangereuse choisie par les pêcheurs autochtones. Tout pouvoir de réglementation que le gouvernement continuerait à exercer devrait être exceptionnel et strictement limité à une réglementation nettement compatible avec les fins protectrices et réparatrices du par. 35(1). L'avocat de l'appellant a donc supposé que [TRA-
DUCTION] «dans certains cas, des mesures de conservation nécessaires et raisonnables pourraient être adoptées» (nous soulignons) si, par exemple, de telles mesures étaient nécessaires pour éviter qu'on porte sérieusement atteinte aux droits ancestraux des générations actuelles et futures, si les objectifs de conservation ne pouvaient être atteints que par une restriction de ce droit et non de la pêche pratiquée par d'autres pêcheurs, et si le groupe autochtone visé refusait de mettre en œuvre les mesures de conservation nécessaires. Par analogie avec l'article premier de la *Charte*, il incomberait au gouvernement de justifier l'adoption de règlements restrictifs.

Afin de répondre à ces arguments et de trouver le cadre d'interprétation approprié pour le par. 35(1), nous commençons par examiner l'historique de ce paragraphe.

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; see *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.); see also the Royal Proclamation itself (R.S.C., 1985, App. II, No. 1, pp. 4-6); *Calder, supra, per* Judson J., at p. 328, Hall J., at pp. 383 and 402. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654. As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."

For many years, the rights of the Indians to their aboriginal lands — certainly as legal rights — were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to

Il convient de rappeler que bien que la politique britannique envers la population autochtone fût fondée sur le respect de leur droit d'occuper leurs terres ancestrales, comme en faisait foi la Proclamation royale de 1763, dès le départ, on n'a jamais douté que la souveraineté et la compétence législative, et même le titre sous-jacent, à l'égard de ces terres revenaient à Sa Majesté; voir l'arrêt *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (C.S.É.-U.); voir également la Proclamation royale elle-même (L.R.C. (1985), app. II, n° 1, pp. 4 à 6); *Calder*, précité, le juge Judson, à la p. 328, le juge Hall aux pp. 383 et 402. Et il n'y a pas de doute qu'au fil des ans les droits des Indiens ont souvent été reconnus par suite d'une violation (voir, par exemple l'arrêt *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654). Comme le juge MacDonald l'a affirmé dans la décision *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (C.S.C.-B.), à la p. 37: [TRADUCTION] «Ce n'est pas avec beaucoup de fierté que nous pouvons rappeler le traitement réservé aux autochtones de notre pays».

Pendant plusieurs années les droits des Indiens à leurs terres ancestrales — certainement à titre de droits reconnus en common law — ont été à toutes fins pratiques ignorés. Les arrêts de principe qui ont défini les droits des Indiens au début du siècle portaient sur des revendications étayées par la Proclamation royale ou d'autres documents juridiques et, même dans ces cas, les tribunaux étaient essentiellement intéressés à établir la compétence législative ou les droits des entreprises commerciales. Au cours des cinquante années qui ont suivi la publication de l'ouvrage de Clement, *The Law of the Canadian Constitution* (3^e éd. 1916), on constate une absence quasi totale d'analyse des droits territoriaux des Indiens, et ce, même dans les ouvrages de doctrine. À la fin des années soixante, le gouvernement fédéral n'accordait même pas de valeur juridique aux revendications des autochtones. Ainsi, même si elle procédait d'une intention louable, *La politique indienne du gouvernement du Canada* (1969), contenait (à la p. 12) l'affirmation que «les droits aborigènes [...] sont tellement généraux qu'il n'est pas réaliste de les considérer comme des droits précis, susceptibles d'être réglés excepté par un ensemble de politiques et de mesu-

the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government.

In the light of its reassessment of Indian claims following *Calder*, the federal Government on August 8, 1973 issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country". (Emphasis added.) See *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People*, August 8, 1973. The remarks about these lands were intended "as an expression of acknowledged responsibility". But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. "The Government", it stated, "is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

res qui mettront fin aux injustices dont les Indiens ont souffert comme membres de la société canadienne». Au cours de la même période générale, Hydro Québec a entrepris le développement de la Baie James sans d'abord tenir compte des droits des Indiens qui y vivaient, et ce, même si ces droits bénéficiaient d'une protection constitutionnelle expresse; voir la *Loi de l'extension des frontières de Québec, 1912*, S.C. 1912, ch. 45. Il aura fallu un bon nombre de décisions judiciaires et notamment l'arrêt *Calder* de notre Cour (1973) pour que le gouvernement reconsidère sa position.

Compte tenu de sa nouvelle évaluation des revendications des Indiens à la suite de l'arrêt *Calder*, le gouvernement fédéral public, le 8 août 1973, «une déclaration de principe» concernant les terres indiennes. Par cette déclaration, le gouvernement veut montrer qu'il «reconnaît et accepte sa responsabilité permanente, aux termes de l'Acte de l'Amérique du Nord britannique, en ce qui a trait aux Indiens et aux territoires réservés à leur intention», qu'il considère «comme le résultat d'une évolution historique remontant à la Proclamation royale de 1763, laquelle demeure comme une déclaration fondamentale des intérêts fonciers des Indiens du pays, quelles que soient les différences intervenues quant à son interprétation légale». (Nous soulignons.) Voir la *Déclaration par l'honorable Jean Chrétien, ministre des Affaires indiennes et du Nord canadien, au sujet des revendications des Indiens et Inuit*, en date du 8 août 1973. Les remarques au sujet de ces terres se voulaient «une attestation de [...] responsabilité.» Mais, pour la première fois, le gouvernement y exprime sa volonté de négocier concernant les revendications d'un titre aborigène de propriété, particulièrement en Colombie-Britannique, dans le Nouveau-Québec et les Territoires, et ce, indépendamment de tout document officiel. «Le gouvernement», dit-on, «est maintenant prêt à négocier avec les représentants mandatés par ces groupes, en partant du principe que, dans les cas où leurs droits traditionnels aux terres revendiquées peuvent être établis, les autochtones recevront, en retour de ces intérêts, une indemnité ou un avantage convenus.»

It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position; see also *In All Fairness: A Native Claims Policy — Comprehensive Claims* (1981), pp. 11-12; Slattey, "Understanding Aboriginal Rights" *op. cit.*, at p. 730. As recently as *Guerin v. The Queen*, [1984] 2 S.C.R. 335, the federal government argued in this Court that any federal obligation was of a political character.

It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event, flow from the *Guerin* case, *supra*, but for a proper understanding of the situation, it is essential to remember that the *Guerin* case was decided after the commencement of the *Constitution Act, 1982*. In addition to its effect on aboriginal rights, s. 35(1) clarified other issues regarding the enforcement of treaty rights (see Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada," in Beaudoin and Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed., especially at p. 730).

In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95, says the following about s. 35(1), at p. 100:

Il ressort clairement du texte que l'attitude adoptée à l'égard des revendications des autochtones dans la déclaration de 1973 exprimait une politique plutôt qu'une prise de position sur le plan juridique; voir également *En toute justice: Une politique des revendications des autochtones: revendications globales* (1981), pp. 11 et 12; Slattey, «Understanding Aboriginal Rights», *op. cit.*, à la p. 730. Aussi récemment que dans l'affaire *Guerin c. La Reine*, [1984] 2 R.C.S. 335, le gouvernement fédéral a soutenu devant notre Cour que toute obligation fédérale était de nature politique.

Il est donc clair que le par. 35(1) de la *Loi constitutionnelle de 1982* représente l'aboutissement d'une bataille longue et difficile à la fois dans l'arène politique et devant les tribunaux pour la reconnaissance de droits ancestraux. La forte représentation des associations autochtones et d'autres groupes soucieux du bien-être des peuples autochtones du Canada a rendu possible l'adoption du par. 35(1) et il est important de souligner que cette disposition s'applique aux Indiens, aux Inuit et aux Métis. Le paragraphe 35(1) procure, tout au moins, un fondement constitutionnel solide à partir duquel des négociations ultérieures peuvent être entreprises. Il accorde également aux autochtones une protection constitutionnelle contre la compétence législative provinciale. Nous sommes évidemment conscients que cela découlerait de toute façon de l'arrêt *Guerin*, précité, mais pour bien comprendre la situation, il est essentiel de se rappeler que l'arrêt *Guerin* a été rendu après l'entrée en vigueur de la *Loi constitutionnelle de 1982*. En outre, en plus de son effet sur les droits ancestraux, le par. 35(1) a clarifié d'autres points concernant l'application des droits issus de traités (voir Sanders, «Pre-existing Rights: The Aboriginal Peoples of Canada», dans Beaudoin et Ratushny (éd.), *The Canadian Charter of Rights and Freedoms*, 2^e éd., particulièrement à la p. 730).

À notre avis, l'importance du par. 35(1) va au-delà de ces effets fondamentaux. Dans «An Essay on Constitutional Interpretation» (1988), 26 *Osgoode Hall L.J.* 95, à la p. 100, le professeur Lyon dit ceci au sujet du par. 35(1):

... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of "recognized and affirmed" that, in our opinion, gives appropriate weight to the constitutional nature of these words.

In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court said the following about the perspective to be adopted when interpreting a constitution, at p. 745:

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the *Constitution Act, 1982*, which deal with aboriginal rights, it said the following, at p. 322:

[TRADUCTION] ... le contexte de l'année 1982 nous fournit assurément une indication suffisante qu'il ne s'agit pas d'une simple codification de la jurisprudence portant sur les droits ancestraux qui existait en 1982. L'article 35 exige un règlement équitable en faveur des peuples autochtones. Il écarte les anciennes règles du jeu en vertu desquelles Sa Majesté établissait des cours de justice auxquelles elle refusait le pouvoir de mettre en doute Ses revendications souveraines.

La méthode qu'il convient d'adopter pour interpréter le par. 35(1) est dérivée des principes généraux d'interprétation constitutionnelle, des principes relatifs aux droits ancestraux et des objets sous-jacents à la disposition constitutionnelle elle-même. Nous allons ici ébaucher le cadre d'une interprétation de l'expression «reconnus et confirmés» qui, selon nous, accorde au caractère constitutionnel de ces mots l'importance qui lui revient.

Dans le *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, notre Cour affirme ceci au sujet de l'optique dans laquelle il faut aborder l'interprétation d'une constitution, à la p. 745:

La Constitution d'un pays est l'expression de la volonté du peuple d'être gouverné conformément à certains principes considérés comme fondamentaux et à certaines prescriptions qui restreignent les pouvoirs du corps législatif et du gouvernement. Elle est, comme le déclare l'art. 52 de la *Loi constitutionnelle de 1982*, la «loi suprême» de notre pays, qui ne peut être modifiée par le processus législatif normal et qui ne tolère aucune loi incompatible avec elle. Il appartient au pouvoir judiciaire d'interpréter et d'appliquer les lois du Canada et de chacune des provinces et il est donc de notre devoir d'assurer que la loi constitutionnelle a préséance.

La nature même du par. 35(1) laisse supposer qu'il y a lieu de l'interpréter en fonction de l'objet qu'il vise. Si on considère les objectifs de la confirmation des droits ancestraux, il est évident qu'une interprétation généreuse et libérale du texte de cette disposition constitutionnelle s'impose. Devant l'argument voulant que l'art. 35 n'ait aucun effet sur les droits ancestraux ou issus de traités et qu'il ne soit qu'un préambule aux parties de la *Loi constitutionnelle de 1982* qui portent sur les droits des autochtones, la Cour d'appel en l'espèce dit ceci, à la p. 322:

This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.*, [1983] 1 S.C.R. 29

In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36, the following principle that should govern the interpretation of Indian treaties and statutes was set out:

... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

In *R. v. Agawa*, *supra*, Blair J.A. stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16:

The second principle was enunciated by the late Associate Chief Justice MacKinnon in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian rights "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:

"The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."

This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legisla-

[TRANSCRIPTION] Cet argument ne donne aucun sens à l'art. 35. En le retenant, on se trouverait à nier la déclaration non équivoque de cet article que les droits existants sont reconnus et confirmés et à n'en faire qu'une simple promesse de reconnaître et de confirmer ces droits à une époque future [...] Une telle interprétation du par. 35(1) ferait abstraction à la fois de ses termes et du principe selon lequel la Constitution doit recevoir une interprétation libérale et réparatrice. Nous ne pouvons accepter que ce principe s'applique avec moins de force aux droits ancestraux qu'à ceux garantis par la Charte, compte tenu particulièrement de l'histoire et de la méthode d'interprétation des traités et des lois concernant les Indiens commandée par des arrêts comme *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29 . . .

Dans l'arrêt *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, à la p. 36, on énonce le principe qui doit régir l'interprétation des traités et des lois concernant les Indiens:

... les traités et les lois visant les Indiens doivent recevoir une interprétation libérale et [...] toute ambiguïté doit profiter aux Indiens.

Dans l'arrêt *R. v. Agawa*, précité, le juge Blair affirme que ce principe devrait s'appliquer à l'interprétation du par. 35(1). Aux pages 215 et 216, il ajoute comme tout aussi applicable le principe suivant:

[TRANSCRIPTION] Le second principe a été énoncé par feu le juge en chef adjoint MacKinnon dans l'arrêt *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360. Soulignant l'importance de l'histoire et des traditions indiennes ainsi que ce qu'on croyait être l'effet du traité au moment de sa signature, il a en outre fait une mise en garde contre la détermination des droits des Indiens «dans l'abstrait». L'interprétation de traités avec les Indiens met en cause l'honneur de la Couronne et, par conséquent, l'équité envers les Indiens est un facteur dominant. Il dit, à la p. 367:

«Les principes applicables à l'interprétation de traités visant les Indiens ont fait l'objet de nombreuses discussions au fil des ans. Lorsqu'il s'agit d'interpréter les conditions d'un traité, tout à fait indépendamment des autres considérations déjà évoquées, il y va toujours de l'honneur de la Couronne et aucune apparence de «manœuvres malhonnêtes» ne doit être tolérée.»

Ce point de vue se reflète dans de récentes décisions judiciaires insistant sur la responsabilité qu'a le gouvernement de protéger les droits des Indiens, laquelle responsabilité résulte des rapports fiduciaires spéciaux

tion: see **Guerin v. The Queen**, [1984] 2 S.C.R. 335; 55 N.R. 161; 13 D.L.R. (4th) 321.

In *Guerin*, *supra*, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the 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.

We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principles outlined above, derived from *Nowegijick*, *Taylor and Williams* and *Guerin*, should guide the interpretation of s. 35(1). As commentators have noted, s. 35(1) is a solemn commitment that must be given meaningful content (Lyon, *op. cit.*; Pentney, *op. cit.*; Schwartz, "Unstarted Business: Two Approaches to Defining s. 35—'What's in the Box?' and 'What Kind of Box?'"', Chapter XXIV, in *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft*; Slattery, *op. cit.*; and Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 *Am. J. of Comp. Law* 361).

In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the *Charter*, it is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our

créés par l'histoire, par des traités et par des textes législatifs: voir **Guerin c. La Reine**, [1984] 2 R.C.S. 335; 55 N.R. 161; 13 D.L.R. (4th) 321.

Dans l'affaire *Guerin*, précitée, la bande indienne Musqueam avait cédé des terres réservées à Sa Majesté pour que celle-ci les loue à un club de golf. Les conditions du bail consenti par Sa Majesté étaient beaucoup moins favorables que celles approuvées par la bande à l'assemblée de la cession. Notre Cour a statué que Sa Majesté a envers les Indiens une obligation de fiduciaire en ce qui concerne leurs terres. La nature *sui generis* du titre indien de même que les pouvoirs et la responsabilité historiques de Sa Majesté constituent la source de cette obligation de fiduciaire. À notre avis, l'arrêt *Guerin*, conjugué avec l'arrêt *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, justifie un principe directeur général d'interprétation du par. 35(1), savoir, le gouvernement a la responsabilité d'agir en qualité de fiduciaire à l'égard des peuples autochtones. Les rapports entre le gouvernement et les autochtones sont de nature fiduciaire plutôt que contradictoire et la reconnaissance et la confirmation contemporaines des droits ancestraux doivent être définies en fonction de ces rapports historiques.

Nous partageons l'avis de la Cour d'appel de la Colombie-Britannique en l'espèce et de la Cour d'appel de l'Ontario que, dans l'interprétation du par. 35(1), on doit se laisser guider par les principes exposés ci-dessus qui découlent des arrêts *Nowegijick*, *Taylor and Williams* et *Guerin*. Comme les auteurs l'ont souligné, le par. 35(1) constitue un engagement solennel qui doit avoir un sens utile (Lyon, *op. cit.*; Pentney, *op. cit.*; Schwartz, "Unstarted Business: Two Approaches to Defining s. 35—'What's in the Box?' and 'What Kind of Box?'"', chapitre XXIV, dans *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft*; Slattery, *op. cit.*, et Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 *Am. J. of Comp. Law* 361).

Pour répondre à l'argument de l'appelant que les droits visés au par. 35(1) bénéficient d'une protection plus sûre que ceux garantis par la *Charte*, il est vrai que le par. 35(1) n'est pas assujéti à

opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick, supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen, supra*.

We refer to Professor Slattery's "Understanding Aboriginal Rights", *op. cit.*, with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these

l'article premier de la *Charte*. Cela ne veut pas dire, selon nous, que toute loi ou tout règlement portant atteinte aux droits ancestraux des autochtones sera automatiquement inopérant en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Un texte législatif qui touche l'exercice de droits ancestraux sera néanmoins valide s'il satisfait au critère applicable pour justifier une atteinte à un droit reconnu et confirmé au sens du par. 35(1).

Le paragraphe en question ne contient aucune disposition explicite autorisant notre Cour ou n'importe quel autre tribunal à apprécier la légitimité d'une mesure législative gouvernementale qui restreint des droits ancestraux. Nous estimons pourtant que l'expression «reconnaissance et confirmation» comporte les rapports de fiduciaire déjà mentionnés et implique ainsi une certaine restriction à l'exercice du pouvoir souverain. Les droits qui sont reconnus et confirmés ne sont pas absolus. Les pouvoirs législatifs fédéraux subsistent, y compris évidemment le droit de légiférer relativement aux Indiens en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*. Toutefois, ces pouvoirs doivent maintenant être rapprochés du par. 35(1). En d'autres termes, le pouvoir fédéral doit être concilié avec l'obligation fédérale et la meilleure façon d'y parvenir est d'exiger la justification de tout règlement gouvernemental qui porte atteinte à des droits ancestraux. Une telle vérification est conforme au principe d'interprétation libérale énoncé dans l'arrêt *Nowegijick*, précité, et avec l'idée que la Couronne doit être tenue au respect d'une norme élevée — celle d'agir honorablement—dans ses rapports avec les peuples autochtones du Canada, comme le laisse entendre l'arrêt *Guerin c. La Reine*, précité.

Nous nous référons à «Understanding Aboriginal Rights», *op. cit.*, du professeur Slattery pour ce qui est d'envisager un processus de justification au par. 35(1). Le professeur Slattery souligne, à la p. 782, qu'un processus de justification s'impose à titre de compromis entre une caractérisation «composée» des droits ancestraux qui ferait entrer dans la définition de ceux-ci les règlements antérieurs et une caractérisation qui garantirait les droits ancestraux sous leur forme initiale sans aucune restriction apportée par des règlements ultérieurs. Nous

two extreme positions must be rejected in favour of a justificatory scheme.

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regula-

sommes d'accord avec lui pour dire que ces deux positions extrêmes doivent être rejetées au profit d'un système de justification.

^a Il semble se dégager du par. 35(1) que, si la réglementation des droits ancestraux n'est pas exclue, une telle réglementation doit être adoptée conformément à un objectif régulier. Notre histoire démontre, trop bien malheureusement, que ^b les peuples autochtones du Canada ont raison de s'inquiéter au sujet d'objectifs gouvernementaux qui, bien que neutres en apparence, menacent en réalité l'existence de certains de leurs droits et intérêts. En accordant aux droits ancestraux le ^c statut et la priorité propres aux droits constitutionnels, le Parlement et les provinces ont sanctionné les contestations d'objectifs de principe socio-économiques énoncés dans des textes législatifs, dans ^d la mesure où ceux-ci portent atteinte à des droits ancestraux. Ce régime constitutionnel comporte implicitement une obligation de la part du législateur de satisfaire au critère de la justification. La façon de réaliser un objectif législatif doit préserver l'honneur de Sa Majesté et doit être conforme ^e aux rapports contemporains uniques, fondés sur l'histoire et les politiques, qui existent entre la Couronne et les peuples autochtones du Canada. La mesure dans laquelle une loi ou un règlement a ^f un effet sur un droit ancestral existant doit être examinée soigneusement de manière à assurer la reconnaissance et la confirmation de ce droit.

La reconnaissance constitutionnelle exprimée ^g dans la disposition en cause permet donc, dans une certaine mesure, de contrôler la conduite du gouvernement et de limiter fortement le pouvoir du législateur. Bien qu'elle ne constitue pas une promesse d'immunité contre la réglementation gouvernementale dans une société qui, au XX^e siècle, ^h devient de plus en plus complexe et interdépendante et où il est nécessaire de protéger et de gérer les ressources épuisables, cette reconnaissance ⁱ représente un engagement important de la part de la Couronne. Le gouvernement se voit imposer l'obligation de justifier toute mesure législative qui a un effet préjudiciable sur un droit ancestral protégé par le par. 35(1).

^j Dans les présents motifs, nous entendons exposer l'analyse appropriée aux fins du par. 35(1)

tion made pursuant to the *Fisheries Act*. We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Section 35(1) and the Regulation of the Fisheries

Taking the above framework as guidance, we propose to set out the test for *prima facie* interference with an existing aboriginal right and for the justification of such an interference. With respect to the question of the regulation of the fisheries, the existence of s. 35(1) of the *Constitution Act, 1982*, renders the authority of *R. v. Derriksan*, *supra*, inapplicable. In that case, Laskin C.J., for this Court, found that there was nothing to prevent the *Fisheries Act* and the Regulations from subjecting the alleged aboriginal right to fish in a particular area to the controls thereby imposed. As the Court of Appeal in the case at bar noted, the *Derriksan* line of cases established that, before April 17, 1982, the aboriginal right to fish was subject to regulation by legislation and subject to extinguishment. The new constitutional status of that right enshrined in s. 35(1) suggests that a different approach must be taken in deciding whether regulation of the fisheries might be out of keeping with constitutional protection.

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations

dans le contexte d'un règlement pris en vertu de la *Loi sur les pêcheries*. Nous tenons à souligner relativement au par. 35(1) l'importance du contexte et d'un examen cas par cas. Étant donné la généralité du texte de la disposition constitutionnelle en cause et compte tenu surtout des complexités que présentent l'histoire, la société et les droits des autochtones, les limites d'une norme justificative doivent être fixées dans le contexte factuel particulier de chaque cas.

Le paragraphe 35(1) et la réglementation des pêcheries

Nous servant du cadre que nous venons de décrire, nous nous proposons d'énoncer le critère applicable pour déterminer s'il y a atteinte à première vue à un droit ancestral existant, d'une part, et pour justifier cette atteinte, d'autre part. En ce qui a trait à la question de la réglementation des pêcheries, l'existence du par. 35(1) de la *Loi constitutionnelle de 1982* fait en sorte que l'arrêt *R. v. Derriksan*, précité, ne s'applique pas. Dans cette affaire, le juge en chef Laskin a statué, au nom de notre Cour, que rien n'empêchait la *Loi sur les pêcheries* et ses règlements d'application d'assujettir aux contrôles y prévus le droit ancestral, qu'on revendiquait, de pêcher dans une zone déterminée. Comme le fait remarquer la Cour d'appel en l'espèce, il ressort du courant de jurisprudence établi par l'arrêt *Derriksan* qu'avant le 17 avril 1982, le droit de pêche ancestral était soumis à une réglementation par voie législative et était susceptible d'extinction. Or, le nouveau statut constitutionnel de ce droit consacré au par. 35(1) laisse entendre qu'on doit procéder différemment en décidant si la réglementation des pêcheries pourrait être incompatible avec la protection constitutionnelle.

La première question à poser est de savoir si la loi en question a pour effet de porter atteinte à un droit ancestral existant. Dans l'affirmative, elle constitue une violation à première vue du par. 35(1). Le Parlement n'est pas censé agir d'une manière contraire aux droits et aux intérêts des autochtones et, en réalité, il peut être empêché de le faire par la seconde étape de l'analyse fondée sur le par. 35(1). L'analyse portant sur l'atteinte commence par un examen des caractéristiques ou des attributs du droit en question. Nos observa-

regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin*, *supra*, at p. 382, referred to as the "*sui generis*" nature of aboriginal rights. (See also Little Bear, "A Concept of Native Title," [1982] 5 *Can. Legal Aid Bul.* 99.)

While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to

tions précédentes concernant la portée du droit de pêche ancestral sont pertinentes à ce propos. Les droits de pêche ne sont pas des droits de propriété au sens traditionnel. Il s'agit de droits qui appartiennent à un groupe et qui sont en harmonie avec la culture et le mode de vie de ce groupe. Les tribunaux doivent donc prendre soin d'éviter d'appliquer les concepts traditionnels de propriété propres à la common law en tentant de saisir ce qu'on appelle, dans les motifs de jugement de l'affaire *Guerin*, précitée, à la p. 382, la nature «*sui generis*» des droits ancestraux. (Voir aussi Little Bear, «A Concept of Native Title,» [1982] 5 *Can. Legal Aid Bul.* 99.)

S'il est impossible de donner une définition simple des droits de pêche, il est possible et même crucial de se montrer ouvert au point de vue des autochtones eux-mêmes quant à la nature des droits en cause. Il serait artificiel, par exemple, de tenter d'établir une distinction nette entre le droit de pêche et la manière précise dont ce droit est exercé.

Pour déterminer si les droits de pêche ont subi une atteinte constituant une violation à première vue du par. 35(1), on doit poser certaines questions. Premièrement, la restriction est-elle déraisonnable? Deuxièmement, le règlement est-il indûment rigoureux? Troisièmement, le règlement refuse-t-il aux titulaires du droit le recours à leur moyen préféré de l'exercer? C'est au particulier ou au groupe qui conteste la mesure législative qu'il incombe de prouver qu'il y a eu violation à première vue. En ce qui concerne les faits du présent pourvoi, le règlement serait jugé constituer une atteinte à première vue si on concluait qu'il impose une restriction néfaste à l'exercice par les Musqueams de leur droit de pêcher à des fins de subsistance. Nous tenons à souligner ici que la question en litige n'exige pas simplement qu'on examine si la prise autorisée de poissons a été réduite au-dessous de ce qui est requis pour subvenir aux besoins alimentaires et rituels raisonnables des Musqueams. Le critère nécessite plutôt qu'on se demande si, de par son objet ou son effet, la restriction imposée quant à la longueur des filets porte atteinte inutilement aux intérêts protégés par

the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource or in the public interest". (Emphasis added.) We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

The justification of conservation and resource management, on the other hand, is surely uncontroversial. In *Kruger v. The Queen*, [1978] 1 S.C.R. 104, the applicability of the B.C. *Wildlife Act*, S.B.C. 1966, c. 55, to the appellant members

le droit de pêche. Si, par exemple, les Musqueams se voyaient astreints à des pertes injustifiables de temps et d'argent par poisson pris ou si la restriction quant à la longueur des filets faisait en sorte qu'il serait difficile aux Musqueams de prendre du poisson, cela suffirait pour satisfaire aux exigences du premier volet de l'analyse fondée sur le par. 35(1).

Si on conclut à l'existence d'une atteinte à première vue, l'analyse porte ensuite sur la question de la justification. C'est là le critère qui touche la question de savoir ce qui constitue une réglementation légitime d'un droit ancestral garanti par la Constitution. L'analyse de la justification se déroulerait comme suit. En premier lieu, il faut se demander s'il existe un objectif législatif régulier. À ce stade, la cour se demanderait si l'objectif visé par le Parlement en autorisant le ministère à adopter des règlements en matière de pêche est régulier. Serait également examiné l'objectif poursuivi par le ministère en adoptant le règlement en cause. L'objectif de préserver, par la conservation et la gestion d'une ressource naturelle par exemple, des droits visés au par. 35(1) serait régulier. Seraient également réguliers des objectifs visant apparemment à empêcher l'exercice de droits visés au par. 35(1) lorsque cet exercice nuirait à l'ensemble de la population ou aux peuples autochtones eux-mêmes, ou d'autres objectifs jugés impérieux et réels.

La Cour d'appel en l'espèce a décidé, à la p. 331, qu'une réglementation pourrait être valide si elle était raisonnablement justifiée comme [TRANSLATION] «nécessaire pour la gestion et la conservation judicieuses des ressources ou dans l'intérêt public». (Nous soulignons.) Nous considérons que la justification fondée sur «l'intérêt public» est si vague qu'elle ne fournit aucune ligne directrice utile et si générale qu'elle est inutilisable comme critère applicable pour déterminer si une restriction imposée à des droits constitutionnels est justifiée.

Par contre, la justification de la conservation et de la gestion des ressources ne constitue sûrement pas un sujet de controverse. Dans l'affaire *Kruger c. La Reine*, [1978] 1 R.C.S. 104, notre Cour s'est penchée sur la question de l'applicabilité de la

of the Penticton Indian Band was considered by this Court. In discussing that Act, the following was said about the objective of conservation (at p. 112):

Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former.

While the "presumption" of validity is now outdated in view of the constitutional status of the aboriginal rights at stake, it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin, supra*. That is, the 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 legislation or action in question can be justified.

The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between

Wildlife Act de la Colombie-Britannique, S.B.C. 1966, ch. 55, aux appelants membres de la bande indienne Penticton. En analysant cette loi, on affirme au sujet de l'objectif de conservation (à la

a p. 112):

Les lois sur la conservation de la faune ont pour but la protection du gibier. On peut soutenir que sans mesure de protection, l'anéantissement de la faune rendrait théorique la question du droit des Indiens ou d'autres personnes de chasser pour se nourrir. Il faut présumer que le texte législatif en cause est valide. En l'espèce, cela signifie qu'en l'absence d'une preuve à l'effet contraire, il faut aussi présumer que les mesures adoptées par la Législature de la Colombie-Britannique ont pour but la protection efficace de la faune de la province, pour ses habitants, et ne visent pas à opposer les intérêts des écologistes à ceux des Indiens en favorisant les revendications des premiers.

Bien que la «présomption» de validité soit maintenant désuète étant donné le statut constitutionnel des droits ancestraux en cause, il est évident que l'importance des objectifs de conservation est reconnue depuis longtemps en matière de législation et d'action gouvernementales. De plus, la conservation et la gestion de nos ressources sont compatibles avec les croyances et les pratiques des autochtones et, en fait, avec la mise en valeur des droits de ces derniers.

Si on conclut à l'existence d'un objectif législatif régulier, on passe au second volet de la question de la justification. Ici, nous nous référons au principe directeur d'interprétation qui découle des arrêts *Taylor and Williams* et *Guerin*, précités. C'est-à-dire, l'honneur de Sa Majesté est en jeu lorsqu'Elle transige avec les peuples autochtones. Les rapports spéciaux de fiduciaire et la responsabilité du gouvernement envers les autochtones doivent être le premier facteur à examiner en déterminant si la mesure législative ou l'action en cause est justifiable.

Le problème qui se pose en évaluant la mesure législative en fonction de son objectif et de la responsabilité de la Couronne, est que les efforts de conservation dans une industrie de la pêche moderne fortement exploitée se heurtent inévitablement à la répartition et à la gestion efficaces d'une ressource à la fois peu abondante et très prisée. La nature de la protection constitutionnelle

the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocation-
a problems that arise regarding the fisheries. We refer to the reasons of Dickson J., as he then was, in *Jack v. The Queen, supra*, for such guidelines.

In *Jack*, the appellants' defence to a charge of fishing for salmon in certain rivers during a prohibited period was based on the alleged constitutional incapacity of Parliament to legislate such as to deny the Indians their right to fish for food. They argued that art. 13 of the *British Columbia Terms of Union* imposed a constitutional limitation on the federal power to regulate. While we recognize that the finding that such a limitation had been imposed was not adopted by the majority of this Court, we point out that this case concerns a different constitutional promise that asks this Court to give a meaningful interpretation to recognition and affirmation. That task requires equally meaningful guidelines responsive to the constitutional priority accorded aboriginal rights. We therefore repeat the following passage from *Jack*, at p. 313:

Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.

qu'offre le par. 35(1) dans ce contexte commande l'existence d'un lien entre la question de la justification et l'établissement de priorités dans le domaine de la pêche. La reconnaissance et la confirmation des droits ancestraux, prévues dans la Constitution, peuvent donner lieu à des conflits avec les intérêts d'autrui étant donné la nature limitée de la ressource. De toute évidence, on a besoin de lignes directrices qui permettront de résoudre les problèmes de répartition des ressources qui surgissent dans le domaine des pêcheries. Pour de telles lignes directrices, nous renvoyons aux motifs du juge Dickson (maintenant Juge en chef) dans l'affaire *Jack c. La Reine*, précité.

Dans l'affaire *Jack*, les appelants, accusés d'avoir pêché le saumon pendant une période et en un endroit prohibés, ont invoqué comme moyen de défense la prétendue absence de compétence constitutionnelle du Parlement pour légiférer de manière à priver les Indiens du droit de pêcher pour se nourrir. Ils ont fait valoir que l'art. 13 des *Conditions de l'adhésion de la Colombie-Britannique* imposait une limite constitutionnelle au pouvoir réglementaire fédéral. Tout en reconnaissant que la conclusion qu'une telle limite avait été imposée n'a pas été adoptée par la majorité dans notre Cour, nous soulignons qu'il s'agit en l'espèce d'une promesse constitutionnelle différente, par suite de laquelle notre Cour est appelée à donner un sens utile aux notions de reconnaissance et de confirmation. C'est là une tâche dont l'accomplissement nécessite des lignes directrices tout aussi utiles qui tiennent compte de la priorité constitutionnelle accordée aux droits ancestraux. En conséquence, nous reprenons le passage suivant de l'arrêt *Jack*, à la p. 313:

La protection des ressources constitue une considération législative valide. Les appelants l'admettent. Ce qui les préoccupe c'est plutôt la répartition des ressources après la détermination et l'application des mesures de protection raisonnables et nécessaires. Ils ne réclament pas le droit de pêcher jusqu'au dernier saumon. Ils préconisent plutôt, me semble-t-il, l'ordre de priorité suivant: (i) la protection de la ressource; (ii) la pêche par les Indiens; (iii) la pêche commerciale par les non-Indiens; ou (iv) la pêche sportive par les non-Indiens; les Indiens ne devraient pas subir en premier lieu le fardeau des mesures de protection.

I agree with the general tenor of this argument With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.

The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

The decision of the Nova Scotia Court of Appeal in *R. v. Denny* (1990), 55 C.C.C. (3d) 322, addresses the constitutionality of the Nova Scotia Miqmaq Indians' right to fish in the waters of Indian Brook and the Afton River, and does so in a way that accords with our understanding of the constitutional nature of aboriginal rights and the link between allocation and justification required for government regulation of the exercise of the

J'accepte cet argument dans ses grandes lignes [...] En ce qui concerne la pêche du saumon, les pêcheurs indiens doivent avoir priorité, sous réserve des difficultés pratiques relatives aux eaux internationales et aux déplacements du poisson. Mais toute restriction à la pêche par les Indiens établie conformément à un objectif valide de protection des ressources l'emporte sur la protection de la pêche par les Indiens prévue à l'art. 13, au même titre que ces mesures de protection l'emportent sur les autres genres de pêche.

La nature constitutionnelle du droit des Musqueams de pêcher à des fins de subsistance fait en sorte que, dans l'établissement des priorités suite à la mise en œuvre de mesures de conservation valides, il faut accorder la priorité absolue à la pêche par les Indiens à des fins de subsistance. Si l'objectif visé se rapportait à la conservation des ressources, le plan de conservation serait examiné en vue de déterminer les priorités. Bien que la répartition détaillée de ressources maritimes soit une tâche devant être confiée aux experts dans le domaine, on doit satisfaire d'abord aux besoins alimentaires des Indiens en procédant à cette répartition. L'importance d'accorder la priorité absolue au droit ancestral de pêcher pour se nourrir peut s'expliquer ainsi. Si, au cours d'une année donnée, il s'avérait nécessaire pour les besoins de la conservation de réduire le nombre de prises de poisson et que ce nombre soit égal à celui requis par les Indiens pour leur alimentation, alors il résulterait de la nature constitutionnelle de leur droit de pêche que c'est aux Indiens que reviendrait la totalité des poissons pouvant être pris suite aux mesures de conservation. Si, d'une manière plus réaliste, il restait encore du poisson après que les besoins alimentaires des Indiens eurent été satisfaits, ce seraient alors les pêcheurs sportifs et les pêcheurs commerciaux qui feraient les frais de ces mesures de conservation.

Dans l'arrêt *R. v. Denny* (1990), 55 C.C.C. (3d) 322, la Cour d'appel de la Nouvelle-Écosse se penche sur la constitutionnalité du droit des Indiens Miqmacs de la Nouvelle-Écosse de pêcher dans les eaux du ruisseau Indian et de la rivière Afton et elle le fait d'une manière conforme à notre compréhension de la nature constitutionnelle des droits ancestraux et du lien entre la répartition et la justification qui est requis pour que le gouverne-

rights. Clarke C.J.N.S., for a unanimous court, found that the Nova Scotia *Fishery Regulations* enacted pursuant to the federal *Fisheries Act* were in part inconsistent with the constitutional rights of the appellant Micmac Indians. Section 35(1) of the *Constitution Act, 1982*, provided the appellants with the right to a top priority allocation of any surplus of the fisheries resource which might exist after the needs of conservation had been taken into account. With respect to the issue of the Indians' priority to a food fishery, Clarke C.J.N.S. noted that the official policy of the federal government recognizes that priority. He added the following, at p. 339:

I have no hesitation in concluding that factual as well as legislative and policy recognition must be given to the existence of an Indian food fishery in the waters of Indian Brook, adjacent to the Eskasoni Reserve, and the waters of the Afton River after the needs of conservation have been taken into account . . .

To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource". This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

Further, Clarke C.J.N.S. found that s. 35(1) provided the constitutional recognition of the aboriginal priority with respect to the fishery, and that the regulations, in failing to guarantee that priority, were in violation of the constitutional provision. He said the following, at pp. 340-41:

Though it is crucial to appreciate that the rights afforded to the appellants by s. 35(1) are not absolute, the impugned regulatory scheme fails to recognize that this section provides the appellants with a priority of allocation and access to any surplus of the fisheries resource once the needs of conservation have been taken into account. Section 35(1), as applied to these appeals, provides the appellants with an entitlement to fish in the waters in issue to satisfy their food needs, where a

ment puisse réglementer l'exercice de ces droits. Le juge en chef Clarke a décidé, au nom d'une cour unanime, que les *Fishery Regulations* de la Nouvelle-Écosse pris en vertu de la *Loi sur les pêcheries* fédérale étaient incompatibles en partie avec les droits constitutionnels des Micmacs appelants. Le paragraphe 35(1) de la *Loi constitutionnelle de 1982* conférait aux appelants le droit d'obtenir la priorité absolue sur tout surplus de poisson pouvant exister après la prise en considération des besoins en matière de conservation. Quant à la question de la priorité du droit des Indiens de pêcher pour se nourrir, le juge en chef Clarke fait remarquer que le gouvernement fédéral reconnaît officiellement cette priorité. Il ajoute, à la p. 339:

[TRADUCTION] Je conclus sans hésitation que l'existence du droit des Indiens, sous réserve des exigences de la conservation, de pêcher à des fins de subsistance dans les eaux du ruisseau Indian, adjacentes à la réserve Eskasoni, et dans les eaux de la rivière Afton, doit être reconnue aussi bien dans les faits que sur les plans de la législation et des politiques . . .

Il ne convient simplement pas que le gouvernement fédéral accorde à des groupes d'usagers tels que les pêcheurs sportifs (les pêcheurs à la ligne) une priorité en matière de pêche qui l'emporte sur les besoins alimentaires légitimes des appelants et de leurs familles. Cela est inconciliable avec le fait que les appelants jouissent depuis bien des années d'un droit ancestral de pêcher à des fins de subsistance. Les appelants, pour reprendre la formule de leur avocat, ont «droit à une part de la ressource disponible». Ce droit constitutionnel ne cède le pas qu'aux mesures de conservation pouvant être prévues dans des lois fédérales.

Le juge en chef Clarke a conclu en outre que le par. 35(1) énonçait la reconnaissance constitutionnelle de la priorité des autochtones en matière de pêche et que le règlement, du fait qu'il ne garantissait pas cette priorité, violait cette disposition constitutionnelle. Il dit, aux pp. 340 et 341:

[TRADUCTION] Quoiqu'il importe au plus haut degré de comprendre que les droits conférés aux appelants par le par. 35(1) ne sont pas absolus, le règlement contesté pêche par l'omission de reconnaître que ce paragraphe accorde aux appelants la priorité dans la répartition de tout surplus de poisson ainsi que l'accès en priorité à ce surplus après qu'ont été pris en considération les besoins en matière de conservation. Appliqué aux présents appels, le paragraphe 35(1) accorde aux appelants le

surplus exists. To the extent that the regulatory scheme fails to recognize this, it is inconsistent with the Constitution. Section 52 mandates a finding that such regulations are of no force and effect.

In light of this approach, the argument that the cases of *R. v. Hare and Debassige*, *supra*, and *R. v. Eninew*, *R. v. Bear* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.), stand for the proposition that s. 35(1) provides no basis for restricting the power to regulate must be rejected, as was done by the Court of Appeal below. In *Hare and Debassige*, which addressed the issue of whether the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, applied to members of an Indian Band entitled to the benefit of the Manitoulin Island Treaty which granted certain rights with respect to taking fish, Thorson J.A. emphasized the need for priority to be given to measures directed to the management and conservation of fish stocks with the following observation (at p. 17):

Since 1867 and subject to the limitations thereon imposed by the Constitution, which of course now includes s. 35 of the *Constitution Act, 1982*, the constitutional authority and responsibility to make laws in relation to the fisheries has rested with Parliament. Central to Parliament's responsibility has been, and continues to be, the need to provide for the proper management and conservation of our fish stocks, and the need to ensure that they are not depleted or imperilled by deleterious practices or methods of fishing.

The prohibitions found in ss. 12 and 20 of the Ontario regulations clearly serve this purpose. Accordingly, it need not be ignored by our courts that while these prohibitions place limits on the rights of all persons, they are there to serve the larger interest which all persons share in the proper management and conservation of these important resources.

In *Eninew*, Hall J.A. found, at p. 368, that "the treaty rights can be limited by such regulations as are reasonable". As we have pointed out, management and conservation of resources is indeed an important and valid legislative objective. Yet, the fact that the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights. Rather, the regu-

droit de pêcher dans les eaux en cause pour répondre à leurs besoins alimentaires lorsqu'il existe un surplus. Dans la mesure où le règlement ne reconnaît pas cela, il est incompatible avec la Constitution. L'article 52 requiert qu'un tel règlement soit déclaré inopérant.

Compte tenu de ce point de vue, l'argument voulant que les arrêts *R. v. Hare and Debassige*, précité, et *R. v. Eninew*, *R. v. Bear* (1984), 12 C.C.C. (3d) 365 (C.A. Sask.), établissent que le par. 35(1) ne justifie aucunement la restriction du pouvoir réglementaire doit être rejeté, comme l'a fait la Cour d'appel en l'espèce. Dans l'arrêt *Hare and Debassige*, où l'on aborde la question de savoir si le *Règlement de pêche de l'Ontario*, C.R.C. 1978, ch. 879, s'applique aux membres d'une bande indienne visée par le traité de l'île Manitoulin, qui est attributif de certains droits relatifs à la prise de poissons, le juge Thorson souligne la nécessité de donner la priorité aux mesures de gestion et de conservation des stocks de poisson en faisant remarquer (à la p. 17):

[TRADUCTION] Depuis 1867 et sous réserve des restrictions imposées par la Constitution qui, bien entendu, comprend maintenant l'art. 35 de la *Loi constitutionnelle de 1982*, le pouvoir et la responsabilité constitutionnels de légiférer en matière de pêcheries reviennent au Parlement. La nécessité d'assurer la saine gestion et conservation de nos stocks de poisson ainsi que la nécessité de veiller à ce qu'ils ne soient réduits et que leur existence ne soit pas compromise par des pratiques ou des méthodes de pêche délétères, ont constitué, et constituent encore, des aspects fondamentaux de la responsabilité du Parlement à cet égard.

Les interdictions énoncées aux art. 12 et 20 du règlement ontarien servent manifestement cette fin. Par conséquent, il est loisible à nos tribunaux de tenir compte du fait que, si ces interdictions imposent des restrictions aux droits de tous, leur raison d'être est de servir l'intérêt plus général qu'a tout le monde à ce qu'il y ait une saine gestion et conservation de ces ressources importantes.

Dans l'arrêt *Eninew*, le juge Hall de la Cour d'appel conclut, à la p. 368, que [TRADUCTION] «les droits issus de traités peuvent être limités par une réglementation raisonnable». Comme nous l'avons déjà fait remarquer, la gestion et la conservation de ressources constituent vraiment un objectif législatif important et régulier. Pourtant, le fait que cet objectif soit «raisonnable» ne saurait suffire

lations enforced pursuant to a conservation or management objective may be scrutinized according to the justificatory standard outlined above.

We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

comme reconnaissance et confirmation constitutionnelles de droits ancestraux. Au contraire, les règlements appliqués conformément à un objectif de conservation ou de gestion peuvent être examinés selon la norme de justification énoncée plus haut.

Nous reconnaissons que la norme de justification à respecter est susceptible d'imposer un lourd fardeau à Sa Majesté. Toutefois, la politique gouvernementale relativement à la pêche en Colombie-Britannique commande déjà, et ce, indépendamment du par. 35(1), que, dans l'attribution du droit de prendre du poisson, le droit des Indiens de pêcher à des fins d'alimentation ait la priorité sur les intérêts d'autres groupes d'utilisateurs. Le droit constitutionnel énoncé au par. 35(1) exige que Sa Majesté assure que Ses règlements respectent cette attribution de priorité. Cette exigence ne vise pas à miner la capacité et la responsabilité du Parlement de créer et d'administrer des plans globaux de conservation et de gestion concernant la pêche au saumon. L'objectif est plutôt de garantir que ces plans réservent aux peuples autochtones un traitement qui assure que leurs droits sont pris au sérieux.

Il y a, dans l'analyse de la justification, d'autres questions à aborder, selon les circonstances de l'enquête. Il s'agit notamment des questions de savoir si, en tentant d'obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation est prévue en cas d'expropriation et si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre. On s'attendrait certainement à ce que les peuples autochtones, traditionnellement sensibilisés à la conservation et ayant toujours vécu dans des rapports d'interdépendance avec les ressources naturelles, soient au moins informés relativement à la conception d'un régime approprié de réglementation de la pêche.

Nous ne nous proposons pas de présenter une énumération exhaustive des facteurs à considérer dans l'appréciation de la justification. Qu'il suffise de souligner que la reconnaissance et la confirmation exigent que le gouvernement, les tribunaux et même l'ensemble des Canadiens soient conscients des droits des peuples autochtones et qu'ils les respectent.

Application to this Case—Is the Net Length Restriction Valid?

The Court of Appeal below found that there was not sufficient evidence in this case to proceed with an analysis of s. 35(1) with respect to the right to fish for food. In reviewing the competing expert evidence, and recognizing that fish stock management is an uncertain science, it decided that the issues at stake in this appeal were not well adapted to being resolved at the appellate court level.

Before the trial, defence counsel advised the Crown of the intended aboriginal rights defence and that the defence would take the position that the Crown was required to prove, as part of its case, that the net length restriction was justifiable as a necessary and reasonable conservation measure. The trial judge found s. 35(1) to be inapplicable to the appellant's defence, based on his finding that no aboriginal right had been established. He therefore found it inappropriate to make findings of fact with respect to either an infringement of the aboriginal right to fish or the justification of such an infringement. He did, however, find that the evidence called by the appellant "[c]asts some doubt as to whether the restriction was necessary as a conservation measure. More particularly, it suggests that there were more appropriate measures that could have been taken if necessary; measures that would not impose such a hardship on the Indians fishing for food. That case was not fully met by the Crown."

According to the Court of Appeal, the findings of fact were insufficient to lead to an acquittal. There was no more evidence before this Court. We also would order a re-trial which would allow findings of fact according to the tests set out in these reasons.

The appellant would bear the burden of showing that the net length restriction constituted a *prima facie* infringement of the collective aboriginal right

Application à la présente affaire—La limitation de la longueur des filets est-elle valide?

La Cour d'appel a conclu en l'espèce à l'absence d'éléments de preuve suffisants pour permettre de procéder à une analyse du par. 35(1) dans le contexte du droit de pêcher à des fins de subsistance. Après avoir examiné les témoignages contradictoires des experts et reconnaissant que la gestion des stocks de poisson est une science approximative, on a jugé que les questions en litige se prêtaient mal à une décision d'une cour d'appel.

Avant le procès, l'avocat de la défense a prévenu le ministère public de son intention d'invoquer les droits ancestraux comme moyen de défense et lui a fait savoir que la position de la défense serait qu'il incombait au ministère public de prouver que la restriction imposée quant à la longueur des filets était justifiable à titre de mesure de conservation nécessaire et raisonnable. Le juge de première instance a décidé que le par. 35(1) était inapplicable au moyen de défense soulevé par l'appellant, vu sa conclusion qu'on n'avait pas établi l'existence d'un droit ancestral. Il a en conséquence décidé qu'il ne convenait pas de tirer des conclusions de fait relativement à une atteinte possible au droit de pêche ancestral ou à la justification d'une telle atteinte. Il a toutefois estimé que la preuve produite par l'appellant [TRADUCTION] «[l]aisse planer des doutes quant à savoir si la restriction s'imposait à titre de mesure de conservation. Plus particulièrement, elle laisse entendre qu'il existait des mesures plus appropriées qui auraient pu être prises au besoin, des mesures qui seraient moins rigoureuses pour les Indiens qui pêchent à des fins de subsistance. C'est là une preuve qui n'a pas été pleinement réfutée par le ministère public.»

D'après la Cour d'appel, les conclusions de fait étaient insuffisantes pour justifier un acquittement. Il n'y avait pas plus d'éléments de preuve devant notre Cour. Nous sommes également d'avis d'ordonner un nouveau procès qui permettrait de tirer des conclusions de fait conformément aux critères énoncés dans les présents motifs.

Il incomberait à l'appellant de démontrer que la restriction imposée quant à la longueur des filets constitue une atteinte à première vue au droit

to fish for food. If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam. Further, it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation. In trying to show that the restriction is necessary in the circumstances of the Fraser River fishery, the Crown could use facts pertaining to fishing by other Fraser River Indians.

In conclusion, we would dismiss the appeal and the cross-appeal and affirm the Court of Appeal's setting aside of the conviction. We would accordingly affirm the order for a new trial on the questions of infringement and whether any infringement is nonetheless consistent with s. 35(1), in accordance with the interpretation set out here.

For the reasons given above, the constitutional question must be answered as follows:

Question Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the *British Columbia Fishery (General) Regulations* and the *Fisheries Act*, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the *Constitution Act, 1982*?

Answer This question will have to be sent back to trial to be answered according to the analysis set out in these reasons.

Appeal and cross-appeal dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

Solicitors for the appellant: Blake, Cassels & Graydon, Toronto.

ancestral collectif de pêcher à des fins de subsistance. Si on concluait à l'existence d'une atteinte, le fardeau de la preuve passerait au ministère public qui devrait alors démontrer que le règlement est justifiable. Pour ce faire, il lui faudrait prouver l'absence de tout objectif inconstitutionnel sous-jacent, comme celui d'attribuer une part plus importante de la ressource en question à un groupe d'utilisateurs qui prend rang après les Musqueams. Il lui faudrait en outre démontrer que le règlement qu'on cherchait à imposer était nécessaire pour réaliser la restriction requise. En tentant d'établir que cette restriction s'imposait dans les circonstances de la pêche sur le fleuve Fraser, le ministère public pourrait se servir de faits relatifs à la pêche par d'autres Indiens du fleuve Fraser.

En conclusion, nous sommes d'avis de rejeter le pourvoi et le pourvoi incident et de confirmer l'annulation de la déclaration de culpabilité, prononcée par la Cour d'appel. En conséquence, nous sommes d'avis de confirmer l'ordonnance de nouveau procès quant à la question de l'atteinte et à celle de savoir si une atteinte est néanmoins compatible avec le par. 35(1), conformément à l'interprétation exposée dans les présents motifs.

Pour les motifs que nous venons d'exposer, la question constitutionnelle doit recevoir la réponse suivante:

Question La limite de la longueur des filets contenue dans le permis de pêche de subsistance des Indiens de la bande des Musqueams, délivré le 30 mars 1984 conformément au *Règlement de pêche général de la Colombie-Britannique* et à la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14, est-elle incompatible avec le par. 35(1) de la *Loi constitutionnelle de 1982*?

Réponse Cette question devra être renvoyée en première instance afin de recevoir une réponse conformément à l'analyse exposée dans les présents motifs.

Pourvoi et pourvoi incident rejetés. La question constitutionnelle doit être renvoyée en première instance afin de recevoir une réponse conformément à l'analyse exposée dans les présents motifs.

Procureurs de l'appellant: Blake, Cassels & Graydon, Toronto.

Solicitors for the respondent: Braidwood, MacKenzie, Brewer & Greyell, Vancouver.

Solicitors for the intervener the National Indian Brotherhood / Assembly of First Nations: Pape & Salter, Vancouver.

Solicitors for the interveners the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Pacific Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C.: Russell & DuMoulin, Vancouver.

Solicitors for the intervener the Fisheries Council of British Columbia: Mawhinney & Kellough, Vancouver.

Solicitors for the intervener the United Fishermen and Allied Workers' Union: Rankin & Company, Vancouver.

Solicitor for the intervener the Attorney General for Ontario: The Deputy Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

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

Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland, St. John's.

Procureurs de l'intimée: Braidwood, MacKenzie, Brewer & Greyell, Vancouver.

Procureurs de l'intervenante la Fraternité des Indiens du Canada / Assemblée des premières nations: Pape & Salter, Vancouver.

Procureurs des intervenants la B.C. Wildlife Federation, la Steelhead Society of British Columbia, la Pacific Fishermen's Defence Alliance, Northern Trollers' Association, la Pacific Gillnetters Association, la Gulf Trollers' Association, la Pacific Trollers' Association, la Prince Rupert Fishing Vessel Owners' Association, la Fishing Vessel Owners' Association of British Columbia, la Pacific Coast Fishing Vessel Owners' Guild, la Prince Rupert Fishermen's Cooperative Association, la Co-op Fishermen's Guild et la Deep Sea Trawlers' Association of B.C.: Russell & DuMoulin, Vancouver.

Procureurs de l'intervenant le Fisheries Council of British Columbia: Mawhinney & Kellough, Vancouver.

Procureurs de l'intervenant le Syndicat des pêcheurs et travailleurs assimilés: Rankin & Company, Vancouver.

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

Procureur de l'intervenant le procureur général du Québec: Le procureur général du Québec, Ste-Foy.

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Le procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de la Saskatchewan: Brian Barrington-Foote, Regina.

Procureur de l'intervenant le procureur général de l'Alberta: Le ministère du Procureur général de l'Alberta, Edmonton.

Procureur de l'intervenant le procureur général de Terre-Neuve: Le procureur général de Terre-Neuve, St. John's.

Dorothy Marie Van der Peet Appellant

v.

Her Majesty The Queen Respondent

and

The Attorney General of Quebec, the Fisheries Council of British Columbia, the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation, the First Nations Summit, Delgamuukw et al., Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner Interveners

INDEXED AS: R. v. VAN DER PEET

File No.: 23803.

1995: November 27, 28, 29; 1996: August 21.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Aboriginal rights — Right to sell fish on non-commercial basis — Fish caught under native food fish licence — Regulations prohibiting sale or barter of fish caught under that licence — Fish sold to non-aboriginal and charges laid — Definition of "existing aboriginal rights" as used in s. 35 of Constitution Act, 1982 — Whether an aboriginal right being exercised in the circumstances — Constitution Act, 1982, s. 35(1) — Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1) — British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5).

The appellant, a native, was charged with selling 10 salmon caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, which prohibited the sale or barter of fish caught under such a licence. The restrictions imposed by s. 27(5) were alleged to infringe the appellant's aboriginal right to sell fish and accord-

Dorothy Marie Van der Peet Appelante

This is Exhibit VV referred to in the Affidavit of Tanny Nguyen sworn before me at Vancouver, BC this 6th day of July, 2019.

Sa Majesté la Reine Intimée

et A Commissioner for taking affidavits for British Columbia

Le procureur général du Québec, le Fisheries Council of British Columbia, la British Columbia Fisheries Survival Coalition et la British Columbia Wildlife Federation, le First Nations Summit, Delgamuukw et autres, Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese et Allan Gardner Intervenants

RÉPERTORIÉ: R. c. VAN DER PEET

N° du greffe: 23803.

1995: 27, 28, 29 novembre; 1996: 21 août.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Droit constitutionnel — Droits ancestraux — Droit de vendre du poisson à des fins non commerciales — Poisson pris en vertu d'un permis de pêche de subsistance des Indiens — Règlement interdisant la vente et l'échange du poisson pris en vertu d'un tel permis — Poisson vendu à des non-autochtones et dépôt d'accusations — Définition de «droits ancestraux existants» à l'art. 35 de la Loi constitutionnelle de 1982 — S'agissait-il, dans les circonstances, de l'exercice d'un droit ancestral? — Loi constitutionnelle de 1982, art. 35(1) — Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 61(1) — Règlement de pêche général de la Colombie-Britannique, DORS/84-248, art. 27(5).

L'appelante, une autochtone, a été accusée d'avoir vendu 10 saumons pris en vertu d'un permis de pêche de subsistance des Indiens, contrairement au par. 27(5) du *Règlement de pêche général de la Colombie-Britannique*, qui interdisait la vente et l'échange du poisson pris en vertu d'un tel permis. On a plaidé que les restrictions imposées par le par. 27(5) portent

ingly were invalid because they violated s. 35(1) of the *Constitution Act, 1982*. The trial judge held that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell such fish and found the appellant guilty. The summary appeal judge found an aboriginal right to sell fish and remanded for a new trial. The Court of Appeal allowed the Crown's appeal and restored the guilty verdict. The constitutional question before this Court queried whether s. 27(5) of the Regulations was of no force or effect in the circumstances by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*.

Held (L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be dismissed.

The Aboriginal Right

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: A purposive analysis of s. 35(1) must take place in light of the general principles applicable to the legal relationship between the Crown and aboriginal peoples. This relationship is a fiduciary one and a generous and liberal interpretation should accordingly be given in favour of aboriginal peoples. Any ambiguity as to the scope and definition of s. 35(1) must be resolved in favour of aboriginal peoples. This purposive analysis is not to be limited to an analysis of why a pre-existing doctrine was elevated to constitutional status.

Aboriginal rights existed and were recognized under the common law. They were not created by s. 35(1) but subsequent to s. 35(1) they cannot be extinguished. They can, however, be regulated or infringed consistent with the justificatory test laid out in *R. v. Sparrow*.

Section 35(1) provides the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose. The French version of the text, prior jurisprudence of this Court and the courts of

atteinte au droit ancestral de l'appelante de vendre du poisson et qu'elles sont en conséquence invalides parce qu'elles violent le par. 35(1) de la *Loi constitutionnelle de 1982*. Le juge du procès a statué que le droit ancestral de pêcher à des fins alimentaires et rituelles n'inclut pas le droit de vendre le poisson ainsi pris et a déclaré l'appelante coupable. Le juge d'appel des poursuites sommaires a estimé qu'il existait un droit ancestral de vendre du poisson et ordonné la tenue d'un nouveau procès. La Cour d'appel a fait droit à l'appel du ministère public et rétabli le verdict de culpabilité. La question constitutionnelle que la Cour était appelée à trancher portait sur le point suivant: le par. 27(5) du Règlement était-il, dans les circonstances de la présente affaire, inopérant en raison de l'existence de droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*?

Arrêt (les juges L'Heureux-Dubé et McLachlin sont dissidentes): Le pourvoi est rejeté.

Le droit ancestral

Le juge en chef Lamer et les juges La Forest, Sopinka, Gonthier, Cory, Iacobucci et Major: L'analyse du par. 35(1) en fonction de son objet doit être faite à la lumière des principes généraux applicables aux rapports juridiques entre l'État et les peuples autochtones. L'État a, envers les peuples autochtones, une obligation de fiduciaire qui a pour conséquence que les dispositions concernant les peuples autochtones doivent recevoir une interprétation généreuse et libérale. Les doutes ou ambiguïtés concernant la portée et la définition des droits visés par le par. 35(1) doivent être résolus en faveur des peuples autochtones. Il ne faut pas limiter l'analyse de l'objet de cette disposition aux raisons pour lesquelles une doctrine juridique préexistante s'est vue conférer un statut constitutionnel.

Les droits ancestraux existaient déjà et ils étaient reconnus en common law. Le paragraphe 35(1) n'a pas créé les droits ancestraux, mais à la suite de l'adoption du par. 35(1), ils ne peuvent pas être éteints. Ils peuvent, toutefois, être réglementés ou violés en conformité avec le critère de justification énoncé dans *R. c. Sparrow*.

Le paragraphe 35(1) établit le cadre constitutionnel qui permet de reconnaître que les autochtones vivaient sur le territoire en sociétés distinctives, possédant leurs propres coutumes, pratiques et traditions, et de concilier ce fait avec la souveraineté de Sa Majesté. Les droits substantiels visés par cette disposition doivent être définis à la lumière de cet objet. Cette façon d'analyser le par. 35(1) trouve également appui dans le texte français de cette disposition, dans des décisions antérieures de notre Cour et des tribunaux australiens et américains,

Australia and the United States, academic commentators and legal literature support this approach.

To be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. A number of factors must be considered in applying the "integral to a distinctive culture" test. The court must take into account the perspective of the aboriginal peoples, but that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.

In assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right. To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. The activities must be considered at a general rather than specific level. They may be an exercise in modern form of a pre-contact practice, custom or tradition and the claim should be characterized accordingly.

To be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question — one of the things which made the culture of the society distinctive. A court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) or at those aspects of the aboriginal society that are only incidental or occasional to that society. It is those distinctive features that need to be acknowledged and reconciled with the sovereignty of the Crown.

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 with European society. Conclusive evidence from pre-contact times about the practices, customs and traditions of the community in question need not be produced. The evidence simply needs to be directed at

chez des commentateurs universitaires et dans la littérature juridique.

Pour constituer un droit ancestral, une activité doit être un élément d'une coutume, pratique ou tradition faisant partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit en question. Un certain nombre de facteurs doivent être pris en considération dans l'application du critère de la «partie intégrante d'une culture distinctive». Le tribunal doit tenir compte du point de vue des autochtones, mais il faut que ce point de vue soit exprimé d'une manière compatible avec l'organisation juridique et constitutionnelle du Canada.

Dans l'appréciation de la revendication d'un droit ancestral, le tribunal doit d'abord déterminer la nature du droit revendiqué, pour juger si la revendication satisfait au critère de la partie intégrante de la culture distinctive du groupe autochtone qui revendique ce droit. Pour bien caractériser la revendication du demandeur, le tribunal doit tenir compte de facteurs tels que la nature de l'acte qui, d'affirmer le demandeur, a été accompli en vertu d'un droit ancestral, la nature du règlement, de la loi ou de l'autre mesure gouvernementale contestée, ainsi que la coutume, pratique ou tradition invoquée pour établir l'existence du droit. Il doit examiner ces activités d'un point de vue général et non spécifique. Il est possible que les activités en question soient l'exercice, sous une forme contemporaine, d'une coutume, pratique ou tradition qui existait avant le contact avec les Européens, auquel cas il doit adapter sa caractérisation de la revendication en conséquence.

Pour faire partie intégrante d'une culture distinctive, une coutume, pratique ou tradition doit avoir une importance fondamentale pour la société autochtone concernée — être l'une des choses qui rendaient la culture de la société distinctive. Le tribunal ne peut tenir compte des aspects de la société autochtone qui sont communs à toutes les sociétés humaines (p. ex. le fait de manger pour survivre), ni des aspects de la société autochtone qui n'ont qu'un caractère secondaire ou occasionnel. Ce sont ces caractéristiques distinctives qui doivent être reconnues et conciliées avec la souveraineté de Sa Majesté.

Constituent des droits ancestraux les coutumes, pratiques et traditions qui marquent la continuité avec les coutumes, pratiques et traditions qui existaient avant le contact avec les Européens. Il n'est pas nécessaire de produire, relativement aux coutumes, pratiques et traditions de la collectivité, une preuve concluante, datant de l'époque antérieure au contact avec les Européens.

demonstrating which aspects of the aboriginal community and society have their origins pre-contact. The concept of continuity is the means by which a "frozen rights" approach to s. 35(1) will be avoided. It does not require an unbroken chain between current practices, customs and traditions and those existing prior to contact. A practice existing prior to contact can be resumed after an interruption.

Basing the identification of aboriginal rights in the period prior to contact is not inconsistent with the inclusion of the Métis in the definition of "aboriginal peoples of Canada" in s. 35(2) of the *Constitution Act, 1982*. The history of the Métis and the reasons underlying their inclusion in the protection given by s. 35 are quite distinct from those relating to other aboriginal peoples in Canada. The manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined.

A court should approach the rules of evidence, and interpret the evidence that exists, conscious of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions and customs engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards applied in other contexts.

Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. Claims to aboriginal rights are not to be determined on a general basis.

In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a

Il suffit que cette preuve tende à démontrer lesquels des aspects de la collectivité et de la société autochtones datent d'avant le contact avec les Européens. Le concept de continuité est le moyen qui permet d'éviter une interprétation du par. 35(1) fondée sur la notion de «droits figés». Il n'exige pas la preuve d'une continuité parfaite entre les coutumes, pratiques et traditions actuelles et celles qui existaient avant le contact avec les Européens. Une pratique qui existait avant le contact avec les Européens peut être reprise après une interruption.

Le fait de se reporter à la période antérieure au contact avec les Européens pour identifier les droits ancestraux n'est pas incompatible avec le fait que, aux termes du par. 35(2) de la *Loi constitutionnelle de 1982*, les Métis sont compris dans la définition de «peuples autochtones du Canada». L'histoire des Métis et les raisons qui sous-tendent leur inclusion pour qu'ils bénéficient de la protection accordée par l'art. 35 diffèrent considérablement de celles qui concernent les autres peuples autochtones du Canada. La manière dont les droits ancestraux des autres peuples autochtones sont définis n'est pas nécessairement déterminante en ce qui concerne la manière dont sont définis ceux des Métis.

Le tribunal doit appliquer les règles de preuve et interpréter la preuve existante en étant conscient de la nature particulière des revendications des autochtones et des difficultés que soulève la preuve d'un droit qui remonte à une époque où les coutumes, pratiques et traditions n'étaient pas consignées par écrit. Les tribunaux doivent se garder d'accorder un poids insuffisant à la preuve présentée par les demandeurs autochtones simplement parce que cette preuve ne respecte pas de façon précise les normes qui seraient appliquées dans d'autres contextes.

Le tribunal saisi d'une revendication fondée sur l'existence d'un droit ancestral doit s'attacher spécifiquement à l'examen des coutumes, pratiques et traditions du groupe autochtone qui revendique ce droit. Les revendications de droits ancestraux ne peuvent pas être tranchées de manière générale.

Le tribunal appelé à identifier les coutumes, pratiques et traditions qui constituent les droits ancestraux reconnus et confirmés par le par. 35(1) doit s'assurer que la coutume, pratique ou tradition invoquée dans un cas donné revêt une importance particulière pour la collectivité autochtone qui revendique le droit. Il ne doit pas s'agir d'une coutume, pratique ou tradition simplement accessoire d'une autre coutume, pratique ou tradition. Les coutumes, pratiques et traditions accessoires ne peu-

process of piggybacking on integral practices, customs and traditions.

A practice, custom or tradition, to be recognized as an aboriginal right need not be distinct, meaning "unique", to the aboriginal culture in question. The aboriginal claimants must simply demonstrate that the custom or tradition is a defining characteristic of their culture.

The fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. A practice, custom or tradition will not meet the standard for recognition of an aboriginal right, however, where it arose solely as a response to European influences.

The relationship between aboriginal rights and aboriginal title (a sub-category of aboriginal rights dealing solely with land claims) must not confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look both at the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

The first step in the application of the integral to a distinctive culture test requires the Court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. Here, the appellant claimed that the practices, customs and traditions of the Sto:lo include as an integral element the exchange of fish for money or other goods. The significance of the practice, tradition or custom is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. The claim must be based on the actual practices, customs and traditions related to the fishery,

vent être considérées comme des droits ancestraux du fait qu'elles se greffent sur des coutumes, pratiques et traditions faisant partie intégrante d'une culture.

Pour être reconnue comme un droit ancestral, une coutume, pratique ou tradition n'a pas à être distincte, c'est-à-dire «propre» à la culture autochtone en cause. Les demandeurs autochtones doivent simplement montrer que la coutume, pratique ou tradition en cause est une caractéristique déterminante de leur culture.

Le fait que cette coutume, pratique ou tradition se soit poursuivie après l'arrivée des Européens et se soit adaptée en réaction à cet événement, n'est pas pertinent pour l'appréciation de la revendication; l'arrivée et l'influence des Européens ne peuvent être invoquées pour rejeter la revendication, par ailleurs valide, d'un droit ancestral présentée par un groupe autochtone. En revanche, si la coutume, pratique ou tradition n'est que le fruit des influences européennes, alors elle ne respecte pas la norme applicable pour la reconnaissance d'un droit ancestral.

Le rapport entre le titre aborigène (une sous-catégorie de droits ancestraux qui concerne seulement les revendications de droits fonciers) et les droits ancestraux ne doit pas embrouiller l'analyse de ce qui constitue un droit ancestral. Les droits ancestraux découlent non seulement de l'occupation antérieure du territoire, mais aussi de l'organisation sociale antérieure et des cultures distinctives des peuples autochtones habitant ce territoire. Pour déterminer si le bien-fondé de la revendication d'un droit ancestral a été établi, les tribunaux doivent considérer et les rapports qu'entretient le demandeur autochtone avec le territoire, et les coutumes, pratiques et traditions de la société à laquelle il appartient et de la culture distinctive de cette société. Ils ne doivent pas se concentrer sur les rapports qu'entretiennent les peuples autochtones avec le territoire au point de négliger les autres facteurs pertinents pour l'identification et la définition des droits ancestraux.

Conformément à la première étape de l'application du critère de la partie intégrante d'une culture distinctive, notre Cour doit identifier la nature précise de la prétention de l'appelante qu'elle exerçait un droit ancestral. En l'espèce, l'appelante soutient que les coutumes, pratiques et traditions des Sto:lo incluent, en tant que partie intégrante de leur culture, l'échange de poisson contre de l'argent ou d'autres biens. L'importance de cette coutume, pratique ou tradition est pertinente pour décider si celle-ci fait partie intégrante de la culture, mais elle ne peut à elle seule justifier le bien-fondé de la revendication d'un droit ancestral. La revendication doit plutôt

here the custom of exchanging fish for money or other goods.

The trial judge made no clear and palpable error which would justify an appellate court's substituting its findings of fact. These findings included: (1) prior to contact exchanges of fish were only "incidental" to fishing for food purposes; (2) there was no regularized trading system amongst the appellant's people prior to contact; (3) the trade that developed with the Hudson's Bay Company, while of significance to the Sto:lo of the time, was qualitatively different from what was typical of Sto:lo culture prior to contact; and, (4) the Sto:lo's exploitation of the fishery was not specialized and that suggested that the exchange of fish was not a central part of Sto:lo culture. The appellant failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo culture which existed prior to contact and was therefore protected by s. 35(1) of the *Constitution Act, 1982*.

Per L'Heureux-Dubé J. (dissenting): Aboriginal rights find their origin in the historic occupation and use of native ancestral lands. These rights relate not only to aboriginal title but also to the component elements of this larger right, such as aboriginal rights to hunt, fish or trap, and their accompanying practices, customs and traditions. They also include other matters, not related to land, that form part of a distinctive aboriginal culture.

Aboriginal rights can exist on reserve lands, aboriginal title lands, and aboriginal right lands. Reserve lands are reserved by the federal government for the exclusive use of Indian people. Title to aboriginal title lands — lands which the natives possess for occupation and use at their own discretion — is founded on common law and is subject to the Crown's ultimate title. It exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest to occupy and use the land. Aboriginal title can also be founded on treaties. Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited

être fondée sur les coutumes, pratiques et traditions se rattachant concrètement à la pêche, en l'occurrence la coutume d'échanger du poisson contre de l'argent ou d'autres biens.

Le juge du procès n'a commis aucune erreur manifeste et dominante qui justifierait une cour d'appel de substituer ses conclusions de fait aux siennes. Parmi ces conclusions, on peut relever les suivantes: (1) avant le contact avec les Européens, les échanges de poisson n'étaient qu'un aspect «accessoire» de la pêche pratiquée à des fins alimentaires; (2) il n'existait pas, avant le contact avec les Européens, de système de commerce organisé chez le peuple auquel appartient l'appelante; (3) le commerce entre les Sto:lo et la Compagnie de la Baie d'Hudson, même s'il était important pour la société sto:lo de cette époque, était qualitativement différent de celui qui était typique de la culture sto:lo d'avant le contact avec les Européens; (4) l'absence de spécialisation dans l'exploitation des ressources de la pêche chez les Sto:lo tend à indiquer que l'échange de poisson n'était pas un élément fondamental de la culture sto:lo. L'appelante n'a pas démontré que l'échange de poisson contre de l'argent ou d'autres biens faisait partie intégrante de la culture sto:lo distinctive qui existait avant le contact avec les Européens et était en conséquence protégé par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Le juge L'Heureux-Dubé (dissidente): La source des droits ancestraux est l'occupation et l'utilisation historiques par les autochtones de leurs terres ancestrales, et ces droits comprennent non seulement le titre aborigène, mais aussi les éléments constitutifs de ce droit plus large — tels les droits de chasse, de pêche et de piégeage ancestraux, et les coutumes, pratiques et traditions connexes — ainsi que d'autres éléments qui font partie intégrante de la culture autochtone distinctive visée, mais ne se rapportent pas au territoire.

Les droits ancestraux peuvent se rattacher aux terres des réserves, aux terres visées par un titre aborigène et aux terres visées par un droit ancestral. Les terres des réserves sont réservées par le gouvernement fédéral pour l'usage exclusif des Indiens. Les terres visées par un titre aborigène, fondé sur la common law, sont les terres que possèdent les autochtones et qu'ils peuvent occuper et utiliser à leur gré, sous réserve du fait que c'est Sa Majesté qui, en dernier ressort, en détient le titre. Le titre aborigène existe lorsque l'ensemble des droits ancestraux est suffisamment important pour commander la reconnaissance d'un droit foncier *sui generis* d'occupation et d'utilisation des terres visées. Un titre aborigène peut également être fondé sur un traité. Enfin, les terres visées par un droit ancestral sont les terres

and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. These types of lands are not static or mutually exclusive.

Prior to 1982, aboriginal rights were founded only on the common law and they could be extinguished by treaty, conquest and legislation as they were "dependent upon the good will of the Sovereign". Now, s. 35(1) of the *Constitution Act, 1982* protects aboriginal interests arising out of the native historic occupation and use of ancestral lands through the recognition and affirmation of "existing aboriginal and treaty rights of the aboriginal peoples of Canada".

The *Sparrow* test deals with constitutional claims of infringement of aboriginal rights. This test involves three steps: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a *prima facie* infringement of such right; and, (3) the justification of the infringement.

Section 35(1) must be given a generous, large and liberal interpretation and ambiguities or doubts should be resolved in favour of the natives. Aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people. Most importantly, aboriginal rights protected under s. 35(1) must be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. It is not appropriate that the perspective of the common law be given an equal weight with the perspective of the natives.

The issue of the nature and extent of aboriginal rights protected under s. 35(1) is fundamentally about characterization. Two approaches have emerged.

The first approach focuses on the particular aboriginal practice, custom or tradition. It considers that what is common to both aboriginal and non-aboriginal cultures is non-aboriginal and hence not protected by s. 35(1).

auxquelles ne peuvent se rattacher que des droits ancestraux spécifiques (p. ex., le droit de chasser à des fins alimentaires, sociales et rituelles), parce que l'occupation et l'utilisation des terres par le groupe autochtone concerné sont trop limitées et, en conséquence, ne respectent pas le critère applicable en vue de la reconnaissance, en common law, d'un titre aborigène. Le classement d'une terre dans un type donné n'est pas immuable. De plus, une terre peut appartenir à plus d'un type.

Avant 1982, la doctrine des droits ancestraux n'était fondée que sur la common law, et les droits ancestraux pouvaient en conséquence être éteints par traité, par conquête et par voie législative puisqu'ils «dépendaient de la bonne volonté du Souverain». Désormais, le par. 35(1) de la *Loi constitutionnelle de 1982* protège les intérêts des autochtones qui découlent de l'occupation et de l'utilisation historiques par ceux-ci de leurs terres ancestrales, en reconnaissant et en confirmant «[l]es droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada».

Le test énoncé dans *Sparrow* est le cadre d'analyse des affaires constitutionnelles dans lesquelles on demande qu'un droit soit protégé en tant que droit ancestral. Il comporte trois étapes: (1) l'évaluation et la définition d'un droit ancestral existant (y compris son extinction), (2) l'établissement d'une atteinte *prima facie* à ce droit, et (3) la justification de cette atteinte.

Le paragraphe 35(1) doit recevoir une interprétation généreuse, large et libérale et les ambiguïtés, doutes ou incertitudes doivent être résolus en faveur des autochtones. Les droits ancestraux doivent être interprétés à la lumière des rapports spéciaux de fiduciaire et de la responsabilité de Sa Majesté vis-à-vis des autochtones. La règle la plus importante est que les droits ancestraux protégés par le par. 35(1) doivent être interprétés dans le contexte de l'histoire et de la culture de la société autochtone concernée, de manière à leur donner un sens pour les autochtones. Il n'est pas approprié d'affirmer que, dans la définition des droits ancestraux, la perspective de la common law importe autant que celle des autochtones.

La question de la nature et de l'étendue des droits ancestraux protégés par le par. 35(1) est fondamentalement une question de caractérisation. Deux méthodes d'analyse se sont dégagées.

La première est axée sur la coutume, pratique ou tradition en cause. Suivant ce point de vue, ce qui est commun aux cultures autochtones et non autochtones est non autochtone et donc n'est pas protégé par le

This approach should not be adopted. This approach misconstrues the words "distinctive culture", used in *Sparrow*, by interpreting it as if it meant "distinct culture". It is also overly majoritarian. Finally, this approach is unduly restrictive as it defines aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away.

The second approach describes aboriginal rights in a fairly high level of abstraction and is more generic. Its underlying premise is that the notion of "integral part of [aboriginals'] distinctive culture" constitutes a general statement regarding the purpose of s. 35(1). Section 35(1) should be viewed as protecting, not a catalogue of individualized practices, customs or traditions but the "distinctive culture" of which aboriginal activities are manifestations. The emphasis is on the significance of these activities to natives rather than on the activities themselves. These aboriginal activities should be distinguished from the practices or habits which were merely incidental to the lives of a particular group of aboriginal people and, as such, would not warrant protection under s. 35(1).

The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, customs and traditions which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). A generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. What constitutes a practice, custom or tradition distinctive to native culture and society must be examined through the eyes of aboriginal people.

The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, custom or tradition has to exist prior to a specific date, and also to the length of time necessary for an aboriginal activity to be recognized as a right under s. 35(1). Two basic approaches exist: the "frozen right" approach and the "dynamic right" approach. The latter should be preferred.

par. 35(1). Cette méthode ne devrait pas être adoptée. Elle décrit mal l'expression «culture distinctive» utilisée dans l'arrêt *Sparrow*, en lui donnant le sens de «culture distincte». C'est une analyse qui accorde beaucoup trop d'importance au point de vue de la majorité. Enfin, elle est une interprétation par trop rigide qui revient à définir la culture autochtone et les droits ancestraux comme étant ce qu'il en reste après qu'on en ait retranché les caractéristiques des cultures non autochtones.

La deuxième méthode est plus générale et décrit les droits ancestraux avec un degré d'abstraction assez élevé. Le principe sur lequel elle repose est que la notion de «partie intégrante de la culture distinctive [des autochtones visés]» constitue un énoncé général de l'objet du par. 35(1). Il faudrait considérer que le par. 35(1) protège non pas une liste de coutumes, pratiques ou traditions propres, mais plutôt la «culture distinctive» dont les activités autochtones sont des manifestations. L'accent serait mis sur l'importance de ces activités pour les autochtones plutôt que sur les activités elles-mêmes. Il faudrait distinguer ces activités autochtones des pratiques ou habitudes qui étaient simplement des aspects accessoires de la vie d'un groupe particulier d'autochtones et qui, en tant que telles, ne commanderaient pas la protection du par. 35(1).

Le critère de la «culture autochtone distinctive» ne devrait pas être restreint aux activités exercées uniquement par les autochtones et non par les non-autochtones. Au contraire, toutes les coutumes, pratiques et traditions ayant un lien suffisant avec le sentiment d'identité et le désir de préservation des sociétés autochtones organisées devraient être considérées comme valant d'être protégées en vertu du par. 35(1). Qui plus est, il faudrait interpréter ces activités de façon généreuse, large et libérale afin de donner plein effet à la reconnaissance constitutionnelle du caractère distinctif de la culture autochtone. Ce qui constitue une coutume, pratique ou tradition distinctive pour une culture et une société autochtones doit être examiné avec les yeux des autochtones.

La question de la période pertinente pour la reconnaissance de droits ancestraux amène à se demander si la coutume, pratique ou tradition doit avoir existé avant une date spécifique, et quelle est la période nécessaire pendant laquelle une activité autochtone doit avoir été exercée pour être reconnue comme un droit visé au par. 35(1). Deux méthodes principales ont été préconisées: la méthode fondée sur les «droits figés» et celle fondée sur le «caractère dynamique des droits». Il y a lieu de préférer la dernière.

The "frozen right" approach would recognize practices, customs and traditions that existed from time immemorial and that continued to exist at the time of British sovereignty. This approach overstates the impact of European influence on aboriginal communities, crystallizes aboriginal practice as of an arbitrary date, and imposes a heavy burden on the persons claiming an aboriginal right even if evidentiary standards are relaxed. In addition, it embodies inappropriate and unprovable assumptions about aboriginal culture and society and is inconsistent with *Sparrow* which refused to define existing aboriginal rights so as to incorporate the manner in which they were regulated in 1982.

Underlying the "dynamic right" approach is the premise that "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. Aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, customs and traditions change and evolve with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under s. 35(1) would ensure their continued vitality. Practices, customs and traditions need not have existed prior to British sovereignty or European contact. British sovereignty, instead of being considered the turning point in aboriginal culture, would be regarded as having recognized and affirmed practices, customs and traditions which are sufficiently significant and fundamental to the culture and social organization of aboriginal people. This idea relates to the "doctrine of continuity".

The aboriginal activity must have formed an integral part of a distinctive aboriginal culture for a substantial continuous period of time. This period should be assessed based on: (1) the type of aboriginal practices, customs and traditions; (2) the particular aboriginal culture and society; and, (3) the reference period of 20 to 50 years. This approach gives proper consideration to the perspective of aboriginal people on the meaning of their existing rights.

As regards the delineation of the aboriginal right claimed, the purposes of aboriginal practices, customs and traditions are highly relevant in assessing if they are sufficiently significant to the culture for a substantial continuing period of time. The purposes should not be

Suivant la méthode fondée sur les «droits figés», seraient reconnues les coutumes, pratiques et traditions qui existaient de temps immémorial au moment de la souveraineté britannique. Cette méthode exagère l'incidence de l'influence européenne sur les collectivités autochtones, cristallise les pratiques autochtones à une date arbitraire et, sur le plan de la preuve, impose aux autochtones un fardeau lourd que ne permet pas d'atténuer l'assouplissement des normes de preuve. Ce critère intègre des hypothèses inappropriées et improuvables en ce qui concerne la culture et la société autochtones et est incompatible avec l'arrêt *Sparrow* qui a refusé de définir les droits ancestraux existants de façon à intégrer la manière dont ils étaient réglementés en 1982.

La méthode fondée sur le «caractère dynamique des droits» repose sur le principe que l'expression «droits ancestraux existants» doit recevoir une interprétation souple de manière à permettre à ces droits d'évoluer avec le temps. Il faut permettre aux droits ancestraux de conserver une pertinence contemporaine par rapport aux besoins des autochtones, au fur et à mesure que leurs coutumes, pratiques et traditions changent et évoluent en même temps que l'ensemble de la société dans laquelle ils vivent. Cette interprétation généreuse, large et libérale des droits ancestraux protégés en vertu du par. 35(1) garantirait leur vitalité continue. Il n'est pas impératif que les coutumes, pratiques et traditions aient existé avant l'affirmation de la souveraineté britannique ou avant le contact avec les Européens. Au lieu d'être perçue comme le point tournant pour la culture autochtone, la souveraineté britannique serait plutôt considérée comme ayant reconnu et confirmé les coutumes, pratiques et traditions qui sont suffisamment importantes et fondamentales pour l'organisation sociale et la culture des autochtones. Cette idée se rattache à la «doctrine de la continuité».

L'activité autochtone doit avoir fait partie intégrante d'une culture autochtone distinctive pendant une période considérable et ininterrompue. Cette période devrait être appréciée en fonction des critères suivants: (1) le type de coutumes, pratiques et traditions autochtones en cause, (2) la culture et la société autochtones particulières visées, et (3) la période de référence de 20 à 50 ans. Cette méthode permet de tenir compte, comme il se doit, de la perspective des autochtones en ce qui concerne la signification de leurs droits existants.

Pour ce qui est de la définition du droit ancestral revendiqué, les fins pour lesquelles sont exercées les activités en cause sont considérées comme hautement pertinentes dans l'examen de la question de savoir si les coutumes, pratiques et traditions autochtones ont été

strictly compartmentalized but rather should be viewed on a spectrum, with aboriginal activities undertaken solely for food at one extreme, those directed to obtaining purely commercial profit at the other extreme, and activities relating to livelihood, support and sustenance at the centre.

An aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. Whether an activity is sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time will have to be determined on the specific facts giving rise to each case, as proven by the Crown, in view of the particular aboriginal culture and the evidence supporting the recognition of such right.

Nevertheless, the facts did not support framing the issue in this case in terms of commercial fishing. Appellant did not argue that her people possessed an aboriginal right to fish for commercial purposes but only the right to sell, trade and barter fish for their livelihood, support and sustenance. Finally, the legislative provision under constitutional challenge was not only aimed at commercial fishing but also at the non-commercial sale, trade and barter of fish.

The trial judge and the Court of Appeal erred in framing the issue and in using a "frozen right" approach. The trial judge, since he asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right under s. 35(1), made no finding of fact, or insufficient findings of fact, as regards the Sto:lo's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. An appellate court, given these palpable and overriding errors affecting the trial judge's assessment of the facts, is accordingly justified in intervening in the trial judge's findings of fact and substituting its own assessment of the evidence presented at trial.

The fishery always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. These activities formed part of the

suffisamment importantes pour la culture d'un groupe particulier d'autochtones, et ce pendant une période considérable et ininterrompue. Ces fins ne devraient pas être compartimentées de manière stricte, mais plutôt être considérées comme les divers éléments d'une gamme sur laquelle les activités autochtones exercées seulement à des fins alimentaires se trouveraient à une extrémité et celles visant des fins purement commerciales à l'autre extrémité, alors que les activités faites à des fins de subsistance occuperaient le centre.

Il n'est pas nécessaire qu'une activité autochtone soit accomplie à des fins de subsistance pour bénéficier de la protection du par. 35(1). La question de savoir si une activité est suffisamment importante et fondamentale pour l'organisation sociale et la culture pendant une période considérable et ininterrompue doit être tranchée à partir des faits propres à chaque cas et prouvés par le ministère public, compte tenu de la culture autochtone en cause et de la preuve étayant la reconnaissance du droit revendiqué.

Toutefois, les faits de l'espèce ne permettent pas de formuler la question sous l'angle de la pêche commerciale. L'appelante n'a pas plaidé que son peuple possède un droit ancestral de pêcher à des fins commerciales, mais seulement le droit de vendre et d'échanger du poisson à des fins de subsistance. Enfin, la disposition législative visée par la présente contestation constitutionnelle ne concernait pas seulement la pêche commerciale, mais aussi la vente et l'échange du poisson à des fins non commerciales.

Le juge du procès et la Cour d'appel ont commis une erreur en formulant la question en litige et en appliquant la méthode des «droits figés». Le juge du procès s'est posé les mauvaises questions et a fait erreur quant à la preuve requise pour établir l'existence d'un droit ancestral visé au par. 35(1). En conséquence, il n'a pas tiré de conclusion de fait — ou celles qu'il a tirées étaient insuffisantes — au sujet de la culture autochtone distinctive des Sto:lo en ce qui a trait à la vente et à l'échange de poisson à des fins de subsistance. Vu ces erreurs manifestes et dominantes, qui ont faussé l'appréciation des faits par le juge du procès, une cour d'appel est justifiée de modifier les conclusions de fait du juge de première instance et de substituer son appréciation de la preuve présentée au procès à celle du juge de première instance.

La pêche a toujours été un aspect central de la vie et de la subsistance des Sto:lo, qui ont toujours échangé du saumon afin d'assurer leur subsistance et celle de leur famille. Ces activités ont fait partie de la culture autoch-

Sto:lo's distinctive aboriginal culture for a substantial continuous period of time — for centuries before the arrival of Europeans — and continued in modernized forms until the present day. The criteria regarding the characterization and the time requirement of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* were met.

Per McLachlin J. (dissenting): A court considering the question of whether a particular practice is the exercise of a s. 35(1) constitutional aboriginal right must adopt an approach which: (1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of aboriginal claims); (2) is liberal and generous toward aboriginal interests; (3) considers the aboriginal claim in the context of the historic way of life of the people asserting it; and (4) above all, is true to the Crown's position as fiduciary for the first peoples. The legal perspectives of both the European and the aboriginal societies must be incorporated and the common law being applied must give full recognition to the pre-existing aboriginal tradition.

The sale at issue should not be labelled as something other than commerce. One person selling something to another is commerce. The critical question is not whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.

An aboriginal right must be distinguished from the exercise of an aboriginal right. Rights are generally cast in broad, general terms and remain constant over the centuries. The exercise of rights may take many forms and vary from place to place and from time to time. The principle that aboriginal rights must be ancestral rights is reconciled with this Court's insistence that aboriginal rights not be frozen by the determination of whether the modern practice at issue may be characterized as an exercise of the right. The rights are ancestral: their exercise takes modern forms.

History is important. A recently adopted practice would generally not qualify as being aboriginal. A practice, however, need not be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal

tone distinctive des Sto:lo pendant une période considérable et ininterrompue — pendant des siècles avant l'arrivée des Européens — et continuent d'être pratiquées de nos jours, quoique sous des formes modernes. Le critère applicable afin de caractériser les droits ancestraux protégés par le par. 35(1) de la *Loi constitutionnelle de 1982*, ainsi que l'exigence de durée pertinente, ont été respectés.

Le juge McLachlin (dissidente): Le tribunal qui est appelé à décider si une pratique donnée est l'exercice d'un droit ancestral protégé par la Constitution en vertu du par. 35(1) doit adopter une méthode (1) qui reconnaît les deux objets du par. 35(1) (savoir empêcher l'extinction des droits ancestraux et constituer une assise solide en vue du règlement des revendications autochtones), (2) qui soit libérale et généreuse envers les intérêts des autochtones, (3) qui considère le droit ancestral revendiqué dans le contexte du mode de vie historique du peuple qui l'invoque; (4) et, par-dessus tout, qui soit respectueuse du rôle de fiduciaire que l'État joue auprès des premiers habitants du pays. Les points de vue juridiques des sociétés européennes et autochtones doivent être intégrés et la common law appliquée doit reconnaître pleinement la tradition autochtone préexistante.

La vente faite en l'espèce ne devrait pas être qualifiée autrement que d'acte de commerce. Quand une personne vend quelque chose à autrui, c'est du commerce. La question cruciale qui se pose n'est pas de savoir si, en l'espèce, la vente du poisson est ou non un acte de commerce, mais bien si elle peut être justifiée en tant qu'exercice d'un droit ancestral plus fondamental, qui serait la poursuite, par les autochtones concernés, de l'utilisation historique de la ressource.

Il est nécessaire de faire une distinction entre un droit ancestral et l'exercice d'un tel droit. Les droits sont généralement énoncés en termes larges et généraux et ne changent pas au fil des siècles. L'exercice des droits peut prendre diverses formes et varier selon les lieux et les époques. C'est en déterminant si la pratique moderne en cause peut être qualifiée d'exercice du droit visé que l'on concilie le principe que les droits des peuples autochtones doivent être des droits ancestraux et l'insistance de notre Cour sur le principe que les droits ancestraux ne sont pas figés. Il s'agit de droits ancestraux: cependant, l'exercice de ces droits prend des formes modernes.

L'histoire est un facteur important. Une pratique d'adoption récente ne saurait généralement être qualifiée d'ancestrale. Toutefois, il n'est pas essentiel qu'une pratique remonte à l'époque qui a précédé le contact avec

rights do not find their source in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question, which existed prior to the imposition of European law and which often dated from time immemorial.

Continuity — a link — must be established between the historic practice and the right asserted. The exercise of a right can lapse, however, for a period of time. Aboriginal rights under s. 35(1) are not confined to rights formally recognized by treaty or the courts before 1982.

Neither the “integral part” nor the “dynamic rights” approach provides a satisfactory test for determining whether an aboriginal right exists, even though each captures important facets of aboriginal rights. The “integral-incident” test is too broad, too indeterminate and too categorical.

Aboriginal rights should be defined through an empirical approach. Inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1) should be drawn from history rather than attempting to describe *a priori* what an aboriginal right is.

The common law predicated dealings with aboriginals on two fundamental principles: (1) that the Crown asserted title subject to existing aboriginal interests in their traditional lands and adjacent waters, and (2) that those interests were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for their sustenance is a fundamental aboriginal right which is supported by the common law and by the history of this country and which is enshrined in s. 35(1) of the *Constitution Act, 1982*.

The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained therefrom. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration. The right is not the right to

les Européens pour être reconnue comme un droit constitutionnel. Les droits ancestraux ont leur origine non pas dans le moment magique du contact avec les Européens, mais dans les lois et coutumes traditionnelles que respectait le peuple en question avant que ne lui soient imposées celles des Européens et qui souvent existaient de temps immémorial.

Il faut établir qu'il y a continuité — un lien — entre la pratique historique et le droit revendiqué. Il peut arriver, cependant, qu'un droit cesse d'être exercé pendant un certain temps. Les droits ancestraux visés au par. 35(1) ne se limitent pas aux droits reconnus formellement par traité ou par les tribunaux avant 1982.

Ni l'approche fondée sur la notion de «partie intégrante», ni celle fondée sur le caractère «dynamique des droits» ne constituent un critère satisfaisant pour déterminer si un droit ancestral existe, même si ces deux approches tiennent compte de certaines facettes importantes des droits ancestraux. Le critère de la «partie intégrante ou accessoire» est trop large, trop indéterminé et trop catégorique.

Il convient de définir les droits ancestraux selon une approche empirique. Plutôt que d'essayer de définir *a priori* ce qu'est un droit ancestral, nous devons étudier l'histoire pour en tirer des inférences sur ce qui peut constituer un droit ancestral visé au par. 35(1).

En common law, les rapports avec les autochtones étaient fondés sur deux principes fondamentaux: (1) Sa Majesté prenait possession du territoire sous réserve des droits existants des autochtones sur les terres qu'ils avaient traditionnellement occupées et sur les eaux y adjacentes; (2) les droits des peuples autochtones d'utiliser les terres et les eaux y adjacentes pour assurer leur subsistance ne devaient leur être enlevés que par traité solennel et moyennant octroi à ceux-ci et à leurs descendants d'une juste indemnité. Ce droit des autochtones d'utiliser les terres et les eaux y adjacentes comme ils l'avaient fait traditionnellement pour assurer leur subsistance est un droit ancestral fondamental qui trouve appui dans la common law et dans l'histoire du pays, et qui est constitutionnalisé au par. 35(1) de la *Loi constitutionnelle de 1982*.

Le droit de pêche ancestral peut être défini comme étant le droit de continuer à tirer du fleuve, de la rivière ou de la mer en question ce que les autochtones concernés en ont traditionnellement tiré. Si les autochtones démontrent qu'ils ont traditionnellement tiré leur subsistance du fleuve, de la rivière ou de la mer, ils ont alors à première vue le droit de continuer à le faire, s'ils n'ont pas, par traité, échangé ce droit contre autre chose. Ce

trade, but the right to continue to use the resource in the traditional way to provide for traditional needs, albeit in their modern form. If the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.

The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what they traditionally obtained from the resource — basic housing, transportation, clothing and amenities — over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers.

All aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. Any right, aboriginal or other, also carries with it the obligation to use it responsibly. The Crown must establish a regulatory regime which respects these objectives.

The evidence conclusively established that over many centuries the fishery was used not only for food and ceremonial purposes but also for a variety of other needs. The scale of fishing here fell well within the limit of the traditional fishery.

Extinguishment

Per L'Heureux-Dubé J. (dissenting): The question of the extinguishment of the right found to exist must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

n'est pas le droit de faire du commerce, mais le droit de continuer d'utiliser la ressource de la manière traditionnelle, afin de pourvoir aux besoins traditionnels, quoique sous leur forme moderne. Si les autochtones démontrent que le commerce est la seule manière d'utiliser la ressource de façon à leur permettre de se procurer l'équivalent moderne de ce qu'ils ont traditionnellement tiré de celle-ci, il s'ensuit qu'ils devraient être autorisés à faire le commerce de cette ressource dans la mesure nécessaire pour obtenir des biens et des commodités de remplacement. Dans ce contexte, le commerce n'est rien d'autre que la méthode ou la pratique par laquelle est exercé le droit plus fondamental qui consiste à tirer sa subsistance de la ressource.

Le droit d'échanger les produits du territoire et des eaux y adjacentes contre d'autres biens n'est pas illimité. Ce droit est la poursuite de l'exploitation historique de la ressource par les autochtones visés. Il n'y a donc rien qui justifie d'élargir le droit au-delà de ce qui est nécessaire pour permettre aux autochtones de se procurer des biens de remplacement raisonnables à la place de ceux qu'ils ont traditionnellement obtenus pour la ressource — pour pourvoir aux besoins de base en matière de logement, de transport, d'habillement et de commodités de la vie — en sus de leurs besoins alimentaires et rituels. Au-delà de ces besoins, les pêcheurs autochtones n'ont aucun droit de priorité sur les non-autochtones qui pratiquent la pêche commerciale ou sportive.

Tous les droits ancestraux sur les terres et les eaux y adjacentes sont assujettis aux restrictions imposées pour des fins de conservation. Tout droit — ancestral ou autre — emporte l'obligation de l'utiliser de façon responsable. Il incombe à l'État d'établir un régime de réglementation qui respecte ces objectifs.

La preuve a établi décisivement que, pendant des siècles, les Sto:lo ont pêché non seulement à des fins alimentaires et rituelles, mais aussi pour satisfaire divers autres besoins. L'ampleur des activités de pêche en l'espèce restait bien en deçà des limites de la pêche traditionnelle.

Extinction

Le juge L'Heureux-Dubé (dissidente): La question de l'extinction du droit dont l'existence a été reconnue doit être renvoyée au tribunal de première instance en vue de la tenue d'un nouveau procès, étant donné que la preuve est insuffisante pour permettre à notre Cour de statuer sur celle-ci.

Per McLachlin J. (dissenting): For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain". No government of the day considered either the aboriginal right or the effect of its proposed action on that right, as required by the "clear and plain" test, in effecting any regulations which allegedly had the effect of extinguishing the aboriginal right to fish commercially.

Prima Facie Infringement

Per L'Heureux-Dubé J. (dissenting): The question of *prima facie* infringement must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): The inquiry into infringement involves two stages: (1) the person charged must show that he or she had a *prima facie* right to his or her actions, and (2) the Crown must then show that the regulatory scheme satisfied the particular aboriginal entitlement to fish for sustenance. The second requirement was not met.

Justification

Per L'Heureux-Dubé J. (dissenting): The question of justification must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): A large view of justification which cuts back the aboriginal right on the ground that this is required for reconciliation and social harmony should not be adopted. It runs counter to the authorities, is indeterminate and ultimately more political than legal. A more limited view of justification, that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use, should be adopted.

A government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Limits that have the effect of transferring the

Le juge McLachlin (dissidente): Pour qu'une mesure législative ou réglementaire éteigne un droit ancestral, cette intention doit être «claire et expresse». Aucun gouvernement antérieur n'a, en prenant de règlement qui aurait, affirme-t-on, éteint tout droit ancestral de pêche commerciale, pris en considération, comme l'exige le critère de l'intention «claire et expresse», le droit ancestral ou encore l'effet sur ce droit de la mesure qu'il se proposait de prendre.

Atteinte à première vue

Le juge L'Heureux-Dubé (dissidente): La question de l'atteinte *prima facie* doit être renvoyée au tribunal de première instance en vue de la tenue d'un nouveau procès, étant donné que la preuve est insuffisante pour permettre à notre Cour de statuer sur celle-ci.

Le juge McLachlin (dissidente): L'examen de la question de l'atteinte comporte deux étapes: (1) la personne accusée doit établir qu'elle avait, à première vue, le droit de faire ce qu'elle a fait; (2) il incombe alors au ministère public de prouver que le régime de réglementation respecte le droit particulier des autochtones de pêcher à des fins de subsistance. La deuxième condition n'a pas été remplie.

Justification

Le juge L'Heureux-Dubé (dissidente): La question de la justification doit être renvoyée au tribunal de première instance en vue de la tenue d'un nouveau procès, étant donné que la preuve est insuffisante pour permettre à notre Cour de statuer sur celle-ci.

Le juge McLachlin (dissidente): Il ne convient pas d'adopter une conception large de la justification, qui ampute le droit pour le motif que cela est nécessaire à des fins de réconciliation et d'harmonie sociales. Une telle conception est contraire à la jurisprudence, indéterminée et, en dernière analyse, plus politique que juridique. Il y a lieu d'adopter une conception plus limitée de la justification, savoir qu'il est loisible à l'État d'interdire l'exploitation de la ressource qui est incompatible avec son utilisation continue et responsable.

La restriction par le gouvernement d'un droit ancestral peut être justifiée, pourvu qu'elle vise à assurer la conservation de la ressource et l'exercice responsable du droit. La validité de restrictions qui iraient plus loin ne saurait être sauvegardée pour le motif que celles-ci sont nécessaires pour assurer la réconciliation ou la paix sociales. Des restrictions ayant pour effet de retirer à des autochtones la jouissance de la ressource pour la transférer à d'autres, et ce sans conclure de traité avec les pre-

resource from aboriginal people without treaty or consent cannot be justified.

Subject to the limitations relating to conservation and prevention of harm to others, the aboriginal people have a priority to fish for food, ceremony and supplementary sustenance defined in terms of the basic needs that the fishery provided to the people in ancestral times. Non-aboriginal peoples may use the resource subject to these conditions.

The regulation at issue was not justified.

Cases Cited

By Lamer C.J.

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **considered:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1; **referred to:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *R. v. Oakes*, [1986] 1 S.C.R. 103; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. George*, [1966] S.C.R. 267; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.), [1976] 2 S.C.R. v; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247.

By L'Heureux-Dubé J. (dissenting)

R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Sparrow*, [1990] 1

miers ou obtenir leur consentement, ne sauraient être justifiées.

Sous réserve des limites justifiées par la conservation de la ressource et la prévention des activités nuisibles à autrui, les autochtones ont la priorité pour pêcher à des fins alimentaires et rituelles, ainsi qu'à des fins supplémentaires de subsistance, c'est-à-dire pour satisfaire les besoins fondamentaux que la pêche permettait à leurs ancêtres de combler. Sous réserve de ces conditions, les non-autochtones peuvent exploiter la ressource.

La disposition réglementaire en cause n'était pas justifiée.

Jurisprudence

Citée par le juge en chef Lamer

Arrêt appliqué: *R. c. Sparrow*, [1990] 1 R.C.S. 1075; **arrêts examinés:** *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *Johnson c. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Worcester c. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Mabo c. Queensland [No. 2]* (1992), 175 C.L.R. 1; **arrêts mentionnés:** *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Washington c. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *R. c. Oakes*, [1986] 1 R.C.S. 103; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *R. c. Horseman*, [1990] 1 R.C.S. 901; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *R. c. George*, [1966] R.C.S. 267; *R. c. Sutherland*, [1980] 2 R.C.S. 451; *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Kruger c. La Reine*, [1978] 1 R.C.S. 104; *R. c. Derriksan* (1976), 71 D.L.R. (3d) 159 (C.S.C.), [1976] 2 R.C.S. v; *Stein c. Le navire «Kathy K»*, [1976] 2 R.C.S. 802; *Beaudoin-Daigneault c. Richard*, [1984] 1 R.C.S. 2; *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 R.C.S. 705; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *N.V. Bocimar S.A. c. Century Insurance Co. of Canada*, [1987] 1 R.C.S. 1247.

Citée par le juge L'Heureux-Dubé (dissidente)

R. c. N.T.C. Smokehouse Ltd., [1996] 2 R.C.S. 672; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Johnson c. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation c. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester c. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *R. c. Sparrow*,

S.C.R. 1075; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46; *R. v. Lewis*, [1996] 1 S.C.R. 921; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Badger*, [1996] 1 S.C.R. 771; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *R. v. George*, [1966] S.C.R. 267; *Sikyea v. The Queen*, [1964] S.C.R. 642; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227; *Jack v. The Queen*, [1980] 1 S.C.R. 294; *R. v. Denny* (1990), 55 C.C.C. (3d) 322; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Attorney General of Quebec v. Blaikie (No. 1)*, [1979] 2 S.C.R. 1016; *Re Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *Frank v. The Queen*, [1978] 1 S.C.R. 95; *R. v. Jones* (1993), 14 O.R. (3d) 421; *R. v. King*, [1993] O.J. No. 1794; *R. v. Fraser*, [1994] 3 C.N.L.R. 139; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *R. v. Burns*, [1994] 1 S.C.R. 656; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254.

By McLachlin J. (dissenting)

R. v. Sparrow, [1990] 1 S.C.R. 1075; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516; *In re Southern Rhodesia*, [1919] A.C. 211;

[1990] 1 R.C.S. 1075; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *Mabo c. Queensland [No. 2]* (1992), 175 C.L.R. 1; *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 A.C. 46; *R. c. Lewis*, [1996] 1 R.C.S. 921; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *Baker Lake c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *R. c. Horseman*, [1990] 1 R.C.S. 901; *R. c. Badger*, [1996] 1 R.C.S. 771; *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85; *R. c. George*, [1966] R.C.S. 267; *Sikyea c. The Queen*, [1964] R.C.S. 642; *Kruger c. La Reine*, [1978] 1 R.C.S. 104; *R. c. Taylor* (1981), 62 C.C.C. (2d) 227; *Jack c. La Reine*, [1980] 1 R.C.S. 294; *R. c. Denny* (1990), 55 C.C.C. (3d) 322; *Edwards c. Attorney-General for Canada*, [1930] A.C. 124; *Procureur général du Québec c. Blaikie (n° 1)*, [1979] 2 R.C.S. 1016; *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *R. c. Sutherland*, [1980] 2 R.C.S. 451; *Moosehunter c. La Reine*, [1981] 1 R.C.S. 282; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *Delgamuukw c. British Columbia* (1993), 104 D.L.R. (4th) 470; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606; *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031; *Frank c. La Reine*, [1978] 1 R.C.S. 95; *R. c. Jones* (1993), 14 O.R. (3d) 421; *R. c. King*, [1993] O.J. No. 1794; *R. c. Fraser*, [1994] 3 C.N.L.R. 139; *Stein c. Le navire «Kathy K»*, [1976] 2 R.C.S. 802; *Beaudoin-Daigneault c. Richard*, [1984] 1 R.C.S. 2; *Lensen c. Lensen*, [1987] 2 R.C.S. 672; *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 R.C.S. 705; *Ontario (Procureur général) c. Bear Island Foundation*, [1991] 2 R.C.S. 570; *Lapointe c. Hôpital Le Gardeur*, [1992] 1 R.C.S. 351; *R. c. Burns*, [1994] 1 R.C.S. 656; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Schwartz c. Canada*, [1996] 1 R.C.S. 254.

Citée par le juge McLachlin (dissidente)

R. c. Sparrow, [1990] 1 R.C.S. 1075; *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Mabo c. Queensland [No. 2]* (1992), 175 C.L.R. 1; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516; *In re Southern Rhodesia*, [1919] A.C. 211;

Tijani v. Secretary, Southern Nigeria, [1921] 2 A.C. 399; *Oyekan v. Adele*, [1957] 2 All E.R. 785; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *United States v. Dion*, 476 U.S. 734 (1986); *Jack v. The Queen*, [1980] 1 S.C.R. 294.

Statutes and Regulations Cited

British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5) [ad. SOR/85-290, s. 5].
British Columbia Terms of Union, R.S.C., 1985, App. II, No. 10.
Constitution Act, 1867, s. 91(24).
Constitution Act, 1982, ss. 35(1), (2), 52.
Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1).
Indian Act, R.S.C., 1985, c. I-5, ss. 81, 82, 88.
Loi sur la protection du consommateur, L.R.Q. 1977, c. P-40.1.
Order in Council, P.C. 2539 (September 11, 1917).
Oregon Boundary Treaty, 1846, 34 B.S.P. 14.
Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.

Authors Cited

Asch, Michael. *Home and Native Land: Aboriginal Rights and the Canadian Constitution*. Toronto: Methuen, 1984.
 Asch, Michael and Patrick Macklem. "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991), 29 *Alta. L. Rev.* 498.
 Binnie, W. I. C. "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990), 15 *Queen's L.J.* 217.
 Blackstone, Sir William. *Commentaries on the Laws of England*, vol. 2. Oxford: Clarendon Press, 1769.
 Bowker, Andrea. "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995), 53 *Toronto Fac. L. Rev.* 1.
 Chitty, Joseph. *A Treatise on the Law of the Prerogatives of the Crown*. London: Butterworths, 1820.
Concise Oxford Dictionary of Current English, 9th ed. Edited by Della Thompson. Oxford: Clarendon Press, 1995, "distinct", "distinctive", "tradition".
Driedger on the Construction of Statutes, 3rd ed. By Ruth Sullivan. Toronto: Butterworths, 1994.
 Duff, Wilson. *The Upper Stalo Indians of the Fraser Valley, British Columbia (Anthropology in British Columbia — Memoir No. 1)*. Victoria: British Columbia Provincial Museum, 1952.

Tijani c. Secretary, Southern Nigeria, [1921] 2 A.C. 399; *Oyekan c. Adele*, [1957] 2 All E.R. 785; *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *United States c. Dion*, 476 U.S. 734 (1986); *Jack c. La Reine*, [1980] 1 R.C.S. 294.

Lois et règlements cités

Conditions de l'adhésion de la Colombie-Britannique, L.R.C. (1985), app. II, n° 10.
 Décret C.P. 2539 (11 septembre 1917).
Loi constitutionnelle de 1867, art. 91(24).
Loi constitutionnelle de 1982, art. 35(1), (2), 52.
Loi sur la protection du consommateur, L.R.Q. 1977, ch. P-40.1.
Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 81, 82, 88.
Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 61(1).
Oregon Boundary Treaty, 1846, 34 B.S.P. 14.
Proclamation royale de 1763, L.R.C. (1985), app. II, n° 1.
Règlement de pêche général de la Colombie-Britannique, DORS/84-248, art. 27(5) [aj. DORS/85-290, art. 5].

Doctrine citée

Asch, Michael. *Home and Native Land: Aboriginal Rights and the Canadian Constitution*. Toronto: Methuen, 1984.
 Asch, Michael and Patrick Macklem. «Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*» (1991), 29 *Alta. L. Rev.* 498.
 Binnie, W. I. C. «The Sparrow Doctrine: Beginning of the End or End of the Beginning?» (1990), 15 *Queen's L.J.* 217.
 Blackstone, Sir William. *Commentaries on the Laws of England*, vol. 2. Oxford: Clarendon Press, 1769.
 Bowker, Andrea. «Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal» (1995), 53 *Toronto Fac. L. Rev.* 1.
 Chitty, Joseph. *A Treatise on the Law of the Prerogatives of the Crown*. London: Butterworths, 1820.
Concise Oxford Dictionary of Current English, 9th ed. Edited by Della Thompson. Oxford: Clarendon Press, 1995, «distinct», «distinctive», «tradition».
Driedger on the Construction of Statutes, 3rd ed. By Ruth Sullivan. Toronto: Butterworths, 1994.
 Duff, Wilson. *The Upper Stalo Indians of the Fraser Valley, British Columbia (Anthropology in British Columbia — Memoir No. 1)*. Victoria: British Columbia Provincial Museum, 1952.

- Elliott, David. *Law and Aboriginal Peoples of Canada*, 2nd ed. Canadian Legal Studies Series. North York, Ont.: Captus Press, 1994.
- Émond, André. "Existe-t-il un titre indien originaire dans les territoires cédés par la France en 1763?" (1995), 41 *McGill L.J.* 59.
- Émond, André. "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale" (1996), 30 *R.J.T.* 1.
- Grammond, Sébastien. "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*" (1991), 36 *McGill L.J.* 1382.
- Halsbury's Laws of Australia*, vol. 1 ["Hunting, Gathering and Fishing Rights"], paras. 5-2250, 5-2255, 5-2260, 5-2265]. North Ryde: Butterworths Pty Limited, 1991 (loose-leaf).
- Hogg, Peter W. *Constitutional Law of Canada*, 3rd ed. Toronto: Carswell, 1992.
- Holdsworth, Sir William Searle. *A History of English Law*, vol. 11. London: Methuen, 1938.
- Lafontaine, Alain. "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones" (1995), 36 *C. de D.* 669.
- Lyon, Noel. "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95.
- Lysyk, Kenneth. "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 *Can. Bar Rev.* 450.
- Macklem, Patrick. "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 *McGill L.J.* 382.
- Macklem, Patrick. "Normative Dimensions of an Aboriginal Right of Self-Government" (1995), 21 *Queen's L.J.* 173.
- McNeil, Kent. "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *Sup. Ct. L. Rev.* 255.
- McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon Press, 1989.
- Pentney, William. "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act*, 1982, Part II — Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207.
- Petit Robert I. Paris: Le Robert, 1990, "ancestral".
- Sanders, Douglas. "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314.
- Shorter Oxford English Dictionary*, 3rd ed., vol. 1. Oxford: Clarendon Press, 1973, "integral".
- Slattery, Brian. "Aboriginal Sovereignty and Imperial Claims" (1991), 29 *Osgoode Hall L.J.* 681.
- Elliott, David. *Law and Aboriginal Peoples of Canada*, 2nd ed. Canadian Legal Studies Series. North York, Ont.: Captus Press, 1994.
- Émond, André. «Existe-t-il un titre indien originaire dans les territoires cédés par la France en 1763?» (1995), 41 *R.D. McGill* 59.
- Émond, André. «Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale» (1996), 30 *R.J.T.* 1.
- Grammond, Sébastien. «La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*» (1991), 36 *R.D. McGill* 1382.
- Halsbury's Laws of Australia*, vol. 1 [«Hunting, Gathering and Fishing Rights», paras. 5-2250, 5-2255, 5-2260, 5-2265]. North Ryde: Butterworths Pty Limited, 1991 (loose-leaf).
- Hogg, Peter W. *Constitutional Law of Canada*, 3rd ed. Toronto: Carswell, 1992.
- Holdsworth, Sir William Searle. *A History of English Law*, vol. 11. London: Methuen, 1938.
- Lafontaine, Alain. «La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones» (1995), 36 *C. de D.* 669.
- Lyon, Noel. «An Essay on Constitutional Interpretation» (1988), 26 *Osgoode Hall L.J.* 95.
- Lysyk, Kenneth. «The Indian Title Question in Canada: An Appraisal in the Light of Calder» (1973), 51 *R. du B. can.* 450.
- Macklem, Patrick. «First Nations Self-Government and the Borders of the Canadian Legal Imagination» (1991), 36 *McGill L.J.* 382.
- Macklem, Patrick. «Normative Dimensions of an Aboriginal Right of Self-Government» (1995), 21 *Queen's L.J.* 173.
- McNeil, Kent. «The Constitutional Rights of the Aboriginal Peoples of Canada» (1982), 4 *Sup. Ct. L. Rev.* 255.
- McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon Press, 1989.
- Pentney, William. «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act*, 1982, Part II — Section 35: The Substantive Guarantee» (1988), 22 *U.B.C. L. Rev.* 207.
- Petit Robert I. Paris: Le Robert, 1990, «ancestral».
- Sanders, Douglas. «The Rights of the Aboriginal Peoples of Canada» (1983), 61 *R. du B. can.* 314.
- Shorter Oxford English Dictionary*, 3rd ed., vol. 1. Oxford: Clarendon Press, 1973, «integral».
- Slattery, Brian. «Aboriginal Sovereignty and Imperial Claims» (1991), 29 *Osgoode Hall L.J.* 681.

Slaterry, Brian. *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*. Saskatoon: University of Saskatchewan Native Law Centre, 1983.

Slaterry, Brian. "First Nations and the Constitution: A Question of Trust" (1992), 71 *Can. Bar Rev.* 261.

Slaterry, Brian. "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 *Queen's L.J.* 232.

Slaterry, Brian. *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories*. Saskatoon: University of Saskatchewan Native Law Centre, 1979.

Slaterry, Brian. "The Legal Basis of Aboriginal Title". In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*. Edited by Frank Cassidy. Lantzville, B.C.: Oolichan Books, 1992.

Slaterry, Brian. "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.

Walters, Mark. "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350.

APPEAL from a judgment of the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 75, 29 B.C.A.C. 209, 48 W.A.C. 209, 83 C.C.C. (3d) 289, [1993] 5 W.W.R. 459, [1993] 4 C.N.L.R. 221, allowing an appeal from a judgment of Selbie J. (1991), 58 B.C.L.R. (2d) 392, [1991] 3 C.N.L.R. 161, allowing an appeal from conviction by Scarlett Prov. Ct. J., [1991] 3 C.N.L.R. 155. Appeal dismissed, L'Heureux-Dubé and McLachlin JJ. dissenting.

Louise Mandell and Leslie J. Pinder, for the appellant.

S. David Frankel, Q.C., and *Cheryl J. Tobias*, for the respondent.

René Morin, for the intervenor the Attorney General of Quebec.

J. Keith Lowes, for the intervenor the Fisheries Council of British Columbia.

Christopher Harvey, Q.C., and *Robert Lonergan*, for the intervenors the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation.

Slaterry, Brian. *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*. Saskatoon: University of Saskatchewan Native Law Centre, 1983.

Slaterry, Brian. «First Nations and the Constitution: A Question of Trust» (1992), 71 *R. du B. can.* 261.

Slaterry, Brian. «The Constitutional Guarantee of Aboriginal and Treaty Rights» (1983), 8 *Queen's L.J.* 232.

Slaterry, Brian. *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories*. Saskatoon: University of Saskatchewan, Native Law Centre, 1979.

Slaterry, Brian. «The Legal Basis of Aboriginal Title». In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*. Edited by Frank Cassidy. Lantzville, B.C.: Oolichan Books, 1992.

Slaterry, Brian. «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727.

Walters, Mark. «British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*» (1992), 17 *Queen's L.J.* 350.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1993), 80 B.C.L.R. (2d) 75, 29 B.C.A.C. 209, 48 W.A.C. 209, 83 C.C.C. (3d) 289, [1993] 5 W.W.R. 459, [1993] 4 C.N.L.R. 221, qui a accueilli l'appel contre le jugement du juge Selbie (1991), 58 B.C.L.R. (2d) 392, [1991] 3 C.N.L.R. 161, qui avait accueilli l'appel contre la déclaration de culpabilité prononcée par le juge Scarlett de la Cour provinciale, [1991] 3 C.N.L.R. 155. Pourvoi rejeté, les juges L'Heureux-Dubé et McLachlin sont dissidentes.

Louise Mandell et Leslie J. Pinder, pour l'appelante.

S. David Frankel, c.r., et *Cheryl J. Tobias*, pour l'intimée.

René Morin, pour l'intervenant le procureur général du Québec.

J. Keith Lowes, pour l'intervenant le Fisheries Council of British Columbia.

Christopher Harvey, c.r., et *Robert Lonergan*, pour les intervenantes la British Columbia Fisheries Survival Coalition et la British Columbia Wildlife Federation.

Harry A. Slade, Arthur C. Pape and Robert C. Freedman, for the intervener the First Nations Summit.

Stuart Rush, Q.C., and Michael Jackson, for the interveners Delgamuukw et al.

Arthur C. Pape and Clayton C. Ruby, for the interveners Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner.

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major J.J. was delivered by

THE CHIEF JUSTICE —

I. Introduction

¹ This appeal, along with the companion appeals in *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, raises the issue left unresolved by this Court in its judgment in *R. v. Sparrow*, [1990] 1 S.C.R. 1075: How are the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* to be defined?

² In *Sparrow*, Dickson C.J. and La Forest J., writing for a unanimous Court, outlined the framework for analyzing s. 35(1) claims. First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been extinguished. Third, a court must determine whether that right has been infringed. Finally, a court must determine whether the infringement is justified. In *Sparrow*, however, it was not seriously disputed that the Musqueam had an aboriginal right to fish for food, with the result that it was unnecessary for the Court to answer the question of how the rights recognized and affirmed by s. 35(1) are to be defined. It is this question and, in particular, the question of whether s. 35(1)

Harry A. Slade, Arthur C. Pape et Robert C. Freedman, pour l'intervenant le First Nations Summit.

Stuart Rush, c.r., et Michael Jackson, pour les intervenants Delgamuukw et autres.

Arthur C. Pape et Clayton C. Ruby, pour les intervenants Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese et Allan Gardner.

Version française du jugement du juge en chef Lamer et des juges La Forest, Sopinka, Gonthier, Cory, Iacobucci et Major rendu par

LE JUGE EN CHEF —

I. Introduction

Le présent pourvoi, ainsi que les pourvois connexes *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672 et *R. c. Gladstone*, [1996] 2 R.C.S. 723, soulèvent la question que notre Cour n'a pas tranchée dans l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075: Comment faut-il s'y prendre pour définir les droits ancestraux reconnus et confirmés par le par. 35(1) de la *Loi constitutionnelle de 1982*?

Dans l'arrêt *Sparrow*, le juge en chef Dickson et le juge La Forest, qui ont rédigé la décision unanime de la Cour, ont donné les grandes lignes du cadre d'analyse des demandes fondées sur le par. 35(1). Premièrement, le tribunal doit déterminer si le demandeur a prouvé qu'il avait agi en vertu d'un droit ancestral. Deuxièmement, il doit décider s'il y a eu extinction de ce droit. Troisièmement, il doit déterminer s'il y a eu atteinte à ce droit. Enfin, le tribunal doit décider si l'atteinte est justifiée. Dans *Sparrow*, toutefois, l'existence du droit ancestral des Musqueams de pêcher à des fins alimentaires n'était pas sérieusement contestée, de sorte que notre Cour n'avait pas à trancher la question de savoir comment il faut s'y prendre pour définir les droits reconnus et confirmés par le par. 35(1). C'est à cette question et, en particulier, à celle de savoir si le par. 35(1) reconnaît et confirme le droit

recognizes and affirms the right of the Sto:lo to sell fish, which must now be answered by this Court.

In order to define the scope of aboriginal rights, it will be necessary first to articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible. As Dickson J. (as he then was) said in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, a constitutional provision must be understood "in the light of the interests it was meant to protect". This principle, articulated in relation to the rights protected by the *Canadian Charter of Rights and Freedoms*, applies equally to the interpretation of s. 35(1).

This judgment will thus, after outlining the context and background of the appeal, articulate a test for identifying aboriginal rights which reflects the purposes underlying s. 35(1), and the interests which that constitutional provision is intended to protect.

II. Statement of Facts

The appellant Dorothy Van der Peet was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248. At the time at which the appellant was charged s. 27(5) read:

27. . . .

(5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

The charges arose out of the sale by the appellant of 10 salmon on September 11, 1987. The salmon had been caught by Steven and Charles Jimmy under the authority of an Indian food fish

des Sto:lo de vendre du poisson, que notre Cour doit maintenant répondre.

Pour définir la portée des droits ancestraux, il sera d'abord nécessaire d'énoncer les objets qui sous-tendent le par. 35(1), en particulier les raisons pour lesquelles on y reconnaît et confirme le statut constitutionnel unique des peuples autochtones au Canada. En effet, tant que l'on n'a pas saisi pourquoi les droits ancestraux existent et sont protégés par la Constitution, il est impossible de les définir. Comme le juge Dickson (plus tard Juge en chef) l'a dit dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, à la p. 344, les textes constitutionnels doivent être interprétés «en fonction des intérêts qu'ils visent à protéger». Ce principe, énoncé à l'égard des droits protégés par la *Charte canadienne des droits et libertés*, s'applique également à l'interprétation du par. 35(1).

En conséquence, après un bref exposé du contexte du présent pourvoi, le présent jugement fera état, en vue de l'identification des droits ancestraux, d'un critère reflétant les objets visés au par. 35(1) et les intérêts que cette disposition constitutionnelle est censée protéger.

II. Exposé des faits

L'appelante Dorothy Van der Peet a été accusée, en application du par. 61(1) de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14, de l'infraction d'avoir vendu du poisson pris en vertu d'un permis de pêche de subsistance des Indiens, contrairement au par. 27(5) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248. À la date où l'appelante a été inculpée, le par. 27(5) était ainsi rédigé:

27. . . .

(5) Il est interdit à quiconque de vendre, d'échanger ou d'offrir de vendre ou d'échanger du poisson pris en vertu d'un permis de pêche de subsistance des Indiens.

Les accusations découlaient de la vente par l'appelante de 10 saumons le 11 septembre 1987. Ces poissons avaient été pris par Steven et Charles Jimmy en vertu d'un permis de pêche de subsis-

licence. Charles Jimmy is the common law spouse of the appellant. The appellant, a member of the Sto:lo, has not contested these facts at any time, instead defending the charges against her on the basis that in selling the fish she was exercising an existing aboriginal right to sell fish. The appellant has based her defence on the position that the restrictions imposed by s. 27(5) of the Regulations infringe her existing aboriginal right to sell fish and are therefore invalid on the basis that they violate s. 35(1) of the *Constitution Act, 1982*.

tance des Indiens. Charles Jimmy est le conjoint de fait de l'appelante. Celle-ci, membre des Sto:lo, n'a jamais contesté ces faits, invoquant plutôt pour sa défense qu'en vendant ces poissons elle exerçait un droit ancestral existant de vendre du poisson. L'appelante a fondé sa défense sur la thèse que les restrictions imposées par le par. 27(5) du Règlement portent atteinte à son droit ancestral existant de vendre du poisson et qu'elles sont donc invalides parce qu'elles violent le par. 35(1) de la *Loi constitutionnelle de 1982*.

III. Judgments Below

III. Les décisions des juridictions inférieures

Provincial Court, [1991] 3 C.N.L.R. 155

La Cour provinciale, [1991] 3 C.N.L.R. 155

7 Scarlett Prov. Ct. J. rejected the appellant's argument that she sold fish pursuant to an aboriginal right. On the basis of the evidence from members of the appellant's band, and anthropological experts, he found that, historically, the Sto:lo people clearly fished for food and ceremonial purposes, but that any trade in salmon that occurred was incidental and occasional only. He found, at p. 160, that there was no trade of salmon "in any regularized or market sense" but only "opportunistic exchanges taking place on a casual basis". He found that the Sto:lo could not preserve or store fish for extended periods of time and that the Sto:lo were a band rather than a tribal culture; he held both of these facts to be significant in suggesting that the Sto:lo did not engage in a market system of exchange. On the basis of these findings regarding the nature of the Sto:lo trade in salmon, Scarlett Prov. Ct. J. held that the Sto:lo's aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. He therefore found the accused guilty of violating s. 61(1) of the *Fisheries Act*.

Le juge Scarlett de la Cour provinciale a rejeté l'argument de l'appelante voulant qu'elle ait vendu du poisson en vertu d'un droit ancestral. S'appuyant sur les témoignages de membres de la bande et d'anthropologues, il a conclu que, historiquement, les Sto:lo avaient clairement pratiqué la pêche à des fins alimentaires et rituelles, mais que les échanges de saumons qui se produisaient avaient un caractère uniquement accessoire et occasionnel. Il a statué, à la p. 160, qu'il n'y avait pas de commerce du saumon [TRADUCTION] «au sens d'un commerce organisé ou d'un marché», mais seulement des «échanges découlant d'occasions fortuites». Il a conclu que les Sto:lo n'étaient pas en mesure de conserver ou d'emmagasiner le poisson durant de longues périodes, et que leur culture était celle d'une bande plutôt que d'une tribu. Il a estimé que ces deux faits étaient importants en ce qu'ils tendaient à indiquer que les Sto:lo ne faisaient pas d'échanges dans le cadre d'un système de marché. Sur la foi de ces conclusions concernant la nature des échanges de saumon faits par les Sto:lo, le juge Scarlett a statué que le droit ancestral de ceux-ci de pêcher à des fins alimentaires et rituelles n'inclut pas le droit de vendre le poisson ainsi pris. Il a donc déclaré l'accusée coupable d'avoir contrevenu au par. 61(1) de la *Loi sur les pêcheries*.

Supreme Court of British Columbia (1991), 58 B.C.L.R. (2d) 392

Selbie J. of the Supreme Court of British Columbia held that Scarlett Prov. Ct. J. erred when he looked at the evidence in terms of whether or not it demonstrated that the Sto:lo participated in a market system of exchange. The evidence should not have been considered in light of “contemporary tests for ‘marketing’” (at para. 15) but should rather have been viewed so as to determine whether it “is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise” (at para. 16). He held, at para. 16, that the evidence in this case was consistent with an aboriginal right to sell fish because it suggested that aboriginal societies had no stricture or prohibition against the sale of fish, with the result that “when the first Indian caught the first salmon he had the ‘right’ to do anything he wanted with it — eat it, trade it for deer meat, throw it back or keep it against a hungrier time”. Selbie J. therefore held that the Sto:lo had an aboriginal right to sell fish and that the trial judge’s verdict against the appellant was inconsistent with the evidence. He remanded for a new trial on the questions of whether this right had been extinguished, whether the regulations infringed the right and whether any infringement of the right had been justified.

The Court of Appeal (1993), 80 B.C.L.R. (2d) 75

The British Columbia Court of Appeal allowed the Crown’s appeal and restored the guilty verdict of Scarlett Prov. Ct. J. Macfarlane J.A. (Taggart J.A. concurring) held, at para. 20, that a practice will be protected as an aboriginal right under s. 35(1) of the *Constitution Act, 1982* where the evidence establishes that it had “been exercised, at the time sovereignty was asserted, for a sufficient length of time to become integral to the aboriginal society”. To be protected as an aboriginal right, however, the practice cannot have become “preva-

La Cour suprême de la Colombie-Britannique (1991), 58 B.C.L.R. (2d) 392

Le juge Selbie de la Cour suprême de la Colombie-Britannique a statué que le juge Scarlett de la Cour provinciale avait commis une erreur en se demandant si la preuve établissait que les Sto:lo avaient fait des échanges dans le cadre d’un système de marché. La preuve n’aurait pas dû être examinée à la lumière des [TRADUCTION] «critères contemporains de «commercialisation»» (par. 15), mais plutôt en vue de déterminer si «elle [était] davantage compatible avec l’existence d’un droit de pêche ancestral incluant le droit de vendre ou d’échanger le produit de la pêche, que le contraire» (par. 16). Le juge a conclu, au par. 16, que, en l’espèce, la preuve était compatible avec l’existence d’un droit ancestral de vendre du poisson parce qu’elle tendait à indiquer que les sociétés autochtones ne faisaient l’objet d’aucune restriction ou interdiction en ce qui concerne la vente du poisson, de sorte que [TRADUCTION] «quand le premier Indien a pris le premier saumon il avait le «droit» d’en faire ce qu’il voulait — le manger, l’échanger contre de la viande de chevreuil, le remettre à l’eau ou le garder pour les temps plus difficiles». En conséquence, le juge Selbie a statué que les Sto:lo possédaient un droit ancestral de vendre du poisson et que la décision rendue par le juge du procès contre l’appelante était incompatible avec la preuve. Il a ordonné la tenue d’un nouveau procès sur les questions de savoir si ce droit avait été éteint, si le règlement portait atteinte à ce droit et, si oui, si la violation était justifiée.

La Cour d’appel (1993), 80 B.C.L.R. (2d) 75

La Cour d’appel de la Colombie-Britannique a accueilli à l’appel du ministère public et rétabli la déclaration de culpabilité prononcée par le juge Scarlett de la Cour provinciale. Le juge Macfarlane (avec l’appui du juge Taggart), a conclu, au par. 20, qu’une pratique est protégée par le par. 35(1) de la *Loi constitutionnelle de 1982* en tant que droit ancestral si la preuve établit qu’elle a [TRADUCTION] «été exercée, au moment de l’affirmation de la souveraineté, pendant une période suffisamment longue pour devenir partie intégrante

lent merely as a result of European influences" (para. 21) but must rather arise from the aboriginal society itself. On the basis of this test Macfarlane J.A. held that the Sto:lo did not have an aboriginal right to sell fish. The question was not, he held at para. 30, whether the Sto:lo could support a right to dispose of surplus food fish on a casual basis but was rather whether they had a right to "sell fish allocated for food purposes on a commercial basis" which should be given constitutional priority in the allocation of the fishery resource. Given that this was the question, Macfarlane J.A. held that the assessment of the evidence by the trial judge was correct. The evidence, while indicating that surplus fish would have been disposed of or traded, did not establish that the "purpose of fishing was to engage in commerce" (para. 41). While the Sto:lo did trade salmon with the Hudson's Bay Company prior to the British assertion of sovereignty in a manner that could be characterized as commercial, this trade was "not of the same nature and quality as the aboriginal traditions disclosed by the evidence" (para. 41) and did not, therefore, qualify for protection as an aboriginal right under s. 35(1).

de la société autochtone». Cependant, pour être protégée en tant que droit ancestral, la pratique ne doit pas s'être [TRADUCTION] «répandue du seul fait des influences européennes» (au par. 21), mais bien émaner de la société autochtone elle-même. Sur le fondement de ce critère, le juge Macfarlane a statué, au par. 30, que les Sto:lo n'avaient pas de droit ancestral de vendre du poisson. Il a conclu que la question n'était pas de savoir si les Sto:lo étaient en mesure d'établir l'existence du droit d'aliéner du poisson excédentaire à l'occasion, mais bien de savoir s'ils avaient le droit de [TRADUCTION] «vendre commercialement du poisson attribué à des fins alimentaires», droit qui doit bénéficier de la priorité garantie par la Constitution en ce qui concerne la répartition de cette ressource. Puisque c'était là la question à trancher, le juge Macfarlane a statué que le juge du procès avait bien apprécié la preuve qui — même si elle indiquait qu'on aliénait le poisson excédentaire, notamment par voie d'échanges — n'établissait pas que [TRADUCTION] «le but de la pêche était de faire le commerce du poisson» (par. 41). Bien que, avant l'affirmation de la souveraineté par les Britanniques, les Sto:lo échangeaient effectivement du saumon à la Compagnie de la Baie d'Hudson contre d'autres biens, d'une manière qui pourrait être qualifiée de commerciale, ces échanges ne participaient «pas de la même nature et de la même qualité que les traditions autochtones dont l'existence avait été établie par la preuve» (par. 41), et ils ne bénéficiaient donc pas de la protection du par. 35(1) en tant que droit ancestral.

10 In his concurring judgment Wallace J.A. articulated a test for aboriginal rights similar to that of Macfarlane J.A. in so far as he too held, at para. 78, that the practices protected as aboriginal rights by s. 35(1) are those "traditional and integral to the native society pre-sovereignty". Wallace J.A. emphasized that s. 35(1) should not be interpreted as having the purpose of enlarging the pre-1982 concept of aboriginal rights; instead it should be seen as having the purpose of protecting from legislative encroachment those aboriginal rights that existed in 1982. Section 35(1) was not enacted so as to facilitate the current objectives of the aboriginal community but was rather enacted so as to pro-

Dans son jugement concordant, le juge Wallace a énoncé, à l'égard des droits ancestraux, un critère analogue à celui du juge Macfarlane, dans la mesure où il a lui aussi statué, au par. 78, que sont protégées par le par. 35(1) en tant que droits ancestraux les pratiques [TRADUCTION] «traditionnelles qui faisaient partie intégrante de la société autochtone avant l'affirmation de la souveraineté». Le juge Wallace a souligné qu'il ne faut pas considérer que le par. 35(1) a pour but d'élargir la notion de droits ancestraux telle qu'elle existait avant 1982, mais plutôt qu'il vise à protéger contre les atteintes législatives les droits ancestraux qui existaient en 1982. Le paragraphe 35(1) n'a pas été

tect "traditional aboriginal practices integral to the culture and traditional way of life of the native community" (para. 78). Wallace J.A. held, at para. 104, that rights should not be "determined by reference to the economic objectives of the rights-holders". He concluded from this analytical framework that the trial judge was correct in determining that the commercial sale of fish is different in nature and kind from the aboriginal right of the Sto:lo to fish for sustenance and ceremonial purposes, with the result that the appellant could not be said to have been exercising an aboriginal right when she sold the fish.

Lambert J.A. dissented. While he agreed that aboriginal rights are those aboriginal customs, traditions and practices which are an integral part of a distinctive aboriginal culture, he added to that proposition the proviso that to determine whether a practice is in fact integral it is necessary first to describe it correctly. In his view, the appropriate description of a right or practice is one based on the significance of the practice to the particular aboriginal culture. As such, in determining the extent to which aboriginal fishing is a protected right under s. 35(1) a court should look not to the purpose for which aboriginal people fished, but should rather look at the significance of fishing to the aboriginal society; it is the social significance of fishing which is integral to the distinctive aboriginal society and which is, therefore, protected by s. 35(1) of the *Constitution Act, 1982*. Lambert J.A. found support for this proposition in this Court's judgment in *Sparrow, supra*, in the American case law arising out of disputes over the terms of treaties signed with aboriginal people in the Pacific northwest (see, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979)), and in the general principle that the definition of aboriginal rights must take into account the perspective of aboriginal people. Lambert J.A. held that the social significance of fishing for the Sto:lo was that fishing was the means by which they provided themselves with a moderate livelihood; he therefore

édicte pour faciliter la réalisation des objectifs actuels de la collectivité autochtone, mais bien pour protéger [TRADUCTION] «les pratiques autochtones traditionnelles qui font partie intégrante du mode de vie traditionnel et de la culture de la collectivité autochtone» (par. 78). Le juge Wallace a statué, au par. 104, que les droits ne doivent pas être [TRADUCTION] «déterminés eu égard aux objectifs économiques de leurs titulaires». À partir de ce cadre d'analyse, il a conclu que le juge du procès avait à juste titre statué que la vente de poisson à des fins commerciales diffère de par sa nature du droit ancestral des Sto:lo de pêcher à des fins alimentaires et rituelles, de sorte qu'il était impossible d'affirmer que l'appelante exerçait un droit ancestral lorsqu'elle a vendu le poisson.

Le juge Lambert a exprimé sa dissidence. Tout en convenant que les droits ancestraux sont les coutumes, pratiques et traditions autochtones qui font partie intégrante d'une culture autochtone distinctive, il a ajouté la réserve que, pour décider si une pratique fait effectivement partie intégrante de cette culture, il faut d'abord la décrire correctement. Selon lui, pour bien décrire un droit ou une pratique il faut se fonder sur son importance pour la culture autochtone concernée. À cette fin, pour déterminer dans quelle mesure la pêche autochtone constitue un droit protégé par le par. 35(1), le tribunal doit tenir compte non pas du but dans lequel les autochtones pêchaient, mais plutôt de l'importance de la pêche pour la société autochtone. Ce n'est pas la pêche mais son importance sociale qui fait partie intégrante de la société autochtone distinctive et qui, de ce fait, est protégée par le par. 35(1) de la *Loi constitutionnelle de 1982*. À l'appui de cette proposition, le juge Lambert a invoqué l'arrêt *Sparrow* de notre Cour, précité, ainsi qu'un arrêt américain touchant un différend concernant les conditions de traités signés avec les autochtones du nord-ouest de la côte du Pacifique (voir, p. ex., *Washington c. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979)), et le principe général que, dans la définition des droits ancestraux, il faut tenir compte du point de vue des autochtones. Le juge Lambert a conclu que l'importance de la pêche sur le plan social pour les Sto:lo était le fait que cette

held at para. 150 that the Sto:lo had an aboriginal right protected by s. 35(1)

to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood. . . . [Emphasis in original.]

Lambert J.A. rejected the position of the majority that the commercial dimension of the fishery was introduced by Europeans and therefore outside of the protection of s. 35(1). The key point, he suggested, is not that the Europeans introduced commerce, but is rather that as soon as the Europeans arrived the Sto:lo began trading with them. In doing so the Sto:lo were not breaking with their past; the trade with the Hudson's Bay Company "represented only a response to a new circumstance in the carrying out of the existing practice" (para. 180). Lambert J.A. went on to hold that the Sto:lo right to fish for a moderate livelihood had not been extinguished and that it had been infringed by s. 27(5) of the Regulations in a manner not justified by the Crown. He would thus have dismissed the appeal of the Crown and entered a verdict of acquittal.

activité était le moyen qui leur permettait de s'assurer une subsistance convenable. Il a par conséquent statué, au par. 150, que les Sto:lo possédaient le droit ancestral, protégé par le par. 35(1):

[TRADUCTION] *de prendre et, s'ils le désirent, de vendre eux-mêmes et par l'entremise d'autres Sto:lo, suffisamment de saumon pour assurer à tous ceux qui souhaitent pêcher — ainsi qu'aux personnes à leur charge — compte tenu de leurs autres ressources financières, une subsistance convenable. . . .* [En italique dans l'original.]

Le juge Lambert a rejeté la position de la majorité que la dimension commerciale de la pêche a été introduite par les Européens et qu'elle ne bénéficie donc pas de la protection du par. 35(1). Le point essentiel, a-t-il affirmé, n'est pas que les Européens aient introduit le commerce, mais bien que, dès l'arrivée de ceux-ci, les Sto:lo ont commencé à faire du commerce avec eux. Ce faisant, ils ne rompaient pas avec leur passé. Le commerce avec la Compagnie de la Baie d'Hudson [TRADUCTION] «n'était qu'une réaction à une nouvelle circonstance dans l'exercice de la pratique existante» (par. 180). Le juge Lambert a ajouté que le droit des Sto:lo de pêcher pour s'assurer une subsistance convenable n'avait pas été éteint, et qu'il avait été violé par le par. 27(5) du Règlement, d'une manière qui n'a pas été justifiée par le ministère public. Il aurait donc rejeté l'appel de ce dernier et inscrit un acquittement.

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Hutcheon J.A. also dissented. He did so on the basis that there is no authority for the proposition that the relevant point for identifying aboriginal rights is prior to contact with Europeans and European culture. Hutcheon J.A. held that the relevant historical time is instead 1846, the time of the assertion of British sovereignty in British Columbia. Since it is undisputed that by 1846 the Sto:lo were trading commercially in salmon, the Sto:lo can claim an aboriginal right to sell fish protected by s. 35(1) of the *Constitution Act, 1982*. Hutcheon J.A. held further that this right had not been extinguished prior to 1982. In the result, he would have remanded for a new trial on the issues of infringement and justification.

Le juge Hutcheon a lui aussi exprimé sa dissidence. Il l'a fait sur le fondement que rien n'appuie la thèse que le moment pertinent pour l'identification des droits ancestraux est la période antérieure aux contacts avec les Européens et leur culture. Il a jugé que le moment historique pertinent est plutôt 1846, date de l'affirmation de la souveraineté britannique sur la Colombie-Britannique. Comme il n'est pas contesté qu'en 1846 les Sto:lo faisaient le commerce du saumon, ils peuvent revendiquer un droit ancestral de vendre du poisson protégé par le par. 35(1) de la *Loi constitutionnelle de 1982*. Le juge Hutcheon a en outre conclu que ce droit n'avait pas été éteint avant 1982. En conséquence, il aurait ordonné la tenue d'un nouveau procès sur les questions de l'atteinte à ce droit et de la justification.

IV. Grounds of Appeal

Leave to appeal to this Court was granted on March 10, 1994. The following constitutional question was stated:

Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

The appellant appealed on the basis that the Court of Appeal erred in defining the aboriginal rights protected by s. 35(1) as those practices integral to the distinctive cultures of aboriginal peoples. The appellant argued that the Court of Appeal erred in holding that aboriginal rights are recognized for the purpose of protecting the traditional way of life of aboriginal people. The appellant also argued that the Court of Appeal erred in requiring that the Sto:lo satisfy a long-time use test, in requiring that they demonstrate an absence of European influence and in failing to adopt the perspective of aboriginal peoples themselves.

The First Nations Summit intervened in support of the appellant as did Delgamuukw et al. and Pamajewon et al. The Fisheries Council of British Columbia, the Attorney General of Quebec, the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation intervened in support of the respondent Crown.

V. Analysis

Introduction

I now turn to the question which, as I have already suggested, lies at the heart of this appeal: How should the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?

In her factum the appellant argued that the majority of the Court of Appeal erred because it defined the rights in s. 35(1) in a fashion which

IV. Moyens d'appel

L'autorisation de pourvoi devant notre Cour a été accordée le 10 mars 1994. La question constitutionnelle suivante a été formulée:

Le paragraphe 27(5) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248, tel qu'il se lisait le 11 septembre 1987, est-il, dans les circonstances de la présente affaire, inopérant à l'égard de l'appelante en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'elle invoque?

L'appelante a interjeté appel pour le motif que la Cour d'appel aurait fait erreur en définissant les droits ancestraux protégés par le par. 35(1) comme étant les pratiques qui font partie intégrante des cultures distinctives des peuples autochtones. Elle a prétendu que la Cour d'appel a commis une erreur en statuant que les droits ancestraux sont reconnus dans le but de protéger le mode de vie traditionnel des autochtones. Elle a de plus affirmé que la Cour d'appel avait fait erreur en exigeant que les Sto:lo satisfassent à un critère exigeant la preuve d'une longue période d'utilisation, en exigeant qu'ils démontrent l'absence d'influence européenne et en ne retenant pas le point de vue des autochtones eux-mêmes.

Le First Nations Summit, Delgamuukw et autres ainsi que Pamajewon et autres sont intervenus pour appuyer l'appelante. Le Fisheries Council of British Columbia, le procureur général du Québec, la British Columbia Fisheries Survival Coalition et la British Columbia Wildlife Federation sont intervenus au soutien de l'intimée Sa Majesté la Reine.

V. Analyse

Introduction

J'aborde maintenant la question qui, comme je l'ai déjà indiqué, est au cœur du présent pourvoi: Comment faut-il s'y prendre pour définir les droits ancestraux reconnus et confirmés par le par. 35(1) de la *Loi constitutionnelle de 1982*?

Dans son mémoire, l'appelante a prétendu que la Cour d'appel à la majorité avait commis une erreur en définissant les droits visés au par. 35(1) d'une

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“converted a Right into a Relic”; such an approach, the appellant argued, is inconsistent with the fact that the aboriginal rights recognized and affirmed by s. 35(1) are rights and not simply aboriginal practices. The appellant acknowledged that aboriginal rights are based in aboriginal societies and cultures, but argued that the majority of the Court of Appeal erred because it defined aboriginal rights through the identification of pre-contact activities instead of as pre-existing legal rights.

manière qui [TRADUCTION] «a transformé un droit en une relique». Une telle façon de voir, d'affirmer l'appelante, est inconciliable avec le fait que les droits ancestraux reconnus et confirmés par le par. 35(1) sont des droits et non simplement des pratiques autochtones. L'appelante a reconnu que les droits ancestraux tirent leur origine des sociétés et cultures autochtones, mais elle a soutenu que la Cour d'appel à la majorité a commis une erreur parce qu'elle a défini les droits ancestraux en s'attachant à identifier des activités antérieures au contact avec les Européens plutôt que des droits légaux préexistants.

17 While the appellant is correct to suggest that the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights, the position she would have this Court adopt takes s. 35(1) too far from that which the provision is intended to protect. Section 35(1), it is true, recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal.

Même si l'appelante a raison de dire que la simple existence d'une activité dans une collectivité autochtone donnée avant le contact avec les Européens n'est pas, en soi, un fondement suffisant pour définir des droits ancestraux, la thèse qu'elle voudrait que notre Cour adopte éloigne trop la protection du par. 35(1) de ce qu'elle est censée protéger. Il est vrai que le par. 35(1) reconnaît et confirme les droits ancestraux existants, mais il ne faut pas oublier que les droits qu'il reconnaît et confirme sont des droits autochtones.

18 In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the *Charter*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the “inherent dignity” of each individual in society is respected: *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136; *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 336.

Selon la philosophie libérale du Siècle des Lumières, qui a inspiré le Bill of Rights des États-Unis et, plus indirectement, la *Charte*, les droits appartiennent à tous les membres de la société, étant donné que chacun a droit à la dignité et au respect. Les droits sont généraux et universels; ils constituent la manière dont la «dignité inhérente» à chaque individu dans la société est respectée: *R. c. Oakes*, [1986] 1 R.C.S. 103, à la p. 136; *R. c. Big M Drug Mart Ltd.*, précité, à la p. 336.

19 Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. As academic commentators have noted, aboriginal rights “inhere in the very meaning of aboriginality”, Michael Asch and Patrick Macklem, “Aboriginal Rights and Cana-

Toutefois, les droits ancestraux ne peuvent être définis par l'application des préceptes de cette philosophie. Même s'ils ont une portée et une importance égales aux droits inscrits dans la *Charte*, les droits ancestraux doivent être considérés différemment des droits garantis par la *Charte*, parce qu'ils sont détenus seulement par les autochtones au sein de la société canadienne. Les droits ancestraux tirent leur origine du fait que les peuples autochtones sont des autochtones. Comme l'ont souligné des commentateurs universitaires, les droits ancestraux [TRADUCTION] «participent de l'essence

dian Sovereignty: An Essay on *R. v. Sparrow*" (1991), 29 *Alta. L. Rev.* 498, at p. 502; they are the rights held by "Indians *qua* Indians", Brian Slaterry, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 776.

The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.

The way to accomplish this task is, as was noted at the outset, through a purposive approach to s. 35(1). It is through identifying the interests that s. 35(1) was intended to protect that the dual nature of aboriginal rights will be comprehended. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson J. explained the rationale for a purposive approach to constitutional documents. Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the Constitution must be interpreted in a manner which renders it "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers": *Hunter, supra*, at p. 155. A purposive approach to s. 35(1), because ensuring that the provision is not viewed as static and only relevant to current circumstances, will ensure that the recognition and affirmation it offers are consistent with the fact that what it is recognizing and affirming are "rights". Further, because it requires the court to analyze a given constitutional provision "in the light of the interests it was meant to protect"

même de l'«autochtonité», Michael Asch et Patrick Macklem, «Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*» (1991), 29 *Alta. L. Rev.* 498, à la p. 502; il s'agit de droits détenus par [TRADUCTION] «les Indiens en tant qu'Indiens», Brian Slaterry, «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727, à la p. 776.

Notre Cour a pour tâche de définir les droits ancestraux d'une manière qui reconnaisse qu'il s'agit bien de droits, mais de droits détenus par les autochtones parce qu'ils sont des autochtones. Notre Cour ne doit pas perdre de vue le statut constitutionnel généralisé des droits protégés par le par. 35(1), mais elle ne peut pas non plus faire abstraction de la nécessaire spécificité qui résulte de la protection constitutionnelle spéciale accordée à un segment de la société canadienne. Notre Cour doit définir la portée du par. 35(1) d'une manière qui permette de cerner à la fois l'aspect «ancestral» et l'aspect «droit» dans l'expression «droits ancestraux».

Comme il a été indiqué au début, la façon d'accomplir cette tâche est d'appliquer au par. 35(1) une analyse fondée sur l'objet. C'est par la détermination des intérêts que le par. 35(1) vise à protéger qu'il est possible d'appréhender la dualité des droits ancestraux. Dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, le juge Dickson a expliqué la raison d'être de l'analyse fondée sur l'objet des textes constitutionnels. Ainsi, les tribunaux doivent donner à la Constitution une interprétation fondée sur l'objet parce que les constitutions sont, de par leur nature même, des documents conçus autant en fonction de l'avenir que du présent. La Constitution doit être interprétée de telle sorte qu'elle soit «susceptible d'évoluer avec le temps de manière à répondre à de nouvelles réalités sociales, politiques et historiques que souvent ses auteurs n'ont pas envisagées», *Hunter*, précité, à la p. 155. Parce qu'une telle approche assure que la disposition n'est pas considérée comme statique, et pertinente seulement par rapport aux circonstances présentes, l'application au par. 35(1) d'une analyse fondée sur l'objet garantit que la reconnaissance et la confirmation prévues par celui-ci sont compa-

(*Big M Drug Mart Ltd.*, *supra*, at p. 344), a purposive approach to s. 35(1) will ensure that that which is found to fall within the provision is related to the provision's intended focus: aboriginal people and their rights in relation to Canadian society as a whole.

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In *Sparrow*, *supra*, Dickson C.J. and La Forest J. held at p. 1106 that it was through a purposive analysis that s. 35(1) must be understood:

The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. [Emphasis added.]

In that case, however, the Court did not have the opportunity to articulate the purposes behind s. 35(1) as they relate to the scope of the rights the provision is intended to protect. Such analysis is now required to be undertaken.

General Principles Applicable to Legal Disputes Between Aboriginal Peoples and the Crown

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Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In *Sparrow*, *supra*, this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples:

When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. [Emphasis added.]

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This interpretive principle, articulated first in the context of treaty rights — *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 402; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1066 — arises from the

tibles avec le fait que ce qui est reconnu et confirmé ce sont des «droits». De plus, parce qu'elle oblige le tribunal à analyser des textes constitutionnels donnés «en fonction des intérêts qu'ils visent à protéger» (*Big M Drug Mart Ltd.*, précité, à la p. 344), cette analyse du par. 35(1) fait en sorte que ce qui est jugé comme relevant de cette disposition se rapporte à son objet: les peuples autochtones et leurs droits par rapport à la société canadienne dans son ensemble.

Dans *Sparrow*, précité, le juge en chef Dickson et le juge La Forest ont statué, à la p. 1106, qu'il faut interpréter le par. 35(1) en fonction de l'objet qu'il vise:

La méthode qu'il convient d'adopter pour interpréter le par. 35(1) est dérivée des principes généraux d'interprétation constitutionnelle, des principes relatifs aux droits ancestraux et des objets sous-jacents à la disposition constitutionnelle elle-même. [Je souligne.]

Toutefois, dans cette affaire-là, notre Cour n'a pas eu l'occasion de dégager les objets sous-jacents au par. 35(1) eu égard à la portée des droits qu'il vise à protéger. Il faut faire cette analyse dans le présent cas.

Principes généraux applicables aux litiges entre les peuples autochtones et l'État

Toutefois, avant d'analyser le par. 35(1) en fonction de son objet, il convient de signaler qu'une telle analyse doit être faite à la lumière des principes généraux applicables aux rapports juridiques entre l'État et les peuples autochtones. Dans l'arrêt *Sparrow*, précité, notre Cour a statué, à la p. 1106, que le par. 35(1) doit recevoir une interprétation généreuse et libérale en faveur des autochtones:

Si on considère les objectifs de la confirmation des droits ancestraux, il est évident qu'une interprétation généreuse et libérale du texte de cette disposition constitutionnelle s'impose. [Je souligne.]

Ce principe d'interprétation, qui a d'abord été énoncé dans le contexte des droits issus de traités — *Simon c. La Reine*, [1985] 2 R.C.S. 387, à la p. 402; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, à la p. 36; *R. c. Horseman*, [1990] 1 R.C.S. 901, à la p. 907; *R. c. Sioui*, [1990] 1 R.C.S. 1025, à la

nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: *R. v. George*, [1966] S.C.R. 267, at p. 279. This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.

The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of aboriginal peoples. In *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 464, Dickson J. held that paragraph 13 of the Memorandum of Agreement between Manitoba and Canada, a constitutional document, "should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiaries of the rights assured by the paragraph". This interpretive principle applies equally to s. 35(1) of the *Constitution Act, 1982* and should, again, inform the Court's purposive analysis of that provision.

Purposive Analysis of Section 35(1)

I now turn to a purposive analysis of s. 35(1).

When the court identifies a constitutional provision's purposes, or the interests the provision is intended to protect, what it is doing in essence is explaining the rationale of the provision; it is articulating the reasons underlying the protection that the provision gives. With regards to s. 35(1), then, what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of aboriginal peoples; it must identify the basis for the special status that aboriginal peoples have within Canadian society as a whole.

p. 1066 — découle de la nature des rapports entre l'État et les peuples autochtones. L'État a, envers les peuples autochtones, une obligation de fiduciaire qui a pour conséquence de mettre son honneur en jeu lorsqu'il traite avec eux. En raison de cette obligation de fiduciaire et de l'incidence de cette obligation sur l'honneur de l'État, les traités, le par. 35(1) et les autres dispositions législatives et constitutionnelles protégeant les droits des peuples autochtones doivent recevoir une interprétation généreuse et libérale: *R. c. George*, [1966] R.C.S. 267, à la p. 279. Ce principe général doit guider la Cour dans l'analyse des objets qui sous-tendent le par. 35(1), ainsi que dans l'analyse de la définition et de la portée de cette disposition.

L'existence des rapports de fiduciaire qui existent entre l'État et les peuples autochtones emporte en outre que les doutes ou ambiguïtés concernant la portée et la définition des droits visés par le par. 35(1) doivent être résolus en faveur des peuples autochtones. Dans *R. c. Sutherland*, [1980] 2 R.C.S. 451, à la p. 464, le juge Dickson a affirmé, relativement à la clause 13 de la Convention entre le Manitoba et le Canada, un document constitutionnel, qu'il «faut l'interpréter de façon à résoudre tout doute en faveur des Indiens, les bénéficiaires des droits ainsi garantis». Ce principe d'interprétation s'applique également au par. 35(1) de la *Loi constitutionnelle de 1982* et, je le répète, il devrait guider la Cour dans son analyse de l'objet de cette disposition.

Analyse de l'objet du par. 35(1)

Je vais maintenant analyser l'objet du par. 35(1).

Quand le tribunal dégage les objets visés par une disposition constitutionnelle ou les intérêts que celle-ci est censée protéger, ce qu'il fait c'est essentiellement expliquer la raison d'être de cette disposition et énoncer les raisons sous-jacentes de la protection qu'elle offre. En ce qui concerne le par. 35(1), le tribunal doit donc expliquer la raison d'être et le fondement de la reconnaissance et de la confirmation des droits spéciaux des peuples autochtones, et identifier le fondement du statut particulier des peuples autochtones au sein de l'ensemble de la société canadienne.

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In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights: *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 112; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.), [1976] 2 S.C.R. v; it is this which distinguishes the aboriginal rights recognized and affirmed in s. 35(1) from the aboriginal rights protected by the common law. Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*, *supra*.

Dans la détermination du fondement de la reconnaissance et de la confirmation des droits ancestraux, il ne faut pas oublier que le par. 35(1) n'a pas créé la doctrine juridique des droits ancestraux. En effet, ces droits existaient déjà et ils étaient reconnus en common law: *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313. Évidemment, comme les droits ancestraux n'avaient pas, en common law, de statut constitutionnel, le législateur fédéral pouvait à tout moment les éteindre ou les réglementer: *Kruger c. La Reine*, [1978] 1 R.C.S. 104, à la p. 112; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (C.S.C.), [1976] 2 R.C.S. v; c'est ce qui distingue les droits ancestraux reconnus et confirmés par le par. 35(1) de ceux protégés par la common law. À la suite de l'adoption du par. 35(1), les droits ancestraux ne peuvent pas être éteints et ils ne peuvent être réglementés ou violés qu'en conformité avec le critère de justification énoncé par notre Cour dans *Sparrow*, précité.

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The fact that aboriginal rights pre-date the enactment of s. 35(1) could lead to the suggestion that the purposive analysis of s. 35(1) should be limited to an analysis of why a pre-existing legal doctrine was elevated to constitutional status. This suggestion must be resisted. The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights; however, the interests protected by s. 35(1) must be identified through an explanation of the basis for the legal doctrine of aboriginal rights, not through an explanation of why that legal doctrine now has constitutional status.

Le fait que les droits ancestraux sont antérieurs à l'édiction du par. 35(1) pourrait amener à conclure qu'il faudrait limiter l'analyse de l'objet de cette disposition aux raisons pour lesquelles une doctrine juridique préexistante s'est vue conférer un statut constitutionnel. Il faut s'abstenir de tirer pareille conclusion. La préexistence des droits ancestraux est un élément pertinent pour l'analyse du par. 35(1), parce qu'elle indique que l'importance et l'existence de ces droits sont antérieures à la constitutionnalisation de ceux-ci et qu'elle éclaire sur les raisons justifiant la protection qui leur est accordée. Toutefois, il faut identifier les intérêts protégés par le par. 35(1) en expliquant le fondement de la doctrine juridique des droits ancestraux, et non les raisons pour lesquelles cette doctrine a aujourd'hui un statut constitutionnel.

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

À mon avis, la doctrine des droits ancestraux existe et elle est reconnue et confirmée par le par. 35(1), et ce pour un fait bien simple: quand les Européens sont arrivés en Amérique du Nord, les peuples autochtones s'y trouvaient déjà, ils vivaient en collectivités sur ce territoire et participaient à des cultures distinctives, comme ils l'avaient fait pendant des siècles. C'est ce fait, par-

ples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

That the purpose of s. 35(1) lies in its recognition of the prior occupation of North America by aboriginal peoples is suggested by the French version of the text. For the English "existing aboriginal and treaty rights" the French text reads "[l]es droits existants — ancestraux ou issus de traités". The term "ancestral", which *Le Petit Robert 1* (1990) dictionary defines as "[q]ui a appartenu aux ancêtres, qu'on tient des ancêtres", suggests that the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence — the ancestry — of aboriginal peoples in North America.

This approach to s. 35(1) is also supported by the prior jurisprudence of this Court. In *Calder*, *supra*, the Court refused an application by the Nishga for a declaration that their aboriginal title had not been extinguished. There was no majority in the Court as to the basis for this decision; however, in the judgments of both Judson J. and Hall J. (each speaking for himself and two others) the existence of aboriginal title was recognized. Hall J. based the Nishga's aboriginal title in the fact that the land to which they were claiming title had "been in their possession from time immemorial" (*Calder*, *supra*, at p. 375). Judson J. explained the origins of the Nishga's aboriginal title as follows, at p. 328:

dessus tout, qui distingue les peuples autochtones de tous les autres groupes minoritaires du pays et qui commande leur statut juridique — et maintenant constitutionnel — particulier.

Plus précisément, le par. 35(1) établit le cadre constitutionnel qui permet de reconnaître que les autochtones vivaient sur le territoire en sociétés distinctives, possédant leurs propres cultures, pratiques et traditions, et de concilier ce fait avec la souveraineté de Sa Majesté. Les droits substantiels visés par cette disposition doivent être définis à la lumière de cet objet. Les droits ancestraux reconnus et confirmés par le par. 35(1) doivent tendre à concilier la préexistence des sociétés autochtones et la souveraineté de Sa Majesté.

La conclusion que le par. 35(1) a pour objet de reconnaître l'occupation antérieure de l'Amérique du Nord par les peuples autochtones ressort du texte français de cette disposition. L'expression anglaise «*existing aboriginal and treaty rights*» est rendue en français par «[l]es droits existants — ancestraux ou issus de traités». Le terme «ancestral», qui est défini ainsi dans le dictionnaire *Le Petit Robert 1* (1990): «[q]ui a appartenu aux ancêtres, qu'on tient des ancêtres», tend à indiquer que les droits reconnus et confirmés par le par. 35(1) doivent, sur le plan temporel, tirer leur origine de la présence historique — des ancêtres — des peuples autochtones de l'Amérique du Nord.

Cette façon d'analyser le par. 35(1) trouve également appui dans des décisions antérieures de notre Cour. Dans *Calder*, précité, la Cour a refusé une demande des Nishgas qui sollicitaient une déclaration portant que leur titre aborigène n'avait pas été éteint. Aucune majorité ne s'est dégagée quant au fondement de la décision dans cet arrêt. Toutefois, dans leurs motifs respectifs, les juges Judson et Hall (chacun parlant aussi au nom de deux autres juges) ont reconnu l'existence du titre aborigène. Le juge Hall a basé le titre aborigène des Nishgas sur le fait que ceux-ci avaient «pos-sédé[.] de temps immémorial» (*Calder*, précité, à la p. 375) les terres dont ils revendiquaient le titre. Le juge Judson a expliqué ainsi les origines du titre aborigène des Nishgas, à la p. 328:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. [Emphasis added.]

The position of Judson and Hall JJ. on the basis for aboriginal title is applicable to the aboriginal rights recognized and affirmed by s. 35(1). Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in *Calder, supra*, can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the land as their forefathers had done for centuries" (p. 328).

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The basis of aboriginal title articulated in *Calder, supra*, was affirmed in *Guerin v. The Queen*, [1984] 2 S.C.R. 335. The decision in *Guerin* turned on the question of the nature and extent of the Crown's fiduciary obligation to aboriginal peoples; because, however, Dickson J. based that fiduciary relationship, at p. 376, in the "concept of aboriginal, native or Indian title", he had occasion to consider the question of the existence of aboriginal title. In holding that such title existed, he relied, at p. 376, on *Calder, supra*, for the proposition that "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". [Emphasis added.]

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The view of aboriginal rights as based in the prior occupation of North America by distinctive aboriginal societies, finds support in the early American decisions of Marshall C.J. Although the

Je crois qu'il est clair qu'en Colombie-Britannique, le titre indien ne peut pas avoir pour origine la Proclamation de 1763, mais il reste que lorsque les colons sont arrivés, les Indiens étaient déjà là, ils étaient organisés en sociétés et occupaient les terres comme leurs ancêtres l'avaient fait depuis des siècles. C'est ce que signifie le titre indien et en l'appelant «droit personnel de la nature d'un usufruit», la solution du problème n'en devient pas plus facile. Ils affirment dans la présente action qu'ils avaient le droit de continuer à vivre sur leurs terres comme l'avaient fait leurs ancêtres et que ce droit n'a jamais été juridiquement éteint. [Je souligne.]

La position des juges Judson et Hall quant au fondement du titre aborigène est applicable aux droits ancestraux reconnus et confirmés par le par. 35(1). Le titre aborigène est l'aspect des droits ancestraux qui se rapporte spécifiquement aux revendications territoriales des autochtones; c'est le moyen par lequel la common law reconnaît les droits fonciers des autochtones. Ainsi, l'explication donnée dans l'arrêt *Calder*, précité, relativement au fondement du titre aborigène peut être appliquée également aux droits ancestraux reconnus et confirmés par le par. 35(1). Tant le titre aborigène que les droits ancestraux découlent de l'existence de collectivités autochtones distinctives, occupant «les terres comme leurs ancêtres l'avaient fait depuis des siècles» (p. 328).

Le fondement du titre aborigène énoncé dans *Calder*, précité, a été confirmé dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335. Cet arrêt concernait la nature et l'étendue de l'obligation de fiduciaire de Sa Majesté envers les peuples autochtones. Cependant, comme il a fondé ce rapport de fiduciaire, à la p. 376, sur le «concept du titre aborigène, autochtone ou indien», le juge Dickson a eu l'occasion d'étudier la question de l'existence du titre aborigène. Pour conclure à l'existence d'un tel titre, il a invoqué, à la p. 376, l'arrêt *Calder*, précité, dans lequel «le titre aborigène [a été reconnu] comme un droit, en common law, découlant de l'occupation et de la possession historiques par les Indiens de leurs terres tribales». [Je souligne.]

Le point de vue selon lequel les droits ancestraux sont fondés sur l'occupation antérieure de l'Amérique du Nord par des sociétés autochtones distinctives trouve appui dans de vieilles décisions

constitutional structure of the United States is different from that of Canada, and its aboriginal law has developed in unique directions, I agree with Professor Slattery both when he describes the Marshall decisions as providing “structure and coherence to an untidy and diffuse body of customary law based on official practice” and when he asserts that these decisions are “as relevant to Canada as they are to the United States” — “Understanding Aboriginal Rights”, *supra*, at p. 739. I would add to Professor Slattery’s comments only the observation that the fact that aboriginal law in the United States is significantly different from Canadian aboriginal law means that the relevance of these cases arises from their articulation of general principles, rather than their specific legal holdings.

In *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the first of the Marshall decisions on aboriginal title, the Supreme Court held that Indian land could only be alienated by the U.S. government, not by the Indians themselves. In the course of his decision (written for the court), Marshall C.J. outlined the history of the exploration of North America by the countries of Europe and the relationship between this exploration and aboriginal title. In his view, aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations. The substance and nature of aboriginal rights to land are determined by this intersection (at pp 572-74):

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the

américaines rendues par le juge en chef Marshall. Bien que l’organisation constitutionnelle des États-Unis soit différente de celle du Canada et que le droit américain relatif aux autochtones ait évolué d’une manière propre, je suis d’accord avec le professeur Slattery quand il dit des décisions du juge Marshall qu’elles donnent [TRADUCTION] «une structure et une cohésion à un ensemble désorganisé et diffus de règles de droit coutumier basées sur les pratiques officielles», et quand il affirme que ces décisions sont «aussi pertinentes au Canada qu’aux États-Unis» — «Understanding Aboriginal Rights», *loc. cit.*, à la p. 739. J’ajouterais simplement aux observations du professeur Slattery que, en raison des différences importantes qui existent entre le droit américain relatif aux autochtones et le droit canadien sur la question, l’intérêt de ces arrêts tient davantage aux principes généraux qui y sont énoncés qu’aux décisions spécifiques qui y sont prononcées.

Dans *Johnson c. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), première des décisions du juge Marshall sur le titre aborigène, la Cour suprême a statué que les terres des Indiens ne pouvaient être aliénées que par le gouvernement des États-Unis et non par les Indiens eux-mêmes. Dans sa décision (rédigée pour la cour), le juge en chef Marshall a fait l’historique de l’exploration de l’Amérique du Nord par les pays européens et établi le lien entre cette exploration et le titre aborigène. À son avis, le titre aborigène est le droit que possèdent les peuples autochtones sur le territoire et qui découle de l’intersection de leur occupation préexistante de ce territoire et de l’affirmation par les diverses nations européennes de leur souveraineté sur celui-ci. L’essence et la nature des droits fonciers ancestraux sont déterminées par cette intersection (aux pp. 572 à 574):

[TRADUCTION] Lorsqu’elles ont découvert cet immense continent, les grandes nations européennes tenaient chacune à s’en approprier la plus grande partie possible. Dans ces vastes étendues, tous avaient amplement l’occasion de manifester leur ambition et leur esprit d’initiative; les caractères distinctifs et la religion des habitants du continent fournissaient une justification permettant de les considérer comme un peuple sur lequel le génie supérieur européen pouvait prétendre exercer un ascendant. Les potentats du vieux monde

new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy. [Emphasis added.]

n'ont éprouvé aucune difficulté à se convaincre qu'ils compensaient amplement les habitants du nouveau continent en leur apportant la civilisation et le christianisme en échange de l'indépendance absolue. Mais, comme ces potentats étaient tous à la recherche du même objectif ou à peu près, il était nécessaire, en vue d'éviter les conflits de colonisation et les guerres qui s'ensuivraient, d'établir un principe que tous reconnaîtraient comme constituant le droit en vertu duquel le droit d'acquisition, qu'ils revendiquaient tous, devrait être régi entre eux. Ce principe était que la découverte conférait le titre au gouvernement dont les sujets avaient fait la découverte ou sous l'autorité duquel la découverte était faite, et ce titre qui était opposable à tous les autres gouvernements européens pouvait être rendu parfait par la possession.

L'exclusion de tous les autres pays européens conférait nécessairement à la nation qui faisait la découverte le droit exclusif d'acquérir les terres des autochtones et d'y établir des colonies. Il s'agissait là d'un droit qu'aucun Européen ne pouvait entraver. C'est un droit que chacun faisait valoir pour lui-même, tout en le respectant quand il était affirmé par d'autres.

Les relations qui devaient exister entre découvreur et autochtones devaient se régler entre eux. Les droits ainsi acquis étant exclusifs, aucun autre pouvoir ne pouvait s'interposer.

Dans l'établissement de ces relations, on n'a, en aucun cas, entièrement omis de tenir compte des droits des autochtones; mais ces droits se sont trouvés nécessairement restreints dans une large mesure. On reconnaissait que les autochtones étaient les occupants de plein droit des terres, et pouvaient juridiquement et légitimement demeurer en possession de celles-ci, et les utiliser à leur gré; mais leurs droits à la souveraineté complète, en leur qualité de nations indépendantes, ont été nécessairement diminués, et leur pouvoir de disposer des terres en faveur de n'importe qui a été nié en vertu du principe initial de base selon lequel la découverte conférait à ceux qui l'avait faite un titre exclusif.

Les différentes nations européennes respectaient le droit d'occupation des autochtones, qu'ils pouvaient exercer à leur gré, mais elles revendiquaient la propriété suprême; elles revendiquaient et exerçaient, par suite de ce droit suprême, un pouvoir d'octroyer les terres, alors que celles-ci étaient encore en possession des autochtones. Ces octrois ont été interprétés par tous comme accordant au cessionnaire un titre, sous réserve uniquement du droit d'occupation indien. [Je souligne.]

It is, similarly, the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory, to which the recognition and affirmation of aboriginal rights in s. 35(1) is directed.

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) the U.S. Supreme Court invalidated the conviction under a Georgia statute of a non-Cherokee man for the offence of living on the territory of the Cherokee Nation. The court held that the law under which he was convicted was *ultra vires* the State of Georgia. In so doing the court considered the nature and basis of the Cherokee claims to the land and to governance over that land. Again, it based its judgment on its analysis of the origins of those claims which, it held, lay in the relationship between the pre-existing rights of the "ancient possessors" of North America and the assertion of sovereignty by European nations (at pp. 542-43 and 559):

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from

De la même façon, la reconnaissance et la confirmation des droits ancestraux au par. 35(1) visent à concilier les droits préexistants des autochtones sur le territoire formant aujourd'hui le Canada avec l'affirmation de la souveraineté Britannique sur ce territoire.

Dans l'arrêt *Worcester c. Georgia*, 31 U.S. (6 Pet.) 515 (1832), la Cour suprême des États-Unis a invalidé la déclaration de culpabilité qui avait été prononcée en vertu d'une loi de l'État de la Géorgie contre un non-Cherokee, parce qu'il avait habité sur le territoire de la nation cherokee. La cour a conclu que la loi en vertu de laquelle il avait été déclaré coupable outrepassait les pouvoirs de l'État de la Géorgie. Pour arriver à cette conclusion, elle a examiné la nature et le fondement des revendications des Cherokees quant à la propriété du territoire et à sa régie. Encore une fois, la cour a fondé son jugement sur son analyse des origines de ces revendications qui, selon elle, découlent du rapport entre les droits préexistants des «anciens possesseurs» de l'Amérique du Nord et l'affirmation de la souveraineté par les nations européennes (aux pp. 542, 543 et 559):

[TRADUCTION] L'Amérique, séparée de l'Europe par un vaste océan, était habitée par un peuple différent, divisé en nations distinctes, indépendantes l'une de l'autre et vis-à-vis du reste du monde; elles avaient leurs propres institutions et se gouvernaient elles-mêmes en vertu de leurs propres lois. Il est difficile de comprendre que les habitants d'une partie du globe pouvaient avoir des revendications originales légitimes de suprématie sur les habitants de l'autre ou sur les terres qu'ils occupaient; ou que celui qui découvrirait des terres acquerrait des droits sur le pays découvert, droits qui annulaient les droits préexistants de ceux qui en avaient antérieurement eu la possession.

Après être demeurée chez elle durant des siècles, l'Europe, guidée par la science nautique, a mené, grâce à son esprit d'entreprise, certains de ses fils aventuriers au nouveau monde. Ils ont trouvé celui-ci en la possession d'un peuple qui avait fait peu de progrès dans le domaine agricole ou industriel et qui passait le gros de leur temps à chasser, pêcher et guerroyer.

En naviguant le long de la côte et en mettant à l'occasion pied à terre, ces aventuriers ont-ils acquis, pour le compte des divers gouvernements auxquels ils appartenaient ou qui leur avaient donné une commission, la

the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. [Emphasis added.]

Marshall C.J.'s essential insight that the claims of the Cherokee must be analyzed in light of their pre-existing occupation and use of the land — their "undisputed" possession of the soil "from time immemorial" — is as relevant for the identification of the interests s. 35(1) was intended to protect as it was for the adjudication of Worcester's claim.

The High Court of Australia has also considered the question of the basis and nature of aboriginal rights. Like that of the United States, Australia's aboriginal law differs in significant respects from that of Canada. In particular, in Australia the courts have not as yet determined whether aboriginal fishing rights exist, although such rights are recognized by statute: *Halsbury's Laws of Australia* (1991), vol. 1, paras. 5-2250, 5-2255, 5-2260 and 5-2265. Despite these relevant differences, the analysis of the basis of aboriginal title in the landmark decision of the High Court in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1, is persuasive in the Canadian context.

propriété légitime des terres situées entre l'Atlantique et le Pacifique; ou ont-ils légitimement soumis les nombreux peuples qui occupaient celles-ci à leur autorité? Ou encore, la nature ou le grand créateur de toutes choses ont-ils conféré aux agriculteurs et industriels ces droits sur des chasseurs ou pêcheurs?

Mais la puissance, la guerre, la conquête, confèrent des droits qui, après la possession, sont reconnus par tous et qui ne peuvent jamais être contestés par ceux sur lesquels ils s'exercent. Nous passons à l'état actuel des choses après avoir jeté un coup d'œil sur leurs origines, le rappel de ces origines pouvant éclairer les prétentions actuelles.

Les nations indiennes avaient toujours été considérées comme des communautés politiques distinctes, indépendantes, conservant leurs droits naturels initiaux, parce qu'ils avaient la possession incontestée du sol, de temps immémorial, sous réserve seulement des droits imposés par la puissance irrésistible, qui leur interdisait tout rapport avec quelque potentat européen autre que le premier découvreur de la côte de la région particulière revendiquée. [Je souligne.]

L'idée essentielle du juge en chef Marshall que les revendications des Cherokees doivent être analysées en fonction de leur occupation et utilisation préexistantes du territoire — leur possession «incontestée» du territoire, «de temps immémorial» — est aussi pertinente pour identifier les intérêts que le par. 35(1) vise à protéger qu'elle l'était pour statuer sur les prétentions de Worcester.

La Haute Cour d'Australie a elle aussi étudié la question du fondement et de la nature des droits ancestraux. Comme aux États-Unis, le droit relatif aux autochtones en Australie diffère sous des aspects importants du droit canadien. En particulier, les tribunaux australiens ne se sont pas encore prononcés sur l'existence de droits de pêche ancestraux, quoique ces droits soient reconnus par la loi: *Halsbury's Laws of Australia* (1991), vol. 1, par. 5-2250, 5-2255, 5-2260 et 5-2265. Malgré ces différences importantes, l'analyse du fondement du titre aborigène qui est faite dans l'arrêt de principe de la Haute Cour *Mabo c. Queensland [No. 2]* (1992), 175 C.L.R. 1, est convaincante dans le contexte canadien.

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The *Mabo* judgment resolved the dispute between the Meriam people and the Crown regarding who had title to the Murray Islands. The islands had been annexed to Queensland in 1879 but were reserved for the native inhabitants (the Meriam) in 1882. The Crown argued that this annexation was sufficient to vest absolute ownership of the lands in the Crown. The High Court disagreed, holding that while the annexation did vest radical title in the Crown, it was insufficient to eliminate a claim for native title; the court held at pp. 50-51 that native title can exist as a burden on the radical title of the Crown: "there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty".

From this premise, Brennan J., writing for a majority of the Court, went on at p. 58 to consider the nature and basis of aboriginal title:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty, as Moynihan J. perceived in the present case. It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled "with the institutions or the legal ideas of civilized society", *In re Southern Rhodesia*, [1919] A.C., at p. 233, that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown. These fictions denied the possibility of a native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidents of native title. [Emphasis added.]

L'arrêt *Mabo* a réglé le différend entre les Meriams et Sa Majesté concernant le titre sur les îles Murray. Ces îles avaient été annexées au Queensland en 1879, mais réservées aux aborigènes (les Meriams) en 1882. Sa Majesté a soutenu que cette annexion suffisait pour lui conférer la propriété absolue des terres. La Haute Cour a exprimé son désaccord, statuant que même si l'annexion avait effectivement conféré un titre absolu à Sa Majesté elle était insuffisante pour écarter la revendication d'un titre aborigène. La cour a conclu, aux pp. 50 et 51, que le titre aborigène peut exister à titre de charge grevant le titre absolu de Sa Majesté: [TRADUCTION] «il n'y a aucune raison pour que des terres comprises dans le territoire de Sa Majesté ne continuent pas d'être assujetties au titre aborigène. La notion que le titre aborigène est éteint par l'acquisition de la souveraineté procède du raisonnement faux qui assimile souveraineté et propriété bénéficiaire des terres».

À partir de cette prémisse, le juge Brennan, qui a rédigé les motifs de la majorité, a poursuivi, à la p. 58, en analysant la nature et le fondement du titre aborigène:

[TRADUCTION] Le titre aborigène tire son origine et son contenu des coutumes et des lois traditionnelles observées et reconnues par les habitants autochtones d'un territoire. La nature et les attributs du titre aborigène doivent être déterminés en tant que question de fait, eu égard à ces coutumes et à ces lois. Cette tâche peut présenter des difficultés considérables, comme l'a fait remarquer le juge Moynihan dans le présent cas. C'est un problème qui ne s'est pas posé dans le cas d'une colonie tant qu'ont été maintenues les fictions selon lesquelles les droits fondés sur la coutume ne pouvaient pas être conciliés «avec les institutions ou les conceptions juridiques des sociétés civilisées», *In re Southern Rhodesia*, [1919] A.C., à la p. 233, qu'il n'existait aucune loi avant l'arrivée des colons britanniques et qu'il n'y avait aucun législateur souverain dans le territoire d'une colonie avant l'affirmation de la souveraineté par Sa Majesté. Ces fictions ont empêché la reconnaissance d'un titre aborigène dans nos lois. Mais dès l'instant où il est reconnu qu'un territoire habité, devenu une colonie, n'était pas davantage un désert au sens de la loi qu'il n'était dans les faits un «désert», il est nécessaire de déterminer, selon la preuve, la nature et les attributs du titre aborigène. [Je souligne.]

This position is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" — that which is "handed down [from ancestors] to posterity", *The Concise Oxford Dictionary* (9th ed. 1995), — implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.

Cette position est identique à celle qui est adoptée dans le présent pourvoi. Les «coutumes traditionnelles» et les «lois traditionnelles» sont ces choses qui sont transmises de génération en génération et qui émanent de la culture et des coutumes préexistantes des peuples autochtones. Le sens même du mot «tradition» — ce qui est [TRADUCTION] «transmis [par les ancêtres] à leurs descendants», *The Concise Oxford Dictionary* (9^e éd. 1995) — suppose, dans le cas des coutumes et des lois, les origines que la Haute Cour d'Australie dans *Mabo* déclarent pertinentes pour la détermination de l'existence du titre aborigène. Baser le titre aborigène sur les lois et les coutumes traditionnelles, comme l'a fait la cour dans l'arrêt *Mabo*, revient donc à fonder ce titre dans les sociétés préexistantes des peuples autochtones. Il s'agit du même fondement que celui qui est avancé en l'espèce pour les droits ancestraux.

41

Academic commentators have also been consistent in identifying the basis and foundation of the s. 35(1) claims of aboriginal peoples in aboriginal occupation of North America prior to the arrival of Europeans. As Professor David Elliott, at p. 25, puts it in his compilation *Law and Aboriginal Peoples of Canada* (2nd ed. 1994), the "prior aboriginal presence is at the heart of the concept of aboriginal rights". Professor Macklem has, while also considering other possible justifications for the recognition of aboriginal rights, described prior occupancy as the "familiar" justification for aboriginal rights, arising from the "straightforward conception of fairness which suggests that, all other things being equal, a prior occupant of land possesses a stronger claim to that land than subsequent arrivals": Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995), 21 *Queen's L.J.* 173, at p. 180. Finally, I would note the position of Professor Pentney who has described aboriginal rights as collective rights deriving "their existence from the common law's recognition of [the] prior social organization" of aboriginal peoples: William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982, Part II* —

Les commentateurs universitaires ont constamment indiqué que les droits des peuples autochtones visés au par. 35(1) tiraient leur origine et leur fondement de l'occupation de l'Amérique du Nord par les autochtones avant l'arrivée des Européens. Comme le dit le professeur David Elliott, à la p. 25 de son recueil *Law and Aboriginal Peoples of Canada* (2^e éd. 1994) la [TRADUCTION] «présence antérieure des autochtones est au cœur du concept des droits ancestraux». Le professeur Macklem, tout en examinant aussi d'autres justifications possibles pour la reconnaissance des droits ancestraux, a décrit l'occupation antérieure comme étant la justification [TRADUCTION] «usuelle» des droits ancestraux, qui découle de la «conception simple de l'équité selon laquelle, toutes choses égales d'ailleurs, le premier occupant d'un territoire possède sur celui-ci un droit supérieur à faire valoir que ceux qui arrivent plus tard»: Patrick Macklem, «Normative Dimensions of an Aboriginal Right of Self-Government» (1995), 21 *Queen's L.J.* 173, à la p. 180. Finalement, je tiens à souligner la position du professeur Pentney, qui a décrit les droits ancestraux comme étant des droits collectifs tirant [TRADUCTION] «leur existence de la reconnaissance en common law de l'organisation sociale antérieure» des peuples autochtones: William Pentney,

Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207, at p. 258.

I would note that the legal literature also supports the position that s. 35(1) provides the constitutional framework for reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty. In his comment on *Delgamuukw v. British Columbia* ("British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350), Mark Walters suggests at pp. 412-13 that the essence of aboriginal rights is their bridging of aboriginal and non-aboriginal cultures:

The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. . . . a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives. [Emphasis added.]

Similarly, Professor Slaterry has suggested that the law of aboriginal rights is "neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities" (Brian Slaterry, "The Legal Basis of Aboriginal Title", in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (1992), at pp. 120-21) and that such rights concern "the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions" ("Understanding Aboriginal Rights", *supra*, at p. 737).

The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by

«The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II — Section 35: The Substantive Guarantee» (1988), 22 *U.B.C. L. Rev.* 207, à la p. 258.

Je signale également que la littérature juridique appuie aussi la thèse selon laquelle le par. 35(1) fournit le cadre constitutionnel permettant de concilier la souveraineté de Sa Majesté avec la préexistence de sociétés autochtones distinctives occupant le territoire. Dans son commentaire sur l'arrêt *Delgamuukw c. Colombie-Britannique* («British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*» (1992), 17 *Queen's L.J.* 350), Mark Walters émet l'avis, aux pp. 412 et 413, que l'essence des droits ancestraux est que ceux-ci établissent un rapprochement entre les cultures autochtones et non autochtones:

[TRADUCTION] La difficulté que pose la définition des droits ancestraux tient au fait que ce sont des droits particuliers à la rencontre de deux cultures juridiques extrêmement dissemblables; par conséquent, il faudra toujours se demander à partir de laquelle de ces cultures les droits doivent être définis [. . .] une conception moralement et politiquement défendable des droits ancestraux intégrer ces deux points de vue juridiques. [Je souligne.]

De même, le professeur Slaterry a avancé que le droit relatif aux droits ancestraux n'est [TRADUCTION] «ni d'origine anglaise, ni d'origine autochtone: il s'agit d'une forme de droit intersociétal, découlant de l'évolution de pratiques de longue date liant les diverses collectivités» (Brian Slaterry, «The Legal Basis of Aboriginal Title» dans Frank Cassidy, dir., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (1992), aux pp. 120 et 121) et que ces droits concernent [TRADUCTION] «le statut des peuples autochtones vivant sous la protection de Sa Majesté, ainsi que la place faite à leurs terres, à leurs règles de droit coutumier et à leurs institutions politiques» («Understanding Aboriginal Rights», *loc. cit.*, à la p. 737).

La jurisprudence et la doctrine canadiennes, américaines et australiennes étayent donc la thèse fondamentale suivante, avancée au début de la présente section: la meilleure façon de décrire les

s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes; the next section of the judgment, as well as that which follows it, will attempt to accomplish this task.

droits ancestraux reconnus et confirmés par le par. 35(1) est de dire qu'ils sont, premièrement, le moyen par lequel la Constitution reconnaît le fait qu'avant l'arrivée des Européens en Amérique du Nord le territoire était déjà occupé par des sociétés autochtones distinctives, et, deuxièmement, le moyen de concilier cette occupation antérieure avec l'affirmation par Sa Majesté de sa souveraineté sur le territoire canadien. Le contenu des droits ancestraux doit viser la réalisation de ces deux objets. Dans la prochaine partie du jugement, ainsi que dans celle qui suivra, c'est la tâche que l'on tente d'accomplir.

The Test for Identifying Aboriginal Rights in Section 35(1)

Le critère d'identification des droits ancestraux visés au par. 35(1)

44 In order to fulfil the purpose underlying s. 35(1) — i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions — the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

Pour réaliser l'objet qui sous-tend le par. 35(1) — c'est-à-dire la protection et la conciliation des intérêts découlant du fait que, avant l'arrivée des Européens en Amérique du Nord, les peuples autochtones vivaient en sociétés distinctives, possédant leurs propres coutumes, pratiques et traditions —, le critère d'identification des droits ancestraux reconnus et confirmés par le par. 35(1) doit viser à reconnaître les éléments fondamentaux de ces sociétés distinctives préexistantes. Autrement dit, ce critère doit tendre à identifier les coutumes, pratiques et traditions fondamentales des sociétés autochtones qui existaient en Amérique du Nord avant le contact avec les Européens.

45 In *Sparrow*, *supra*, this Court did not have to address the scope of the aboriginal rights protected by s. 35(1); however, in their judgment at p. 1099 Dickson C.J. and La Forest J. identified the Musqueam right to fish for food in the fact that:

Dans l'arrêt *Sparrow*, précité, notre Cour n'a pas eu à étudier la portée des droits ancestraux protégés par le par. 35(1). Toutefois, dans leur jugement, à la p. 1099, le juge en chef Dickson et le juge La Forest ont dégagé le droit des Musqueams de pêcher à des fins alimentaires du fait suivant:

The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. [Emphasis added.]

D'après la preuve anthropologique produite pour établir l'existence de ce droit, la pêche au saumon a toujours fait partie intégrante de la culture distinctive des Musqueams. Le rôle important qu'elle joue ne se résume pas à la consommation à des fins de subsistance, mais il comprend également la consommation de saumon dans le cadre d'activités rituelles et sociales. Les Musqueams ont toujours pêché pour des raisons liées à leur survie culturelle et matérielle. [Je souligne.]

The suggestion of this passage is that participation in the salmon fishery is an aboriginal right because it is an "integral part" of the "distinctive culture" of the Musqueam. This suggestion is consistent with the position just adopted; identifying those practices, customs and traditions that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of Europeans.

In light of the suggestion of *Sparrow*, *supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

I would note that this test is, in large part, consistent with that adopted by the judges of the British Columbia Court of Appeal. Although the various judges disagreed on such crucial questions as how the right should be framed, the relevant time at which the aboriginal culture should be examined and the role of European influences in limiting the scope of the right, all of the judges agreed that aboriginal rights must be identified through the practices, customs and traditions of aboriginal cultures. Macfarlane J.A. held at para. 20 that aboriginal rights exist where "the right had been exercised . . . for a sufficient length of time to become integral to the aboriginal society" (emphasis added); Wallace J.A. held at para. 78 that aboriginal rights are those practices "traditional and integral to the native society" (emphasis added); Lambert J.A. held at para. 131 that aboriginal rights are those "custom[s], tradition[s], or practice[s] . . . which formed an integral part of the distinctive culture of the aboriginal people in question" (emphasis added). While, as will become apparent, I do not adopt entirely the position of any of the judges at the Court of Appeal, their shared position that aboriginal rights lie in those practices,

L'idée qui ressort de ce passage est que la participation à la pêche au saumon est un droit ancestral parce que cette activité fait «partie intégrante» de la «culture distinctive» des Musqueams. Cette idée est compatible avec la position qui vient d'être adoptée; le fait de déterminer les coutumes, pratiques et traditions qui font partie intégrante des cultures autochtones distinctives permettra d'identifier les éléments fondamentaux des sociétés autochtones distinctives qui occupaient l'Amérique du Nord avant l'arrivée des Européens.

À la lumière de l'idée exprimée dans *Sparrow*, précité, et des objets qui sous-tendent le par. 35(1), le critère suivant devrait être appliqué pour déterminer si le demandeur a établi l'existence d'un droit ancestral protégé par le par. 35(1): pour constituer un droit ancestral, une activité doit être un élément d'une coutume, pratique ou tradition faisant partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit en question.

Je tiens à souligner que ce critère est, dans une large mesure, conforme à celui adopté par les juges de la Cour d'appel de la Colombie-Britannique. Quoique ceux-ci n'aient pas tous été d'accord sur des questions cruciales telles que la manière de formuler ce droit, la période pertinente pour l'examen de la culture autochtone et le rôle des influences européennes dans la limitation de la portée de ce droit, ils ont par ailleurs tous été d'accord pour dire que les droits ancestraux doivent être identifiés au moyen des coutumes, pratiques et traditions des cultures autochtones. Le juge Macfarlane a conclu, au par. 20, que des droits ancestraux existent lorsqu'ils [TRADUCTION] «sont exercés [. . .] depuis assez longtemps pour être devenus partie intégrante de la société autochtone» (je souligne). Pour sa part, le juge Wallace a statué, au par. 78, que les droits ancestraux sont les pratiques [TRADUCTION] «traditionnelles faisant partie intégrante de la société autochtone» (je souligne). Le juge Lambert a affirmé, au par. 131, que les droits ancestraux sont [TRADUCTION] «les coutume[s], pratique[s] et tradition[s . . .] qui faisaient partie intégrante de la culture distinctive du peuple autochtone en question» (je souligne). Même si,

customs and traditions that are integral is consistent with the test I have articulated here.

Factors to be Considered in Application of the Integral to a Distinctive Culture Test

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The test just laid out — that aboriginal rights lie in the practices, customs and traditions integral to the distinctive cultures of aboriginal peoples — requires further elaboration with regards to the nature of the inquiry a court faced with an aboriginal rights claim must undertake. I will now undertake such an elaboration, concentrating on such questions as the time period relevant to the court's inquiry, the correct approach to the evidence presented, the specificity necessary to the court's inquiry, the relationship between aboriginal rights and the rights of aboriginal people as Canadian citizens, and the standard that must be met in order for a practice, custom or tradition to be said to be "integral".

Courts must take into account the perspective of aboriginal peoples themselves

49

In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In *Sparrow*, *supra*, Dickson C.J. and La Forest J. held, at p. 1112, that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake". It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware

comme cela deviendra manifeste, je n'adopte pas entièrement la position de l'un ou l'autre des juges de la Cour d'appel, leur position commune que les droits ancestraux résident dans les coutumes, pratiques et traditions qui font partie intégrante de la culture en cause est compatible avec le critère que j'ai énoncé en l'espèce.

Facteurs à prendre en considération dans l'application du critère de la partie intégrante d'une culture distinctive

Il convient de préciser davantage le critère énoncé plus haut — savoir que les droits ancestraux résident dans les coutumes, pratiques et traditions qui font partie intégrante des cultures distinctives des peuples autochtones — pour ce qui concerne la nature de l'examen que doit faire le tribunal saisi de la revendication de droits ancestraux. Je vais maintenant donner ces précisions, en me concentrant sur des questions telles que la période pertinente pour cet examen, la bonne façon d'apprécier la preuve présentée, le caractère spécifique de l'examen du tribunal, le rapport entre les droits ancestraux et les droits des autochtones en tant que citoyens canadiens et, enfin, la norme à laquelle une coutume, une pratique ou une tradition doit satisfaire pour être considérée comme une «partie intégrante».

Les tribunaux doivent tenir compte du point de vue des autochtones eux-mêmes

Dans son appréciation d'une revendication invoquant l'existence d'un droit ancestral, le tribunal doit tenir compte du point de vue des autochtones qui revendiquent ce droit. Dans *Sparrow*, précité, le juge en chef Dickson et le juge La Forest ont décidé, à la p. 1112, qu'il est «crucial de se montrer ouvert au point de vue des autochtones eux-mêmes quant à la nature des droits en cause». Toutefois, il faut également reconnaître que ce point de vue doit être exprimé d'une manière compatible avec l'organisation juridique et constitutionnelle du Canada. Comme il a déjà été signalé, un des objets fondamentaux du par. 35(1) est la conciliation de la préexistence de sociétés autochtones distinctives avec l'affirmation de la souveraineté de Sa Majesté. Les tribunaux appelés à statuer sur des

that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: “a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives”. The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

It is possible, of course, that the Court could be said to be “reconciling” the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of “reconciliation” does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.

Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right

Related to this is the fact that in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant’s claim is of importance because whether or not the evidence supports the appellant’s claim will depend, in significant part, on what, exactly, that evidence is being called to support.

revendications de droits ancestraux doivent donc se montrer ouverts au point de vue des autochtones, tout en étant conscients que les droits ancestraux existent dans les limites du système juridique canadien. Pour citer de nouveau Mark Walters, à la p. 413: [TRADUCTION] «une conception moralement et politiquement défendable des droits ancestraux intégrera les deux points de vue juridiques [autochtone et non autochtone]». Pour concilier véritablement l’occupation antérieure du territoire canadien par les peuples autochtones avec l’affirmation par Sa Majesté de sa souveraineté sur celui-ci, un droit ancestral doit être défini d’une manière qui, tout en tenant compte du point de vue des autochtones, soit néanmoins compatible avec le système juridique non autochtone.

Évidemment, il est possible que l’on dise que la Cour «concilie» l’occupation antérieure du pays par les peuples autochtones avec la souveraineté de Sa Majesté suivant une conception soit restrictive, soit libérale des droits ancestraux; la notion de «conciliation» ne commande pas, dans l’abstrait, que l’on donne un contenu particulier aux droits ancestraux. Cela dit, toutefois, la seule façon juste et équitable de faire cette conciliation est, comme le propose Mark Walters, de tenir compte à la fois du point de vue des autochtones et de la common law. La conciliation véritable accorde, également, de l’importance à chacun de ces éléments.

Les tribunaux doivent déterminer avec précision la nature de la revendication en cause lorsqu’il décide si le requérant autochtone a établi l’existence d’un droit ancestral

Se rattache à cette question le fait que, dans l’appréciation de la revendication d’un droit ancestral, le tribunal doit d’abord déterminer la nature du droit revendiqué. Pour juger si une revendication satisfait au critère de la partie intégrante de la culture distinctive du groupe autochtone qui revendique ce droit, le tribunal doit d’abord délimiter correctement ce qui est revendiqué. Il est important de bien caractériser la revendication de l’appelante, car la réponse à la question de savoir si la preuve étaye sa revendication dépend, dans une large mesure, de la nature précise de ce que la preuve vise à établir.

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I would note here by way of illustration that, in my view, both the majority and the dissenting judges in the Court of Appeal erred with respect to this aspect of the inquiry. The majority held that the appellant's claim was that the practice of selling fish "on a commercial basis" constituted an aboriginal right and, in part, rejected her claim on the basis that the evidence did not support the existence of such a right. With respect, this characterization of the appellant's claim is in error; the appellant's claim was that the practice of selling fish was an aboriginal right, not that selling fish "on a commercial basis" was. It was however, equally incorrect to adopt, as Lambert J.A. did, a "social" test for the identification of the practice, tradition or custom constituting the aboriginal right. The social test casts the aboriginal right in terms that are too broad and in a manner which distracts the court from what should be its main focus — the nature of the aboriginal community's practices, customs or traditions themselves. The nature of an applicant's claim must be delineated in terms of the particular practice, custom or tradition under which it is claimed; the significance of the practice, custom or tradition to the aboriginal community is a factor to be considered in determining whether the practice, custom or tradition is integral to the distinctive culture, but the significance of a practice, custom or tradition cannot, itself, constitute an aboriginal right.

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To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the practices, customs and traditions she invokes in support of her claim.

Je ferai remarquer ici, à titre d'exemple, qu'à mon sens tant les juges de la majorité que les dissidents en Cour d'appel ont fait erreur sur cet aspect de l'examen. Les juges de la majorité ont conclu que l'appelante soutenait que la pratique consistant à vendre du poisson «commerciallement» constituait un droit ancestral, et ils ont en partie rejeté sa revendication pour le motif que la preuve n'appuyait pas l'existence d'un tel droit. Avec égards, cette caractérisation de la revendication de l'appelante est erronée. L'appelante prétendait que la pratique qui consiste à vendre du poisson est un droit ancestral, et non que le fait de vendre «commerciallement» du poisson est un tel droit. Toutefois, il était tout aussi inexact d'adopter, comme l'a fait le juge Lambert, un critère «social» afin d'identifier la coutume, pratique ou tradition qui constitue le droit ancestral. Le critère social a pour effet de décrire le droit ancestral dans des termes trop larges et d'une façon qui éloigne le tribunal de ce qui doit être l'aspect principal de son examen — la nature des coutumes, pratiques ou traditions mêmes de la collectivité autochtone. La nature de la revendication du demandeur doit être définie en fonction de la coutume, pratique ou tradition particulière invoquée au soutien de celle-ci. L'importance de la coutume, pratique ou tradition pour la collectivité autochtone est un facteur qui doit être pris en considération pour décider si cette coutume, pratique ou tradition fait partie intégrante de la culture distinctive, mais l'importance d'une coutume, pratique ou tradition ne peut, en soi, faire de celle-ci un droit ancestral.

Pour bien caractériser la revendication du demandeur, le tribunal doit tenir compte de facteurs tels que la nature de l'acte qui, d'affirmer le demandeur, a été accompli en vertu d'un droit ancestral, la nature du règlement, de la loi ou de l'autre mesure gouvernementale contestée, ainsi que la coutume, pratique ou tradition invoquée pour établir l'existence du droit. Par conséquent, dans la présente espèce, notre Cour prendra en considération les actes qui ont conduit à l'inculpation de l'appelante, le règlement de pêche en vertu duquel elle a été inculpée et les coutumes, pratiques et traditions qu'elle invoque à l'appui de sa revendication.

It should be acknowledged that a characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.

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.

This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal

Il convient de reconnaître qu'il faut faire preuve de prudence en caractérisant la revendication de l'appelante à partir des actes qui ont conduit à son inculpation. Pour se guider dans son analyse, le tribunal doit examiner ces activités d'un point de vue général et non spécifique. De plus, le tribunal ne doit pas perdre de vue qu'il est possible que les activités en question soient l'exercice, sous une forme contemporaine, d'une coutume, pratique ou tradition qui existait avant le contact avec les Européens, auquel cas il doit adapter sa caractérisation de la revendication en conséquence.

Pour faire partie intégrante d'une culture distinctive, une coutume, pratique ou tradition doit avoir une importance fondamentale pour la société autochtone concernée

Pour satisfaire au critère de l'élément faisant partie intégrante d'une culture distinctive, le demandeur autochtone doit non seulement démontrer qu'une coutume, pratique ou tradition était un aspect de la société autochtone à laquelle il appartient ou qu'elle y était exercée, mais en outre qu'elle était un élément fondamental et important de la culture distinctive de cette société. Autrement dit, il doit établir que la coutume, pratique ou tradition était l'une des choses qui rendaient la culture de la société distinctive — que c'était l'une des choses qui véritablement faisait de la société ce qu'elle était.

Cet aspect du critère de la partie intégrante d'une culture distinctive découle du fait que les droits ancestraux sont fondés sur l'occupation antérieure du Canada par des sociétés autochtones distinctives. Pour reconnaître et confirmer l'occupation antérieure du pays par des sociétés autochtones distinctives, le tribunal doit, dans l'identification des droits ancestraux, s'attacher à ce qui rend ces sociétés distinctives. Il ne peut tenir compte des aspects de la société autochtone qui sont communs à toutes les sociétés humaines (p. ex. le fait de manger pour survivre), ni des aspects de la société autochtone qui n'ont qu'un caractère secondaire ou occasionnel; le tribunal doit plutôt s'attacher aux attributs fondamentaux de la société autochtone concernée, qui la définissent. Ce n'est que si elle s'attache aux aspects de la

rights will accomplish the purpose underlying s. 35(1).

société autochtone qui rendent celle-ci distinctive que la définition des droits ancestraux permettra la réalisation de l'objet qui sous-tend le par. 35(1).

Moreover, the aboriginal rights protected by s. 35(1) have been said to have the purpose of reconciling pre-existing aboriginal societies with the assertion of Crown sovereignty over Canada. To reconcile aboriginal societies with Crown sovereignty it is necessary to identify the distinctive features of those societies; it is precisely those distinctive features which need to be acknowledged and reconciled with the sovereignty of the Crown.

Qui plus est, les droits ancestraux protégés par le par. 35(1) ont pour objet, a-t-on affirmé, de concilier les sociétés autochtones préexistantes avec l'affirmation par Sa Majesté de sa souveraineté sur le Canada. Pour ce faire, il est nécessaire d'identifier les caractéristiques distinctives de ces sociétés, car ce sont précisément ces caractéristiques distinctives qui doivent être reconnues et conciliées avec la souveraineté de Sa Majesté.

As was noted earlier, Lambert J.A. erred when he used the significance of a practice, custom or tradition as a means of identifying what the practice, custom or tradition is; however, he was correct to recognize that the significance of the practice, custom or tradition is important. The significance of the practice, custom or tradition does not serve to identify the nature of a claim of acting pursuant to an aboriginal right; however, it is a key aspect of the court's inquiry into whether a practice, custom or tradition has been shown to be an integral part of the distinctive culture of an aboriginal community. The significance of the practice, custom or tradition will inform a court as to whether or not that practice, custom or tradition can be said to be truly integral to the distinctive culture in question.

Comme il a été indiqué précédemment, le juge Lambert a commis une erreur en se servant de l'importance d'une coutume, pratique ou tradition comme moyen d'identifier cette coutume, pratique ou tradition. Toutefois, il a eu raison de reconnaître que l'importance de la coutume, pratique ou tradition est un facteur clé. L'importance de la coutume, pratique ou tradition ne sert pas à identifier la nature de la prétention du demandeur qu'il a agi en vertu d'un droit ancestral. Cependant, il s'agit d'un aspect essentiel de l'examen du tribunal sur la question de savoir si la preuve établit qu'une coutume, pratique ou tradition fait partie intégrante de la culture distinctive d'une collectivité autochtone. L'importance de la coutume, pratique ou tradition guidera le tribunal dans son analyse de la question de savoir s'il est possible d'affirmer qu'elle fait vraiment partie intégrante de la culture distinctive en cause.

A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question.

Une façon pratique d'aborder ce problème est de se demander si, sans cette coutume, pratique ou tradition, la culture en cause serait fondamentalement modifiée ou différente. Reformulée affirmativement, cette question consiste à se demander si la coutume, pratique ou tradition est une caractéristique déterminante de la culture en cause.

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

Constituent des droits ancestraux les coutumes, pratiques et traditions qui marquent la continuité avec les coutumes, pratiques et traditions qui existaient avant le contact avec les Européens

The time period that a court should consider in identifying whether the right claimed meets the

La période que doit prendre en considération le tribunal pour décider si le droit revendiqué satisfait

standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown.

That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the

au critère de la partie intégrante de la culture distinctive de la collectivité autochtone qui revendique le droit en cause est la période qui a précédé le contact entre les sociétés autochtones et européennes. Comme c'est le fait que des sociétés autochtones distinctives vivaient sur le territoire avant l'arrivée des Européens qui est le fondement des droits ancestraux protégés par le par. 35(1), c'est à cette période antérieure au contact que les tribunaux doivent s'attacher dans l'identification des droits ancestraux.

Le fait que la doctrine des droits ancestraux sert à concilier la souveraineté de Sa Majesté avec l'existence de sociétés autochtones préexistantes n'y change rien. Bien que ce soit avec la souveraineté de Sa Majesté que les sociétés autochtones préexistantes sont conciliées, c'est à l'examen de ces sociétés préexistantes que doivent s'attacher les tribunaux dans la définition des droits ancestraux. Ce n'est pas le fait que des sociétés autochtones existaient avant l'affirmation de la souveraineté par Sa Majesté qui est pertinente mais le fait qu'elles existaient avant l'arrivée des Européens en Amérique du Nord. En conséquence, la période pertinente est celle qui a précédé l'arrivée des Européens, et non celle qui a précédé l'affirmation par Sa Majesté de sa souveraineté.

Le fait qu'il s'agisse là de la période pertinente n'emporte cependant pas que le groupe autochtone revendiquant le droit en cause doit s'acquitter de la tâche pratiquement impossible de produire, relativement aux coutumes, pratiques et traditions de sa collectivité, une preuve concluante, datant de l'époque antérieure au contact avec les Européens. Il serait tout à fait contraire à l'esprit et au but du par. 35(1) de définir les droits ancestraux d'une manière qui, dans la pratique, vouerait à l'échec toute revendication de l'existence de tels droits. La preuve sur laquelle s'appuient le demandeur et les tribunaux peut se rapporter aux coutumes, pratiques et traditions autochtones postérieures au contact avec les Européens. Il suffit que cette preuve tende à démontrer lesquels des aspects de la collectivité et de la société autochtones datent d'avant le contact avec les Européens. Constitueront des droits ancestraux les coutumes, pratiques

pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

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I would note in relation to this point the position adopted by Brennan J. in *Mabo, supra*, where he holds, at p. 60, that in order for an aboriginal group to succeed in its claim for aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to the present day:

... when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim (I take no position on that matter), but rather in its suggestion of the importance of considering the continuity in the practices, customs and traditions of aboriginal communities in assessing claims to aboriginal rights. It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

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The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the

et traditions dont l'origine peut être attribuée aux ancêtres de la collectivité autochtone en cause, qui vivaient avant le contact avec les Européens.

Sur ce point, je tiens à souligner la position adoptée par le juge Brennan dans l'arrêt *Mabo*, précité, où il a statué, à la p. 60, que pour avoir gain de cause le groupe autochtone qui revendique un titre aborigène doit établir que le lien rattachant ses coutumes et ses lois au territoire s'est perpétué jusqu'à nos jours:

[TRADUCTION] ... quand, par suite de la marche du temps, les coutumes et les lois traditionnelles ont, dans les faits, cessé d'être observées, le fondement du titre aborigène a disparu. Il est impossible de faire renaître, en vue d'une reconnaissance contemporaine, un titre aborigène qui s'est éteint par suite de l'abandon des coutumes et des lois fondées sur la tradition.

La pertinence de cette observation pour l'identification des droits visés au par. 35(1) ne réside pas dans les propos concernant l'effet de la disparition d'une coutume, d'une pratique ou d'une tradition sur une revendication autochtone (je ne me prononce pas sur ce point), mais dans l'idée qui y est avancée relativement à l'importance de tenir compte, dans l'appréciation des revendications de droits ancestraux, de la continuité des coutumes, pratiques et traditions des collectivités autochtones. Ce sont précisément les coutumes, pratiques et traditions actuelles, à l'égard desquelles il est possible d'établir qu'elles marquent une continuité avec les coutumes, pratiques et traditions qui existaient avant le contact avec les Européens, qui serviront de fondement pour l'identification et la définition des droits ancestraux visés au par. 35(1). Quand une collectivité autochtone peut démontrer qu'une coutume, pratique ou tradition particulière fait partie intégrante de sa culture distinctive aujourd'hui et marque une continuité avec les coutumes, pratiques et traditions de l'époque antérieure au contact avec les Européens, cette collectivité aura fait la preuve que cette coutume, pratique ou tradition est un droit ancestral au sens du par. 35(1).

Le concept de continuité est aussi le principal moyen d'assurer que la définition et l'identification des droits ancestraux respectent la mise en

admonition in *Sparrow, supra*, at p. 1093, that “the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time”. The concept of continuity is, in other words, the means by which a “frozen rights” approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.

I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, *infra*, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.

Further, I would note that basing the identification of aboriginal rights in the period prior to contact is not inconsistent with the fact that s. 35(2) of the *Constitution Act, 1982* includes within the defi-

garde faite dans *Sparrow*, précité, à la p. 1093, savoir que «l'expression «droits ancestraux existants» doit recevoir une interprétation souple de manière à permettre à ces droits d'évoluer avec le temps». En d'autres mots, le concept de continuité est le moyen qui permet d'éviter une interprétation du par. 35(1) fondée sur la notion de «droits figés». Comme les coutumes, pratiques et traditions que protège le par. 35(1) sont celles qui existent aujourd'hui, sous réserve seulement de l'obligation de démontrer qu'elles marquent une continuité avec les coutumes, pratiques et traditions qui existaient avant le contact avec les Européens, il faut que la définition elle-même des droits ancestraux évite que ces droits soient figés dans l'état où ils se trouvaient avant cette époque. L'évolution des coutumes, pratiques et traditions, jusque dans leur forme actuelle, ne les empêchera pas d'être protégées en tant que droits ancestraux, pourvu qu'on démontre qu'elles marquent une continuité avec les coutumes, pratiques et traditions d'avant le contact avec les Européens.

Je tiens à faire remarquer que le concept de continuité n'exige pas que les groupes autochtones fassent la preuve d'une continuité parfaite entre leurs coutumes, pratiques et traditions actuelles et celles qui existaient avant le contact avec les Européens. Il est possible que, pour une raison ou pour une autre, un groupe autochtone ait, pendant une certaine période, cessé de respecter une coutume, pratique ou tradition qui existait avant le contact avec les Européens, mais qu'il l'ait reprise ultérieurement. Une telle interruption n'empêche pas l'établissement d'un droit ancestral. Les juges qui entendent les procès devraient faire montre de la même souplesse relativement à la preuve de la continuité qu'en ce qui concerne, comme il est expliqué plus loin, la preuve présentée dans le but d'établir l'existence, avant le contact avec les Européens, des coutumes, pratiques et traditions du groupe autochtone qui revendique un droit ancestral.

Qui plus est, je tiens aussi à souligner que le fait de se reporter à la période antérieure au contact avec les Européens pour identifier les droits ancestraux n'est pas incompatible avec le fait que, aux

nition of "aboriginal peoples of Canada" the Métis people of Canada.

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Although s. 35 includes the Métis within its definition of "aboriginal peoples of Canada", and thus seems to link their claims to those of other aboriginal peoples under the general heading of "aboriginal rights", the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.

Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims

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In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal cul-

termes du par. 35(2) de la *Loi constitutionnelle de 1982*, les Métis sont compris dans la définition de «peuples autochtones du Canada».

Même si les Métis sont compris dans la définition de «peuples autochtones du Canada» à l'art. 35 et que, de ce fait, leurs revendications semblent rattachées à celles des autres peuples autochtones, sous la rubrique générale «droits ancestraux», l'histoire des Métis et les raisons qui sous-tendent leur inclusion pour qu'ils bénéficient de la protection accordée par l'art. 35 diffèrent considérablement de celles qui concernent les autres peuples autochtones du Canada. Comme telle, la manière dont les droits ancestraux des autres peuples autochtones sont définis n'est pas nécessairement déterminante en ce qui concerne la manière dont sont définis ceux des Métis. Lorsque notre Cour sera saisie d'une revendication présentée par des Métis en vertu de l'art. 35, elle sera alors à même, grâce aux arguments des avocats, du contexte factuel et du fait que la revendication touche spécifiquement les Métis, d'examiner la question des objets qui sous-tendent la protection accordée par l'art. 35 aux droits ancestraux des Métis et de déterminer le genre de revendications qui relèvent du par. 35(1) dans les cas où les demandeurs sont des Métis. Le fait que, en ce qui concerne d'autres peuples autochtones, l'art. 35 protège leurs coutumes, pratiques et traditions qui existaient avant le contact avec les Européens n'est pas nécessairement pertinent pour ce qui est de la réponse qui sera donnée à cette question. Il est possible qu'il soit statué sur les revendications des Métis sur la base des coutumes, pratiques et traditions de leurs ancêtres autochtones avant le contact avec les Européens, mais il se peut aussi que non. Il faudra attendre une affaire où cette question se posera avant de connaître la réponse.

Dans l'application des règles de preuve, les tribunaux doivent tenir compte des difficultés inhérentes à l'examen des affaires concernant des revendications autochtones

Pour déterminer si un demandeur autochtone a produit une preuve suffisante pour établir que ses activités sont un aspect d'une coutume, pratique ou tradition qui fait partie intégrante d'une culture

ture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

Claims to aboriginal rights must be adjudicated on a specific rather than general basis

Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. In the case of *Kruger, supra*, this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

For a practice, custom or tradition to constitute an aboriginal right it must be of independent

autochtone distinctive, le tribunal doit appliquer les règles de preuve et interpréter la preuve existante en étant conscient de la nature particulière des revendications des autochtones et des difficultés que soulève la preuve d'un droit qui remonte à une époque où les coutumes, pratiques et traditions n'étaient pas consignées par écrit. Les tribunaux doivent se garder d'accorder un poids insuffisant à la preuve présentée par les demandeurs autochtones simplement parce que cette preuve ne respecte pas de façon précise les normes qui seraient appliquées dans une affaire de responsabilité civile délictuelle par exemple.

Les revendications de droits ancestraux doivent être tranchées de manière spécifique et non générale

Le tribunal saisi d'une revendication fondée sur l'existence d'un droit ancestral doit s'attacher spécifiquement à l'examen des coutumes, pratiques et traditions du groupe autochtone qui revendique ce droit. Dans *Kruger*, précité, notre Cour a rejeté l'idée que les revendications de droits ancestraux pouvaient être tranchées de manière générale. Cette position est bien fondée. L'existence d'un droit ancestral dépend entièrement des coutumes, pratiques et traditions de la collectivité autochtone qui revendique le droit. Comme il a été dit plus tôt, même si les droits ancestraux sont des droits constitutionnels, cela n'enlève rien au fait capital que les intérêts que les droits ancestraux sont censés protéger se rapportent à l'histoire spécifique du groupe qui revendique le droit. Les droits ancestraux n'ont pas un caractère général et universel. Leur portée et leur contenu doivent être déterminés au cas par cas. Le fait qu'un groupe autochtone possède le droit ancestral de faire une chose donnée ne permet pas, à lui seul, d'établir qu'une autre collectivité autochtone a le même droit. L'existence du droit en question dépendra de la situation spécifique de chaque collectivité autochtone.

Pour qu'une coutume, une pratique ou une tradition constitue un droit ancestral, elle doit avoir

significance to the aboriginal culture in which it exists

une importance particulière pour la culture autochtone où elle existe

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In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

Le tribunal appelé à identifier les coutumes, pratiques et traditions qui constituent les droits ancestraux reconnus et confirmés par le par. 35(1) doit s'assurer que la coutume, la pratique ou la tradition invoquée dans un cas donné revêt une importance particulière pour la collectivité autochtone qui revendique le droit. Il ne doit pas s'agir d'une coutume, pratique ou tradition simplement accessoire d'une autre coutume, pratique ou tradition, mais elle doit plutôt présenter elle-même une importance fondamentale pour la société autochtone concernée. Lorsqu'il existe deux coutumes, mais que l'une d'elles est simplement un accessoire de l'autre, la coutume qui fait partie intégrante de la culture de la collectivité autochtone en cause sera considérée comme un droit ancestral, mais pas celle qui a simplement un caractère accessoire. Les coutumes, pratiques et traditions accessoires ne peuvent être considérées comme des droits ancestraux du fait qu'elles se greffent sur des coutumes, pratiques et traditions faisant partie intégrante d'une culture.

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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

Le critère de la partie intégrante d'une culture distinctive exige qu'une coutume, pratique ou tradition soit distinctive, non pas qu'elle soit distincte

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The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is not that it be distinct to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is distinctive. A tradition or custom that is distinct is one that is unique — “different in kind or quality; unlike” (*Concise Oxford Dictionary, supra*). A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims that a practice, custom or tradition is distinctive — “distinguishing, characteristic” — makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the prac-

La norme qui doit être respectée par une coutume, pratique ou tradition pour être reconnue comme un droit ancestral n'est pas qu'elle soit une coutume, pratique ou tradition distincte, propre à la culture autochtone en cause. Les demandeurs autochtones doivent simplement montrer que la coutume, pratique ou tradition en cause est distinctive. Est une coutume, pratique ou tradition distincte une coutume, pratique ou tradition qui est unique — [TRADUCTION] «qui se distingue par sa nature ou sa qualité; différente» (*Concise Oxford Dictionary, loc. cit.*) Une culture qui possède une tradition distincte doit affirmer que, du fait de cette tradition, elle est différente des autres cultures. Une prétention à la différence appelle, de par sa nature même, une comparaison avec d'autres cultures ou traditions. Par contraste, la culture qui prétend qu'une coutume, pratique ou tradition est dis-

tices, customs or traditions of any other culture. It is a claim that this tradition or custom makes the culture what it is, not that the practice, custom or tradition is different from the practices, customs or traditions of another culture. The person or community claiming the existence of an aboriginal right protected by s. 35(1) need only show that the particular practice, custom or tradition which it is claiming to be an aboriginal right is distinctive, not that it is distinct.

That the standard an aboriginal community must meet is distinctiveness, not distinctness, arises from the recognition in *Sparrow, supra*, of an aboriginal right to fish for food. Certainly no aboriginal group in Canada could claim that its culture is "distinct" or unique in fishing for food; fishing for food is something done by many different cultures and societies around the world. What the Musqueam claimed in *Sparrow, supra*, was rather that it was fishing for food which, in part, made Musqueam culture what it is; fishing for food was characteristic of Musqueam culture and, therefore, a distinctive part of that culture. Since it was so it constituted an aboriginal right under s. 35(1).

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

The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europe-

tinutive — «qui permet de distinguer, caractéristique» — ne fait pas de comparaison. Sa prétention se rapporte plutôt à ses propres coutumes, pratiques et traditions, considérées indépendamment de celles de toute autre culture. La culture en question prétend que cette coutume, pratique ou tradition fait d'elle ce qu'elle est, et non que la coutume, pratique ou tradition est différente de celles d'une autre culture. La personne ou la collectivité qui prétend à l'existence d'un droit ancestral protégé par le par. 35(1) n'a qu'à démontrer que la coutume, pratique ou tradition particulière qu'elle revendique comme un droit ancestral est distinctive, et non qu'elle est distincte.

Le fait que la norme à laquelle doit satisfaire une collectivité autochtone est celle du caractère distinctif et non du caractère distinct découle de la reconnaissance, dans *Sparrow*, précité, de l'existence d'un droit ancestral de pêcher à des fins alimentaires. Il est certain qu'aucun groupe autochtone au Canada ne saurait prétendre que sa culture est «distincte» ou unique du fait qu'il pêche à des fins alimentaires. La pêche à des fins alimentaires est en effet pratiquée par bon nombre de cultures et de sociétés différentes aux quatre coins du monde. Ce que les Musqueams soutenaient dans *Sparrow*, précité, c'était plutôt que cette pêche contribuait à faire de la culture musqueam ce qu'elle est. La pêche à des fins alimentaires était caractéristique de la culture musqueam et, par conséquent, un élément distinctif de cette culture. De ce fait, elle constituait un droit ancestral visé au par. 35(1).

L'influence de la culture européenne n'est pertinente, dans le cadre de l'examen, que s'il est démontré que la coutume, la pratique ou la tradition ne fait partie intégrante de la culture qu'en raison de cette influence

Le fait que les Européens aient eu, en Amérique du Nord, des coutumes, pratiques ou traditions identiques à celles invoquées pour revendiquer un droit ancestral n'est pertinent pour l'appréciation de la revendication autochtone que s'il est possible d'affirmer que la coutume, pratique ou tradition en question n'existe qu'en raison de l'influence de la culture européenne. Si la coutume, pratique ou tradition faisait partie intégrante de la culture d'une

ans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.

Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples

collectivité autochtone avant le contact avec les Européens, le fait que cette coutume, pratique ou tradition se soit poursuivie après l'arrivée de ceux-ci et se soit adaptée en réaction à cet événement, n'est pas pertinent pour l'appréciation de la revendication. L'arrivée et l'influence des Européens ne peuvent être invoquées pour rejeter la revendication, par ailleurs valide, d'un droit ancestral présentée par un groupe autochtone. En revanche, si la coutume, pratique ou tradition n'est que le fruit des influences européennes, alors elle ne respecte pas la norme applicable pour la reconnaissance d'un droit ancestral.

Les tribunaux doivent tenir compte à la fois des rapports qu'entretiennent les peuples autochtones avec le territoire et des cultures et sociétés distinctives de ces peuples

74 As was noted in the discussion of the purposes of s. 35(1), aboriginal rights and aboriginal title are related concepts; aboriginal title is a subcategory of aboriginal rights which deals solely with claims of rights to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

Comme il a été dit durant l'examen des objets du par. 35(1), les droits ancestraux et le titre aborigène sont des notions connexes. En effet, le titre aborigène est une sous-catégorie de droits ancestraux qui concerne seulement les revendications de droits fonciers. Toutefois, le rapport entre le titre aborigène et les droits ancestraux ne doit pas embrouiller l'analyse de ce qui constitue un droit ancestral. Les droits ancestraux découlent non seulement de l'occupation antérieure du territoire, mais aussi de l'organisation sociale antérieure et des cultures distinctives des peuples autochtones habitant ce territoire. Pour déterminer si le bien-fondé de la revendication d'un droit ancestral a été établi, les tribunaux doivent considérer et les rapports qu'entretient le demandeur autochtone avec le territoire et les coutumes, pratiques et traditions de la société à laquelle il appartient et de la culture distinctive de cette société. Ils ne doivent pas se concentrer sur les rapports qu'entretiennent les peuples autochtones avec le territoire au point de négliger les autres facteurs pertinents pour l'identification et la définition des droits ancestraux.

75 With these factors in mind I will now turn to the particular claim made by the appellant in this case to have been acting pursuant to an aboriginal right.

Conscient de ces facteurs, je vais maintenant aborder la prétention particulière avancée par l'appelante en l'espèce, savoir qu'elle a agi en vertu d'un droit ancestral.

Application of the Integral to a Distinctive Culture Test to the Appellant's Claim

The first step in the application of the integral to a distinctive culture test requires the court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. In this case the most accurate characterization of the appellant's position is that she is claiming an aboriginal right to exchange fish for money or for other goods. She is claiming, in other words, that the practices, customs and traditions of the Sto:lo include as an integral part the exchange of fish for money or other goods.

That this is the nature of the appellant's claim can be seen through both the specific acts which led to her being charged and through the regulation under which she was charged. Mrs. Van der Peet sold 10 salmon for \$50. Such a sale, especially given the absence of evidence that the appellant had sold salmon on other occasions or on a regular basis, cannot be said to constitute a sale on a "commercial" or market basis. These actions are instead best characterized in the simple terms of an exchange of fish for money. It follows from this that the aboriginal right pursuant to which the appellant is arguing that her actions were taken is, like the actions themselves, best characterized as an aboriginal right to exchange fish for money or other goods.

Moreover, the regulations under which the appellant was charged prohibit all sale or trade of fish caught pursuant to an Indian food fish licence. As such, to argue that those regulations implicate the appellant's aboriginal right requires no more of her than that she demonstrate an aboriginal right to the exchange of fish for money (sale) or other goods (trade). She does not need to demonstrate an aboriginal right to sell fish commercially.

Application à la revendication de l'appelante du critère de la partie intégrante d'une culture distinctive

Conformément à la première étape de l'application du critère de la partie intégrante d'une culture distinctive, le tribunal doit identifier la nature précise de la prétention de l'appelante qu'elle exerçait un droit ancestral. En l'espèce, la façon la plus précise de décrire la position de l'appelante consiste à dire qu'elle revendique un droit ancestral d'échanger du poisson contre de l'argent ou d'autres biens. Autrement dit, elle soutient que les coutumes, pratiques et traditions des Sto:lo incluent, en tant que partie intégrante de leur culture, l'échange de poisson contre de l'argent ou d'autres biens.

Cette description de la nature de la revendication de l'appelante ressort à la fois des actes spécifiques qui ont conduit à son inculpation et du règlement en vertu duquel elle a été inculpée. Madame Van der Peet a vendu 10 saumons pour 50 \$. Compte tenu particulièrement de l'absence de preuve indiquant que l'appelante avait déjà vendu du saumon ou qu'elle en vendait régulièrement, il est impossible d'affirmer qu'il s'agit d'une vente «commerciale» ou sur le marché. La meilleure façon de décrire ces actions est plutôt de les qualifier simplement d'échange de poisson contre de l'argent. Il s'ensuit que la meilleure façon de caractériser tant le droit ancestral en vertu duquel l'appelante prétend avoir accompli ces actions, que les actions elles-mêmes, est de les qualifier de droit ancestral d'échanger du poisson contre de l'argent ou d'autres biens.

De plus, le règlement en application duquel l'appelante a été inculpée interdit complètement la vente ou l'échange de poisson pris en vertu d'un permis de pêche de subsistance des Indiens. En conséquence, pour établir que ce règlement met en jeu son droit ancestral, l'appelante n'a qu'à démontrer l'existence d'un droit ancestral d'échanger du poisson contre de l'argent (vente) ou d'autres biens (échange). Elle n'a pas à établir l'existence d'un droit ancestral de vendre du poisson commercialement.

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79 The appellant herself characterizes her claim as based on a right "to sufficient fish to provide for a moderate livelihood". In so doing the appellant relies on the "social" test adopted by Lambert J.A. at the British Columbia Court of Appeal. As has already been noted, however, a claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question. The definition of aboriginal rights is determined through the process of determining whether a particular practice, custom or tradition is integral to the distinctive culture of the aboriginal group. The significance of the practice, custom or tradition is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. As such, the appellant's claim cannot be characterized as based on an assertion that the Sto:lo's use of the fishery, and the practices, customs and traditions surrounding that use, had the significance of providing the Sto:lo with a moderate livelihood. It must instead be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.

80 Having thus identified the nature of the appellant's claim, I turn to the fundamental question of the integral to a distinctive culture test: Was the practice of exchanging fish for money or other goods an integral part of the specific distinctive culture of the Sto:lo prior to contact with Europeans? In answering this question it is necessary to consider the evidence presented at trial, and the findings of fact made by the trial judge, to determine whether the evidence and findings support the appellant's claim that the sale or trade of fish is an integral part of the distinctive culture of the Sto:lo.

81 It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the

L'appelante elle-même soutient que sa revendication est fondée sur le droit à [TRANSDUCTION] «suffisamment de poisson pour assurer une subsistance convenable». Ce faisant, elle s'appuie sur le critère «social» adopté par le juge Lambert de la Cour d'appel de la Colombie-Britannique. Toutefois, comme il a été dit précédemment, la revendication d'un droit ancestral ne peut pas être fondée sur l'importance d'une coutume, pratique ou tradition autochtone pour la collectivité autochtone en cause. Pour définir des droits ancestraux, il faut déterminer si une coutume, pratique ou tradition donnée fait partie intégrante de la culture distinctive du groupe autochtone concerné. L'importance de cette coutume, pratique ou tradition est pertinente pour décider si celle-ci fait partie intégrante de la culture, mais elle ne peut à elle seule justifier le bien-fondé de la revendication d'un droit ancestral. Par conséquent, la revendication de l'appelante ne saurait être fondée sur l'assertion que l'utilisation de la pêche par les Sto:lo ainsi que les coutumes, pratiques et traditions rattachées à cette utilisation étaient importantes en ce qu'elles assuraient aux Sto:lo une subsistance convenable. Elle doit plutôt être fondée sur les coutumes, pratiques et traditions se rattachant concrètement à la pêche, en l'occurrence la coutume d'échanger du poisson contre de l'argent ou d'autres biens.

Après avoir identifié de la sorte la nature de la revendication de l'appelante, j'aborde maintenant la question fondamentale que pose le critère de la partie intégrante d'une culture distinctive: La pratique d'échanger du poisson contre de l'argent ou d'autres biens faisait-elle partie intégrante de la culture distinctive spécifique des Sto:lo avant le contact avec les Européens? Pour répondre à cette question, il est nécessaire d'examiner la preuve présentée au procès ainsi que les conclusions de fait tirées par le juge du procès afin de déterminer si cette preuve et ces conclusions étayaient l'affirmation de l'appelante que la vente ou l'échange de poisson font partie intégrante de la culture distinctive des Sto:lo.

Selon un principe juridique bien établi, lorsqu'une cour d'appel examine la décision du juge du procès, elle doit faire montre d'une retenue con-

trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses. In *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, Ritchie J., speaking for the Court, held at p. 808 that absent a "palpable and overriding error" affecting the trial judge's assessment of the facts, an appellate court should not substitute its own findings of fact for those of the trial judge:

These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

This principle has also been followed in more recent decisions of this Court: *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, at pp. 8-9; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 794; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 426. In the recently released decision of *Schwartz v. Canada*, [1996] 1 S.C.R. 254, La Forest J. made the following observation at para. 32, with which I agree, regarding appellate court deference to findings of fact:

Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact... This explains why the rule applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge...

I would also note that the principle of appellate court deference has been held to apply equally to findings of fact made on the basis of the trial

sidérable à l'égard des conclusions de fait du juge, en particulier lorsque ces conclusions de fait sont fondées sur son appréciation des témoignages et de la crédibilité des témoins. Dans l'arrêt *Stein c. Le navire «Kathy K»*, [1976] 2 R.C.S. 802, le juge Ritchie, au nom de la Cour, a conclu, à la p. 808, que, en l'absence d'«erreur manifeste et dominante» ayant faussé l'appréciation des faits par le juge du procès, une cour d'appel ne doit pas substituer ses propres conclusions sur les faits à celles tirées par ce dernier:

On ne doit pas considérer que ces arrêts signifient que les conclusions sur les faits tirées en première instance sont intangibles, mais plutôt qu'elles ne doivent pas être modifiées à moins qu'il ne soit établi que le juge du procès a commis une erreur manifeste et dominante qui a faussé son appréciation des faits. Bien que la Cour d'appel ait l'obligation de réexaminer la preuve afin de s'assurer qu'aucune erreur de ce genre n'a été commise, j'estime qu'il ne lui appartient pas de substituer son appréciation de la prépondérance des probabilités aux conclusions tirées par le juge qui a présidé le procès.

Ce principe a également été suivi dans des arrêts plus récents de notre Cour: *Beaudoin-Daigneault c. Richard*, [1984] 1 R.C.S. 2, aux pp. 8 et 9; *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 R.C.S. 705, à la p. 794; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, à la p. 426. Dans l'arrêt récent *Schwartz c. Canada*, [1996] 1 R.C.S. 254, le juge La Forest a, au par. 32, fait l'observation suivante, à laquelle je souscris, au sujet de la retenue dont doivent faire montre les cours d'appel à l'égard des conclusions de fait:

Une intervention illimitée des cours d'appel ferait augmenter considérablement le nombre et la durée des appels en général. D'importantes ressources sont mises à la disposition des tribunaux de première instance pour qu'ils puissent évaluer les faits. Il faut préserver l'autonomie et l'intégrité du procès en faisant preuve de retenue à l'égard des conclusions de fait des tribunaux de première instance; [...] Cela explique pourquoi la règle s'applique non seulement lorsque la crédibilité des témoins est en cause, quoiqu'elle puisse alors s'appliquer plus strictement, mais également à toutes les conclusions de fait tirées par le juge de première instance...

Je souligne également qu'il a été décidé que le principe de la retenue par les cours d'appel s'applique aussi aux conclusions de fait du juge de pre-

judge's assessment of the credibility of the testimony of expert witnesses, *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247, at pp. 1249-50.

mière instance qui sont fondées sur son appréciation de la crédibilité des témoignages d'experts: *N.V. Bocimar S.A. c. Century Insurance Co. of Canada*, [1987] 1 R.C.S. 1247, aux pp. 1249 et 1250.

82 In the case at bar, Scarlett Prov. Ct. J., the trial judge, made findings of fact based on the testimony and evidence before him, and then proceeded to make a determination as to whether those findings of fact supported the appellant's claim to the existence of an aboriginal right. The second stage of Scarlett Prov. Ct. J.'s analysis — his determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them — is a determination of a question of law which, as such, mandates no deference from this Court. The first stage of Scarlett Prov. Ct. J.'s analysis, however — the findings of fact from which that legal inference was drawn — do mandate such deference and should not be overturned unless made on the basis of a "palpable and overriding error". This is particularly the case given that those findings of fact were made on the basis of Scarlett Prov. Ct. J.'s assessment of the credibility and testimony of the various witnesses appearing before him.

Dans le cas qui nous occupe, le juge Scarlett de la Cour provinciale, juge du procès, a tiré des conclusions de fait fondées sur les témoignages et les autres éléments de preuve qui lui ont été présentés, puis il s'est demandé si ces conclusions de fait étayaient l'existence du droit ancestral revendiqué par l'appelante. Dans la deuxième étape de son analyse — la détermination de la portée des droits ancestraux de l'appelante à la lumière de ses conclusions de fait — le juge Scarlett tranche une question de droit qui, en tant que telle, ne commande aucune retenue de la part de notre Cour. Toutefois, la première étape de son analyse — savoir les conclusions de fait à partir desquelles cette inférence juridique est tirée — commande une telle retenue, et ces conclusions ne doivent pas être modifiées, sauf si elles résultent d'une «erreur manifeste et dominante». C'est particulièrement le cas, en l'espèce, étant donné que ces conclusions de fait sont fondées sur l'appréciation qu'a faite le juge Scarlett de la crédibilité des divers témoins qui ont comparu devant lui et de leurs dépositions.

83 In adjudicating this case Scarlett Prov. Ct. J. obviously did not have the benefit of direction from this Court as to how the rights recognized and affirmed by s. 35(1) are to be defined, with the result that his legal analysis of the evidence was not entirely correct; however, that Scarlett Prov. Ct. J. was not entirely correct in his legal analysis of the facts as he found them does not mean that he made a clear and palpable error in reviewing the evidence and making those findings of fact. Indeed, a review of the transcript and exhibits submitted to this Court demonstrate that Scarlett Prov. Ct. J. conducted a thorough and compelling review of the evidence before him and committed no clear and palpable error which would justify this Court, or any other appellate court, in substituting its findings of fact for his. Moreover, I would note that the appellant, while disagreeing with Scarlett Prov. Ct. J.'s legal analysis of the facts, made no

Il va de soi que, lorsqu'il a statué sur la présente affaire, le juge Scarlett ne disposait pas des indications de notre Cour sur la façon dont il faut s'y prendre pour définir les droits reconnus et confirmés par le par. 35(1), de sorte que son analyse juridique de la preuve n'était pas entièrement exacte. Cependant, le fait que l'analyse juridique des faits par le juge Scarlett n'ait pas été entièrement exacte ne signifie pas qu'il a fait une erreur manifeste en examinant la preuve et en tirant ces conclusions de fait. De fait, il ressort de l'examen de la transcription des débats et des pièces soumises à notre Cour que le juge Scarlett a fait une analyse approfondie et convaincante de la preuve qui lui a été présentée, et qu'il n'a commis aucune erreur manifeste qui justifierait notre Cour, ou toute autre cour d'appel, de substituer ses conclusions de fait aux siennes. De plus, je tiens à souligner que, même si elle a exprimé son désaccord

arguments suggesting that in making findings of fact from the evidence before him Scarlett Prov. Ct. J. committed a palpable and overriding error.

Scarlett Prov. Ct. J. carefully considered all of the testimony presented by the various witnesses with regards to the nature of Sto:lo society and came to the following conclusions at p. 160:

Clearly, the Sto:lo fish for food and ceremonial purposes. Evidence presented did not establish a regularized market system in the exchange of fish. Such fish as were exchanged through individual trade, gift, or barter were fish surplus from time to time. Natives did not fish to supply a market, there being no regularized trading system, nor were they able to preserve and store fish for extended periods of time. A market as such for salmon was not present but created by European traders, primarily the Hudson's Bay Company. At Fort Langley the Sto:lo were able to catch and deliver fresh salmon to the traders where it was salted and exported. This use was clearly different in nature and quantity from aboriginal activity. Trade in dried salmon with the fort was clearly dependent upon Sto:lo first satisfying their own requirements for food and ceremony.

This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This Court accepts the evidence of Dr. Stryd and John Dewhurst [*sic*] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.

avec l'analyse juridique des faits du juge Scarlett, l'appelante n'a aucunement prétendu que le juge Scarlett aurait, en tirant ses conclusions de fait de la preuve qui lui a été soumise, commis une erreur manifeste et dominante.

Le juge Scarlett de la Cour provinciale a soigneusement étudié les dépositions des divers témoins quant à la nature de la société sto:lo et il a tiré les conclusions suivantes, à la p. 160:

[TRADUCTION] De toute évidence, les Sto:lo pêchent à des fins alimentaires et rituelles. La preuve présentée n'a pas établi l'existence d'un système de marché organisé d'échange du poisson. Le poisson qui changeait de mains par suite d'échange, de don ou de troc individuel était le poisson excédentaire disponible à l'occasion. Les autochtones ne pêchaient pas pour approvisionner un marché, puisqu'il n'existait aucun système de marché organisé, et qu'ils n'étaient pas capables de conserver et d'emmagasiner le poisson durant de longues périodes. Il n'existait pas comme tel de marché pour le saumon, celui-ci a été créé par les marchands européens, principalement la Compagnie de la Baie d'Hudson. À Fort Langley, les Sto:lo pouvaient prendre et livrer du saumon frais aux marchands, qui le salaient et l'exportaient. Cette utilisation de la ressource était manifestement différente des activités autochtones, tant de par sa nature que de par les quantités en cause. Le commerce du saumon séché avec le fort était manifestement subordonné à la satisfaction par les Sto:lo, en premier lieu, de leurs propres besoins alimentaires et rituels.

La présente cour n'est pas convaincue, à la lumière de la preuve, que le commerce du saumon existait chez les autochtones au sens d'un commerce organisé d'un marché. Il ressort des témoignages oraux que le commerce était un aspect accessoire de la pêche pratiquée à des fins alimentaires. Les éléments de preuve anthropologique et archéologique étaient contradictoires. La présente cour préfère les témoignages de M. Stryd et de John Dewhurst [*sic*] à celui de M. Daly et, en conséquence, accepte que la culture des Sto:lo était celle d'une bande plutôt que d'une tribu. Même si les bandes étaient guidées par des siem ou familles importantes, il n'y avait pas de commerce organisé du saumon au temps des aborigènes. Le commerce qui se faisait résultait soit d'échanges faits à des fins rituelles soit d'échanges découlant d'occasions fortuites. Ces échanges avaient seulement un caractère accessoire. La preuve présentée par le ministère public que les Sto:lo ne disposaient pas de sel permettant de conserver le poisson est acceptée.

Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic.

I would add to Scarlett Prov. Ct. J.'s summation of his findings only the observation, which does not contradict any of his specific findings, that the testimony of the experts appearing before him indicated that such limited exchanges of salmon as took place in Sto:lo society were primarily linked to the kinship and family relationships on which Sto:lo society was based. For example, under cross-examination Dr. Daly described trade as occurring through the "idiom" of maintaining family relationships:

The medium or the idiom of much trade was the idiom of kinship, of providing hospitality, giving gifts, reciprocating in gifts. . . .

Similarly, Mr. Dewhirst testified that the exchange of goods was related to the maintenance of family and kinship relations.

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The facts as found by Scarlett Prov. Ct. J. do not support the appellant's claim that the exchange of salmon for money or other goods was an integral part of the distinctive culture of the Sto:lo. As has already been noted, in order to be recognized as an aboriginal right, an activity must be of central significance to the culture in question — it must be something which makes that culture what it is. The findings of fact made by Scarlett Prov. Ct. J. suggest that the exchange of salmon for money or other goods, while certainly taking place in Sto:lo society prior to contact, was not a significant, integral or defining feature of that society.

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First, Scarlett Prov. Ct. J. found that, prior to contact, exchanges of fish were only "incidental" to fishing for food purposes. As was noted above, to constitute an aboriginal right, a custom must

Les échanges de poisson étaient tributaires des conditions locales sur le plan de la disponibilité, du transport et de la conservation. C'est l'établissement de la Compagnie de la Baie d'Hudson au fort situé à Langley qui a créé le marché et le commerce du saumon frais. Les échanges de saumon séché au temps des aborigènes n'avaient, comme il a été dit plus tôt, qu'un caractère minimal et fortuit.

J'ajouterais uniquement au résumé que le juge Scarlett fait de ses conclusions l'observation suivante, qui ne contredit aucune de ses conclusions spécifiques, savoir que les dépositions des experts qui ont comparu devant lui ont indiqué que ces échanges limités de saumon dans la société sto:lo étaient reliés principalement aux rapports familiaux et de parenté sur lesquels cette société était fondée. Par exemple, au cours de son contre-interrogatoire, M. Daly a dit que les échanges survenaient par l'intermédiaire de l'[TRADUCTION] «idiome» du maintien des rapports familiaux:

[TRADUCTION] La plupart des échanges survenaient par l'intermédiaire de l'idiome de la parenté, de l'hospitalité de l'échange de cadeaux. . . .

De même, M. Dewhirst a témoigné que l'échange de biens se rattachait au maintien des rapports familiaux et de parenté.

Les faits constatés par le juge Scarlett de la Cour provinciale n'appuient pas la prétention de l'appelante que l'échange de saumon contre de l'argent ou d'autres biens faisait partie intégrante de la culture distinctive des Sto:lo. Comme il a été indiqué précédemment, pour être reconnue comme un droit ancestral, une activité doit avoir une importance fondamentale pour la culture concernée — elle doit être quelque chose qui fait de cette culture ce qu'elle est. Les conclusions de fait du juge Scarlett tendent à indiquer que les échanges de saumon contre de l'argent ou d'autres biens, quoiqu'il y en ait certainement eu dans la société sto:lo avant le contact avec les Européens, n'étaient pas une caractéristique déterminante ou importante de cette société, ni une partie intégrante de celle-ci.

Premièrement, le juge Scarlett a conclu que, avant le contact avec les Européens, les échanges de poisson n'étaient qu'un aspect «accessoire» de la pêche pratiquée à des fins alimentaires. Comme

itself be integral to the distinctive culture of the aboriginal community in question; it cannot be simply incidental to an integral custom. Thus, while the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Sto:lo culture, this is not sufficient, absent a demonstration that the exchange of salmon was itself a significant and defining feature of Sto:lo society, to demonstrate that the exchange of salmon is an integral part of Sto:lo culture.

For similar reasons, the evidence linking the exchange of salmon to the maintenance of kinship and family relations does not support the appellant's claim to the existence of an aboriginal right. Exchange of salmon as part of the interaction of kin and family is not of an independent significance sufficient to ground a claim for an aboriginal right to the exchange of fish for money or other goods.

Second, Scarlett Prov. Ct. J. found that there was no "regularized trading system" amongst the Sto:lo prior to contact. The inference drawn from this fact by Scarlett Prov. Ct. J., and by Macfarlane J.A. at the British Columbia Court of Appeal, was that the absence of a market means that the appellant could not be said to have been acting pursuant to an aboriginal right because it suggests that there is no aboriginal right to fish commercially. This inference is incorrect because, as has already been suggested, the appellant in this case has only claimed a right to exchange fish for money or other goods, not a right to sell fish in the commercial marketplace; the significance of the absence of regularized trading systems amongst the Sto:lo arises instead from the fact that it indicates that the exchange of salmon was not widespread in Sto:lo society. Given that the exchange of salmon was not widespread it cannot be said that, prior to contact, Sto:lo culture was defined by trade in salmon; trade or exchange of salmon took place, but the

il a été dit précédemment, pour constituer un droit ancestral, une coutume doit elle-même faire partie intégrante de la culture distinctive de la collectivité autochtone en cause, et ne pas être simplement un aspect accessoire d'une coutume qui serait partie intégrante de la culture concernée. En conséquence, même si la preuve a clairement démontré que la pêche à des fins alimentaires et rituelles était une caractéristique importante et déterminante de la culture sto:lo, ce fait n'est pas suffisant, en l'absence de preuve que l'échange de saumon était en soi une caractéristique importante et déterminante de la société sto:lo, pour établir que l'échange de saumon fait partie intégrante de la culture sto:lo.

Pour des motifs analogues, la preuve rattachant l'échange de saumon au maintien de rapports familiaux et de parenté n'étaye pas l'existence du droit ancestral revendiqué par l'appelante. Les échanges de saumon qui surviennent dans le cadre des rapports entre les membres de la famille et la parenté ne revêtent pas en soi une importance suffisante pour fonder la revendication d'un droit ancestral d'échanger du poisson contre de l'argent ou des biens.

Deuxièmement, le juge Scarlett a conclu qu'il n'existait pas de [TRADUCTION] «système de commerce organisé» chez les Sto:lo avant le contact avec les Européens. L'inférence qu'ont tirée de ce fait le juge Scarlett de la Cour provinciale et le juge Macfarlane de la Cour d'appel de la Colombie-Britannique était que, vu l'absence d'un marché, il était impossible d'affirmer que l'appelante avait agi en vertu d'un droit ancestral, étant donné que ce fait tend à indiquer qu'il n'existe pas de droit ancestral de pêcher à des fins commerciales. Cette inférence est incorrecte parce que, comme il a déjà été indiqué, en l'espèce l'appelante a revendiqué seulement le droit d'échanger du saumon contre de l'argent ou d'autres biens, et non le droit de vendre du poisson sur le marché. L'importance de l'absence de systèmes de commerce organisés chez les Sto:lo découle plutôt du fait que cette absence indique que l'utilisation du poisson comme monnaie d'échange n'était pas un phénomène répandu dans la société sto:lo. Comme les

absence of a market demonstrates that this exchange did not take place on a basis widespread enough to suggest that the exchange was a defining feature of Sto:lo society.

échanges de saumon n'étaient pas une activité répandue, il est impossible d'affirmer que, avant le contact avec les Européens, la culture sto:lo était définie par l'utilisation du saumon comme monnaie d'échange. Il y avait bien des échanges de saumon, mais l'absence de marché pour ce produit démontre que ces échanges n'étaient pas suffisamment répandus pour indiquer qu'ils étaient une caractéristique déterminante de la société sto:lo.

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Third, the trade engaged in between the Sto:lo and the Hudson's Bay Company, while certainly of significance to the Sto:lo society of the time, was found by the trial judge to be qualitatively different from that which was typical of the Sto:lo culture prior to contact. As such, it does not provide an evidentiary basis for holding that the exchange of salmon was an integral part of Sto:lo culture. As was emphasized in listing the criteria to be considered in applying the "integral to" test, the time relevant for the identification of aboriginal rights is prior to contact with European societies. Unless a post-contact practice, custom or tradition can be shown to have continuity with pre-contact practices, customs or traditions, it will not be held to be an aboriginal right. The trade of salmon between the Sto:lo and the Hudson's Bay Company does not have the necessary continuity with Sto:lo culture pre-contact to support a claim to an aboriginal right to trade salmon. Further, the exchange of salmon between the Sto:lo and the Hudson's Bay Company can be seen as central or significant to the Sto:lo primarily as a result of European influences; activities which become central or significant because of the influence of European culture cannot be said to be aboriginal rights.

Troisièmement, le commerce entre les Sto:lo et la Compagnie de la Baie d'Hudson, même s'il était certainement important pour la société sto:lo de cette époque, a été jugé par le juge du procès qualitativement différent de celui qui était typique de la culture sto:lo d'avant le contact avec les Européens. En conséquence, il ne constitue pas un élément de preuve permettant de conclure que l'échange de saumon faisait partie intégrante de la culture sto:lo. Comme il a été souligné dans l'énumération des facteurs à prendre en considération pour appliquer le critère de la «partie intégrante», la période pertinente pour l'identification des droits ancestraux est celle qui a précédé le contact avec les sociétés européennes. Sauf s'il est possible d'établir qu'une coutume, pratique ou tradition postérieure au contact avec les Européens marque une continuité avec les coutumes, pratiques ou traditions antérieures à cette période, la coutume, pratique ou tradition en question ne sera pas déclarée être à un droit ancestral. Le commerce du saumon entre les Sto:lo et la Compagnie de la Baie d'Hudson ne marque pas la continuité nécessaire avec la culture sto:lo antérieure au contact avec les Européens pour étayer la revendication d'un droit ancestral de faire le commerce du saumon. En outre, il est possible d'affirmer que le commerce du saumon entre les Sto:lo et la Compagnie de la Baie d'Hudson est devenu une activité fondamentale ou importante pour les Sto:lo principalement par suite des influences européennes. Les activités qui deviennent fondamentales ou importantes en raison de l'influence de la culture européenne ne peuvent être considérées comme des droits ancestraux.

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Finally, Scarlett Prov. Ct. J. found that the Sto:lo were at a band level of social organization

Finalement, le juge Scarlett a conclu que l'organisation sociale des Sto:lo était celle d'une bande

rather than at a tribal level. As noted by the various experts, one of the central distinctions between a band society and a tribal society relates to specialization and division of labour. In a tribal society there tends to be specialization of labour — for example, specialization in the gathering and trade of fish — whereas in a band society division of labour tends to occur only on the basis of gender or age. The absence of specialization in the exploitation of the fishery is suggestive, in the same way that the absence of regularized trade or a market is suggestive, that the exchange of fish was not a central part of Sto:lo culture. I would note here as well Scarlett Prov. Ct. J.'s finding that the Sto:lo did not have the means for preserving fish for extended periods of time, something which is also suggestive that the exchange or trade of fish was not central to the Sto:lo way of life.

For these reasons, then, I would conclude that the appellant has failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society which existed prior to contact. The exchange of fish took place, but was not a central, significant or defining feature of Sto:lo society. The appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*.

The Sparrow Test

Since the appellant has failed to demonstrate that the exchange of fish was an aboriginal right of the Sto:lo, it is unnecessary to consider the tests for extinguishment, infringement and justification laid out by this Court in *Sparrow, supra*.

VI. Disposition

Having concluded that the aboriginal rights of the Sto:lo do not include the right to exchange fish for money or other goods, I would dismiss the

plutôt que d'une tribu. Comme l'ont indiqué les divers experts, l'une des distinctions principales entre les sociétés tribales et celles organisées en bande concerne la spécialisation et la division des tâches. Dans les sociétés tribales, il tend à y avoir spécialisation des tâches — par exemple, spécialisation dans la pêche et l'échange du poisson — alors que dans les sociétés organisées en bande, la division des tâches tend à refléter seulement le sexe ou l'âge des participants. Tout comme l'absence de commerce organisé ou de marché, l'absence de spécialisation dans l'exploitation des ressources de la pêche tend à indiquer que l'échange de poisson n'était pas un élément fondamental de la culture sto:lo. Je tiens à également souligner ici la conclusion du juge Scarlett que les Sto:lo n'avaient pas de moyens de conserver le poisson pendant de longues périodes, autre élément qui tend à indiquer que les échanges de poisson n'étaient pas un aspect fondamental du mode de vie des Sto:lo.

Pour ces motifs, je conclurais donc que l'appelante n'a pas démontré que l'échange de poisson contre de l'argent ou d'autres biens faisait partie intégrante de la société sto:lo distinctive qui existait avant le contact avec les Européens. Il y avait des échanges de poisson, mais il ne s'agissait pas d'une caractéristique fondamentale, importante ou déterminante de la société sto:lo. L'appelante n'a donc pas démontré que l'échange de saumon contre de l'argent ou d'autres biens par les Sto:lo est un droit ancestral reconnu et confirmé par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Le critère établi dans Sparrow

Comme l'appelante n'a pas établi que l'échange de poisson était un droit ancestral des Sto:lo, il n'est pas nécessaire d'analyser les critères relatifs à l'extinction, à l'atteinte et à la justification énoncés par notre Cour dans l'arrêt *Sparrow*, précité.

VI. Dispositif

Comme j'ai conclu que les droits ancestraux des Sto:lo ne comprennent pas le droit d'échanger du poisson contre de l'argent ou d'autres biens, je suis

appeal and affirm the decision of the Court of Appeal restoring the trial judge's conviction of the appellant for violating s. 61(1) of the *Fisheries Act*. There will be no order as to costs.

d'avis de rejeter le pourvoi et de confirmer la décision de la Cour d'appel qui a rétabli la déclaration de culpabilité prononcée contre l'appelante par le juge du procès à l'égard de la violation du par. 61(1) de la *Loi sur les pêcheries*. Il n'y aura pas d'ordonnance concernant les dépens.

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For the reasons given above, the constitutional question must be answered as follows:

Pour les motifs qui précèdent, la question constitutionnelle doit recevoir la réponse suivante:

Question Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

Question Le paragraphe 27(5) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248, tel qu'il se lisait le 11 septembre 1987, est-il, dans les circonstances de la présente affaire, inopérant à l'égard de l'appelante en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'elle invoque?

Answer No.

Réponse Non.

The following are the reasons delivered by

Les motifs suivants ont été rendus par

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L'HEUREUX-DUBÉ J. (dissenting) — This appeal, as well as the appeals in *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, in which judgment is handed down concurrently, and the appeal in *R. v. Nikal*, [1996] 1 S.C.R. 1013, concern the definition of aboriginal rights as constitutionally protected under s. 35(1) of the *Constitution Act, 1982*.

LE JUGE L'HEUREUX-DUBÉ (dissidente) — Le présent pourvoi ainsi que les pourvois *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672 et *R. c. Gladstone*, [1996] 2 R.C.S. 723, dans lesquels jugement est rendu en même temps, et l'arrêt *R. c. Nikal*, [1996] 1 R.C.S. 1013 portent sur la définition des droits ancestraux qui bénéficient de la protection de la Constitution en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*.

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While the narrow issue in this particular case deals with whether the Sto:lo, of which the appellant is a member, possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, the broader issue is the interpretation of the nature and extent of constitutionally protected aboriginal rights.

Bien que la question restreinte qui se pose en l'espèce soit de savoir si les Sto:lo, dont l'appelante fait partie, possèdent un droit de pêche ancestral incluant le droit de vendre et d'échanger du poisson à des fins de subsistance, la question plus générale porte sur l'interprétation de la nature et de l'étendue des droits ancestraux protégés par la Constitution.

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The Chief Justice concludes that the Sto:lo do not possess an aboriginal right to exchange fish for money or other goods and that, as a result, the appellant's conviction under the *Fisheries Act*, R.S.C. 1970, c. F-14, should be upheld. Not only do I disagree with the result he reaches, but I also diverge from his analysis of the issue at bar, spe-

Le Juge en chef conclut que les Sto:lo ne possèdent pas le droit ancestral d'échanger du poisson contre de l'argent ou d'autres biens et que, en conséquence, la déclaration de culpabilité prononcée contre l'appelante en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14 devrait être confirmée. Je suis non seulement en désaccord avec ce résul-

cifically as to his approach to defining aboriginal rights and as to his delineation of the aboriginal right claimed by the appellant.

The Chief Justice has set out the facts and judgments and I will only briefly refer to them for a better understanding of what follows.

Dorothy Van der Peet, the appellant, was charged with violating s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, and, thereby, committing an offence contrary to s. 61(1) of the *Fisheries Act*. These charges arose out of the appellant's sale of 10 salmon caught by her common law spouse and his brother under the authority of an Indian food fish licence, issued pursuant to s. 27(1) of the Regulations. Section 27(5) of the *British Columbia Fishery (General) Regulations*, is the provision here under constitutional challenge; it provides:

27. . . .

(5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

The appellant, her common law husband and his brother are all members of the Sto:lo Band, part of the Coast Salish Nation. Both parties to this dispute accept that the appellant sold the fish, that the sale of the fish was contrary to the Regulations and that the fish were caught pursuant to a recognized aboriginal right to fish. The parties disagree, however, as to the nature of the Sto:lo's relationship with the fishery, particularly whether their right to fish encompasses the right to sell, trade and barter fish.

Scarlett Prov. Ct. J., the trial judge found on the evidence, [1991] 3 C.N.L.R. 155, that trade by the Sto:lo was incidental to fishing for food and was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. He held,

tat, mais également avec l'analyse que fait le Juge en chef de la question en litige, tout particulièrement avec sa façon de définir les droits ancestraux et la définition qu'il donne du droit ancestral revendiqué par l'appelante.

Le Juge en chef a exposé les faits et les jugements, et je ne les rappellerai que brièvement, pour permettre une meilleure compréhension de ce qui suit.

L'appelante, Dorothy Van der Peet, a été accusée d'avoir contrevenu au par. 27(5) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248, et d'avoir ainsi commis une infraction au par. 61(1) de la *Loi sur les pêcheries*. Le fait à l'origine des accusations est la vente par l'appelante de 10 saumons qui avaient été pris par son conjoint de fait et le frère de celui-ci en vertu d'un permis de pêche de subsistance des Indiens délivré conformément au par. 27(1) du *Règlement*. Le paragraphe 27(5) du *Règlement de pêche général de la Colombie-Britannique*, disposition qui fait l'objet de la contestation constitutionnelle en l'espèce, se lit ainsi:

27. . . .

(5) Il est interdit à quiconque de vendre, d'échanger ou d'offrir de vendre ou d'échanger du poisson pris en vertu d'un permis de pêche de subsistance des Indiens.

L'appelante, son conjoint de fait et le frère de celui-ci sont tous des membres de la bande des Sto:lo, qui fait partie de la nation des Salish de la côte. Les deux parties au présent pourvoi conviennent que l'appelante a vendu du poisson, que cette vente contrevenait au *Règlement* et que les poissons ont été pris conformément à un droit de pêche ancestral reconnu. Cependant, elles ne s'entendent pas sur la nature des rapports qu'entretiennent les Sto:lo avec la pêche, et tout particulièrement sur la question de savoir si le droit de pêche inclut le droit de vendre et d'échanger du poisson.

Le juge du procès, le juge Scarlett de la Cour provinciale, a conclu que, à la lumière de la preuve, [1991] 3 C.N.L.R. 155, les échanges faits par les Sto:lo étaient un aspect accessoire de la pêche pratiquée à des fins alimentaires et qu'ils

therefore, that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell and found the appellant guilty as charged.

étaient effectués soit à des fins rituelles soit dans le cadre d'occasions fortuites. Il a en conséquence statué que le droit ancestral de pêcher à des fins alimentaires et rituelles n'incluait pas le droit de vendre le poisson, et il a déclaré l'appelante coupable des accusations dont elle faisait l'objet.

102 On appeal to the British Columbia Supreme Court, (1991), 58 B.C.L.R. (2d) 392, Selbie J., the summary appeal judge, gave a different interpretation to the oral testimony, expert evidence and archaeological records. In his view, the evidence demonstrated that the Sto:lo's relationship with the fishery was broad enough to include the trade of fish since the Sto:lo who caught fish in their original aboriginal society could do whatever they wanted with that fish. He overturned the appellant's conviction and entered an acquittal.

En appel devant la Cour suprême de la Colombie-Britannique (1991), 58 B.C.L.R. (2d) 392, le juge d'appel Selbie des poursuites sommaires a interprété différemment les dépositions orales, la preuve offerte par les experts et les documents archéologiques. À son avis, la preuve établissait que les rapports qu'entretenait la bande des Sto:lo avec la pêcherie étaient suffisamment larges pour inclure le commerce du poisson puisque les premiers Sto:lo pouvaient faire ce qu'ils voulaient avec ce poisson. Le juge Selbie a écarté la déclaration de culpabilité et acquitté l'appelante.

103 At the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 75, the findings and verdict of the trial judge were restored. The majority of the Court of Appeal, *per* Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A., found that the Sto:lo engaged only in casual exchanges of fish and that this was entirely different from fishing for commercial and market purposes. Lambert J.A., dissenting, held that the best description of the aboriginal practices, traditions and customs of the Sto:lo was one which included the sale, trade and barter of fish. Also dissenting, Hutcheon J.A. focused on the evidence demonstrating that by 1846, the date of British sovereignty, trade in salmon was taking place in the Sto:lo community.

La Cour d'appel de la Colombie-Britannique (1993), 80 B.C.L.R. (2d) 75, a rétabli les conclusions et la décision du juge du procès. La Cour d'appel à la majorité — les juges Macfarlane (avec l'appui du juge Taggart) et Wallace — a conclu que les Sto:lo ne faisaient que des échanges fortuits de poisson, activité complètement différente de la pêche qui est pratiquée à des fins commerciales, pour approvisionner un marché. Le juge Lambert, dissident, a conclu que la meilleure façon de décrire les coutumes, pratiques et traditions autochtones des Sto:lo était de dire qu'elles incluaient les activités de vente et d'échange de poisson. Le juge Hutcheon, également dissident, s'est attaché à la preuve établissant que, en 1846, date d'affirmation de la souveraineté britannique, on faisait le commerce du saumon dans la collectivité Sto:lo.

104 Leave to appeal was granted by this Court and the Chief Justice stated the following constitutional question:

Notre Cour a accueilli la demande d'autorisation de pourvoi et le Juge en chef a formulé la question constitutionnelle suivante:

Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

Le paragraphe 27(5) du *Règlement de pêche général de la Colombie-Britannique*, DORS-84-248, tel qu'il se lisait le 11 septembre 1987, est-il, dans les circonstances de la présente affaire, inopérant à l'égard de l'appelante en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'elle invoque?

In my view, the definition of aboriginal rights as to their nature and extent must be addressed in the broader context of the historical aboriginal reality in Canada. Therefore, before going into the specific analysis of aboriginal rights protected under s. 35(1), a review of the legal evolution of aboriginal history is in order.

I. Historical and General Background

It is commonly accepted that the first aboriginal people of North America came from Siberia, over the Bering terrestrial bridge, some 12,000 years ago. They found a *terra nullius* and gradually began to explore and populate the territory. These people have always enjoyed, whether as nomadic or sedentary communities, some kind of social and political structure. Accordingly, it is fair to say that prior to the first contact with the Europeans, the native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs.

In that regard, it is useful to acknowledge the findings of Marshall C.J. of the United States Supreme Court in the so-called trilogy, comprised of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Particularly in *Worcester*, Marshall C.J.'s general description of aboriginal societies in North America is apropos (at pp. 542-43):

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.

This passage was quoted, with approval, by Hall J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 383. Also in *Calder*,

À mon avis, la détermination de la nature et de l'étendue des droits ancestraux doit se faire dans le contexte plus général de la réalité historique autochtone au Canada. En conséquence, avant d'entamer l'analyse spécifique des droits ancestraux protégés par le par. 35(1), il convient d'examiner l'évolution juridique de l'histoire autochtone.

I. Le contexte historique général

Il semble généralement reconnu que les premiers habitants de l'Amérique du Nord sont venus de Sibérie, il y a quelque 12,000 ans, par le pont terrestre de Béring. Ils ont trouvé une *terra nullius*, qu'ils ont progressivement explorée et peuplée. Ces gens ont toujours possédé, autant comme communautés nomades que comme communautés sédentaires, une certaine forme d'organisation sociale et politique. En conséquence, il est juste d'affirmer que les peuples autochtones d'Amérique du Nord étaient, avant les premiers contacts avec les Européens, des nations indépendantes qui occupaient et contrôlaient leur propre territoire et possédaient une culture distinctive ainsi que leurs propres coutumes, pratiques et traditions.

À cet égard, il est utile de faire état des conclusions du juge en chef Marshall de la Cour suprême des États-Unis dans ce qu'on appelle la trilogie, savoir les arrêts suivants: *Johnson c. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation c. Georgia*, 30 U.S. (5 Pet.) 1 (1831) et *Worcester c. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Dans *Worcester*, tout particulièrement, le juge en chef Marshall a donné une description générale pertinente des sociétés autochtones d'Amérique du Nord (aux pp. 542 et 543):

[TRADUCTION] L'Amérique, séparée de l'Europe par un vaste océan, était habitée par un peuple différent, divisé en nations distinctes, indépendantes l'une de l'autre et vis-à-vis du reste du monde; elles avaient leurs propres institutions et se gouvernaient elles-mêmes en vertu de leurs propres lois.

Cet extrait a été cité et approuvé par le juge Hall dans l'arrêt *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313, à la

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Judson J., for the majority in the result, made the following observations at p. 328:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the 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. [Emphasis added.]

See also, regarding the independent character of aboriginal nations, the remarks of Lamer J. (as he then was) in *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1053.

108 At the time of the first formal arrival of the Europeans, in the sixteenth century, most of the territory of what is now Canada was occupied and used by aboriginal people. From the earliest point, however, the settlers claimed sovereignty in the name of their home country. Traditionally, there are four principles upon which states have relied to justify the assertion of sovereignty over new territories: see Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (1979). These are: (1) conquest, (2) cession, (3) annexation, and (4) settlement, i.e., acquisition of territory that was previously unoccupied or is not recognized as belonging to another political entity.

109 In the eyes of international law, the settlement thesis is the one rationale which can most plausibly justify European sovereignty over Canadian territory and the native people living on it (see Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995), 21 *Queen's L.J.* 173) although there is still debate as to whether the land was indeed free for occupation. See Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991), 29 *Osgoode Hall L.J.* 681, and Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984).

110 In spite of the sovereignty proclamation, however, the early practices of the British recognized

p. 383. Dans ce même arrêt, le juge Judson, s'exprimant au nom de la majorité, a fait les observations suivantes, à la p. 328:

Je crois qu'il est clair qu'en Colombie-Britannique, le titre indien ne peut pas avoir pour origine la Proclamation de 1763, mais il reste que lorsque les colons sont arrivés, les Indiens étaient déjà là, ils étaient organisés en sociétés et occupaient les terres comme leurs ancêtres l'avaient fait depuis des siècles. [Je souligne.]

En ce qui concerne le caractère indépendant des nations autochtones, voir aussi les remarques du juge Lamer (maintenant Juge en chef) dans l'arrêt *R. c. Sioui*, [1990] 1 R.C.S. 1025, à la p. 1053.

Au seizième siècle, à l'époque de l'arrivée officielle des Européens, la majeure partie du territoire qui est aujourd'hui le Canada était occupée et utilisée par les peuples autochtones. Cependant, dès leur arrivée, les colons ont affirmé la souveraineté de leur mère patrie sur ce territoire. Traditionnellement, quatre principes ont été invoqués par les États pour affirmer leur souveraineté sur de nouveaux territoires: voir Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (1979). Ces principes sont: (1) la conquête, (2) la cession, (3) l'annexion, et (4) la colonisation, c'est-à-dire l'acquisition d'un territoire qui n'était pas occupé auparavant ou qui n'était pas reconnu comme appartenant à une autre entité politique.

En droit international, c'est le principe de la colonisation qui permet de justifier de la façon la plus plausible la souveraineté européenne sur le territoire canadien et les autochtones qui l'habitaient (voir Patrick Macklem, «Normative Dimensions of an Aboriginal Right of Self-Government» (1995), 21 *Queen's L.J.* 173), quoique la question de savoir s'il s'agissait d'un territoire libre qui pouvait être occupé continue d'être débattue. (Voir Brian Slattery, «Aboriginal Sovereignty and Imperial Claims» (1991), 29 *Osgoode Hall L.J.* 681, et Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984).

Malgré la proclamation de souveraineté, cependant, par les pratiques qu'ils ont appliquées au

aboriginal title or rights and required their extinguishment by cession, conquest or legislation: see André Émond, "Existe-t-il un titre indien originaire dans les territoires cédés par la France en 1763?" (1995), 41 *McGill L.J.* 59, at p. 62. This tradition of the British imperial power (either applied directly or after French capitulation) was crystallized in the *Royal Proclamation of 1763*, R.S.C., 1985, App. II, No. 1.

In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, Dickson C.J. and La Forest J. wrote the following regarding Crown sovereignty and British practices *vis-à-vis* aboriginal people at p. 1103:

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

See also André Émond, "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale" (1996), 30 *R.J.T.* 1, at p. 1.

As a result, it has become accepted in Canadian law that aboriginal title, and aboriginal rights in general, derive from historic occupation and use of ancestral lands by the natives and do not depend on any treaty, executive order or legislative enactment: see *Calder v. Attorney-General of British Columbia*, *supra*, at p. 390, *per* Hall J., confirmed in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 379, *per* Dickson J. (as he then was), and *Sparrow*, *supra*; see also the decision of the High Court of Australia in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1. See also Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 *Queen's L.J.* 232, at p. 242, and Peter W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992) at p. 679. This position is known as the "inherent theory" of aboriginal rights, as contrasted with the "contingent theory" of aboriginal rights: see Michael Asch and Patrick Macklem,

départ les Britanniques reconnaissaient les titres autochtones ou droits ancestraux et ils exigeaient qu'ils aient été éteints par cession, conquête ou législation: voir André Émond, «Existe-t-il un titre indien originaire dans les territoires cédés par la France en 1763?» (1995), 41 *R.D. McGill* 59, à la p. 62. La *Proclamation royale de 1763*, L.R.C. (1985), app. II, n° 1, a cristallisé cette tradition du pouvoir impérial britannique (qui s'est appliquée soit directement, soit après la capitulation de la France).

Dans *R. c. Sparrow*, [1990] 1 R.C.S. 1075, le juge en chef Dickson et le juge La Forest ont écrit ce qui suit relativement à la souveraineté de Sa Majesté et aux pratiques britanniques vis-à-vis des peuples autochtones (à la p. 1103):

Il convient de rappeler que bien que la politique britannique envers la population autochtone fût fondée sur le respect de leur droit d'occuper leurs terres ancestrales, comme en faisait foi la Proclamation royale de 1763, dès le départ, on n'a jamais douté que la souveraineté et la compétence législative, et même le titre sous-jacent, à l'égard de ces terres revenaient à Sa Majesté. . .

Voir aussi André Émond, «Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale» (1996), 30 *R.J.T.* 1, à la p. 1.

En conséquence, il est maintenant reconnu en droit canadien que le titre autochtone et les droits ancestraux en général découlent de l'occupation et de l'utilisation historiques des terres ancestrales par les autochtones et qu'ils ne sont pas tributaires de quelque traité, décret ou mesure législative: *Calder c. Procureur général de la Colombie-Britannique*, précité, à la p. 390, le juge Hall; confirmé dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335, à la p. 379, le juge Dickson (plus tard Juge en chef) et *Sparrow*, précité; voir également l'arrêt *Mabo c. Queensland [No. 2]* (1992), 175 C.L.R. 1 de la High Court of Australia. Voir aussi Brian Slattery, «The Constitutional Guarantee of Aboriginal and Treaty Rights» (1983), 8 *Queen's L.J.* 232, à la p. 242, et Peter W. Hogg, *Constitutional Law of Canada* (3^e éd. 1992), à la p. 679. Cette position est la [TRADUCTION] «théorie du caractère inhérent» des droits ancestraux, par

“Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991), 29 *Alta. L. Rev.* 498, Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991), 36 *McGill L.J.* 382, and Kent McNeil, *Common Law Aboriginal Title* (1989).

opposition à la «théorie du caractère conditionnel» des droits ancestraux: voir Michael Asch and Patrick Macklem, «Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*» (1991), 29 *Alta. L. Rev.* 498, Patrick Macklem, «First Nations Self-Government and the Borders of the Canadian Legal Imagination» (1991), 36 *R.D. McGill* 382, et Kent McNeil, *Common Law Aboriginal Title* (1989).

113 Aboriginal people's occupation and use of North American territory was not static, nor, as a general principle, should be the aboriginal rights flowing from it. Natives migrated in response to events such as war, epidemic, famine, dwindling game reserves, etc. Aboriginal practices, traditions and customs also changed and evolved, including the utilisation of the land, methods of hunting and fishing, trade of goods between tribes, and so on. The coming of Europeans increased this fluidity and development, bringing novel opportunities, technologies and means to exploit natural resources: see Brian Slattery, “Understanding Aboriginal Rights” (1987), 66 *Can. Bar Rev.* 727, at pp. 741-42. Accordingly, the notion of aboriginal rights must be open to fluctuation, change and evolution, not only from one native group to another, but also over time.

L'occupation et l'utilisation du territoire de l'Amérique du Nord par les peuples autochtones n'étaient pas statiques et, en règle générale, les droits ancestraux en découlant ne devraient pas l'être non plus. Poussés par divers événements telles des guerres, des épidémies, des famines et la rareté du gibier, les autochtones migraient. De même, leurs coutumes, pratiques et traditions changeaient et évoluaient, notamment l'utilisation des terres, les méthodes de chasse et de pêche, l'échange de biens entre tribus. L'arrivée des Européens a accru ces déplacements et ces changements, créant de nouvelles occasions et introduisant de nouvelles techniques et méthodes d'exploitation des ressources naturelles: voir Brian Slattery, «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727, aux pp. 741 et 742. En conséquence, la notion de droits ancestraux doit pouvoir fluctuer, changer et évoluer, non seulement d'un groupe autochtone à l'autre, mais aussi dans le temps.

114 Aboriginal interests arising out of natives' original occupation and use of ancestral lands have been recognized in a body of common law rules referred to as the doctrine of aboriginal rights: see Brian Slattery, “Understanding Aboriginal Rights”, *supra*, at p. 732. These principles define the terms upon which the Crown acquired sovereignty over native people and their territories.

Les intérêts autochtones découlant de leur occupation et utilisation originales des terres ancestrales ont été reconnus dans un ensemble de règles de common law appelées doctrine des droits ancestraux; voir Brian Slattery, «Understanding Aboriginal Rights», *loc. cit.*, à la p. 732. Ces principes définissent les conditions auxquelles Sa Majesté a acquis la souveraineté sur les autochtones et leur territoire.

115 The traditional and main component of the doctrine of aboriginal rights relates to aboriginal title, i.e., the *sui generis* proprietary interest which gives native people the right to occupy and use the land at their own discretion, subject to the Crown's ultimate title and exclusive right to purchase the land: see *St. Catherine's Milling and Lumber Co. v. The*

La principale composante traditionnelle de la doctrine des droits ancestraux concerne le titre aborigène, c'est-à-dire le droit foncier *sui generis* qui confère aux autochtones le droit d'occuper et d'utiliser à leur gré les terres visées, sous réserve du fait que c'est Sa Majesté qui, en dernier ressort, en détient le titre et possède le droit exclusif

Queen (1888), 14 A.C. 46 (P.C.), at p. 54, *Calder v. Attorney-General of British Columbia*, *supra*, at p. 328, *per* Judson J., and at p. 383, *per* Hall J., and *Guerin*, *supra*, at pp. 378 and 382, *per* Dickson J. (as he then was).

The concept of aboriginal title, however, does not capture the entirety of the doctrine of aboriginal rights. Rather, as its name indicates, the doctrine refers to a broader notion of aboriginal rights arising out of the historic occupation and use of native ancestral lands, which relate not only to aboriginal title, but also to the component elements of this larger right — such as aboriginal rights to hunt, fish or trap, and their accompanying practices, traditions and customs — as well as to other matters, not related to land, that form part of a distinctive aboriginal culture: see W. I. C. Binnie, “The Sparrow Doctrine: Beginning of the End or End of the Beginning?” (1990), 15 *Queen’s L.J.* 217, and Douglas Sanders, “The Rights of the Aboriginal Peoples of Canada” (1983), 61 *Can. Bar Rev.* 314.

This brings me to the different type of lands on which aboriginal rights can exist, namely reserve lands, aboriginal title lands, and aboriginal right lands: see Brian Slattery, “Understanding Aboriginal Rights”, *supra*, at pp. 743-44. The common feature of these lands is that the Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of aboriginal people, which is the result of the British assertion of sovereignty over Canadian territory. There are, however, important distinctions to draw between these types of lands with regard to the legislation applicable and claims of aboriginal rights.

Reserve lands are those lands reserved by the Federal Government for the exclusive use of Indian people; such lands are regulated under the *Indian Act*, R.S.C., 1985, c. I-5. On reserve lands, federal legislation, pursuant to s. 91(24) of the

d’acheter les terres en question: voir *St. Catherine’s Milling and Lumber Co. c. The Queen* (1888), 14 A.C. 46 (C.P.), à la p. 54, *Calder c. Procureur général de la Colombie-Britannique*, précité, à la p. 328, le juge Judson et à la p. 383, le juge Hall, et *Guerin*, précité, aux pp. 378 et 382, le juge Dickson (plus tard Juge en chef).

Cependant, le titre aborigène ne représente pas l’ensemble de la doctrine des droits ancestraux. Au contraire, comme son nom l’indique, cette doctrine vise un ensemble plus grand de droits fondés sur l’occupation et l’utilisation historiques par les autochtones de leurs terres ancestrales, qui comprend non seulement le titre aborigène, mais aussi les éléments constitutifs de ce droit plus large — tels les droits de chasse, de pêche et de piégeage ancestraux, et les coutumes, pratiques et traditions connexes — ainsi que d’autres éléments qui font partie intégrante de la culture autochtone distinctive visée, mais ne se rapportent pas au territoire: voir W. I. C. Binnie, «The Sparrow Doctrine: Beginning of the End or End of the Beginning?» (1990), 15 *Queen’s L.J.* 217, et Douglas Sanders, «The Rights of the Aboriginal Peoples of Canada» (1983), 61 *R. du B. can.* 314.

Cela m’amène aux différents types de terres auxquelles peuvent se rattacher des droits ancestraux: les terres des réserves, les terres visées par un titre aborigène et les terres visées par un droit ancestral: voir Brian Slattery, «Understanding Aboriginal Rights», *loc. cit.*, aux pp. 743 et 744. Ces terres ont en commun le fait que le législateur fédéral et, dans une certaine mesure, les assemblées législatives provinciales possèdent un pouvoir général de légiférer à l’égard des activités des autochtones, pouvoir qui découle de l’affirmation de la souveraineté britannique sur le territoire canadien. Cependant, des distinctions importantes doivent être faites entre ces divers types de terres quant aux lois qui leur sont applicables et aux droits ancestraux qui peuvent y être revendiqués.

Les terres des réserves sont les terres qui sont réservées par le gouvernement fédéral pour l’usage exclusif des Indiens. Ces terres sont régies par la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5. S’applique sur ces terres et les lois fédérales, conformé-

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Constitution Act, 1867, as well as provincial laws of general application, pursuant to s. 88 of the *Indian Act*, are applicable. However, under s. 81 of the *Indian Act*, band councils can enact by-laws, for particular purposes specified therein, which supplant incompatible provincial legislation — even that enacted under s. 88 of the Act — as well as incompatible federal legislation — in so far as the Minister of Indian Affairs has not disallowed the by-laws pursuant to s. 82 of the Act. The latter scenario was the foundation of the claims in *R. v. Lewis*, [1996] 1 S.C.R. 921, and partly in *R. v. Nikal*, *supra*.

ment au par. 91(24) de la *Loi constitutionnelle de 1867*, et les lois provinciales d'application générale, conformément à l'art. 88 de la *Loi sur les Indiens*. Cependant, les conseils de bande peuvent, en vertu de l'art. 81 de la *Loi sur les Indiens*, décréter des règlements administratifs pour les fins particulières précisées dans cette disposition. Ces règlements administratifs remplacent les lois provinciales incompatibles — même celles édictées en vertu de l'art. 88 de la Loi — ainsi que les lois fédérales incompatibles — dans la mesure où le ministre des Affaires indiennes ne désavoue pas les règlements administratifs en question conformément à l'art. 82 de la Loi. Ce dernier scénario était le fondement des réclamations à l'origine de l'arrêt *R. c. Lewis*, [1996] 1 R.C.S. 921, et il l'était en partie dans *R. c. Nikal*, précité.

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Aboriginal title lands are lands which the natives possess for occupation and use at their own discretion, subject to the Crown's ultimate title (see *Guerin v. The Queen*, *supra*, at p. 382); federal and provincial legislation applies to aboriginal title lands, pursuant to the governments' respective general legislative authority. Aboriginal title of this kind is founded on the common law and strict conditions must be fulfilled for such title to be recognized: see *Calder v. Attorney-General of British Columbia*, *supra*, and *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518. In fact, aboriginal title exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest to occupy and use the land. It follows that aboriginal rights can be incidental to aboriginal title but need not be; these rights are severable from and can exist independently of aboriginal title. As I have already noted elsewhere, the source of these rights is the historic occupation and use of ancestral lands by the natives.

Les terres visées par un titre aborigène sont les terres que possèdent les autochtones et qu'ils peuvent occuper et utiliser à leur gré, sous réserve du fait que c'est Sa Majesté qui, en dernier ressort, en détient le titre (voir *Guerin c. La Reine*, précité, à la p. 382). Les lois fédérales et provinciales s'appliquent aux terres visées par un titre aborigène, conformément au pouvoir général de légiférer respectif de ces deux ordres de gouvernement. Un titre aborigène de cette nature est fondé sur la common law et doit respecter des conditions strictes pour être reconnu: voir *Calder c. Procureur général de la Colombie-Britannique*, précité; et *Baker Lake c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518. De fait, le titre aborigène existe lorsque l'ensemble des droits ancestraux est suffisamment important pour commander la reconnaissance d'un droit foncier *sui generis* d'occupation et d'utilisation des terres visées. Il s'ensuit que des droits ancestraux peuvent être des éléments accessoires d'un titre aborigène, mais pas nécessairement. Ces droits sont dissociables du titre aborigène et peuvent exister indépendamment de celui-ci. Comme je l'ai déjà mentionné, la source de ces droits est l'occupation et l'utilisation historiques par les autochtones de leurs terres ancestrales.

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Aboriginal title can also be founded on treaties concluded between the natives and the competent

Un titre aborigène peut également être fondé sur un traité entre les autochtones concernés et le gou-

government: see *Simon v. The Queen*, [1985] 2 S.C.R. 387, and *R. v. Horseman*, [1990] 1 S.C.R. 901. Where this occurs, the aboriginal rights crystallized in the treaty become treaty rights and their scope must be delineated by the terms of the agreement. The rights arising out of a treaty are immune from provincial legislation — even that enacted under s. 88 of the *Indian Act* — unless the treaty incorporates such legislation, as in *R. v. Badger*, [1996] 1 S.C.R. 771. A treaty, however, does not exhaust aboriginal rights; such rights continue to exist apart from the treaty, provided that they are not substantially connected to the rights crystallized in the treaty or extinguished by its terms.

Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. In these cases, the aboriginal rights on the land are restricted to residual portions of the aboriginal title — such as the rights to hunt, fish or trap — or to other matters not connected to land; they do not, therefore, entail the full *sui generis* proprietary right to occupy and use the land.

Both the Canadian Parliament and provincial legislatures can enact legislation, pursuant to their respective general legislative competence, that affect native activities on aboriginal right lands. As Cory J. puts it in *Nikal*, *supra* (at para. 92): “[t]he government must ultimately be able to determine and direct the way in which these rights [of the natives and of the rest of Canadian society] should interact”. See also, *Calder v. Attorney-General of British Columbia*, *supra*, at pp. 328-29, *per* Judson J., and at p. 401, *per* Hall J; *Guerin*, *supra*, at pp. 377-78, *Sparrow*, *supra*, at p. 1103, and

vernement compétent: voir *Simon c. La Reine*, [1985] 2 R.C.S. 387, et *R. c. Horseman*, [1990] 1 R.C.S. 901. Dans un tel cas, les droits ancestraux cristallisés dans le traité deviennent des droits issus de traités et leur portée doit être déterminée eu égard aux conditions de cet accord. Les droits découlant d'un traité sont soustraits à l'application des lois provinciales — même celles édictées en vertu de l'art. 88 de la *Loi sur les Indiens* — sauf si le traité incorpore ces lois, voir l'arrêt *R. c. Badger*, [1996] 1 R.C.S. 771. Cependant, un traité ne fait pas disparaître les droits ancestraux. De tels droits continuent d'exister, indépendamment du traité, pourvu qu'ils ne se rattachent pas de façon importante aux droits qui ont été cristallisés dans le traité ou éteints par les conditions de celui-ci.

Enfin, les terres visées par un droit ancestral sont les terres auxquelles ne peuvent se rattacher que des droits ancestraux spécifiques (p. ex., le droit de chasser à des fins alimentaires, sociales et rituelles), parce que l'occupation et l'utilisation des terres par le groupe autochtone concerné sont trop limitées et, en conséquence, ne respectent pas le critère applicable en vue de la reconnaissance, en common law, d'un titre aborigène. Dans de tels cas, les droits ancestraux visant ces terres se limitent aux aspects résiduels du titre aborigène — tel le droit de chasser, de pêcher ou de piéger — ou à d'autres aspects ne se rapportant pas au territoire. Ces droits ne comportent donc pas le plein droit de propriété *sui generis* d'occuper et d'utiliser les terres.

Tant le législateur fédéral que les assemblées législatives provinciales peuvent édicter, conformément à leur pouvoir général respectif de légiférer, des mesures législatives applicables aux activités des autochtones sur les terres visées par des droits ancestraux. Comme le dit le juge Cory dans l'arrêt *R. c. Nikal*, précité (au par. 92): «[l]e gouvernement doit, en dernier ressort, être capable d'établir ou de régir la façon dont ces droits [ceux des autochtones et du reste de la société canadienne] devraient interagir». Voir aussi *Calder c. Procureur général de la Colombie-Britannique*, précité, aux pp. 328 et 329, le juge Judson, et à la p. 401, le juge Hall, *Guerin*, précité, aux pp. 377 et

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Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, at p. 109.

378, *Sparrow*, précité, à la p. 1103 et *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85, à la p. 109.

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These types of lands are not static or mutually exclusive. A piece of land can be conceived of as aboriginal title land and later become reserve land for the exclusive use of Indians; such land is then, reserve land on aboriginal title land. Further, aboriginal title land can become aboriginal right land because the occupation and use by the particular group of aboriginal people has narrowed to specific activities. The bottom line is this: on every type of land described above, to a larger or smaller degree, aboriginal rights can arise and be recognized.

Le classement d'une terre dans un type donné n'est pas immuable. De plus, une terre peut appartenir à plus d'un type. Ainsi, on peut imaginer que des terres qualifiées de terres visées par un titre aborigène deviennent par la suite des terres de réserve mises de côté pour l'usage exclusif des Indiens. Ces terres sont alors des terres de réserve situées sur des terres visées par un titre aborigène. Par ailleurs, des terres visées par un titre aborigène peuvent devenir des terres visées par un droit ancestral, si le groupe autochtone concerné ne les occupent et ne les utilisent que pour des activités spécifiques. Bref, la situation est la suivante: sur chacun des types de terres que j'ai décrits précédemment, des droits ancestraux peuvent naître et être reconnus, dans une plus ou moins grande mesure.

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This being said, the instant case is confined to the recognition of an aboriginal right and does not involve by-laws on a reserve or claims of aboriginal title, nor does it relate to any treaty rights. The contention of the appellant is simply that the Sto:lo, of which she is one, possess an aboriginal right to fish — arising out of the historic occupation and use of their lands — which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes.

Cela dit, le présent pourvoi ne vise qu'à faire reconnaître un droit ancestral et il ne met en jeu ni règlement administratif décrété dans une réserve ni revendication d'un titre aborigène, et il ne concerne aucun droit issu de traité. L'appelante soutient simplement que le peuple Sto:lo, dont elle fait partie, possède — du fait de l'occupation et de l'utilisation historiques de ses terres — un droit de pêche ancestral qui inclut le droit de vendre et d'échanger du poisson à des fins de subsistance.

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Prior to 1982, the doctrine of aboriginal rights was founded only on the common law and aboriginal rights could be extinguished by treaty, conquest and legislation as they were "dependent upon the good will of the Sovereign": see *St. Catherine's Milling and Lumber Co. v. The Queen*, *supra*, at p. 54, also *R. v. George*, [1966] S.C.R. 267, *Sikyea v. The Queen*, [1964] S.C.R. 642, and *Calder v. Attorney-General of British Columbia*, *supra*; see also, regarding the mode of extinguishing aboriginal rights, Kenneth Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of *Calder*" (1973), 51 *Can. Bar Rev.* 450.

Avant 1982, la doctrine des droits ancestraux n'était fondée que sur la common law, et les droits ancestraux pouvaient en conséquence être éteints par traité, par conquête et par voie législative puisqu'ils [TRADUCTION] «dépendaient de la bonne volonté du Souverain»: voir *St. Catherine's Milling and Lumber Co. c. The Queen*, précité, à la p. 54, *R. c. George*, [1966] R.C.S. 267, *Sikyea c. The Queen*, [1964] R.C.S. 642 et *Calder c. Procureur général de la Colombie-Britannique*, précité; voir aussi, en ce qui concerne le mode d'extinction des droits ancestraux, Kenneth Lysyk, «The Indian Title Question in Canada: An Appraisal in the Light of *Calder*» (1973), 51 *R. du B. can.* 450.

Since then, however, s. 35(1) of the *Constitution Act, 1982* provides constitutional protection to aboriginal interests arising out of the native historic occupation and use of ancestral lands through the recognition and affirmation of "existing aboriginal and treaty rights of the aboriginal peoples of Canada": see Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992), 71 *Can. Bar Rev.* 261, at p. 263. Consequently, as I shall examine in some detail, the general legislative authority over native activities is now limited and legislation which infringes upon existing aboriginal or treaty rights must be justified.

The general analytical framework developed under s. 35(1) will now be outlined before proceeding with the interpretation of the nature and extent of constitutionally protected aboriginal rights.

II. Section 35(1) of the *Constitution Act, 1982* and the *Sparrow* Test

The analysis of the issue before us must start with s. 35(1) of the *Constitution Act, 1982*, found in Part II of that Act entitled "Rights of the Aboriginal Peoples of Canada", which provides:

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

The scope of s. 35(1) was discussed in *Sparrow*, *supra*. In that case, a member of the Musqueam Band, Ronald Edward Sparrow, was charged under s. 61(1) of the *Fisheries Act* with the offence of fishing with a drift-net in excess of the 25-fathom depth permitted by the terms of the band's Indian food fishing licence. The fishing occurred in a narrow channel of the Fraser River, a few miles upstream from Vancouver International Airport. Sparrow readily admitted having fished as alleged, but he contended that, because the Musqueam had an aboriginal right to fish, the attempt to regulate net length was inconsistent with s. 35(1) and was

Depuis ce temps, cependant, le par. 35(1) de la *Loi constitutionnelle de 1982* confère la protection de la Constitution aux intérêts des autochtones qui découlent de l'occupation et de l'utilisation historiques par ceux-ci de leurs terres ancestrales, en reconnaissant et en confirmant «[l]es droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada»: voir Brian Slattery, «First Nations and the Constitution: A Question of Trust» (1992), 71 *R. du B. can.* 261, à la p. 263. En conséquence, comme je l'examinerai de façon approfondie, le pouvoir général de légiférer à l'égard des activités des autochtones est maintenant limité, et toute mesure législative portant atteinte à des droits ancestraux ou issus de traités doit être justifiée.

Avant de passer à l'interprétation de la nature et de l'étendue des droits ancestraux protégés par la Constitution, je vais exposer ci-après le cadre d'analyse général qui a été élaboré pour l'application du par. 35(1).

II. Le paragraphe 35(1) de la *Loi constitutionnelle de 1982* et le test établi dans *Sparrow*

L'analyse de la question dont nous sommes saisis commence par l'examen du par. 35(1) de la *Loi constitutionnelle de 1982*, qui figure à la partie II de cette loi et qui est intitulée «Droits des peuples autochtones du Canada». Ce paragraphe est ainsi rédigé:

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

La portée du par. 35(1) a été examinée dans *Sparrow*, précité. Dans cette affaire, un membre de la bande indienne des Musqueams, Ronald Edward Sparrow, avait été accusé, en vertu du par. 61(1) de la *Loi sur les pêcheries*, d'avoir pêché avec un filet dérivant plus long que les 25 brasses autorisées par le permis de pêche de subsistance des Indiens de la bande. L'accusé avait pêché dans un étroit passage du fleuve Fraser, à quelques milles en amont de l'Aéroport international de Vancouver. Sparrow a volontiers reconnu avoir pêché de la manière reprochée, mais il a prétendu que, en raison du droit de pêche ancestral des Musqueams, les

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thus rendered of no force or effect by s. 52 of the *Constitution Act, 1982*.

mesures visant à réglementer la longueur des filets étaient incompatibles avec le par. 35(1) et, par conséquent, inopérantes en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*.

130 I pause here to note that in *Sparrow*, Dickson C.J. and La Forest J. stressed the importance of taking a case-by-case approach to the interpretation of the rights involved in s. 35(1). They stated at p. 1111:

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

See also *Kruger v. The Queen*, [1978] 1 S.C.R. 104, and *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.).

Je m'arrête ici un moment pour signaler que, dans *Sparrow*, le juge en chef Dickson et le juge La Forest ont souligné l'importance de procéder à un examen cas par cas en matière d'interprétation des droits visés par le par. 35(1). Ils ont affirmé ce qui suit, à la p. 1111:

Nous tenons à souligner relativement au par. 35(1) l'importance du contexte et d'un examen cas par cas. Étant donné la généralité du texte de la disposition constitutionnelle en cause et compte tenu surtout des complexités que présentent l'histoire, la société et les droits des autochtones, les limites d'une norme justificative doivent être fixées dans le contexte factuel particulier de chaque cas.

Voir également *Kruger c. La Reine*, [1978] 1 R.C.S. 104 et *R. c. Taylor* (1981), 62 C.C.C. (2d) 227 (C.A. Ont.).

131 The Court, nevertheless, developed a basic analytical framework for constitutional claims of aboriginal right protection under s. 35(1). The test set out in *Sparrow* includes three steps, namely: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a *prima facie* infringement of such right; and (3) the justification of the infringement. I shall briefly discuss each of them in turn.

Notre Cour a néanmoins élaboré un cadre fondamental d'analyse des affaires constitutionnelles dans lesquelles on demande qu'un droit soit protégé en tant que droit ancestral en vertu du par. 35(1). Le test énoncé dans *Sparrow* comporte trois étapes: (1) l'évaluation et la définition d'un droit ancestral existant (y compris son extinction), (2) l'établissement d'une atteinte *prima facie* à ce droit, et (3) la justification de cette atteinte. Je vais examiner brièvement chacune de ces étapes à tour de rôle.

132 The rights of aboriginal people constitutionally protected in s. 35(1) are those in existence at the time of the enactment of the *Constitution Act, 1982*. However, the manner in which they were regulated in 1982 is irrelevant to the definition of aboriginal rights because they must be assessed in their contemporary form; aboriginal rights are not frozen in time: see *Sparrow*, at p. 1093; see also Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", *supra*, Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *Sup. Ct. L. Rev.* 255, and William Pentney, "The Rights of the

Les droits des peuples autochtones qui sont protégés par la Constitution au par. 35(1) sont ceux qui existaient au moment de l'édiction de la *Loi constitutionnelle de 1982*. Cependant, la façon dont ces droits étaient réglementés en 1982 n'est pas pertinente pour la définition des droits ancestraux, étant donné que ceux-ci doivent être appréciés dans leur état actuel; les droits ancestraux ne sont pas figés dans le temps: voir *Sparrow*, à la p. 1093; voir aussi Brian Slattery, «The Constitutional Guarantee of Aboriginal and Treaty Rights», *loc. cit.*; Kent McNeil, «The Constitutional Rights of the Aboriginal Peoples of Canada» (1982), 4

Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II — Section 35: The Substantive Guarantee” (1988), 22 *U.B.C. L. Rev.* 207. The onus is on the claimant to prove that he or she benefits from an existing aboriginal right. I will return later to this first step to elaborate on the interpretation of the nature and extent of aboriginal rights.

Also, the Crown could extinguish aboriginal rights by legislation prior to 1982, but its intention to do so had to be clear and plain. Therefore, the regulation of an aboriginal activity does not amount to its extinguishment (*Sparrow*, at p. 1097) and legislation necessarily inconsistent with the continued enjoyment of aboriginal rights is not sufficient to meet the test. The “clear and plain” hurdle for extinguishment is, as a result, quite high: see *Simon*, *supra*. The onus of proving extinguishment is on the party alleging it, that is, the Crown.

As regards the second step of the *Sparrow* test, when an existing aboriginal right has been established, the claimant must demonstrate that the impugned legislation constitutes a *prima facie* infringement of the right. Put another way, the question becomes whether the legislative provision under scrutiny is in conflict with the recognized aboriginal right, either because of its object or its effects. In *Sparrow*, Dickson C.J. and La Forest J. provided the following guidelines, at p. 1112, regarding infringement:

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their

Sup. Ct. L. Rev. 255 et William Pentney, «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II — Section 35: The Substantive Guarantee» (1988), 22 *U.B.C. L. Rev.* 207. Il incombe au demandeur de prouver qu’il bénéficie d’un droit ancestral existant. Je reviendrai plus loin sur cette première étape pour élaborer sur l’interprétation de la nature et de l’étendue des droits ancestraux.

De plus, avant 1982, Sa Majesté pouvait éteindre des droits ancestraux par une mesure législative, mais son intention de le faire devait être claire et expresse. Par conséquent, la réglementation d’une activité autochtone n’équivaut pas à son extinction (*Sparrow*, à la p. 1097), et une mesure législative nécessairement incompatible avec la jouissance continue de droits ancestraux ne suffit pas pour satisfaire au test. La condition relative à l’intention «claire et expresse» d’éteindre un droit est, en conséquence, très exigeante: voir *Simon*, précité. Le fardeau de prouver l’extinction des droits visés incombe à la partie qui l’allègue, en l’occurrence Sa Majesté.

En ce qui concerne la deuxième étape du test formulé dans *Sparrow*, une fois qu’il a établi l’existence d’un droit ancestral, le demandeur doit démontrer que la mesure législative contestée porte atteinte *prima facie* à ce droit. Autrement dit, la question est alors de savoir si la disposition législative examinée est, de par son objet ou de par ses effets, incompatible avec le droit ancestral reconnu. Dans *Sparrow*, le juge en chef Dickson et le juge La Forest ont formulé les lignes directrices suivantes relativement à la question de l’atteinte, aux pp. 1112 et 1113:

Pour déterminer si les droits de pêche ont subi une atteinte constituant une violation à première vue du par. 35(1), on doit poser certaines questions. Premièrement, la restriction est-elle déraisonnable? Deuxièmement, le règlement est-il indûment rigoureux? Troisièmement, le règlement refuse-t-il aux titulaires du droit le recours à leur moyen préféré de l’exercer? C’est au particulier ou au groupe qui conteste la mesure législative qu’il incombe de prouver qu’il y a eu violation à première vue. En ce qui concerne les faits du présent pourvoi, le règlement serait jugé constituer une atteinte à première vue si on concluait qu’il impose une restriction néfaste à

right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

l'exercice par les Musqueams de leur droit de pêcher à des fins de subsistance. Nous tenons à souligner ici que la question en litige n'exige pas simplement qu'on examine si la prise autorisée de poissons a été réduite au-dessous de ce qui est requis pour subvenir aux besoins alimentaires et rituels raisonnables des Musqueams. Le critère nécessite plutôt qu'on se demande si, de par son objet ou son effet, la restriction imposée quant à la longueur des filets porte atteinte inutilement aux intérêts protégés par le droit de pêche.

135 Thirdly, after the claimant has demonstrated that the legislation in question constitutes a *prima facie* infringement of his or her aboriginal right, the onus then shifts again to the Crown to prove that the infringement is justified. Courts will be asked, at this stage, to balance and reconcile the conflicting interests of native people, on the one hand, and of the rest of Canadian society, on the other. Specifically, this last step of the *Sparrow* test requires the assessment of both the validity of the objective of the legislation and the reasonableness of the limitation.

Troisièmement, après que le demandeur a établi que la mesure législative en question constitue une atteinte *prima facie* à son droit ancestral, le fardeau de la preuve se déplace à nouveau et il incombe alors à Sa Majesté de prouver que cette atteinte est justifiée. À cette étape, les tribunaux sont appelés à mettre en équilibre et à concilier les intérêts opposés des peuples autochtones d'une part, et ceux du reste de la société canadienne d'autre part. De façon plus particulière, il faut, au cours de la dernière étape du test établi dans *Sparrow*, apprécier la validité de l'objectif de la mesure législative ainsi que le caractère raisonnable de la restriction.

136 As to the objective, there is no doubt that a legislative scheme aimed at conservation and management of natural resources will suffice (*Sparrow*, at p. 1113). Other legislative objectives found to be substantial and compelling, such as the security of the public, can also be valid, depending on the circumstances of each case. The notion of public interest, however, is too vague and broad to constitute a valid objective to justify the infringement of an aboriginal right (*Sparrow*, at p. 1113).

En ce qui concerne l'objectif de la mesure législative, il ne fait aucun doute que si celle-ci vise la conservation et la gestion des ressources naturelles, il s'agira là d'un objectif suffisant (*Sparrow*, à la p. 1113). D'autres objectifs législatifs jugés impérieux et réels, comme la sécurité du public, peuvent être également valides, compte tenu des circonstances de chaque cas. Cependant, la notion d'intérêt public est trop vague et générale pour constituer un objectif valide justifiant une atteinte à un droit ancestral (*Sparrow*, à la p. 1113).

137 With respect to the reasonableness of the limits upon the existing aboriginal right, the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people have to be contemplated. At a minimum, this fiduciary duty commands that some priority be afforded to the natives in the regulatory scheme governing the activity recognized as aboriginal right: see *Sparrow*, at pp. 1115-17, also *Jack v. The Queen*, [1980] 1 S.C.R. 294, and *R. v. Denny* (1990), 55 C.C.C. (3d) 322 (N.S.C.A.).

En ce qui concerne le caractère raisonnable des restrictions imposées au droit ancestral existant, il faut examiner les rapports spéciaux de fiduciaire et la responsabilité de Sa Majesté envers les autochtones. Cette obligation de fiduciaire commande à tout le moins que soit accordée une certaine priorité aux autochtones dans le cadre du régime de réglementation régissant l'activité reconnue comme un droit ancestral: voir *Sparrow*, aux pp. 1115 à 1117; aussi *Jack c. La Reine*, [1980] 1 R.C.S. 294 et *R. c. Denny* (1990), 55 C.C.C. (3d) 322 (C.A.N.-É.).

A number of other elements may have to be weighed in the assessment of justification. In *Sparrow*, Dickson C.J. and La Forest J. drew up the following non-exhaustive list of factors relating to justification at p. 1119:

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

In the case at bar, the issue relates only to the interpretation of the nature and extent of the Sto:lo's aboriginal right to fish and whether it includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes; i.e., the very first step of the *Sparrow* test, dealing with the assessment and definition of aboriginal rights. If it becomes necessary to proceed to extinguishment or to the questions of *prima facie* infringement and justification, the parties agreed that the case should be remitted to trial, as the summary appeal judge did, given that there is insufficient evidence to enable this Court to decide those issues.

In order to determine whether the Sto:lo benefit from an existing aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, it is necessary to elaborate on the appropriate approach to interpreting the nature and extent of aboriginal rights in general. That I now propose to do.

De plus, il pourrait également être nécessaire de tenir compte d'un certain nombre d'autres éléments dans l'appréciation de la justification. Dans *Sparrow*, le juge en chef Dickson et le juge La Forest ont dressé une liste non exhaustive de facteurs à prendre en considération relativement à la justification, à la p. 1119:

Il y a, dans l'analyse de la justification, d'autres questions à aborder, selon les circonstances de l'enquête. Il s'agit notamment des questions de savoir si, en tentant d'obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation est prévue en cas d'expropriation et si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre. On s'attendrait certainement à ce que les peuples autochtones, traditionnellement sensibilisés à la conservation et ayant toujours vécu dans des rapports d'interdépendance avec les ressources naturelles, soient au moins informés relativement à la conception d'un régime approprié de réglementation de la pêche.

Ceci dit, la question en litige en l'espèce concerne uniquement l'interprétation de la nature et de l'étendue du droit de pêche ancestral des Sto:lo et la question de savoir si ce droit inclut le droit de vendre et d'échanger du poisson à des fins de subsistance, c'est-à-dire la première étape même du test établi dans *Sparrow*, qui porte sur l'évaluation et la définition des droits ancestraux. S'il devient nécessaire d'examiner la question de l'extinction d'un droit ou celles de l'atteinte *prima facie* et de la justification, les parties ont convenu que, comme la preuve est insuffisante pour permettre à notre Cour de trancher ces questions, l'affaire devrait être renvoyée pour la tenue d'un nouveau procès, comme l'a fait le juge d'appel des poursuites sommaires.

Pour déterminer si les Sto:lo bénéficient d'un droit de pêche ancestral existant qui inclut le droit de vendre et d'échanger du poisson à des fins de subsistance, il est nécessaire d'explicitier la méthode qu'il convient d'appliquer pour interpréter la nature et l'étendue des droits ancestraux en général. C'est ce que je me propose de faire maintenant.

III. Interpretation of Aboriginal Rights

III. Interprétation des droits ancestraux

141 While I am in general agreement with the Chief Justice on the fundamental interpretative canons relating to aboriginal law which he discussed, the application of those rules to his definition of aboriginal rights under s. 35(1) of the *Constitution Act, 1982* does not, in my view, sufficiently reflect them. For the sake of convenience, I will summarize them here.

Bien que je sois dans l'ensemble d'accord avec les règles fondamentales d'interprétation du droit relatif aux autochtones qu'a examinées le Juge en chef, l'application qu'il a fait de ces règles pour définir les droits ancestraux visés au par. 35(1) de la *Loi constitutionnelle de 1982* n'en tient pas suffisamment compte à mon avis. Pour plus de commodité, je vais résumer ces règles ici.

142 First, as with all constitutional provisions, s. 35(1) must be given a generous, large and liberal interpretation in order to give full effect to its purposes: see, regarding the *Constitution Act, 1867*, *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), *Attorney General of Quebec v. Blaikie (No. 1)*, [1979] 2 S.C.R. 1016, *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; in the context of the *Charter*, *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, *R. v. Keegstra*, [1990] 3 S.C.R. 697; and, particular to aboriginal rights in s. 35(1), *Sparrow, supra*, at p. 1108, where Dickson C.J. and La Forest J. wrote that "s. 35(1) is a solemn commitment that must be given meaningful content".

Premièrement, le par. 35(1) doit, comme toutes les autres dispositions constitutionnelles, recevoir une interprétation généreuse, large et libérale permettant la réalisation de ses objectifs: relativement à la *Loi constitutionnelle de 1867*, voir les arrêts *Edwards c. Attorney-General for Canada*, [1930] A.C. 124 (C.P.), *Procureur général du Québec c. Blaikie (n° 1)*, [1979] 2 R.C.S. 1016, *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714, dans le contexte de la *Charte*, *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, *R. c. Keegstra*, [1990] 3 R.C.S. 697; et en ce qui concerne tout particulièrement les droits ancestraux visés au par. 35(1), *Sparrow*, précité, à la p. 1108, où le juge en chef Dickson et le juge La Forest ont écrit que «le par. 35(1) constitue un engagement solennel qui doit avoir un sens utile».

143 Further, the very nature of ancient aboriginal records, such as treaties, agreements with the Crown and other documentary evidence, commands a generous interpretation, and uncertainties, ambiguities or doubts should be resolved in favour of the natives: see *R. v. Sutherland*, [1980] 2 S.C.R. 451, *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282, *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, *Simon, supra*, *Horseman, supra*, *Sioui, supra*, *Sparrow, supra*, and *Mitchell, supra*; see also William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II — Section 35: The Substantive Guarantee", *supra*, at p. 255.

Qui plus est, la nature même des documents autochtones anciens tels que les traités, les accords avec Sa Majesté et les autres éléments de preuve documentaire commandent une interprétation généreuse, et les ambiguïtés, doutes ou incertitudes doivent être résolus en faveur des autochtones: voir *R. c. Sutherland*, [1980] 2 R.C.S. 451, *Moosehunter c. La Reine*, [1981] 1 R.C.S. 282, *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, *Simon*, précité, *Horseman*, précité, *Sioui*, précité, *Sparrow*, précité et *Mitchell*, précité; voir aussi William Pentney, «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II — Section 35: The Substantive Guarantee», *loc. cit.*, à la p. 255.

144 Second, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal

Deuxièmement, les droits ancestraux doivent être interprétés à la lumière des rapports spéciaux de fiduciaire et de la responsabilité de Sa Majesté

people: see *Taylor, supra*, and *Guerin, supra*. This fiduciary obligation attaches because of the historic power and responsibility assumed by the Crown over aboriginal people. In *Sparrow, supra*, the Court succinctly captured this obligation at p. 1108:

That is, the 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. [Emphasis added.]

See also Alain Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones" (1995), 36 *C. de D.* 669.

Finally, but most importantly, aboriginal rights protected under s. 35(1) have to be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. In that respect, the following remarks of Dickson C.J. and La Forest J. in *Sparrow*, at p. 1112, are particularly apposite:

While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. [Emphasis added.]

Unlike the Chief Justice, I do not think it appropriate to qualify this proposition by saying that the perspective of the common law matters as much as the perspective of the natives when defining aboriginal rights.

These principles of interpretation are important to keep in mind when determining the proper approach to the question of the nature and extent of aboriginal rights protected in s. 35(1) of the *Constitution Act, 1982*, to which I now turn.

The starting point in contemplating whether an aboriginal practice, tradition or custom warrants

envers les autochtones: voir *Taylor* et *Guerin*, précités. Cette obligation de fiduciaire existe en raison du pouvoir et de la responsabilité historiques assumés par Sa Majesté vis-à-vis des autochtones. Dans *Sparrow*, précité, notre Cour a exprimé succinctement cette obligation, à la p. 1108:

... savoir, le gouvernement a la responsabilité d'agir en qualité de fiduciaire à l'égard des peuples autochtones. Les rapports entre le gouvernement et les autochtones sont de nature fiduciaire plutôt que contradictoire et la reconnaissance et la confirmation contemporaines des droits ancestraux doivent être définies en fonction de ces rapports historiques. [Je souligne.]

Voir également Alain Lafontaine, «La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones» (1995), 36 *C. de D.* 669.

Enfin, la dernière et la plus importante de ces règles est que les droits ancestraux protégés par le par. 35(1) doivent être interprétés dans le contexte de l'histoire et de la culture de la société autochtone concernée, de manière à leur donner un sens pour les autochtones. À cet égard, les observations suivantes du juge en chef Dickson et du juge La Forest dans *Sparrow* sont particulièrement à propos, à la p. 1112:

S'il est impossible de donner une définition simple des droits de pêche, il est possible et même crucial de se montrer ouvert au point de vue des autochtones eux-mêmes quant à la nature des droits en cause. [Je souligne.]

Contrairement au Juge en chef, je n'estime pas approprié de restreindre la portée de cet énoncé en affirmant que, dans la définition des droits ancestraux, la perspective de la common law importe autant que celle des autochtones.

Il faut garder ces principes d'interprétation à l'esprit en déterminant la méthode qu'il convient de suivre dans l'examen de la nature et de l'étendue des droits ancestraux protégés par le par. 35(1) de la *Loi constitutionnelle de 1982*, question que j'aborde maintenant.

Dans *Sparrow*, précité, notre Cour a fait allusion au point de départ de l'examen de la question de

constitutional protection under s. 35(1) was hinted at by this Court in *Sparrow*, *supra*. Dickson C.J. and La Forest J. made this observation, at p. 1099, regarding the role of the fishery in Musqueam life:

The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. [Emphasis added.]

savoir s'il est justifié d'accorder à une coutume, pratique ou tradition autochtone la protection de la Constitution en vertu du par. 35(1). Le juge en chef Dickson et le juge La Forest ont fait l'observation suivante relativement au rôle de la pêche dans la vie des Musqueams à la p. 1099:

Il nous faut maintenant préciser la portée du droit de pêche existant des Musqueams. D'après la preuve anthropologique produite pour établir l'existence de ce droit, la pêche au saumon a toujours fait partie intégrante de la culture distinctive des Musqueams. [Je souligne.]

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The crux of the debate at the British Columbia Court of Appeal in the present appeal, and in most of the appeals heard contemporaneously, lies in the application of this standard of "integral part of their distinctive culture" to defining the nature and extent of the particular aboriginal right claimed to be protected in s. 35(1) of the *Constitution Act, 1982*. This broad statement of what characterizes aboriginal rights must be elaborated and made more specific so that it becomes a defining criterion. In particular, two aspects must be examined in detail, namely (1) what are the necessary characteristics of aboriginal rights, and (2) what is the period of time relevant to the assessment of such characteristics.

Characteristics of aboriginal rights

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The issue of the nature and extent of aboriginal rights protected under s. 35(1) is fundamentally about characterization. Which aboriginal practices, traditions and customs warrant constitutional protection? It appears from the jurisprudence developed in the courts below (see the reasons of the British Columbia Court of Appeal and the decision in *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470) that two approaches to this difficult question have emerged. The first one, which the Chief Justice endorses, focuses on the particular aboriginal practice, tradition or custom. The second approach, more generic, describes aboriginal rights in a fairly high level of abstraction. For the reasons that follow, I favour the latter approach.

Le cœur du débat en Cour d'appel de la Colombie-Britannique dans la présente affaire, ainsi que dans la plupart des appels entendus concurremment, porte sur l'application de la norme de «la partie intégrante de la culture distinctive concernée» en vue de définir la nature et l'étendue du droit ancestral qui, prétend-on, est protégé par le par. 35(1) de la *Loi constitutionnelle de 1982*. Cet énoncé général des caractéristiques des droits ancestraux doit être précisé davantage pour devenir le test de leur définition. Deux aspects en particulier doivent être examinés en profondeur: (1) les caractéristiques nécessaires des droits ancestraux, et (2) la période pertinente pour l'appréciation de ces caractéristiques.

Les caractéristiques des droits ancestraux

La question de la nature et de l'étendue des droits ancestraux protégés par le par. 35(1) est fondamentalement une question de caractérisation. Lesquelles des coutumes, pratiques et traditions autochtones nécessitent la protection de la Constitution? Deux méthodes d'analyse de cette difficile question semblent se dégager des jugements des tribunaux inférieurs (voir les motifs de la Cour d'appel de la Colombie-Britannique dans la présente affaire, et l'arrêt *Delgamuukw c. British Columbia* (1993), 104 D.L.R. (4th) 470). La première, à laquelle souscrit le Juge en chef, est axée sur la coutume, pratique ou tradition en cause. La deuxième, plus générale, décrit les droits ancestraux avec un degré d'abstraction assez élevé. Pour les motifs qui suivent, je préfère cette deuxième méthode.

The approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted. The analysis turns on the manifestations of the “integral part of [aboriginals’] distinctive culture” introduced in *Sparrow*, *supra*, at p. 1099. Further, on this view, what makes aboriginal culture distinctive is that which differentiates it from non-aboriginal culture. The majority of the Court of Appeal adopted this position, as the following passage from Macfarlane J.A.’s reasons reveals (at para. 37):

What was happening in the aboriginal society before contact with the Europeans is relevant in identifying the unique traditions of the aborigines which deserved protection by the common law. It is also necessary to separate those traditions from practices which are not a unique part of Indian culture, but which are common to Indian and non-Indian alike. [Emphasis added.]

Accordingly, if an activity is integral to a culture other than that of aboriginal people, it cannot be part of aboriginal people’s distinctive culture. This approach should not be adopted for the following reasons.

First, on the pure terminology angle of the question, this position misconstrues the words “distinctive culture”, used in the above excerpt of *Sparrow*, by interpreting it as if it meant “distinct culture”. These two expressions connote quite different meanings and must not be confused. The word “distinctive” is defined in *The Concise Oxford Dictionary* (9th ed. 1995) as “distinguishing, characteristic” where the word “distinct” is described as “1 (often foll. by *from*) a not identical; separate; individual. b different in kind or quality; unlike”. While “distinct” mandates comparison and evaluation from a separate vantage point, “distinctive” requires the object to be observed on its own. While describing an object’s “distinctive” qualities may entail describing how the object is different from others (i.e., “distinguishing”), there is nothing in the term that requires it to be plainly different. In fact, all that “distinctive culture” requires is the characterization of aboriginal cul-

La méthode fondée sur l’examen des coutumes, pratiques et traditions autochtones ne s’attache qu’à des éléments distincts de la culture autochtone, et les isolent de la culture générale dans laquelle elles sont enracinées. L’analyse porte sur les manifestations de la «partie intégrante de la culture distinctive [des autochtones visés]» formulée dans *Sparrow*, à la p. 1099. De plus, suivant ce point de vue, ce qui rend la culture autochtone distinctive c’est ce qui la distingue de la culture non autochtone. La Cour d’appel à la majorité a adopté ce point de vue, comme le révèle l’extrait qui suit des motifs du juge Macfarlane (au par. 37):

[TRADUCTION] Il est pertinent d’examiner ce qui se passait dans la société autochtone avant le contact avec les Européens pour établir quelles étaient les traditions uniques qui valaient d’être protégées par la common law. Il est également nécessaire de séparer ces traditions des pratiques qui ne constituent pas un aspect propre à la culture indienne, mais qui sont communes aux Indiens et aux non-Indiens. [Je souligne.]

En conséquence, si une activité fait partie intégrante d’une culture autre que celle des autochtones, elle ne peut faire partie de la culture distinctive de ceux-ci. Cette méthode ne devrait pas être adoptée, et ce pour les motifs suivants.

Premièrement, sous l’angle de pure terminologie, cette méthode décrit mal l’expression «culture distinctive» utilisée dans l’extrait précité de l’arrêt *Sparrow*, en lui donnant le sens de «culture distincte». Il ne faut pas confondre ces deux expressions qui ont des sens fort différents. Dans *The Concise Oxford Dictionary* (9^e éd. 1995), le terme «distinctive» est défini ainsi: [TRADUCTION] «ce qui distingue, une caractéristique», alors qu’on y définit de la manière suivante le mot «distinct»: [TRADUCTION] «1 (souvent suivi de la préposition «de») a qui n’est pas identique; séparé; individuel. b de qualité ou d’espèce différentes; différent». Alors que le mot «distinct» appelle une comparaison et une évaluation d’un point de vue particulier, le mot «distinctive» exige que l’objet soit observé individuellement. Même si la description des qualités «distinctives» d’un objet peut amener à décrire en quoi celui-ci diffère d’autres objets («ce qui distingue»), le mot «distinctive» ne demande

ture, not its differentiation from non-aboriginal cultures.

pas que l'objet soit nettement différent. De fait, tout ce qu'exige l'expression «culture distinctive» c'est que l'on caractérise la culture autochtone et non qu'on la différencie des cultures non autochtones.

152 While the Chief Justice recognizes the difference between “distinctive” and “distinct”, he applies it only as regards the manifestations of the distinctive aboriginal culture, i.e., the individualized practices, traditions and customs of a particular group of aboriginal people. As I will examine in more detail in a moment, the “distinctive” aboriginal culture has, in my view, a generic and much broader application.

Bien que le Juge en chef reconnaisse la différence entre les mots «distinctive» et «distinct», il n'applique cette différence qu'à l'égard des manifestations de la culture autochtone distinctive, c'est-à-dire les coutumes, pratiques et traditions propres à un groupe particulier d'autochtones. Comme je vais l'examiner plus en détail dans un moment, l'expression culture autochtone «distinctive» a, à mon avis, une application générale et beaucoup plus large.

153 Second, holding that what is common to both aboriginal and non-aboriginal cultures must necessarily be non-aboriginal and thus not aboriginal for the purpose of s. 35(1) is, to say the least, an overly majoritarian approach. This is diametrically opposed to the view propounded in *Sparrow*, *supra*, that the interpretation of aboriginal rights be informed by the fiduciary responsibility of the Crown *vis-à-vis* aboriginal people as well as by the aboriginal perspective on the meaning of the rights. Such considerations command that practices, traditions and customs which characterize aboriginal societies as the original occupiers and users of Canadian lands be protected, despite their common features with non-aboriginal societies.

Deuxièmement, affirmer que ce qui est commun aux cultures autochtones et non autochtones est nécessairement non autochtone et donc non ancestral pour l'application du par. 35(1) est, pour le moins, une analyse qui accorde beaucoup trop d'importance au point de vue de la majorité. Cette conception est diamétralement opposée au point de vue avancé dans *Sparrow*, précité, suivant lequel l'interprétation des droits ancestraux doit tenir compte de la responsabilité de fiduciaire de Sa Majesté *vis-à-vis* les peuples autochtones, ainsi que de la perspective autochtone quant à la signification des droits en cause. Ces considérations exigent que soient protégées, malgré leurs points communs avec les sociétés non autochtones, les coutumes, pratiques et traditions qui caractérisent les sociétés autochtones en tant que premiers occupants et usagers du territoire canadien.

154 Finally, an approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away. Such a strict construction of constitutionally protected aboriginal rights flies in the face of the generous, large and liberal interpretation of s. 35(1) of the *Constitution Act, 1982* advocated in *Sparrow*.

Enfin, une analyse fondée sur la dichotomie entre les coutumes, pratiques et traditions autochtones et non autochtones revient à définir la culture autochtone et les droits ancestraux comme étant ce qu'il en reste après qu'on en ait retranché les caractéristiques des cultures non autochtones. Une interprétation aussi rigide des droits ancestraux protégés par la Constitution est contraire à l'interprétation généreuse, large et libérale du par. 35(1) de la *Loi constitutionnelle de 1982* préconisée dans *Sparrow*.

A better approach, in my view, is to examine the question of the nature and extent of aboriginal rights from a certain level of abstraction and generality.

A generic approach to defining the nature and extent of aboriginal rights starts from the proposition that the notion of "integral part of [aboriginals'] distinctive culture" constitutes a general statement regarding the purpose of s. 35(1). Instead of focusing on a particular practice, tradition or custom, this conception refers to a more abstract and profound concept. In fact, similar to the values enshrined in the *Canadian Charter of Rights and Freedoms*, aboriginal rights protected under s. 35(1) should be contemplated on a multi-layered or multi-faceted basis: see Andrea Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995), 53 *Toronto Fac. L. Rev.* 1, at pp. 28-29.

Accordingly, s. 35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the "distinctive culture" of which aboriginal activities are manifestations. Simply put, the emphasis would be on the significance of these activities to natives rather than on the activities themselves.

Although I do not claim to examine the question in terms of liberal enlightenment, an analogy with freedom of expression guaranteed in s. 2(b) of the *Charter* will illustrate this position. Section 2(b) of the *Charter* does not refer to an explicit catalogue of protected expressive activities, such as political speech, commercial expression or picketing, but involves rather the protection of the ability to express: see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, *Keegstra, supra*; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199. In other words, the constitutional guarantee of

À mon avis, il vaut mieux examiner la question de la nature et de l'étendue des droits ancestraux à partir d'un certain degré d'abstraction et de généralité.

L'application d'une analyse générale pour définir la nature et l'étendue des droits ancestraux repose sur le principe que la notion de «partie intégrante de la culture distinctive [des autochtones visés]» constitue un énoncé général de l'objet du par. 35(1). Au lieu de mettre l'accent sur une coutume, pratique ou tradition particulière, ce principe renvoie à un concept plus abstrait et plus profond. De fait, à l'instar des valeurs constitutionnalisées dans la *Charte canadienne des droits et libertés*, les droits ancestraux protégés au par. 35(1) devraient être examinés au moyen d'une analyse tenant compte d'une multiplicité d'aspects ou de facettes: voir Andrea Bowker, «Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal» (1995), 53 *Toronto Fac. L. Rev.* 1, aux pp. 28 et 29.

En conséquence, il faudrait considérer que le par. 35(1) protège non pas une liste de coutumes, pratiques ou traditions propres, comme le soutient le Juge en chef, mais plutôt la «culture distinctive» dont les activités autochtones sont des manifestations. Bref, l'accent serait mis sur l'importance de ces activités pour les autochtones plutôt que sur les activités elles-mêmes.

Même si je ne prétends pas examiner la question selon la philosophie libérale des Lumières, une analogie avec la liberté d'expression garantie à l'al. 2b) de la *Charte* permettra d'illustrer cette position. L'alinéa 2b) de la *Charte* ne dresse pas une liste précise de formes d'expression protégées, comme le discours politique, l'expression commerciale ou le piquetage, mais il vise plutôt à protéger la capacité de s'exprimer: voir *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, *Keegstra*, précité; *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139 et *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199. En d'autres mots, la liberté d'expres-

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freedom of expression is conceptualized, not as protecting the possible manifestations of expression, but as preserving the fundamental purposes for which one may express oneself, i.e., the rationales supporting freedom of expression.

sion garantie par la Constitution est conceptualisée non pas comme une façon de protéger les manifestations possibles de cette liberté, mais plutôt comme un moyen de préserver les raisons fondamentales pour lesquelles une personne s'exprime, c'est-à-dire, les motifs qui sont le fondement de la liberté d'expression.

159 Similarly, aboriginal practices, traditions and customs protected under s. 35(1) should be characterized by referring to the fundamental purposes for which aboriginal rights were entrenched in the *Constitution Act, 1982*. As I have already noted elsewhere, s. 35(1) constitutionalizes the common law doctrine of aboriginal rights which recognizes aboriginal interests arising out of the historic occupation and use of ancestral lands by natives. This, in my view, is how the notion of "integral part of a distinctive aboriginal culture" should be contemplated. The "distinctive aboriginal culture" must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands: *Calder v. Attorney-General of British Columbia*, *supra*, at p. 328, *per* Judson J., and *Guerin*, *supra*, at p. 379, *per* Dickson J. (as he then was).

De même, les coutumes, pratiques et traditions autochtones protégées en vertu du par. 35(1) devraient être caractérisées au regard des objets fondamentaux de la constitutionnalisation des droits ancestraux dans la *Loi constitutionnelle de 1982*. Comme je l'ai déjà mentionné, le par. 35(1) constitutionnalise la doctrine de common law des droits ancestraux, qui reconnaît les intérêts des autochtones qui découlent de l'occupation et de l'utilisation historiques par ceux-ci de leurs terres ancestrales. À mon avis, c'est ainsi que devrait être envisagée la notion de «partie intégrante d'une culture autochtone distinctive». L'expression «culture autochtone distinctive» doit être considérée comme tenant compte du fait que, en dépit de la souveraineté britannique, les autochtones ont constitué la première société organisée à occuper et à utiliser le territoire canadien: *Calder c. Procureur général de la Colombie-Britannique*, précité, à la p. 328, le juge Judson; et *Guerin*, précité, à la p. 379, le juge Dickson J. (plus tard Juge en chef).

160 This rationale should inform the characterization of aboriginal activities which warrant constitutional protection as aboriginal rights. The practices, traditions and customs protected under s. 35(1) should be those that are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. See *Delgamuukw v. British Columbia*, *supra*, at pp. 646-47, *per* Lambert J.A., dissenting; see also Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*", *supra*, at p. 505, and Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II — Section 35: The Substantive Guarantee", *supra*, at pp. 258-59.

Ce raisonnement devrait être appliqué dans la caractérisation des activités autochtones qui commandent la protection de la Constitution en tant que droits ancestraux. Les coutumes, pratiques et traditions protégées en vertu du par. 35(1) devraient être celles qui sont suffisamment importantes et fondamentales pour l'organisation sociale et la culture d'un groupe particulier d'autochtones. Voir *Delgamuukw c. British Columbia*, précité, aux pp. 646 et 647, le juge Lambert, dissident; voir aussi Asch et Macklem, «Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*», *loc. cit.*, à la p. 505 et Pentney, «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II — Section 35: The Substantive Guarantee», *loc. cit.*, aux pp. 258 et 259.

161 Put another way, the aboriginal practices, traditions and customs which form the core of the lives

En d'autres mots, les coutumes, pratiques et traditions qui sont au centre de la vie des peuples

of native people and which provide them with a way and means of living as an organized society will fall within the scope of the constitutional protection under s. 35(1). This was described by Lambert J.A., dissenting at the Court of Appeal, as the "social" form of description of aboriginal rights (see para. 140), a formulation the Chief Justice rejects. Lambert J.A. distinguished these aboriginal activities from the practices or habits which were merely incidental to the lives of a particular group of aboriginal people and, as such, would not warrant protection under s. 35(1) of the *Constitution Act, 1982*. I agree with this description which, although flexible, provides a defining criterion for the interpretation of the nature and extent of aboriginal rights and, contrary to what my colleague McLachlin J. suggests, does not suffer from vagueness or overbreadth, as defined by this Court (see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, and *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031).

Further comments regarding this approach are in order. The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). Further, a generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. Finally, it is almost trite to say that what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations.

It is necessary to discuss at this point the period of time relevant to the assessment of the practices,

autochtones et qui leur assurent les moyens de vivre en société organisée relèveront du champ d'application de la protection constitutionnelle offerte par le par. 35(1). C'est ce que le juge Lambert, dans sa dissidence en Cour d'appel, a décrit comme étant la forme «sociale» de description des droits ancestraux (au par. 140), énoncé que rejette le Juge en chef. Le juge Lambert a distingué ces activités autochtones des pratiques ou habitudes qui étaient simplement des aspects accessoires de la vie d'un groupe particulier d'autochtones et qui, en tant que telles, ne commanderaient pas la protection du par. 35(1) de la *Loi constitutionnelle de 1982*. Je suis d'accord avec cette description qui, quoique souple, constitue un critère qui délimite l'interprétation de la nature et de l'étendue des droits ancestraux, et qui, contrairement à ce qu'affirme ma collègue le juge McLachlin, ne souffre pas d'imprécision et n'a pas une portée excessive, suivant le sens donné à ces termes par notre Cour (voir les arrêts *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606 et *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031).

D'autres commentaires s'imposent relativement à cette analyse. Le test de la «culture autochtone distinctive» ne devrait pas être restreint aux activités exercées uniquement par les autochtones et non par les non-autochtones. Au contraire, toutes les coutumes, pratiques et traditions ayant un lien suffisant avec le sentiment d'identité et le désir de préservation des sociétés autochtones organisées devraient être considérées comme valant d'être protégées en vertu du par. 35(1). Qui plus est, il faudrait interpréter ces activités de façon généreuse, large et libérale afin de donner plein effet à la reconnaissance constitutionnelle du caractère distinctif de la culture autochtone. Enfin, c'est presque un truisme de dire que ce qui constitue une coutume, pratique ou tradition distinctive pour une culture et une société autochtones doit être examiné avec les yeux des autochtones, plutôt qu'avec ceux de la majorité non autochtone ou encore à travers le prisme déformant des règlements existants.

Il faut maintenant examiner la question de la période pertinente pour apprécier les coutumes,

traditions and customs which form part of the distinctive culture of a particular group of aboriginal people.

Period of time relevant to aboriginal rights

pratiques et traditions qui font partie de la culture distinctive d'un groupe particulier d'autochtones.

Période pertinente pour l'examen des droits ancestraux

164 The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, tradition or custom has to exist prior to a specific date, and also to the length of time necessary for an aboriginal activity to be recognized as a right under s. 35(1). Here, again, two basic approaches have been advocated in the courts below (see the decisions of the British Columbia Court of Appeal in this case, and in *Delgamuukw v. British Columbia*, *supra*), namely the "frozen right" approach and the "dynamic right" approach. An examination of each will show that the latter view is to be preferred.

La question de la période pertinente pour la reconnaissance de droits ancestraux amène à se demander si la coutume, pratique ou tradition doit avoir existé avant une date spécifique, et quelle est la période nécessaire pendant laquelle une activité autochtone doit avoir été exercée pour être reconnue comme un droit visé au par. 35(1). Une fois encore, deux méthodes principales ont été préconisées devant les tribunaux inférieurs (voir les arrêts de la Cour d'appel de la Colombie-Britannique en l'espèce et dans *Delgamuukw c. British Columbia*, précité): la méthode fondée sur les «droits figés» et celle fondée sur le «caractère dynamique des droits». L'examen de chacune de ces méthodes démontrera qu'il y a lieu de préférer la dernière.

165 The "frozen right" approach would recognize practices, traditions and customs — forming an integral part of a distinctive aboriginal culture — which have long been in existence at the time of British sovereignty: see Slattery, "Understanding Aboriginal Rights", *supra*, at pp. 758-59. This requires the aboriginal right claimant to prove two elements: (1) that the aboriginal activity has continuously existed for "time immemorial", and (2) that it predated the assertion of sovereignty. Defining existing aboriginal rights by referring to pre-contact or pre-sovereignty practices, traditions and customs implies that aboriginal culture was crystallized in some sort of "aboriginal time" prior to the arrival of Europeans. Contrary to the Chief Justice, I do not believe that this approach should be adopted, for the following reasons.

Suivant la méthode fondée sur les «droits figés», seraient reconnues les coutumes, pratiques et traditions — faisant partie intégrante d'une culture autochtone distinctive — qui existaient depuis longtemps au moment de la souveraineté britannique: voir Slattery, «Understanding Aboriginal Rights», *loc. cit.*, aux pp. 758 et 759. Il s'ensuit que la personne qui revendique les droits ancestraux doit prouver deux choses: (1) que l'activité autochtone existe «de temps immémorial», et (2) qu'elle existait avant l'affirmation de la souveraineté. Déterminer les droits ancestraux existants en fonction des coutumes, pratiques et traditions antérieures au contact avec les Européens ou à l'affirmation de la souveraineté britannique sous-entend que la culture autochtone s'est cristallisée au cours d'une sorte d'«époque aborigène», avant l'arrivée des Européens. Contrairement au Juge en chef, je ne crois pas, pour les motifs qui suivent, qu'il y a lieu d'adopter cette méthode.

166 First, relying on the proclamation of sovereignty by the British imperial power as the "cut-off" for the development of aboriginal practices, traditions and customs overstates the impact of European influence on aboriginal communities: see Bowker,

Premièrement, le fait de s'appuyer sur la proclamation de souveraineté par l'empire britannique comme «date limite» de formation des coutumes, pratiques et traditions autochtones exagère l'incidence de l'influence européenne sur les collecti-

“*Sparrow’s Promise: Aboriginal Rights in the B.C. Court of Appeal*”, *supra*, at p. 22. From the native people’s perspective, the coming of the settlers constitutes one of many factors, though a very significant one, involved in their continuing societal change and evolution. Taking British sovereignty as the turning point in aboriginal culture assumes that everything that the natives did after that date was not sufficiently significant and fundamental to their culture and social organization. This is no doubt contrary to the perspective of aboriginal people as to the significance of European arrival on their rights.

Second, crystallizing aboriginal practices, traditions and customs at the time of British sovereignty creates an arbitrary date for assessing existing aboriginal rights: see Sébastien Grammond, “La protection constitutionnelle des droits ancestraux des peuples autochtones et l’arrêt *Sparrow*” (1991), 36 *McGill L.J.* 1382, at pp. 1403-4. In effect, how would one determine the crucial date of sovereignty for the purpose of s. 35(1)? Is it the very first European contacts with native societies, at the time of the Cabot, Verrazzano and Cartier voyages? Is it at a later date, when permanent European settlements were founded in the early seventeenth century? In British Columbia, did sovereignty occur in 1846 — the year in which the *Oregon Boundary Treaty, 1846* was concluded — as held by the Court of Appeal for the purposes of this litigation? No matter how the deciding date is agreed upon, it will not be consistent with the aboriginal view regarding the effect of the coming of Europeans.

As a third point, in terms of proof, the “frozen right” approach imposes a heavy and unfair burden on the natives: the claimant of an aboriginal right must prove that the aboriginal practice, tradition or custom is not only sufficiently significant and fundamental to the culture and social organization of the aboriginal group, but has also been continuously in existence, but as the Chief Justice stresses,

vités autochtones: voir Bowker, «*Sparrow’s Promise: Aboriginal Rights in the B.C. Court of Appeal*», *loc. cit.*, à la p. 22. Du point de vue des autochtones, l’arrivée des colons est un des nombreux facteurs — facteur très important évidemment — qui ont marqué l’évolution constante de leur société. Le fait de considérer la souveraineté britannique comme le point tournant de la culture autochtone suppose que tout ce que les autochtones ont fait après cette date n’était pas suffisamment important et fondamental pour leur culture et leur organisation sociale. Cette prémisse est sans aucun doute à l’opposé du point de vue des autochtones sur l’importance qu’a eue l’arrivée des Européens sur leurs droits.

Deuxièmement, la cristallisation des coutumes, pratiques et traditions autochtones au moment de la souveraineté britannique a pour effet de fixer une date arbitraire pour l’appréciation des droits ancestraux existants: voir Sébastien Grammond, «La protection constitutionnelle des droits ancestraux des peuples autochtones et l’arrêt *Sparrow*» (1991), 36 *R.D. McGill* 1382, aux pp. 1403 et 1404. En effet, comment déterminerait-on la date cruciale de la souveraineté pour l’application du par. 35(1)? S’agit-il des tout premiers contacts entre les Européens et les sociétés autochtones, à l’époque des voyages de Cabot, de Verrazzano et de Cartier? Est-ce plutôt à une date ultérieure, à la date de la fondation des colonies européennes permanentes au début du XVII^e siècle? En Colombie-Britannique, la souveraineté est-elle survenue en 1846 — année de la signature du Traité Oregon — comme l’a conclu la Cour d’appel en l’espèce? Peu importe la façon dont on convient de la date déterminante, celle-ci sera incompatible avec le point de vue des autochtones sur l’effet de la venue des Européens.

Troisièmement, sur le plan de la preuve, la méthode fondée sur les «droits figés» impose aux autochtones un fardeau lourd et injuste. En effet, le demandeur qui revendique un droit ancestral doit prouver que la coutume, pratique ou tradition autochtone est non seulement suffisamment importante et fondamentale pour l’organisation sociale et la culture du groupe autochtone, mais aussi qu’elle

even if interrupted for a certain length of time, for an indeterminate long period of time prior to British sovereignty. This test embodies inappropriate and unprovable assumptions about aboriginal culture and society. It forces the claimant to embark upon a search for a pristine aboriginal society and to prove the continuous existence of the activity for "time immemorial" before the arrival of Europeans. This, to say the least, constitutes a harsh burden of proof, which the relaxation of evidentiary standards suggested by the Chief Justice is insufficient to attenuate. In fact, it is contrary to the interpretative approach propounded by this Court in *Sparrow*, *supra*, which commands a purposive, liberal and favourable construction of aboriginal rights.

a existé de façon ininterrompue pendant une longue période indéterminée avant la souveraineté britannique, quoique, comme le souligne le Juge en chef, il ait pu y avoir interruption pendant un certain temps. Ce critère intègre des hypothèses inappropriées et improuvables en ce qui concerne la culture et la société autochtones. Il oblige le demandeur à se lancer à la recherche d'une société autochtone originale et à prouver que l'activité existait «de temps immémorial» avant l'arrivée des Européens. Il s'agit là, pour le moins, d'un fardeau de preuve exigeant, que l'assouplissement des normes de preuve suggéré par le Juge en chef ne permet pas d'atténuer. De fait, ce critère va à l'encontre de la méthode d'interprétation avancée par notre Cour dans *Sparrow*, précité, qui commande une interprétation des droits ancestraux libérale, favorable et fondée sur l'objet.

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Moreover, when examining the wording of the constitutional provisions regarding aboriginal rights, it appears that the protection should not be limited to pre-contact or pre-sovereignty practices, traditions and customs. Section 35(2) of the *Constitution Act, 1982* provides that the "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada" (emphasis added). Obviously, there were no Métis people prior to contact with Europeans as the Métis are the result of intermarriage between natives and Europeans: see Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II — Section 35: The Substantive Guarantee", *supra*, at pp. 272-74. Section 35(2) makes it clear that aboriginal rights are indeed guaranteed to Métis people. As a result, according to the text of the Constitution of Canada, it must be possible for aboriginal rights to arise after British sovereignty, so that Métis people can benefit from the constitutional protection of s. 35(1). The case-by-case application of s. 35(2) of the *Constitution Act, 1982* proposed by the Chief Justice does not address the issue of the interpretation of s. 35(2).

De plus, l'examen du texte des dispositions constitutionnelles concernant les droits ancestraux tend à indiquer que la protection ne devrait pas s'appliquer uniquement aux coutumes, pratiques et traditions qui existaient avant le contact avec les Européens ou l'affirmation de la souveraineté. En effet, le par. 35(2) de la *Loi constitutionnelle de 1982* dit que l'expression ««peuples autochtones du Canada» s'entend notamment des Indiens, des Inuits et des Métis du Canada»» (je souligne). Il n'existait évidemment pas de Métis avant le contact avec les Européens, puisque les premiers sont issus de mariages entre autochtones et Européens: voir Pentney, «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II — Section 35: The Substantive Guarantee», *loc. cit.*, aux pp. 272 à 274. Le paragraphe 35(2) indique clairement que les droits ancestraux sont effectivement garantis aux Métis. En conséquence, selon le texte de la Constitution du Canada, il faut que des droits ancestraux puissent être nés après l'affirmation de la souveraineté britannique pour que les Métis puissent bénéficier de la protection constitutionnelle offerte par le par. 35(1). L'application cas par cas du par. 35(2) de la *Loi constitutionnelle de 1982* que propose le Juge en chef ne règle pas la question de l'interprétation de cette disposition.

Finally, the “frozen right” approach is inconsistent with the position taken by this Court in *Sparrow*, *supra*, which refused to define existing aboriginal rights so as to incorporate the manner in which they were regulated in 1982. The following passage from Dickson C.J. and La Forest J.’s reasons makes this point (at p. 1093):

Far from being defined according to the regulatory scheme in place in 1982, the phrase “existing aboriginal rights” must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery’s expression, in “Understanding Aboriginal Rights,” *supra*, at p. 782, the word “existing” suggests that those rights are “affirmed in a contemporary form rather than in their primeval simplicity and vigour”. Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate “frozen rights” must be rejected. [Emphasis added.]

This broad proposition should be taken to relate, not only to the meaning of the word “existing” found in s. 35(1), but also to the more fundamental question of the time at which the content of the rights themselves is determined. Accordingly, the interpretation of the nature and extent of aboriginal rights must “permit their evolution over time”.

The foregoing discussion shows that the “frozen right” approach to defining aboriginal rights as to their nature and extent involves several important restrictions and disadvantages. A better position, in my view, would be evolutive in character and give weight to the perspective of aboriginal people. As the following analysis will demonstrate, a “dynamic right” approach to the question will achieve these objectives.

The “dynamic right” approach to interpreting the nature and extent of aboriginal rights starts from the proposition that “the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time” (*Sparrow*, at p. 1093). According to this view, aboriginal rights must be permitted to maintain contemporary rele-

Enfin, la méthode fondée sur les «droits figés» est incompatible avec la position adoptée par notre Cour dans *Sparrow*, précité, où elle a refusé de définir les droits ancestraux existants de façon à intégrer la manière dont ils étaient réglementés en 1982. L’extrait suivant des motifs du juge en chef Dickson et du juge La Forest exprime ce point (à la p. 1093):

Loin d’être définie selon le régime de réglementation en vigueur en 1982, l’expression «droits ancestraux existants» doit recevoir une interprétation souple de manière à permettre à ces droits d’évoluer avec le temps. Pour reprendre l’expression du professeur Slattery, dans «Understanding Aboriginal Rights,» précité, à la p. 782, le mot «existants» laisse supposer que ces droits sont [TRADUCTION] «confirmés dans leur état actuel plutôt que dans leur simplicité et vigueur primitives». Il est alors évident qu’il faut rejeter une interprétation de la garantie constitutionnelle énoncée au par. 35(1) qui engloberait des «droits figés». [Je souligne.]

Cette proposition générale doit être considérée comme visant non seulement le sens du mot «existants» qui figure au par. 35(1), mais aussi la question plus fondamentale de la période servant à la détermination du contenu des droits eux-mêmes. En conséquence, l’interprétation de la nature et de l’étendue des droits ancestraux doit «permettre leur évolution dans le temps».

Il ressort de l’examen qui précède que l’application de la méthode fondée sur les «droits figés», afin de définir la nature et l’étendue des droits ancestraux, comporte plusieurs restrictions et inconvénients importants. À mon avis, une meilleure méthode en serait une qui tiendrait compte de l’évolution des droits et de la perspective autochtone. Comme le démontrera l’analyse qui suit, l’application d’une méthode fondée sur le «caractère dynamique des droits» permettra d’atteindre ces objectifs.

L’interprétation de la nature et de l’étendue des droits ancestraux par la méthode fondée sur le «caractère dynamique des droits» repose sur le principe que «l’expression «droits ancestraux existants» doit recevoir une interprétation souple de manière à permettre à ces droits d’évoluer avec le temps» (*Sparrow*, à la p. 1093). Selon ce principe,

vance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under s. 35(1) would ensure their continued vitality.

il faut permettre aux droits ancestraux de conserver une pertinence contemporaine par rapport aux besoins des autochtones, au fur et à mesure que leurs coutumes, pratiques et traditions changent et évoluent en même temps que l'ensemble de la société dans laquelle ils vivent. Cette interprétation généreuse, large et libérale des droits ancestraux protégés en vertu du par. 35(1) garantirait leur vitalité continue.

173 Distinctive aboriginal culture would not be frozen as of any particular time but would evolve so that aboriginal practices, traditions and customs maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary world. Instead of considering it as the turning point in aboriginal culture, British sovereignty would be regarded as having recognized and affirmed practices, traditions and customs which are sufficiently significant and fundamental to the culture and social organization of aboriginal people. This idea relates to the "doctrine of continuity", founded in British imperial constitutional law, to the effect that when new territory is acquired the *lex loci* of organized societies, here the aboriginal societies, continues at common law.

La culture autochtone distinctive ne serait pas figée à un moment donné, mais elle évoluerait, de sorte que les coutumes, pratiques et traditions conserveraient leur pertinence pour les sociétés autochtones qui vivent dans le monde d'aujourd'hui. Au lieu d'être perçue comme le point tournant pour la culture autochtone, la souveraineté britannique serait plutôt considérée comme ayant reconnu et confirmé les coutumes, pratiques et traditions qui sont suffisamment importantes et fondamentales pour l'organisation sociale et la culture des autochtones. Cette idée se rattache à la [TRANSDUCTION] «doctrine de la continuité», fondée sur le droit constitutionnel impérial britannique et selon laquelle, en cas d'acquisition de nouveaux territoires, la *lex loci* des sociétés organisées, en l'occurrence les sociétés autochtones, continue de s'appliquer en vertu de la common law.

174 See, on the doctrine of continuity in general, Sir William Blackstone, *Commentaries on the Laws of England* (1769), vol. 2, at p. 51, Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820), at p. 119, and Sir William Searle Holdsworth, *A History of English Law* (1938), vol. 11, at pp. 3-274. See also, in the context of Canadian aboriginal law, Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983), Kent McNeil, *Common Law Aboriginal Title* (1989), Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350, Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones", *supra*, at p. 719; and Émond, "Le sable dans l'engrenage du droit

Voir, sur la doctrine de la continuité en général, Sir William Blackstone, *Commentaries on the Laws of England* (1769), vol. 2, à la p. 51; Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820), à la p. 119; et Sir William Searle Holdsworth, *A History of English Law* (1938), vol. 11, aux pp. 3 à 274. Voir aussi dans le contexte du droit canadien en matière autochtone, Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983), Kent McNeil, *Common Law Aboriginal Title* (1989), Mark Walters, «British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*» (1992), 17 *Queen's L.J.* 350; Lafontaine, «La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones», *loc. cit.*, à la p. 719; et Émond, «Le sable

inhérent des autochtones à l'autonomie gouvernementale", *supra*, at p. 96.

Consequently, in order for an aboriginal right to be recognized and affirmed under s. 35(1), it is not imperative for the practices, traditions and customs to have existed prior to British sovereignty and, a fortiori, prior to European contact, which is the cut-off date favoured by the Chief Justice. Rather, the determining factor should only be that the aboriginal activity has formed an integral part of a distinctive aboriginal culture — i.e., to have been sufficiently significant and fundamental to the culture and social organization of the aboriginal group — for a substantial continuous period of time as defined above.

Such a temporal requirement is less stringent than the "time immemorial" criterion developed in the context of aboriginal title: see *Calder v. Attorney-General of British Columbia*, *supra*; and, *Baker Lake v. Minister of Indian Affairs and Northern Development*, *supra*; see also Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*", *supra*, at p. 1394. This qualification of the time immemorial test finds support in the *obiter dicta* of this Court in *Sparrow*, *supra*, at p. 1095, regarding the Musqueam Band's aboriginal right to fish:

It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it. [Emphasis added.]

The substantial continuous period of time for which the aboriginal practice, tradition or custom must have been engaged in will depend on the circumstances and on the nature of the aboriginal right claimed. However, as proposed by Professor Slattery, in "Understanding Aboriginal Rights", *supra*, at p. 758, in the context of aboriginal title, "in most cases a period of some twenty to fifty years would seem adequate". This, in my view, should constitute a reference period to determine

dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale», *loc. cit.*, à la p. 96.

En conséquence, pour qu'un droit ancestral soit reconnu et confirmé en vertu du par. 35(1), il n'est pas impératif que les coutumes, pratiques et traditions aient existé avant l'affirmation de la souveraineté britannique et, a fortiori, avant le contact avec les Européens, date limite préconisée par le Juge en chef. De fait, le facteur déterminant devrait uniquement être le fait que l'activité autochtone ait fait partie intégrante d'une culture autochtone distinctive — c'est-à-dire avoir été suffisamment importante et fondamentale pour l'organisation sociale et la culture du groupe autochtone visé — pendant une période considérable et ininterrompue, au sens indiqué précédemment.

Cette exigence temporelle est moins rigoureuse que le critère du «temps immémorial» fixé dans le contexte du titre aborigène: voir *Calder c. Procureur général de la Colombie-Britannique*, précité, et *Baker Lake c. Ministre des Affaires indiennes et du Nord canadien*, précité; voir aussi Grammond, «La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*», *loc. cit.*, à la p. 1394. Cette réserve apportée au critère du temps immémorial trouve appui dans les *obiter dicta* de notre Cour dans *Sparrow*, précité, à la p. 1095, relativement au droit de pêche ancestral de la bande des Musqueams:

Il est vrai qu'en ce qui concerne la période de 1867 à 1961 la preuve est sommaire. Mais la preuve n'a pas été contestée ni contredite devant les tribunaux d'instance inférieure et il y a preuve d'un exercice ininterrompu suffisant du droit pour justifier la conclusion de la Cour d'appel et nous n'y toucherons pas. [Je souligne.]

En ce qui concerne la période considérable et ininterrompue au cours de laquelle la coutume, pratique ou tradition doit avoir été suivie, elle dépendra des circonstances et de la nature du droit ancestral revendiqué. Cependant, comme l'a proposé le professeur Slattery dans «Understanding Aboriginal Rights», *loc. cit.*, à la p. 758, à l'égard du titre aborigène, [TRADUCTION] «dans la plupart des cas, il semble qu'une période de vingt à cinquante ans serait suffisante». Cette période devrait,

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whether an aboriginal activity has been in existence for long enough to warrant constitutional protection under s. 35(1).

à mon avis, constituer la période de référence pour déterminer si une activité autochtone existe depuis assez longtemps pour justifier que lui soit accordée la protection de la Constitution en vertu du par. 35(1).

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In short, the substantial continuous period of time necessary to the recognition of aboriginal rights should be assessed based on (1) the type of aboriginal practices, traditions and customs, (2) the particular aboriginal culture and society, and (3) the reference period of 20 to 50 years. Such a time frame does not minimize the fact that in order to benefit from s. 35(1) protection, aboriginal activities must still form the core of the lives of native people; this surely cannot be characterized as an extreme position, as my colleague Justice McLachlin affirms.

Bref, la période considérable et ininterrompue nécessaire pour la reconnaissance des droits ancestraux devrait être appréciée en fonction des critères suivants: (1) le type de coutumes, pratiques et traditions autochtones en cause, (2) la culture et la société autochtones particulières visées, et (3) la période de référence de 20 à 50 ans. Une telle période ne minimise pas le fait que, pour profiter de la protection du par. 35(1), les activités autochtones visées doivent être au centre de la vie des autochtones concernés. Une telle position ne peut certainement pas être qualifiée d'extrême, comme l'affirme ma collègue madame le juge McLachlin.

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The most appreciable advantage of the "dynamic right" approach to defining the nature and extent of aboriginal rights is the proper consideration given to the perspective of aboriginal people on the meaning of their existing rights. It recognizes that distinctive aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved with the natives as they have changed, modernized and flourished over time, along with the rest of Canadian society. This, in the aboriginal people's perspective, is no doubt the true sense of the constitutional protection provided to aboriginal rights through s. 35(1) of the *Constitution Act, 1982*.

L'avantage le plus appréciable de la méthode fondée sur le «caractère dynamique des droits» pour interpréter la nature et l'étendue des droits ancestraux est qu'elle permet de tenir compte, comme il se doit, de la perspective des autochtones en ce qui concerne la signification de leurs droits existants. Elle reconnaît que la culture autochtone distinctive n'est pas une chose du passé, préservée et exposée dans un musée, mais bien une caractéristique qui a évolué en même temps que les autochtones, au fur et à mesure que ceux-ci ont changé, se sont modernisés et ont prospéré au fil du temps, parallèlement au reste de la société canadienne. Voilà manifestement quel est, du point de vue des autochtones, le sens véritable de la protection constitutionnelle accordée aux droits ancestraux par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Summary

Résumé

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In the end, the proposed general guidelines for the interpretation of the nature and extent of aboriginal rights constitutionally protected under s. 35(1) can be summarized as follows. The characterization of aboriginal rights should refer to the rationale of the doctrine of aboriginal rights, i.e., the historic occupation and use of ancestral lands by the natives. Accordingly, aboriginal practices,

En définitive, les lignes directrices générales proposées pour l'interprétation de la nature et de l'étendue des droits protégés constitutionnellement par le par. 35(1) peuvent être résumées ainsi. La caractérisation des droits ancestraux devrait se faire en fonction du fondement de la doctrine des droits ancestraux, c.-à-d. l'occupation et l'utilisation historiques par les autochtones de leurs terres

traditions and customs would be recognized and affirmed under s. 35(1) of the *Constitution Act, 1982* if they are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. Furthermore, the period of time relevant to the assessment of aboriginal activities should not involve a specific date, such as British sovereignty, which would crystallize aboriginal's distinctive culture in time. Rather, as aboriginal practices, traditions and customs change and evolve, they will be protected in s. 35(1) provided that they have formed an integral part of the distinctive aboriginal culture for a substantial continuous period of time.

This approach being set out, I will turn to the specific issue raised by this case, namely whether the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. Before examining the distinctive aboriginal culture of the Sto:lo people in that respect, a brief review of the case law on aboriginal trade activities, which shows that aboriginal practices, traditions and customs can have different purposes, will be helpful to delineate the issue at bar.

IV. Case Law on Aboriginal Trade Activities

At the British Columbia Court of Appeal, the majority framed the issue as being whether the Sto:lo possess an aboriginal right to fish which includes the right to make commercial use of the fish. Macfarlane J.A. put the question that way because "[i]n essence, [this case] is about an asserted Indian right to sell fish allocated for food purposes on a commercial basis" (see para. 30). I leave aside for the moment the delineation of the aboriginal right claimed in this case in order, first, to examine the case law on treaty and aboriginal rights regarding trade to demonstrate that there is an important distinction to be drawn between, on the one hand, the sale, trade and barter of fish for livelihood, support and sustenance purposes and,

ancestrales. En conséquence, les coutumes, pratiques et traditions autochtones seront reconnues et confirmées en vertu du par. 35(1) de la *Loi constitutionnelle de 1982* si elles sont suffisamment importantes et fondamentales pour l'organisation sociale et la culture d'un groupe particulier d'autochtones. De plus, la période pertinente pour l'appréciation des activités autochtones ne devrait pas être fonction d'une date spécifique, par exemple l'affirmation de la souveraineté britannique, car cela aurait pour effet de cristalliser dans le temps la culture autochtone distinctive. Au contraire, comme les coutumes, pratiques et traditions autochtones changent et évoluent, elles seront protégées par le par. 35(1) si elles ont fait partie intégrante de la culture autochtone distinctive pendant une période considérable et ininterrompue.

Après avoir exposé cette méthode, je vais maintenant aborder la question précise qui se soulève en l'espèce. Est-ce que le droit de pêche ancestral des Sto:lo inclut le droit de vendre et d'échanger du poisson à des fins de subsistance? Avant d'examiner la culture autochtone distinctive des Sto:lo à cet égard, il est utile, pour bien cerner la question en litige, de passer brièvement en revue la jurisprudence concernant les activités d'échange des autochtones, jurisprudence qui montre que les coutumes, pratiques et traditions autochtones peuvent avoir des fins différentes.

IV. La jurisprudence concernant les activités d'échange des autochtones

La Cour d'appel de la Colombie-Britannique à la majorité a indiqué que la question en litige était de savoir si les Sto:lo possèdent un droit de pêche ancestral incluant le droit de faire une utilisation commerciale du poisson. Le juge Macfarlane a formulé la question en ces termes parce que [TRADUCTION] «[e]ssentiellement, [la présente affaire] porte sur la revendication par des Indiens du droit de vendre commercialement du poisson attribué à des fins alimentaires» (par. 30). Je laisse de côté pour le moment la définition du droit ancestral revendiqué en l'espèce afin d'examiner la jurisprudence relative aux droits ancestraux ou issus de traités concernant les échanges pour montrer qu'il faut faire une distinction importante entre, d'une part,

on the other, the sale, trade and barter of fish for purely commercial purposes.

la vente, l'échange et le troc de poisson à des fins de subsistance, et, d'autre part, la vente et l'échange de poisson à des fins purement commerciales.

183 This Court, in *Sparrow*, *supra*, proposed to leave to another day the discussion of commercial aspects of the right to fish, since (at p. 1101) "the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes" (emphasis added). Accordingly, Dickson C.J. and La Forest J. confined their reasons to the aboriginal right to fish for food, social and ceremonial purposes. In so doing, however, it appears that they implicitly distinguished between (1) the right to fish for food, social and ceremonial purposes (which was recognized for the Musqueam Band), (2) the right to fish for livelihood, support and sustenance purposes, and (3) the right to fish for purely commercial purposes (see *Sparrow*, at pp. 1100-1101). The differentiation between the last two classes of purposes, which is of key interest here, was discussed and elaborated upon by Wilson J. in *Horseman*, *supra*.

Dans *Sparrow*, précité, notre Cour a remis à une autre occasion l'examen des aspects commerciaux du droit de pêche, puisque cette (à la p. 1101) «affaire n'a[vait] pas été débattue en fonction de l'existence d'un droit ancestral de pêcher à des fins commerciales ou de subsistance» (je souligne). En conséquence, le juge en chef Dickson et le juge La Forest ont limité leurs motifs au droit ancestral de pêcher à des fins alimentaires, sociales et rituelles. Cependant, ce faisant, ils semblent avoir implicitement établi une distinction entre (1) le droit de pêcher à des fins alimentaires, sociales et rituelles (qui a été reconnu à la bande des Musqueams), (2) le droit de pêcher à des fins de subsistance, et (3) le droit de pêcher à des fins purement commerciales (voir *Sparrow*, aux pp. 1100 et 1101). La distinction entre ces deux dernières catégories, qui revêt une importance capitale en l'espèce, a été examinée et précisée par le juge Wilson dans l'arrêt *R. c. Horseman*, précité.

184 In *Horseman*, this Court examined the scope of the Horse Lakes Indian Band's right to hunt under *Treaty No. 8*, 1899, as amended by the *Natural Resources Transfer Agreement*, 1930 (Alberta) ("NRTA"). In that case, the appellant, Bert Horseman, was charged with the offence of unlawfully "trafficking" in wildlife, contrary to s. 42 of the *Wildlife Act*, R.S.A. 1980, c. W-9, which was defined as "any single act of selling, offering for sale, buying, bartering, soliciting or trading". The appellant had killed a grizzly bear in self-defence, while legally hunting moose for food, and he sold the bear hide because he was in need of money to support his family. Horseman argued that the *Wildlife Act* did not apply to him because he was within his *Treaty No. 8* rights when he sold the grizzly hide.

Dans *Horseman*, notre Cour a examiné la portée du droit de chasse de la bande indienne de Horse Lakes en vertu du *Traité n° 8*, 1899, modifié par la *Convention sur le transfert des ressources naturelles* de 1930 (Alberta) (la «*Convention*»). Dans cette affaire, l'appelant, Bert Horseman, avait été accusé d'avoir illégalement [TRADUCTION] «fait le trafic» d'un animal sauvage en contravention de l'art. 42 de la *Wildlife Act*, R.S.A. 1980, ch. W-9, infraction définie comme étant [TRADUCTION] «le fait de vendre, d'acheter, de troquer, de solliciter ou d'échanger». L'appelant a, dans un acte de légitime défense, tué un grizzly pendant qu'il chassait légalement l'original pour se nourrir. Il a par la suite vendu la peau du grizzly, car il avait besoin d'argent pour subvenir aux besoins de sa famille. Horseman a plaidé que la *Wildlife Act* ne s'appliquait pas à lui parce qu'il avait exercé des droits que lui conférait le *Traité n° 8* quand il a vendu la peau de l'ours.

185 Cory J. (Lamer, La Forest and Gonthier JJ. concurring), for the majority, held that the *Treaty*

Le juge Cory (avec l'appui des juges Lamer, La Forest et Gonthier), s'exprimant au nom de la

No. 8 right to hunt generally has been circumscribed by the *NRTA* to the right to hunt for "food" only. He made it clear, however, that before the *NRTA* (1930), the Horse Lakes people had the right to hunt for commercial purposes under *Treaty No. 8* (at pp. 928-29):

The economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life.

I am in complete agreement with the finding of the trial judge that the original Treaty right clearly included hunting for purposes of commerce. The next question that must be resolved is whether or not that right was in any way limited or affected by the Transfer Agreement of 1930. [Emphasis added.]

This passage recognizes that the practices, traditions and customs of the Horse Lakes people were not frozen at the time of British sovereignty and that when *Treaty No. 8* was concluded in 1899, their activities had evolved so that commercial hunting and fishing formed an "integral part" of their culture and society.

Furthermore, Cory J. upheld the findings of the courts below that the sale of the grizzly hide constituted a commercial hunting activity which, as a consequence, fell outside the ambit of the treaty rights to hunt. He wrote at p. 936:

It has been seen that the Treaty No. 8 hunting rights have been limited by the provisions of the 1930 Transfer Agreement to the right to hunt for food, that is to say, for sustenance for the individual Indian or the Indian's family. In the case at bar the sale of the bear hide was part of a "multi-stage process" whereby the product was sold to obtain funds for purposes which might include purchasing food for nourishment. The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement. [Emphasis added.]

majorité, a statué que la *Convention* avait limité le droit général de chasse énoncé au *Traité n° 8* au droit de chasser pour «se nourrir» seulement. Cependant, il a clairement indiqué que, avant la *Convention* (1930), les Indiens de Horse Lakes avaient le droit de chasser à des fins commerciales en vertu du *Traité n° 8* (aux pp. 928 et 929):

De toute évidence, au moment de la signature du traité, l'économie de la population indienne avait évolué au point où la chasse et la pêche à des fins commerciales faisaient partie intégrante du mode de vie des Indiens.

Je souscris entièrement à la conclusion du juge de première instance que le droit initial conféré par le traité comprenait manifestement la chasse à des fins du commerce. La prochaine question à laquelle il faut répondre est de savoir si ce droit a été de quelque manière limité ou modifié par la Convention de transfert de 1930. [Je souligne.]

Ce passage reconnaît le fait que les coutumes, pratiques et traditions des Indiens de Horse Lakes n'ont pas été figées au moment de l'affirmation de la souveraineté britannique, et que leurs activités avaient, lors de la signature du *Traité n° 8* en 1899, évolué au point où la chasse et la pêche commerciales faisaient «partie intégrante» de leur culture et de leur société.

En outre, le juge Cory a confirmé les conclusions des tribunaux inférieurs que la vente de la peau du grizzli constituait une activité de chasse commerciale qui, en conséquence, n'était pas visée par les droits de chasse conférés par le Traité. Il a écrit ceci, à la p. 936:

Nous avons constaté que la Convention de transfert de 1930 a limité les droits de chasse conférés par le Traité n° 8 au droit de chasser pour se nourrir, c'est-à-dire pour la subsistance de l'Indien ou de sa famille. En l'espèce, la vente de la peau de l'ours s'inscrivait dans un «processus à plusieurs étapes», la vente ayant pour but l'obtention d'argent pour des fins pouvant comprendre l'achat de denrées alimentaires. Les tribunaux d'instance inférieure ont conclu, à juste titre, que la vente de la peau de l'ours constituait un acte relié à la chasse qui n'était plus de la chasse «pour se nourrir», mais plutôt un acte de commerce. Il ne s'agissait plus en conséquence d'un droit protégé par le Traité n° 8, modifié par la Convention de transfert de 1930. [Je souligne.]

Cory J. concluded that the *Wildlife Act* applied and found the appellant guilty of unlawfully trafficking in wildlife.

Le juge Cory a conclu que la *Wildlife Act* s'appliquait et il a déclaré l'appelant coupable d'avoir illégalement fait le trafic d'un animal sauvage.

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Wilson J. (Dickson C.J. and L'Heureux-Dubé J. concurring), dissenting, was of the view that, from an aboriginal perspective, a simple dichotomy between hunting for domestic use and hunting for commercial purposes should not be determinative of the treaty rights. Rather, *Treaty No. 8* and the *NRTA* should be interpreted so as to preserve the Crown's commitment to respecting the lifestyle of the Horse Lakes people and the way in which they had traditionally pursued their livelihood.

Le juge Wilson (avec l'appui du juge en chef Dickson et de moi-même), dissidente, était d'avis que, du point de vue des autochtones, la simple dichotomie entre la chasse pratiquée pour subvenir à des besoins domestiques et celle pratiquée à des fins commerciales ne devrait pas être déterminante en ce qui concerne les droits issus de traités. Le *Traité n° 8* et la *Convention* devaient plutôt être interprétés de façon à préserver l'engagement solennel que Sa Majesté avait pris de respecter le mode de vie des Indiens de Horse Lakes et la façon dont ceux-ci avaient traditionnellement gagné leur vie.

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Contrary to Cory J., Wilson J. held that the words "for food" in the *NRTA* did not have the effect of placing substantial limits on the range of hunting activities permitted under *Treaty No. 8*. After reviewing the decisions of this Court in *Frank v. The Queen*, [1978] 1 S.C.R. 95, and *Moosehunter*, *supra*, Wilson J. found that the treaty right to hunt "for food" amounted to a right to hunt for support and sustenance. She explained her view as follows, at p. 919:

Contrairement au juge Cory, le juge Wilson a statué que l'expression «pour se nourrir» dans la *Convention* n'avait pas eu pour effet d'imposer des limites importantes à l'étendue des pratiques de chasse autorisées par le *Traité n° 8*. Après avoir examiné les arrêts de notre Cour *Frank c. La Reine*, [1978] 1 R.C.S. 95, et *Moosehunter*, précité, le juge Wilson a conclu que le droit de chasser «pour se nourrir» prévu au *Traité* équivalait à un droit de chasse à des fins de subsistance. Elle a expliqué ainsi son point de vue, à la p. 919:

And if we are to give para. 12 [of the *NRTA*] the "broad and liberal" construction called for in *Sutherland*, a construction that reflects the principle enunciated in *Nowegijick* and *Simon* that statutes relating to Indians must be given a "fair, large and liberal construction", then we should be prepared to accept that the range of activity encompassed by the term "for food" extends to hunting for "support and subsistence", i.e. hunting not only for direct consumption but also hunting in order to exchange the product of the hunt for other items as was their wont, as opposed to purely commercial or sport hunting.

Et si nous voulons donner à l'art. 12 [de la *Convention*] l'interprétation «large et libérale» qu'exige l'arrêt *Sutherland*, une interprétation qui reflète le principe énoncé dans les arrêts *Nowegijick* et *Simon* que les lois relatives aux Indiens doivent être «interprétées de façon juste, large et libérale», nous devrions alors être prêts à accepter que l'étendue des activités visées par l'expression «pour se nourrir» s'étend à la chasse à des fins de «support et [de] subsistance», c'est-à-dire à la chasse non seulement en vue de la consommation directe mais également à la chasse en vue d'échanger le produit de la chasse pour d'autres articles comme c'était leur habitude, par opposition à la chasse purement commerciale ou sportive.

And, indeed, when one thinks of it this makes excellent sense. The whole emphasis of *Treaty No. 8* was on the preservation of the Indian's traditional way of life. But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern

Et d'ailleurs, quand on y pense, cela est tout à fait logique. Le *Traité n° 8* était axé principalement sur la préservation du mode de vie traditionnel des Indiens. Mais cela ne voulait certainement pas dire que les Indiens devraient à tout jamais s'astreindre à un régime de viande et de poisson et qu'ils ne pourraient pas béné-

civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance or for purely commercial profit. [Emphasis added.]

Wilson J. concluded that the *Wildlife Act* could not forbid the activities which fall within the aboriginal traditional way of life and that are linked to the Horse Lakes people's support and sustenance. Consequently, she would have acquitted the appellant because he sold the grizzly hide to buy food for his family, not for commercial profit.

As far as this case is concerned, there are two points which stand out from the foregoing review of the reasons in *Horseman*, *supra*. First, the Horse Lakes people's original practices, traditions and customs regarding hunting were held to have evolved to include, at the time *Treaty No. 8* was concluded, the right to make some commercial use of the game. Second, and more importantly, when determining whether a treaty right exists (which no doubt extends to aboriginal rights), there should be a distinction drawn between, on the one side, activities relating to the support and sustenance of the natives and, on the other, ventures undertaken purely for commercial profit. Such a differentiation is far from being artificial, as McLachlin J. seems to suggest, and, in fact, this distinction ought to be used in the context of s. 35(1) of the *Constitution Act, 1982* as in other contexts; in short, there are sales which do not qualify as commercial sales (see, for example, *Loi sur la protection du consommateur*, L.R.Q. 1977, c. P-40.1).

ficier eux aussi des progrès de la civilisation moderne au cours du siècle suivant. Les droits de chasse et de pêche des Indiens devaient évidemment être conservés et protégés; les Indiens n'auraient pu survivre autrement. Mais cela ne signifie pas qu'en 1990 ils ne peuvent vendre leur viande et leur poisson pour acheter d'autres articles nécessaires à leur subsistance et à celle de leurs enfants. Pourvu qu'ils chassent en vue de consommer la viande, de l'échanger ou de la vendre pour se nourrir et nourrir leur famille, je ne vois pas comment une interprétation conforme au bon sens de l'expression «pour se nourrir» peut interdire cela. Il va sans dire que la question de savoir si une vente est faite à des fins de subsistance ou à des fins purement commerciales est une question de fait à trancher dans chaque cas. [Je souligne.]

Le juge Wilson a statué que la *Wildlife Act* ne pouvait interdire les activités faisant partie du mode de vie autochtone traditionnel et qui sont liées à la subsistance des Indiens de Horse Lakes. En conséquence, elle aurait acquitté l'appelant, étant donné qu'il avait vendu la peau du grizzli non pas à des fins commerciales, mais pour acheter de la nourriture pour sa famille.

En ce qui concerne le présent pourvoi, deux points ressortent de l'analyse qui précède des motifs prononcés dans *Horseman*, précité. Premièrement, il a été jugé que les coutumes, pratiques et traditions originales des Indiens de Horse Lakes en matière de chasse avaient évolué et incluaient, au moment de la conclusion du *Traité n° 8*, le droit de faire une certaine utilisation commerciale du gibier. Deuxièmement, point encore plus important, pour déterminer si un droit issu de traité existe (principe qui s'applique sans aucun doute aussi aux droits ancestraux), il faut établir une distinction entre, d'une part, les activités de subsistance des autochtones, et, d'autre part, celles exercées à des fins purement commerciales. Une telle distinction est loin d'être artificielle, comme semble le suggérer le juge McLachlin, et, de fait, elle devrait être utilisée dans le contexte du par. 35(1) de la *Loi constitutionnelle de 1982* tout comme dans d'autres contextes. Bref, il y a des ventes qui n'ont pas un caractère commercial (voir, par exemple, la *Loi sur la protection du consommateur*, L.R.Q. 1977, ch. P-40.1).

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This differentiation was adopted by the Ontario Court (Prov. Div.) in *R. v. Jones* (1993), 14 O.R. (3d) 421. In that case, the defendants, members of the Chippewas of Nawash, were charged with the offence of taking more lake trout than permitted by the band's commercial fishing licence, contrary to the *Ontario Fishery Regulations, 1989*, authorized by the *Fisheries Act*. The defendants argued that the quota imposed by the Band's licence interfered with their protected aboriginal right or treaty right to engage in commercial fishing. After referring to both the reasons of Cory J. and of Wilson J. in *Horseman, supra*, Fairgrieve Prov. Ct. J. reached the following conclusions at pp. 440-41:

Consideration of the historical, anthropological and archival evidence leaves an existing aboriginal right to fish for commercial purposes that essentially coincides with the treaty right already stated: the Saugeen have a collective ancestral right to fish for sustenance purposes in their traditional fishing grounds. Apart from the waters adjacent to the two reserves and their unsundered islands, the aboriginal commercial fishing right is not exclusive, but does allow them to fish throughout their traditional fishing grounds on both sides of the peninsula. To use Ms. Blair's language [for the Defendants], the nature of the aboriginal right exercised is one directed "to a subsistence use of the resource as opposed to a commercially profitable enterprise". It is the band's continuing communal right to continue deriving "sustenance" from the fishery resource which has always been an essential part of the community's economic base. [Emphasis added.]

See also, *R. v. King*, [1993] O.J. No. 1794 (Ont. Ct. Prov. Div.), at para. 51, and *R. v. Fraser*, [1994] 3 C.N.L.R. 139 (B.C. Prov. Ct.), at p. 145, as well as the commentators Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?", *supra*, at pp. 234-35, and Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal", *supra*, at p. 8.

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In sum, as *Sparrow, supra*, suggests, when assessing whether aboriginal practices, traditions and customs have been sufficiently significant and

Cette distinction a été adoptée par la Cour de l'Ontario (Div. prov.) dans l'affaire *R. c. Jones* (1993), 14 O.R. (3d) 421. Dans cette affaire, les défendeurs, membres des Chippewas de Nawash, avaient été accusés de l'infraction d'avoir pêché un nombre de truites supérieur à celui autorisé par le permis de pêche commerciale de la bande, en contravention du *Règlement de pêche de l'Ontario de 1989*, pris en vertu de la *Loi sur les pêches*. Les défendeurs ont prétendu que le contingent imposé par le permis de la bande portait atteinte au droit ancestral ou issu de traité qui leur était garanti en matière de pêche commerciale. Après s'être référé aux motifs du juge Cory et à ceux du juge Wilson dans *Horseman*, précité, le juge Fairgrieve de la Cour provinciale a formulé les conclusions suivantes, aux pp. 440 et 441:

[TRADUCTION] L'examen de la preuve historique, anthropologique et archivistique révèle l'existence d'un droit ancestral existant de pêcher à des fins commerciales qui coïncide essentiellement avec le droit issu de traité déjà mentionné: les Saugeens possèdent un droit ancestral collectif de pêche à des fins de subsistance dans leurs secteurs de pêche traditionnels. Sauf dans les eaux adjacentes aux deux réserves et à leurs îles non cédées, le droit ancestral de pêche à des fins commerciales n'a pas un caractère exclusif, mais il autorise néanmoins les Saugeens à pêcher partout dans leurs secteurs de pêche des deux côtés de la péninsule. Pour employer les termes de M^{me} Blair [pour les défendeurs], la nature du droit ancestral exercé vise "une utilisation de la ressource à des fins de subsistance par opposition à une entreprise commercialement rentable". C'est le droit collectif continu de la bande de continuer de tirer sa "subsistance" des ressources de la pêche, qui a toujours constitué un élément essentiel de la base économique de la collectivité. [Je souligne.]

Voir aussi *R. c. King*, [1993] O.J. No. 1794 (C. Ont. Div. prov.), au par. 51; et *R. c. Fraser*, [1994] 3 C.N.L.R. 139 (C. prov. C.-B.), à la p. 145; ainsi que les auteurs Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?", *loc. cit.*, aux pp. 234 et 235, et Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal", *loc. cit.*, à la p. 8.

Bref, comme l'indique l'arrêt *Sparrow*, précité, les fins pour lesquelles sont exercées les activités en cause sont considérées comme hautement perti-

fundamental to the culture and social organization of a particular group of aboriginal people for a substantial continuing period of time, the purposes for which such activities are undertaken should be considered highly relevant. An aboriginal activity can form an integral part of the distinctive culture of a group of aboriginal people if it is done for certain purposes — e.g., for livelihood, support and sustenance purposes. However, the same activity could be considered not to be part of their distinctive aboriginal culture if it is done for other purposes — e.g., for purely commercial purposes. The Chief Justice fails to draw this distinction, which I believe to be highly relevant, although he agrees that the Court of Appeal mischaracterized the aboriginal right here claimed.

This contemplation of aboriginal or treaty rights based on the purpose of the activity is aimed at facilitating the delineation of the rights claimed as well as the identification and evaluation of the evidence presented in their support. However, as in *Horseman, supra*, to respect aboriginal perspective on the matter, the purposes for which aboriginal activities are undertaken cannot and should not be strictly compartmentalized. Rather, in my view, such purposes should be viewed on a spectrum, with aboriginal activities undertaken solely for food, at one extreme, those directed to obtaining purely commercial profit, at the other extreme, and activities relating to livelihood, support and sustenance, at the centre.

This being said, in this case, as I have already noted elsewhere, the British Columbia Court of Appeal framed the issue as being one of whether the Sto:lo possess an aboriginal right to fish which includes the right to make commercial use of the fish. To state the question in that fashion not only disregards the above distinction between the purposes for which fish can be sold, traded and bartered but also mischaracterizes the facts of this case, misconceives the contentions of the appellant

nentes dans l'examen de la question de savoir si les coutumes, pratiques et traditions autochtones ont été suffisamment importantes et fondamentales pour l'organisation sociale et la culture d'un groupe particulier d'autochtones, et ce pendant une période considérable et ininterrompue. Une activité autochtone peut faire partie intégrante de la culture distinctive d'un groupe d'autochtones si elle est exercée pour certaines fins, par exemple à des fins de subsistance. Toutefois, la même activité pourrait être considérée comme ne faisant pas partie de cette culture autochtone distinctive si elle vise d'autres fins, par exemple des fins purement commerciales. Le Juge en chef omet d'établir cette distinction, que j'estime hautement pertinente, quoiqu'il reconnaisse que la Cour d'appel a mal caractérisé le droit ancestral revendiqué en l'espèce.

Cet examen des droits ancestraux ou issus de traités, qui est fondé sur la fin visée par l'activité en cause, a pour objet de faciliter la définition des droits revendiqués, de même que la détermination et l'appréciation de la preuve présentée au soutien de ces droits. Cependant, tout comme dans *Horseman*, précité, afin de respecter la perspective autochtone sur la question, les fins pour lesquelles les activités autochtones sont exercées ne peuvent pas et ne devraient pas être compartimentées de manière stricte. À mon avis, ces fins devraient plutôt être considérées comme les divers éléments d'une gamme sur laquelle les activités autochtones exercées seulement à des fins alimentaires se trouveraient à une extrémité et celles visant des fins purement commerciales à l'autre extrémité, alors que les activités faites à des fins de subsistance occuperaient le centre.

Cela dit, en l'espèce, comme je l'ai déjà affirmé, la Cour d'appel de la Colombie-Britannique a dit que la question était de savoir si les Sto:lo possèdent un droit de pêche ancestral incluant le droit de faire une utilisation commerciale du poisson. Non seulement une telle formulation ne tient pas compte de la distinction établie précédemment entre les fins pour lesquelles le poisson peut être vendu et échangé, mais elle caractérise erronément les faits de l'espèce, interprète mal les prétentions

and overlooks the legislative provision here under constitutional challenge.

de l'appelante et fait abstraction de la disposition législative visée par la présente contestation constitutionnelle.

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First, the facts giving rise to this case do not support the Court of Appeal's framing of the issue in terms of commercial fishing. The appellant, Dorothy Van der Peet, was charged with the offence of selling salmon which were legally caught by her common law spouse and his brother. The appellant sold 10 salmon. There is no evidence as to the purposes of the sale or as to what the money was going to be used for. It is clear, however, that the offending transaction proven by the Crown is not part of a commercial venture, nor does it constitute an act directed at profit. It would be different if the Crown had shown, for instance, that the appellant sold 10 salmon every day for a year or that she was selling fish to provide for commercial profit. This is not, however, the scenario presented to us and, as the facts stand on the record, it is reasonable to infer from them that the appellant sold the 10 salmon, not for profit, but for the support and sustenance of herself and her family.

Premièrement, les faits à l'origine de la présente affaire ne permettent pas, comme l'a fait la Cour d'appel, de formuler la question sous l'angle de la pêche commerciale. L'appelante, Dorothy Van der Peet, a été accusée d'avoir vendu des saumons qui avaient été pêchés légalement par son conjoint de fait et le frère de celui-ci. L'appelante a vendu 10 saumons. Il n'existe pas de preuve concernant les fins de la vente ou l'utilisation qu'on entendait faire du produit de celle-ci. Cependant, il est clair que l'opération reprochée et dont le ministère public a fait la preuve, ne s'inscrit pas dans le cadre d'une entreprise commerciale et ne constitue pas non plus un acte visant à réaliser un profit. Toutefois, la situation serait différente si le ministère public avait démontré, par exemple, que l'appelante avait vendu 10 saumons par jour pendant une année, ou encore qu'elle vendait du poisson à des fins commerciales. Cependant, ce n'est pas le scénario qui nous a été présenté et, suivant les faits au dossier, il est raisonnable d'inférer de ceux-ci que l'appelante a vendu les 10 saumons non pas à des fins commerciales, mais pour subvenir à ses besoins et à ceux de sa famille.

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Furthermore, the appellant did not argue in the courts below or before this Court that the Sto:lo possess an aboriginal right to fish for commercial purposes. The submissions were only to the effect that the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for their livelihood, support and sustenance. In fact, before this Court, the appellant relied on the dissenting opinion of Lambert J.A., at the Court of Appeal, who stated (at para. 150) that the Sto:lo had the right to "catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood" (italics omitted, underlining added). It is well settled that in framing the issue in a case courts cannot overlook the contentions of the parties; in the

Qui plus est, l'appelante n'a pas plaidé devant les tribunaux inférieurs ni devant notre Cour que les Sto:lo possèdent un droit ancestral de pêcher à des fins commerciales. Elle a seulement prétendu que le droit de pêche ancestral des Sto:lo inclut le droit de vendre et d'échanger du poisson à des fins de subsistance. De fait, devant notre Cour, l'appelante s'est fondée sur l'opinion dissidente du juge Lambert de la Cour d'appel qui a affirmé (au par. 150) que les Sto:lo avaient le droit [TRADUCTION] «de prendre et, s'ils le désirent, de vendre eux-mêmes et par l'entremise d'autres Sto:lo, suffisamment de saumon pour assurer à tous ceux qui souhaitent pêcher — ainsi qu'aux personnes à leur charge —, compte tenu de leurs autres ressources financières, une subsistance convenable» (j'ai omis les italiques et je souligne). Il est bien établi que, dans la formulation de la question en litige, les tribunaux ne peuvent faire abstraction des prétentions

case at bar, the appellant did not seek the recognition and affirmation of an aboriginal right to fish for commercial purposes.

Finally, the legislative provision under constitutional challenge is not only aimed at commercial fishing, but also forbids both commercial and non-commercial sale, trade and barter of fish. For convenience, here is again s. 27(5) of the *British Columbia Fishery (General) Regulations*:

27. . . .

(5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence. [Emphasis added.]

The scope of s. 27(5) encompasses any sale, trade or barter of fish caught under an Indian food fish licence. If the prohibition were directed at the sale, trade and barter of fish for commercial purposes, the question of the validity of the Regulations would raise a different issue, one which does not arise on the facts of this case since an aboriginal right to fish commercially is not claimed here. Section 27(5) prohibits the sale, trade and barter of fish for livelihood, support and sustenance, and we must determine whether, as it stands, this provision complies with the constitutional protection afforded to aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.

An aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. In other words, the above distinction based on the purposes of aboriginal activities does not impose an additional burden on the claimant of an aboriginal right. It may be that, for a particular group of aboriginal people, the practices, traditions and customs relating to some commercial activities meet the test for the recognition of an aboriginal right, i.e., to be sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time. This will have to be

des parties. En l'espèce, l'appelante n'a pas demandé que soit reconnu et confirmé un droit ancestral de pêcher à des fins commerciales.

Enfin, la disposition législative visée par la présente contestation constitutionnelle ne concerne pas seulement la pêche commerciale, mais elle interdit de vendre et d'échanger du poisson tant à des fins commerciales que non commerciales. Par souci de commodité, je reproduis à nouveau le par. 27(5) du *Règlement de pêche général de la Colombie-Britannique*:

27. . . .

(5) Il est interdit à quiconque de vendre, d'échanger ou d'offrir de vendre ou d'échanger du poisson pris en vertu d'un permis de pêche de subsistance des Indiens. [Je souligne.]

Le paragraphe 27(5) vise la vente et l'échange de poisson pris en vertu d'un permis de pêche de subsistance des Indiens. Si l'interdiction visait la vente et l'échange de poisson à des fins commerciales, la question de la validité du Règlement soulèverait une question différente, qui ne se présente pas compte tenu des faits de la présente affaire, étant donné qu'aucun droit ancestral de pêcher à des fins commerciales n'est revendiqué en l'espèce. Le paragraphe 27(5) interdit de vendre et d'échanger du poisson à des fins de subsistance, et il nous faut déterminer si cette disposition, de la façon dont elle est libellée, est compatible avec la protection constitutionnelle accordée aux droits ancestraux par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Cela dit, il n'est pas nécessaire qu'une activité autochtone soit accomplie à des fins de subsistance pour bénéficier de la protection du par. 35(1). En d'autres termes, la distinction faite précédemment et fondée sur les fins visées par les activités autochtones n'impose pas un fardeau additionnel au demandeur qui revendique un droit ancestral. Il est possible que, pour un groupe particulier d'autochtones, les coutumes, pratiques et traditions se rapportant à certaines activités commerciales respectent le critère applicable en vue de la reconnaissance d'un droit ancestral, c'est-à-dire avoir été suffisamment importantes et fondamentales pour

determined on the specific facts giving rise to each case, as proven by the Crown, in view of the particular aboriginal culture and the evidence supporting the recognition of such right. In fact, the consideration of aboriginal activities based on their purposes is simply aimed at facilitating the delineation of the aboriginal rights claimed as well as the identification and evaluation of the evidence presented in support of the rights.

leur organisation sociale et leur culture pendant une période considérable et ininterrompue. Cette question doit être tranchée à partir des faits propres à chaque cas et prouvés par le ministère public, compte tenu de la culture autochtone en cause et de la preuve étayant la reconnaissance du droit revendiqué. De fait, l'examen des activités autochtones en fonction des fins visées par celles-ci a tout simplement pour but de faciliter la définition des droits ancestraux revendiqués, ainsi que la détermination et l'appréciation de la preuve présentée à l'appui de ces droits.

In the instant case, this Court is only required to decide whether the Sto:lo's right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, and not whether it includes the right to make commercial use of the fish. In that respect, it is necessary to review the evidence to determine whether such activities have formed an integral part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time so as to give rise to an aboriginal right. That is what I now propose to do.

En l'espèce, notre Cour est uniquement appelée à décider si le droit de pêche des Sto:lo inclut le droit de vendre et d'échanger du poisson à des fins de subsistance, et non pas si ce droit inclut celui de faire une utilisation commerciale du poisson. À cet égard, il est nécessaire d'examiner la preuve afin de déterminer si ces activités ont fait partie intégrante de la culture autochtone distinctive des Sto:lo pendant une période considérable et ininterrompue, de façon à donner naissance à un droit ancestral. C'est maintenant ce que je me propose de faire.

V. The Case

V. Le présent pourvoi

The question here is whether the particular group of aboriginal people, the Sto:lo Band, of which the appellant is a member, has engaged in the sale, trade and barter of fish for livelihood, support and sustenance purposes, in a manner sufficiently significant and fundamental to their culture and social organization, for a substantial continuous period of time, entitling them to benefit from a constitutionally protected aboriginal right to that extent.

En l'espèce, la question est de savoir si le groupe particulier d'autochtones, la bande Sto:lo, dont fait partie l'appelante, a vendu et échangé du poisson à des fins de subsistance, et ce d'une manière suffisamment importante et fondamentale pour son organisation sociale et sa culture pendant une période considérable et ininterrompue, de sorte que ce groupe bénéficierait à cet égard d'un droit ancestral protégé par la Constitution.

At trial, after having examined the historical evidence presented by the parties, Scarlett Prov. Ct. J. arrived at the following conclusions (at p. 160):

Au procès, après avoir examiné la preuve de nature historique présentée par les parties, le juge Scarlett de la Cour provinciale est arrivé aux conclusions suivantes (à la p. 160):

This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This court accepts the evidence of Dr. Stryd and John

[TRADUCTION] La présente cour n'est pas convaincue, à la lumière de la preuve, que le commerce du saumon existait chez les autochtones au sens d'un commerce organisé, d'un marché. Il ressort des témoignages oraux que le commerce était un aspect accessoire de la pêche pratiquée à des fins alimentaires. Les éléments de

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Dewhurst [*sic*] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.

Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic. This court concludes on the evidence, therefore, that the Sto:lo aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. [Emphasis added.]

I agree with the Chief Justice that it is well established, both in criminal and civil contexts, that an appellate court will not disturb the findings of fact made by a trial judge in the absence of "some palpable and overriding error which affected his [or her] assessment of the facts" (emphasis added): see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; see also *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, *Lensen v. Lensen*, [1987] 2 S.C.R. 672, *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, *R. v. Burns*, [1994] 1 S.C.R. 656, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, and *Schwartz v. Canada*, [1996] 1 S.C.R. 254.

At the British Columbia Supreme Court, Selbie J. was of the view that the trial judge committed such an error and, as a consequence, substituted his own findings of fact (at paras. 15 and 16):

preuve anthropologique et archéologique étaient contradictoires. La présente cour préfère les témoignages de M. Stryd et de John Dewhurst [*sic*] à celui de M. Daly et, en conséquence, accepte que la culture des Sto:lo était celle d'une bande plutôt que d'une tribu. Même si les bandes étaient guidées par des siem ou familles importantes, il n'y avait pas de commerce organisé du saumon au temps des aborigènes. Le commerce qui se faisait résultait soit d'échanges faits à des fins rituelles soit d'échanges découlant d'occasions fortuites. Ces échanges avaient seulement un caractère accessoire. La preuve présentée par le ministère public que les Sto:lo ne disposaient pas de sel permettant de conserver le poisson est acceptée.

Les échanges de poisson étaient tributaires des conditions locales sur le plan de la disponibilité, du transport et de la conservation. C'est l'établissement de la Compagnie de la Baie d'Hudson au fort situé à Langley qui a créé le marché et le commerce du saumon frais. Les échanges de saumon séché au temps des aborigènes n'avaient, comme il a été dit plus tôt, qu'un caractère minimal et fortuit. Par conséquent, la Cour conclut, à la lumière de la preuve, que le droit ancestral des Sto:lo de pêcher à des fins alimentaires et rituelles n'inclut pas le droit de vendre le poisson ainsi pris [Je souligne.]

Je suis d'accord avec le Juge en chef qu'il est bien établi, tant en matière criminelle que civile, qu'une cour d'appel ne modifie pas les conclusions de fait du juge du procès en l'absence d'une «erreur manifeste et dominante qui a faussé son appréciation des faits» (je souligne): voir *Stein c. Le navire «Kathy K»*, [1976] 2 R.C.S. 802, à la p. 808; voir aussi *Beaudoin-Daigneault c. Richard*, [1984] 1 R.C.S. 2, *Lensen c. Lensen*, [1987] 2 R.C.S. 672, *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 R.C.S. 705, *Ontario (Procureur général) c. Bear Island Foundation*, [1991] 2 R.C.S. 570, *Lapointe c. Hôpital Le Gardeur*, [1992] 1 R.C.S. 351, *R. c. Burns*, [1994] 1 R.C.S. 656, *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377 et *Schwartz c. Canada*, [1996] 1 R.C.S. 254.

Le juge Selbie de la Cour suprême de la Colombie-Britannique a estimé que le juge du procès avait commis une telle erreur et il a en conséquence substitué ses propres conclusions de fait (aux par. 15 et 16):

With respect, in my view the learned judge erred in using contemporary tests for “marketing” to determine whether the aboriginal acted in ways which were consistent with trade albeit in a rudimentary way as dictated by the times.

In my view, the evidence in this case, oral, historical and opinion, looked at in the light of the principles of interpreting aboriginal rights referred to earlier, is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so. We are, after all, basically considering the existence in antiquity of an aboriginal's right to dispose of his fish other than by eating it himself or using it for ceremonial purposes — the words “sell”, “barter”, “exchange”, “share”, are but variations on the theme of “disposing”. It defies common sense to think that if the aboriginal did not want the fish for himself, there would be some stricture against him disposing of it by some other means to his advantage. We are speaking of an aboriginal “right” existing in antiquity which should not be restrictively interpreted by today's standards. I am satisfied that when the first Indian caught the first salmon he had the “right” to do anything he wanted with it — eat it, trade it for deer meat, throw it back or keep it against a hungrier time. As time went on and for an infinite variety of reasons, that “right” to catch the fish and do anything he wanted with it became hedged in by rules arising from religion, custom, necessity and social change. One such restriction requiring an adjustment to his rights was the need dictated by custom or religion to share the first catch — to do otherwise would court punishment by his god and by the people. One of the social changes that occurred was the coming of the white man, a circumstance, as any other, to which he must adjust. With the white man came new customs, new ways and new incentives to colour and change his old life, including his trading and bartering ways. The old customs, rightly or wrongly, for good or for bad, changed and he must needs change with them — and he did. A money economy eventually developed and he adjusted to that also — he traded his fish for money. This was a long way from his ancient sharing, bartering and trading practices but it was the logical progression of such. It has been held that the aboriginal right to hunt is not frozen in time so that only the bow and arrow can be used in exercising it — the right evolves with the times: see *Simon v. R.*, [1985] 2 S.C.R. 387 So, in my view, with the right to fish and dispose of them, which I find on the evidence includes the right to trade and barter them. The Indian right to trade his fish is not frozen in time to doing so only by the medium of the potlatch and

[TRADUCTION] Avec égards, je suis d'avis que le juge du procès a commis une erreur en utilisant des critères contemporains de «commercialisation» pour déterminer si l'autochtone avait agi d'une façon compatible avec les usages du commerce, quoique de la manière rudimentaire dictée par l'époque.

À mon avis, lorsqu'on examine la preuve en l'espèce — orale, historique et d'opinion — à la lumière des principes d'interprétation des droits ancestraux qui ont été mentionnés plus tôt, on constate qu'elle est davantage compatible avec l'existence d'un droit de pêche ancestral incluant le droit de vendre ou d'échanger le produit de la pêche, que le contraire, et il faut conclure en ce sens. Après tout, fondamentalement nous examinons l'existence, dans les temps anciens, du droit d'un autochtone de disposer de son poisson autrement qu'en le consommant lui-même ou en l'utilisant à des fins rituelles — les termes «vendre», «troquer», «échanger», «partager» n'étant que des variantes de l'idée de «disposer». Il est contraire au bon sens de penser que si un autochtone ne voulait pas le poisson pour lui-même, — quelque chose l'empêchait d'en disposer d'une façon qui l'avantagerait. Nous parlons d'un «droit» autochtone qui existait dans les temps anciens et qui ne devrait pas être interprété restrictivement par rapport aux normes actuelles. Je suis convaincu que quand le premier Indien a pris le premier saumon il avait le «droit» d'en faire ce qu'il voulait — le manger, l'échanger contre de la viande de chevreuil, le remettre à l'eau ou le garder pour les temps plus difficiles. Au fil du temps, et pour une gamme de raisons, ce «droit» de prendre du poisson et d'en disposer à sa guise a été circonscrit par des règles fondées sur la religion, la coutume, la nécessité et les changements sociaux. L'une de ces restrictions, qui a entraîné une adaptation des droits du premier Indien, a été l'obligation dictée par la coutume ou la religion de partager la première capture — ne pas le faire l'aurait exposé au châtement de son dieu ou du peuple. L'un des changements sociaux a été l'arrivée des Blancs, circonstance à laquelle, comme toutes les autres, l'Indien a dû s'adapter. Les Blancs sont arrivés avec de nouvelles coutumes, de nouvelles manières de faire et de nouveaux incitatifs à modifier son mode de vie, y compris ses méthodes de troc et d'échange. À tort ou à raison, pour le meilleur ou pour le pire, les vieilles coutumes ont changé et l'Indien a dû évoluer avec elles — ce qu'il a fait. Une économie monétaire s'est éventuellement établie et l'Indien s'y est également adapté — commençant à vendre du poisson pour de l'argent. Il s'agissait d'un changement considérable par rapport à ses anciennes pratiques de partage, d'échange et de troc, mais néanmoins d'une progression logique. Il a été sta-

the like; he is entitled, subject to extinguishment or justifiable restrictions, to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money. It is thus my view that the aboriginal right of the Sto:lo peoples to fish includes the right to sell, trade or barter them after they have been caught. It is my view that the learned judge imposed a verdict inconsistent with the evidence and the weight to be given it. [Emphasis added.]

At the British Columbia Court of Appeal, Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A., for the majority, took the position that an aboriginal right would be recognized only if the manifestations of the distinctive aboriginal culture — i.e., the particular aboriginal practices, traditions or customs — were particular to native culture and not common to non-aboriginal societies. Further, the evidence would need to show that the activities in question have been engaged in for time immemorial at the time sovereignty was asserted by Britain. Macfarlane J.A. wrote (at para. 21):

To be so regarded those practices must have been integral to the distinctive culture of the aboriginal society from which they were said to have arisen. A modernized form of such a practice would be no less an aboriginal right. A practice which had not been integral to the organized society and its distinctive culture, but which became prevalent merely as a result of European influences, would not qualify for protection as an aboriginal right. [Emphasis added.]

The majority of the Court of Appeal agreed with the trial judge's findings and held that the Sto:lo's practices, traditions and customs did not justify the recognition of an aboriginal right to fish for commercial purposes.

tué que le droit de chasse ancestral n'est pas figé dans le temps — sinon, l'autochtone ne pourrait se servir que d'un arc et des flèches pour l'exercer — que le droit évolue avec le temps: voir *Simon c. R.*, [1985] 2 R.C.S. 387 . . . En conséquence, à mon avis, le droit de prendre du poisson et d'en disposer inclut, selon la preuve, le droit de l'échanger ou de le troquer. Le droit de l'Indien d'échanger le poisson n'est pas figé dans le temps — sinon il ne pourrait en disposer que dans le cadre de potlatch et d'autres occasions du genre; de fait, sous réserve d'extinction du droit ou de restrictions justifiables de celui-ci, l'Indien peut profiter des progrès réalisés avec le temps et disposer du poisson par des méthodes modernes, s'il le désire, comme le fait de le vendre contre de l'argent. Je suis donc d'avis que le droit de pêche ancestral des Sto:lo inclut le droit de vendre et d'échanger le poisson pris. A mon avis, le juge a rendu une décision incompatible avec la preuve et l'importance qui devait lui être accordée. [Je souligne.]

S'exprimant au nom de la Cour d'appel de la Colombie-Britannique à la majorité, le juge Macfarlane (avec l'appui du juge Taggart) et le juge Wallace ont exprimé le point de vue qu'un droit ancestral ne sera reconnu que si les manifestations de la culture autochtone distinctive — les coutumes, pratiques ou traditions autochtones particulières — étaient propres à la culture autochtone et non communes aux sociétés non autochtones. De plus, il faudrait que la preuve établisse que, au moment de l'affirmation de la souveraineté britannique, les activités en question étaient exercées de temps immémorial. Le juge Macfarlane a écrit ce qui suit (au par. 21):

[TRADUCTION] Pour être considérées comme telles, ces pratiques doivent avoir fait partie intégrante de la culture distinctive de la société autochtone qui leur aurait donné naissance. Une forme modernisée d'une telle pratique n'en constituerait pas moins un droit ancestral. Une pratique qui n'aurait pas fait partie intégrante de la société organisée et de sa culture distinctive, mais qui ne se serait répandue [que] du seul fait des influences européennes, ne pourrait pas être protégée en tant que droit ancestral. [Je souligne.]

La Cour d'appel à la majorité a souscrit aux conclusions du juge du procès et statué que les coutumes, pratiques et traditions des Sto:lo ne justifiaient pas la reconnaissance d'un droit ancestral de pêcher à des fins commerciales.

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Lambert J.A., in dissent, applied what he called a "social" form of description of aboriginal rights, one which does not "freeze" native practices, traditions and customs in time. In light of the evidence, he concluded that the distinctive aboriginal culture of the Sto:lo warranted the recognition of an aboriginal right to sell, trade and barter fish in order to provide them with a "moderate livelihood". He stated (at para. 150):

For those reasons I conclude that the best description of the aboriginal customs, traditions and practices of the Sto:lo people in relation to the sockeye salmon run on the Fraser River is that their aboriginal customs, traditions and practices have given rise to an aboriginal right, to be exercised in accordance with their rights of self-regulation including recognition of the need for conservation to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood, and, in any event, not less than the quantity of salmon needed to provide every one of the collective holders of the aboriginal right with the same amount of salmon per person per year as would have been consumed or otherwise utilized by each of the collective holders of the right, on average, from a comparable year's salmon run, in, say, 1800. [Italics in original; emphasis added.]

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It appears from the foregoing review of the judgments that the conclusions on the findings of fact relating to whether the Sto:lo possess an aboriginal right to sell, trade and barter fish varied depending on the delineation of the aboriginal right claimed and on the approach used to interpreting such right. The trial judge, as well as the majority of the Court of Appeal, framed the issue as being whether the Sto:lo possess an aboriginal right to fish for commercial purposes and used an approach based on the manifestations of distinctive aboriginal culture which differentiates between aboriginal and non-aboriginal practices and which "freezes" aboriginal rights in a pre-contact or pre-sovereignty aboriginal time. The summary appeal judge, as well as Lambert J.A. at the Court of Appeal, described the issue in terms of whether the Sto:lo possess an aboriginal right to sell, trade and

Le juge Lambert, dissident, a appliqué ce qu'il a appelé une forme «sociale» de description des droits ancestraux n'ayant pas pour effet de «figer» les coutumes, pratiques et traditions autochtones. Au vu de la preuve, il a conclu que la culture autochtone distinctive des Sto:lo justifiait de leur reconnaître un droit ancestral de vendre et d'échanger du poisson de manière à s'assurer «une subsistance convenable». Il a déclaré ceci (au para. 150):

[TRADUCTION] *Pour ces motifs, je conclus que la meilleure façon de décrire les coutumes, pratiques et traditions autochtones des Sto:lo relativement à la remonte de saumon rouge dans le fleuve Fraser est de dire que leurs coutumes, pratiques et traditions ont donné naissance à un droit ancestral, qui doit être exercé conformément à leurs droits à l'autoréglementation, y compris la reconnaissance des besoins de conservation, de prendre et, s'ils le désirent, de vendre eux-mêmes et par l'entremise d'autres Sto:lo suffisamment de saumon pour assurer à tous ceux qui veulent pêcher — ainsi qu'aux personnes à leur charge —, compte tenu de leurs autres ressources financières, une subsistance convenable; la quantité de saumon ne devant pas, quoi qu'il en soit, être inférieure à la quantité requise pour fournir à chacun des détenteurs à titre collectif du droit ancestral la même quantité annuelle de saumon par personne que ces derniers auraient pu consommer ou utiliser par ailleurs, en moyenne, lors d'une remonte annuelle comparable de saumon, disons en 1800. [En italique dans l'original; je souligne.]*

Il ressort de l'examen que je viens de faire des jugements des tribunaux inférieurs que les conclusions tirées des constatations de fait touchant la question de savoir si les Sto:lo possèdent un droit ancestral de vendre et d'échanger du poisson ont varié en fonction de la définition du droit ancestral revendiqué et de la méthode utilisée pour interpréter ce droit. Le juge du procès et les juges de la majorité de la Cour d'appel ont dit que la question était de savoir si les Sto:lo possèdent un droit ancestral de pêcher à des fins commerciales, et ils ont appliqué une méthode fondée sur les manifestations de la culture autochtone distinctive, qui distingue entre les pratiques autochtones et non autochtones et qui «fige» les droits ancestraux dans l'état où ils étaient à une époque autochtone, avant le contact avec les Européens ou l'affirmation de la souveraineté britannique. Le juge d'ap-

barter fish for livelihood. Further, they examined the aboriginal right claimed at a certain level of abstraction, which focused on the distinctive aboriginal culture of the Sto:lo and which was evolutive in nature.

As I have already noted elsewhere, the issue in the present appeal is whether the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. Accordingly, the trial judge and the majority of the Court of Appeal erred in framing the issue. Furthermore, it is my view that the nature and extent of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* must be defined by referring to the notion of "integral part of a distinctive aboriginal culture", i.e., whether an aboriginal practice, tradition or custom has been sufficiently significant and fundamental to the culture and social organization of the particular group of aboriginal people for a substantial continuous period of time. Therefore, by using a "frozen right" approach focusing on aboriginal practice to defining the nature and extent of the aboriginal right, Scarlett Prov. Ct. J. and the majority of the Court of Appeal were also in error.

Consequently, when the trial judge assessed the historical evidence presented at trial, he asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right under s. 35(1) of the *Constitution Act, 1982*. He thus made no finding of fact, or insufficient findings of fact, as regards the Sto:lo's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. It is also noteworthy that the first appellate judge, who asked himself the right ques-

pel des poursuites sommaires et le juge Lambert de la Cour d'appel ont pour leur part estimé que la question était de savoir si les Sto:lo possèdent un droit ancestral de vendre et d'échanger du poisson à des fins de subsistance. De plus, ils ont examiné le droit ancestral revendiqué selon un certain niveau d'abstraction, mettant l'accent sur la culture autochtone distinctive des Sto:lo et le caractère évolutif du droit.

Comme je l'ai déjà mentionné, la question qui se pose dans le présent pourvoi est de savoir si le droit de pêche ancestral inclut le droit de vendre et d'échanger du poisson à des fins de subsistance. En conséquence, le juge du procès et les juges de la majorité de la Cour d'appel ont commis une erreur dans la formulation de la question en litige. En outre, je suis d'avis que la nature et l'étendue des droits ancestraux protégés par le par. 35(1) de la *Loi constitutionnelle de 1982* doivent être interprétées par application de la notion de «partie intégrante d'une culture autochtone distinctive», c.-à-d. en se demandant si la coutume, pratique ou tradition autochtone en cause a été suffisamment importante et fondamentale pour l'organisation sociale et la culture du groupe particulier d'autochtones, pendant une période considérable et ininterrompue. En conséquence, en appliquant la méthode des «droits figés», qui est axée sur la pratique autochtone, pour définir la nature et l'étendue du droit ancestral, le juge Scarlett de la Cour provinciale et les juges de la majorité de la Cour d'appel ont également commis une erreur.

Par conséquent, lorsque le juge du procès a apprécié la preuve historique présentée, il s'est posé les mauvaises questions et a fait erreur quant à la preuve requise pour établir l'existence d'un droit ancestral visé au par. 35(1) de la *Loi constitutionnelle de 1982*. En conséquence, il n'a pas tiré de conclusion de fait — ou celles qu'il a tirées étaient insuffisantes — au sujet de la culture autochtone distinctive des Sto:lo en ce qui a trait à la vente et à l'échange de poisson à des fins de subsistance. Il convient également de signaler que le premier juge d'appel, qui lui s'est posé les bonnes questions, a tiré des conclusions de fait dia-

tions, made diametrically opposed findings of fact on the evidence presented at trial.

métralement opposées à partir de la preuve présentée au procès.

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The result of these palpable and overriding errors, which affected the trial judge's assessment of the facts, is that an appellate court is justified in intervening — as did the summary appeal judge — in the trial judge's findings of fact and substituting its own assessment of the evidence presented at trial: see *Stein v. The Ship "Kathy K"*, *supra*. I note also that this Court, as a subsequent appellate court in such circumstances, does not have to show any deference to the assessment of the evidence made by lower appellate courts. Since this Court is in no less advantageous or privileged position than the lower appellate courts in assessing the evidence on the record, we are free to reconsider the evidence and substitute our own findings of fact (see *Schwartz v. Canada*, *supra*, at paras. 36-37). I find myself, however, in general agreement with the findings of fact of Selbie J., the summary appeal judge, and of Lambert J.A. Nonetheless, I will revisit the evidence to determine whether it reveals that the sale, trade and barter of fish for livelihood, support and sustenance purposes have formed an integral part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time.

Vu ces erreurs manifestes et dominantes, qui ont faussé l'appréciation des faits par le juge du procès, une cour d'appel est justifiée de modifier — comme l'a fait le juge d'appel des poursuites sommaires — les conclusions de fait du juge de première instance et de substituer son appréciation de la preuve présentée au procès à celle du juge de première instance: voir l'arrêt *Stein c. Le navire «Kathy K»*, précité. Je tiens aussi à faire remarquer que notre Cour, en tant que juridiction subséquente d'appel dans de telles circonstances, n'a pas à faire preuve de retenue à l'égard de l'appréciation de la preuve faite par les tribunaux d'appel inférieurs. Comme notre Cour n'est pas dans une situation moins avantageuse ou moins privilégiée que les tribunaux d'appel inférieurs pour apprécier la preuve à partir du dossier, nous sommes libres de réexaminer la preuve et de substituer nos propres conclusions de fait (voir l'arrêt *Schwartz c. Canada*, précité, aux par. 36 et 37) à celles déjà tirées. Cependant, je suis d'accord de façon générale avec les conclusions de fait du juge Selbie, juge d'appel des poursuites sommaires, et celles du juge Lambert de la Cour d'appel. Néanmoins, je vais réexaminer la preuve afin de déterminer si elle révèle que la vente et l'échange de poisson à des fins de subsistance ont fait partie intégrante de la culture autochtone distinctive des Sto:lo pendant une période considérable et ininterrompue.

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The Sto:lo, who are part of the Coast Salish Nation, have lived in their villages along the Fraser River from Langley to above Yale. They were an organized society, whose main socio-political unit was the extended family. The Fraser River was their main source of food the year around and, as such, the Sto:lo considered it to be sacred. It is interesting to note that their name, the "Sto:lo", means "people of the river": see Wilson Duff, *The Upper Stalo Indians of the Fraser Valley, British Columbia (Anthropology in British Columbia — Memoir No. 1)*, 1952, at p. 11.

Les Sto:lo, qui font partie de la nation des Salish de la côte, ont vécu dans leurs villages le long du fleuve Fraser, de Langley jusqu'à Yale. Ils formaient une société organisée, dont la principale unité socio-politique était la famille élargie. Le fleuve Fraser était leur principale source de nourriture à longueur d'année et, pour cette raison, les Sto:lo considéraient ce cours d'eau comme sacré. Il est intéressant de noter que leur nom, les «Sto:lo», signifie «les gens du fleuve»: voir Wilson Duff, *The Upper Stalo Indians of the Fraser Valley, British Columbia (Anthropology in British Columbia — Memoir No. 1)*, 1952, à la p. 11.

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Archaeological evidence demonstrates that the Sto:lo have relied on the fishery for centuries.

La preuve archéologique démontre que les Sto:lo vivent de la pêche depuis des siècles. Située

Located near the mouth of the Fraser River, the Sto:lo fishery consists of five species of salmon — sockeye, chinook, coho, chum and pink — as well as sturgeon, eulachons and trout. The Sto:lo used many methods and devices to fish salmon, such as dip-nets, harpoons, weirs, traps and hooks. Both the wind and the heat retention capacity of the geography of the Fraser Canyon result in an excellent area for wind drying fish. Therefore, although fresh fish were procurable year around, they dried or smoked large amounts at the end of the summer to use for the hard times of winter.

The Sto:lo community is geographically located between two biogeoclimatic zones: the interior plateau region and the coastal maritime area. As such, they have long enjoyed the exchange of regional goods with the people living in these zones. See, in that respect, the report of Dr. Richard Daly, an expert in social and cultural anthropology called by the appellant and who gave expert opinion evidence on the social structure and culture of the Sto:lo, and also Duff, *The Upper Stalo Indians of the Fraser Valley, British Columbia*, *supra*, at p. 95.

The oral histories, corroborated by expert evidence, show a long tradition of trading relationships among the Sto:lo and with their neighbours, both before the arrival of Europeans and to the present day. Dr. Arnoud Henry Stryd, an expert in archaeology with a strong background in anthropology called by the respondent to give expert opinion evidence and to speak to the archaeological record, testified that exchanging goods has been a feature of the human condition from the earliest times:

Q. Yes. You say there's evidence for trade in non-perishable items throughout much of the archaeological record for British Columbia.

près de l'embouchure du fleuve Fraser, la pêche compte cinq espèces de saumon — le saumon rouge, le saumon quinnat, le saumon coho, le saumon keta et le saumon rose — ainsi que de l'esturgeon, de l'eulakane et de la truite. Les Sto:lo utilisaient de nombreuses méthodes et de nombreux engins pour pêcher le saumon: époussette, harpon, bordigue, trappe en filet et gaffe. Tant le vent dans le canyon du Fraser que la capacité calorifique de la géographie de ce lieu font de celui-ci un excellent endroit pour le séchage au vent du poisson. En conséquence, même s'ils pouvaient se procurer du poisson frais tout au long de l'année, les Sto:lo en séchaient ou en boucanaient de grandes quantités à la fin de l'été en vue des périodes difficiles de l'hiver.

Comme, sur le plan géographique, la collectivité sto:lo est située entre deux zones biogéoclimatiques — la région du plateau intérieur et la région côtière maritime —, ses membres ont depuis longtemps l'occasion d'échanger des produits régionaux avec les habitants de ces zones. À cet égard, voir le rapport de M. Richard Daly, expert en anthropologie sociale et culturelle, qui a été assigné par l'appelante et a témoigné en cette qualité sur l'organisation sociale et la culture des Sto:lo, et aussi Duff, *The Upper Stalo Indians of the Fraser Valley, British Columbia*, *op. cit.*, à la p. 95.

Les récits oraux, corroborés par les témoignages d'expert, démontrent l'existence d'une longue tradition de rapports commerciaux entre les Sto:lo et leurs voisins, tant avant l'arrivée des Européens que de nos jours. Monsieur Arnoud Henry Stryd, spécialiste de l'archéologie possédant un solide bagage en anthropologie, qui a été assigné par l'intimée pour témoigner à titre d'expert et parler des documents archéologiques, a affirmé que l'échange de biens est une caractéristique de l'humanité depuis les temps les plus anciens:

[TRADUCTION]

Q. Oui. Vous dites qu'on trouve dans la majeure partie des documents archéologiques concernant la Colombie-Britannique des preuves de l'existence d'un commerce d'articles non périssables.

A. Well, that's right. In my point of view, the tendency to trade is one that's very human and if you have things that you have that you don't need and your neighbours have something that you would like that they are willing to, that they don't need, that it seems very obvious that some kind of exchange of goods would take place and the earliest part of the human condition to exchange items. [Emphasis added.]

Likewise, John Trevor Dewhirst, an anthropologist and ethno-historian called by the respondent, gave expert opinion evidence on the aboriginal trade of salmon of the Sto:lo. Although he insisted that there was no "organized regularized large scale exchange of salmon" in pre-contact or pre-sovereignty aboriginal time, he testified to the effect that the Sto:lo did exchange, trade and barter salmon among themselves and with other native people, and that such activities were rooted in their culture:

Q. We had reached the stage, sir, as I understand it where — we're now at the point with your evidence, sir, that the exchange of salmon amongst the Indians — you've mentioned that, sir, there was some exchange of salmon amongst the Indians?

A. Oh, yes, very definitely.

Q. Yes. Could you expand on that, please?

A. Yes. I think it's very clear from the — both from the historical record and — and from the anthropological evidence, the ethnographic evidence collected by various workers, Wilson Duff, Marion Smith, Dr. Daly and others whom we've mentioned — and Suttles — exchange of salmon for other foodstuffs and perhaps non-food items definitely took place amongst the Sto:Lo and was a definite feature of their society and culture.

What I'd like to do is go over some of that material evidence regarding the exchange of salmon and examine that in terms of — of trade and the — try — try to deter-

R. Oui, c'est exact. À mon avis, la tendance à commercer est quelque chose de très humain; si vous avez quelque chose dont vous n'avez pas besoin et que vos voisins ont quelque chose que vous aimeriez avoir et dont ils n'ont pas besoin, il semble très évident qu'il se produira un certain type d'échange de biens; l'échange de biens remonte au tout début de l'humanité. [Je souligne.]

De même, M. John Trevor Dewhirst, anthropologue et ethno-historien assigné par l'intimée, a témoigné à titre d'expert relativement au commerce du saumon par les ancêtres des Sto:lo. Même s'il a insisté sur le fait qu'il n'y avait pas [TRADUCTION] «d'activités systématisées et organisées d'échange de saumon sur une grande échelle» au temps des aborigènes, avant le contact avec les Européens ou l'affirmation de la souveraineté britannique, il a témoigné que les Sto:lo échangeaient et troquaient effectivement du saumon, entre eux et avec d'autres peuples autochtones, et que ces activités étaient enracinées dans leur culture:

[TRADUCTION]

Q. Monsieur, nous en étions au point, si j'ai bien compris, où — nous en sommes au point dans votre témoignage, Monsieur, où il est question d'échange de saumon entre les Indiens — vous avez mentionné, Monsieur, qu'il y avait échange de saumon entre les Indiens?

R. Oui. Très certainement.

Q. Oui. Pourriez-vous préciser s'il vous plaît?

R. Oui. J'estime qu'il ressort très clairement — tant des archives historiques que — de la preuve anthropologique, de la preuve ethnographique recueillies par diverses personnes, Wilson Duff, Marion Smith, M. Daly et d'autres personnes que nous avons mentionnées — et Suttles — que l'échange de saumon contre d'autres denrées alimentaires et peut-être d'autres produits non alimentaires se pratiquait sûrement chez les Sto:lo et constituait nettement une caractéristique de leur société et culture.

J'aimerais passer en revue certains de ces éléments de preuve matérielle concernant l'échange de saumon et les examiner sous l'angle — du commerce et — essayer —

mine — try to develop a context for in fact what was happening at least in some of these instances.

essayer de déterminer — essayer d'établir le contexte de ce qui se passait dans les faits, à tout le moins dans certains de ces cas.

A. That — I believe that the record does not indicate the presence of an organized regularized large scale exchange of salmon amongst the Sto:Lo or between the Sto:Lo and other Native peoples and by this large scale exchange I — I think — rather, by the exchange of salmon I think it's important to look at this context and see if in fact there is a kind of a market situation. I mean, most cultures, most societies do exchange items between relatives and friends and so on. I think that this is debatable whether you can call this trade in — in the sense of a — of a kind of a marketplace and I'd like to turn now to some of the — some of the evidence that's been presented. [Emphasis added.]

R. Je crois que le dossier ne révèle pas l'existence d'activités systématiques et organisées d'échange de saumon sur une grande échelle, entre les Sto:lo eux-mêmes ou entre les Sto:lo et d'autres peuples autochtones; par échange sur une grande échelle, je — je pense — plutôt, par échange de saumon, je pense qu'il est important d'examiner ce contexte et de déterminer s'il existe en fait une sorte de situation de marché. Je veux dire que, dans la plupart des cultures, dans la plupart des sociétés, il y a échange de biens entre parents, amis et ainsi de suite. Je pense que l'on peut se demander s'il est possible dans ce cas de parler de commerce — dans le sens d'une — sorte de marché, et j'aimerais maintenant examiner certains des — certains éléments de preuve présentés. [Je souligne.]

It seems well founded to conclude, as the expert witnesses for the respondent did, that no formalized market system of trade of salmon existed in the original Sto:lo society because, as a matter of fact, organized large scale trade in salmon appears to run contrary to the Sto:lo's aboriginal culture. They viewed salmon as more than just food; they treated salmon with a degree of respect since the Sto:lo community was highly reliant and dependant on the fish resources. On the one hand, the Sto:lo pursued salmon very aggressively in order to get them for livelihood, support and sustenance purposes. On the other, however, they were sufficiently mindful not to exploit the abundance of the river and they taught their children a thoughtful attitude towards salmon and also how to conserve them.

Il semble bien fondé de conclure, comme l'ont fait les témoins experts de l'intimée, qu'il n'existait pas de système de marché organisé pour le commerce du saumon au sein de la société sto:lo originale, étant donné que le commerce organisé du saumon sur une grande échelle paraît, en fait, aller à l'encontre de la culture autochtone des Sto:lo. Pour eux, le saumon était plus qu'une denrée alimentaire, ils le traitaient avec un certain respect puisque leur collectivité dépendait beaucoup des ressources de la pêche. D'une part, les Sto:lo pêchaient le saumon très activement à des fins de subsistance. D'autre part, toutefois, ils étaient suffisamment soucieux de ne pas abuser des richesses du fleuve, et ils enseignaient à leurs enfants une attitude de parcimonie à l'égard du saumon ainsi que les moyens de conserver cette ressource.

As the social and cultural anthropologist Dr. Richard Daly explained at trial, the exchange of salmon among the Sto:lo and with their neighbours was informed by the ethic of feeding people, catching and trading only what was necessary for their needs and the needs of face-to-face relationships:

Comme l'a expliqué, au procès, Richard Daly, anthropologue social et culturel, l'échange de saumon pratiqué par les Sto:lo entre eux et avec leurs voisins était guidé par le principe qu'il fallait nourrir la population et ne prendre et n'échanger que le poisson nécessaire pour subvenir à leurs propres besoins et à ceux des personnes avec qui ils avaient des rapports directs:

Q. Is the sale of fish or other foodstuff, in your opinion, also part of the Sto:lo culture?

A. The way it is explained to me by people in the Sto:lo community, that it's all part of feeding yourself and feeding others. You're looking after your basic necessities. And today it's all done through the medium of cash. And you may not have anything to reciprocate when — when other native people from a different area come to you with say tanned hides from the Interior for making — for handicraft work. You may not have anything to give them in return at that time and you pay for it, like anyone else would. But then when you — you've put up your salmon or you're able to take them a load of fresh salmon you reciprocate and they pay you. But it's — it's considered to be a similar procedure as the bartering because it's satisfying the basic needs.

And also people tell me that they go fishing in order to get the money for the gas to drive to the fishing sites, to look after the repair of their nets and to — to make some of the necessary amounts of cash needed for their day-to-day existence. And I have observed people going out to fish with an intention of selling. They don't go to get a maximum number of fish and sell them on the market for the — the going price. They sell it at the going price but they — they won't take any more fish than they have orders for because that's — that's the wrong attitude towards the fish and fishing. So I think in a sense it — it's very consistent with the type of bartering that has preceded it and it's sort of still couched in that same idiom, as well. [Emphasis added.]

[TRANSDUCTION]

Q. À votre avis, la vente de poisson ou d'autres denrées alimentaires fait-elle également partie de la culture sto:lo?

R. Comme me l'ont expliqué des membres de la collectivité sto:lo, tout cela fait partie du fait de se nourrir et de nourrir les autres. On doit subvenir à ses besoins essentiels. Et aujourd'hui, tout se fait au moyen de l'argent. Il est possible qu'on n'ait rien à offrir en contrepartie lorsque — lorsque des autochtones d'une autre région arrivent de l'Intérieur avec des peaux tannées — qui serviront à la confection d'objets d'artisanat. Vous pourriez n'avoir rien à offrir en échange, auquel cas vous payez ces peaux comme le ferait toute autre personne. Cependant, lorsque vous offrez votre saumon ou que vous pouvez leur apporter une cargaison de saumon frais, vous faites de même et ils vous paient. Mais c'est — c'est considéré comme une procédure analogue au troc parce que ça satisfait les besoins essentiels.

Les gens me disent également qu'ils vont à la pêche pour obtenir de l'argent pour acheter de l'essence pour se rendre aux sites de pêche, pour faire réparer leurs filets et — pour gagner une partie de l'argent dont ils ont besoin pour subvenir à leurs besoins courants. Et j'ai observé que des gens vont à la pêche avec l'intention de vendre le poisson pris. Ils ne vont pas prendre le plus de poissons possible et les vendre sur le marché — au prix courant. Ils les vendent au prix courant — mais ils ne prennent pas plus que le nombre qu'on leur a commandé parce que c'est — ce n'est pas la bonne attitude à avoir à l'égard du poisson et de la pêche. À mon avis, dans un sens, ces pratiques sont très conformes au type de troc qui les ont précédées, et elles y sont assimilables en quelque sorte. [Je souligne.]

216 The foregoing review of the historical evidence on the record reveals that there was trade of salmon for livelihood, support and sustenance purposes among the Sto:lo and with other native people and, more importantly, that such activities formed part of, and were undoubtedly rooted in, the distinctive aboriginal culture of the Sto:lo. In short, the fishery has always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. Accordingly, to use the terminology of the test propounded above, the sale, trade and barter of fish for livelihood, support and sustenance purposes was suffi-

L'examen qui précède de la preuve de nature historique au dossier révèle qu'il y avait, entre les Sto:lo eux-mêmes et entre les Sto:lo et d'autres peuples autochtones, des échanges de saumon à des fins de subsistance, et, fait encore plus important, que ces activités faisaient partie de la culture autochtone distinctive des Sto:lo et étaient indubitablement enracinées dans celle-ci. Bref, la pêche a toujours été un aspect central de la vie et de la subsistance des Sto:lo, qui ont toujours échangé du saumon afin d'assurer leur subsistance et celle de leur famille. En conséquence, pour employer la formulation du critère proposé plus tôt, les activités de vente et d'échange de poisson à des fins de

ciently significant and fundamental to the culture and social organization of the Sto:lo.

The period of intensive trade of fish in a market-type economy involving the Sto:lo began after the coming of the Europeans, in approximately 1820, when the Hudson's Bay Company established a post at Fort Langley on the Fraser River. Following that, the Sto:lo participated in a thriving commercial fishery centred around the trade of salmon. According to Jamie Morton, an historian called by the appellant to give expert opinion evidence on the history of the European trade with native people, approximately 1,500 to 3,000 barrels of salmon (with 60-90 fish per barrel) were cured per year, which the Hudson's Bay Company bought and shipped to Hawaii and other international ports. (See also Lambert J.A., at para. 121.)

This trade of salmon in a market economy, however, is not relevant to determine whether the Sto:lo possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes. I note, in passing, that such commercial use of the fish would seem to be intrinsically incompatible with the pre-contact or pre-sovereignty culture of the Sto:lo which commanded that the utilization of the salmon, including its sale, trade and barter, be restricted to providing livelihood, support and sustenance, and did not entail obtaining purely commercial profit.

As far as the issue here is concerned, the sale, trade and barter of fish for livelihood, support and sustenance purposes have always been sufficiently significant and fundamental to the culture and social organization of the Sto:lo. This conclusion is no doubt in line with the perspective of the Sto:lo regarding the importance of the trade of salmon in their society. Consequently, the criterion regarding the characterization of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* is met.

subsistance étaient suffisamment importantes et fondamentales pour l'organisation sociale et la culture des Sto:lo.

Cela dit, précisons que la période de commerce intensif du poisson dans une économie de marché à laquelle ont participé les Sto:lo a commencé après l'arrivée des Européens, vers 1820, lorsque la Compagnie de la Baie d'Hudson a établi un poste de traite à Fort Langley, le long du fleuve Fraser. Par la suite, les Sto:lo ont participé à de florissantes activités de pêche commerciale axées sur le commerce du saumon. Selon Jamie Morton, historien assigné par l'appelante pour déposer, à titre de témoin expert, sur l'histoire du commerce des Européens avec les autochtones, environ 1 500 à 3 000 barils de saumon fumé (60 à 90 poissons par baril) étaient vendus chaque année à la Compagnie de la Baie d'Hudson, qui les expédiait ensuite à destination d'Hawaii et d'autres ports internationaux. (Voir aussi les motifs du juge Lambert de la Cour d'appel, au par. 121.)

Cependant, l'existence de ce commerce du saumon dans une économie de marché n'est pas un fait pertinent pour déterminer si les Sto:lo possèdent le droit ancestral de vendre et d'échanger du poisson à des fins de subsistance. En passant, je tiens à préciser qu'une telle utilisation commerciale du poisson semble intrinsèquement incompatible avec la culture des Sto:lo avant le contact avec les Européens ou l'affirmation de la souveraineté britannique, culture qui commandait que l'utilisation du saumon, y compris la vente et l'échange de ce bien, ne vise que des fins de subsistance, et non des fins purement commerciales.

En ce qui concerne la question en litige en l'espèce, les activités de vente et d'échange de poisson à des fins de subsistance ont toujours été suffisamment importantes et fondamentales pour l'organisation sociale et la culture des Sto:lo. Cette conclusion est sans aucun doute compatible avec le point de vue des Sto:lo en ce qui concerne l'importance du commerce du saumon dans leur société. En conséquence, le critère applicable afin de caractériser les droits ancestraux protégés par le par. 35(1) de la *Loi constitutionnelle de 1982* est respecté.

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220 Furthermore, there is no doubt that these activities did form part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time. In that respect, we must consider the type of aboriginal practices, traditions and customs, the particular aboriginal culture and society, and the reference period of 20 to 50 years. Here, the historical evidence shows that the Sto:lo's practices, traditions and customs relating to the trade of salmon for livelihood, support and sustenance purposes have existed for centuries before the arrival of Europeans. As well, it appears that such activities have continued, though in modernized forms, until the present day. Accordingly, the time requirement for the recognition of an aboriginal right is also met in this case.

221 As a consequence, I conclude that the Sto:lo Band, of which the appellant is a member, possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes. Under s. 35(1) of the *Constitution Act, 1982* this right is protected.

VI. Disposition

222 In the result, I would allow the appeal on the question of whether the Sto:lo possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. The question of the extinguishment of such right, as well as the issues of *prima facie* infringement and justification, must be remitted to trial since there is insufficient evidence to enable this Court to decide upon them. Consequently, the constitutional question can only be answered partially:

Question: Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the

Qui plus est, il n'y a pas de doute que ces activités ont fait partie de la culture autochtone distinctive des Sto:lo pendant une période considérable et ininterrompue. Sur ce point, il nous faut tenir compte du type de coutumes, pratiques et traditions autochtones en cause, de la culture et de la société autochtones visées et, enfin, de la période de référence de 20 à 50 ans. En l'espèce, la preuve historique révèle que les coutumes, pratiques et traditions des Sto:lo relativement au commerce du saumon à des fins de subsistance ont existé pendant des siècles avant l'arrivée des Européens. De plus, il semble que ces activités continuent d'être pratiquées de nos jours, quoique sous des formes modernes. En conséquence, l'exigence de durée applicable pour la reconnaissance d'un droit ancestral est également satisfaite.

Par conséquent, je conclus que la bande des Sto:lo, dont fait partie l'appelante, possède le droit ancestral de vendre et d'échanger du poisson à des fins de subsistance. Ce droit est protégé par le par. 35(1) de la *Loi constitutionnelle de 1982*.

VI. Dispositif

Je suis donc d'avis d'accueillir le pourvoi en ce qui concerne la question de savoir si les Sto:lo possèdent un droit de pêche ancestral incluant le droit de vendre et d'échanger du poisson à des fins de subsistance. La question de l'extinction de ce droit ainsi que les questions de l'atteinte *prima facie* et de la justification doivent être renvoyées au tribunal de première instance en vue de la tenue d'un nouveau procès, étant donné que la preuve est insuffisante pour permettre à notre Cour de statuer sur celles-ci. En conséquence, il n'est possible de répondre à la question constitutionnelle qu'en partie:

Question: Le paragraphe 27(5) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248, tel qu'il se lisait le 11 septembre 1987, est-il, dans les circonstances de la présente affaire, inopérant à l'égard de l'appelante en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des

meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

Answer: The aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant, are recognized and the question of whether s. 27(5) of the *British Columbia Fishery (General) Regulations* is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, will depend on the issues of extinguishment, *prima facie* infringement and justification as determined in a new trial.

There will be no costs to either party.

The following are the reasons delivered by

MCLACHLIN J. (dissenting) — This appeal concerns the right of the Sto:lo of British Columbia to sell fish caught in the Fraser River. The appellant, Mrs. Van der Peet, sold salmon caught under an Indian food fishing licence by her common law husband and his brother. The sale of salmon caught under an Indian food licence was prohibited. Mrs. Van der Peet was charged with selling fish contrary to the Regulations of the *Fisheries Act*, R.S.C. 1970, c. F-14. At trial, she raised the defence that the regulations under which she was charged was invalid because it infringed her aboriginal right, confirmed by s. 35 of the *Constitution Act, 1982* to catch and sell fish. If so, s. 52 of the *Constitution Act, 1982* acts to invalidate the regulation to the extent of the conflict.

The inquiry thus focuses on s. 35(1) of the *Constitution Act, 1982*, which provides that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. Section 35(1) gives constitutional protection not only to aboriginal rights codified

droits ancestraux au sens de l’art. 35 de la *Loi constitutionnelle de 1982*, qu’elle invoque?

Réponse: Les droits ancestraux au sens de l’art. 35 de la *Loi constitutionnelle de 1982* invoqués par l’appelante sont reconnus, et la réponse à la question visant de savoir si le par. 27(5) du *Règlement de pêche général de la Colombie-Britannique* est, dans les circonstances de la présente affaire, inopérant à l’égard de l’appelante en vertu de l’art. 52 de la *Loi constitutionnelle de 1982*, dépendra de la façon dont seront tranchées au cours d’un nouveau procès, les questions de l’extinction, de l’atteinte *prima facie* et de la justification.

Le tout sans frais.

Version française des motifs rendus par

LE JUGE MCLACHLIN (dissidente) — Le présent pourvoi concerne le droit des Sto:lo de la Colombie-Britannique de vendre du poisson pris dans le fleuve Fraser. L’appelante, M^{me} Van der Peet, a vendu du saumon qui avait été pris par son conjoint de fait et le frère de celui-ci en vertu d’un permis de pêche de subsistance des Indiens. Or, il était interdit de vendre du saumon pris en vertu d’un tel permis de pêche. Madame Van der Peet a été accusée d’avoir vendu du poisson contrairement à un règlement d’application de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Au procès, elle a fait valoir en défense que les dispositions réglementaires en vertu desquelles elle a été accusée étaient invalides parce qu’elles portaient atteinte à son droit ancestral, confirmé par l’art. 35 de la *Loi constitutionnelle de 1982*, de prendre et de vendre du poisson. Si c’est le cas, l’art. 52 de la *Loi constitutionnelle de 1982* rend ces dispositions réglementaires inopérantes.

L’examen porte donc principalement sur le par. 35(1) de la *Loi constitutionnelle de 1982*, qui dit que «[l]es droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés». Le paragraphe 35(1) accorde la protection de la Constitution non seule-

through treaties at the time of its adoption in 1982, but also to aboriginal rights which had not been formally recognized at that date: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, per Dickson C.J. and La Forest J., at pp. 1105-6. The Crown has never entered into a treaty with the Sto:lo. They rely not on a codified aboriginal right, but on one which they ask the courts to recognize under s. 35(1).

ment aux droits ancestraux qui étaient codifiés dans des traités au moment de son adoption en 1982, mais également aux droits ancestraux qui n'avaient pas été officiellement reconnus à cette date: *R. c. Sparrow*, [1990] 1 R.C.S. 1075, le juge en chef Dickson et le juge La Forest, aux pp. 1105 et 1106. L'État n'a jamais conclu de traité avec les Sto:lo. Ceux-ci invoquent non pas un droit ancestral codifié, mais plutôt un droit ancestral qu'ils demandent aux tribunaux de reconnaître en vertu du par. 35(1).

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Against this background, I turn to the questions posed in this appeal:

1. Do the Sto:lo possess an aboriginal right under s. 35(1) of the *Constitution Act, 1982* which entitles them to sell fish?
 - (a) Has a *prima facie* right been established?
 - (b) If so, has it been extinguished?
2. If a right is established, do the government regulations prohibiting sale infringe the right?
3. If the regulations infringe the right, are they justified?

Sur cette toile de fond, je me penche maintenant sur les questions que soulève le présent pourvoi:

1. Les Sto:lo possèdent-ils, en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*, un droit ancestral de vendre du poisson?
 - a) A-t-on établi, à première vue, l'existence d'un tel droit?
 - b) Si oui, ce droit a-t-il été éteint?
2. Si l'existence du droit a été établie, les dispositions réglementaires prises par l'État pour interdire la vente portent-elles atteinte à ce droit?
3. Si les dispositions réglementaires portent atteinte à ce droit, sont-elles justifiées?

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My conclusions on this appeal may be summarized as follows. The issue of what constitutes an aboriginal right must, in my view, be answered by looking at what the law has historically accepted as fundamental aboriginal rights. These encompass the right to be sustained from the land or waters upon which an aboriginal people have traditionally relied for sustenance. Trade in the resource to the extent necessary to maintain traditional levels of sustenance is a permitted exercise of this right. The right endures until extinguished by treaty or otherwise. The right is limited to the extent of the aboriginal people's historic reliance on the resource, as well as the power of the Crown to limit or prohibit exploitation of the resource incompatible with its responsible use. Applying these principles, I conclude that the Sto:lo possess an aboriginal right to fish commercially for pur-

Mes conclusions dans le cadre du présent pourvoi peuvent être résumées ainsi. Je suis d'avis que, pour répondre à la question de savoir ce qui constitue un droit ancestral, il convient d'examiner les droits qui ont historiquement été reconnus, en droit, comme étant des droits ancestraux fondamentaux. Sont compris parmi ces droits celui qu'a un peuple autochtone de tirer sa subsistance du territoire ou des eaux qu'il a traditionnellement exploités à cette fin. Ce peuple peut exercer le droit en question en échangeant la ressource dans la mesure nécessaire pour s'assurer la subsistance qu'il en a traditionnellement tirée. Ce droit subsiste tant qu'il n'a pas été éteint par traité ou autrement. Ce droit est restreint par les limites de l'exploitation historique de la ressource faite par le peuple autochtone, ainsi que par le pouvoir de l'État de limiter ou d'interdire l'exploitation de la ressource

poses of basic sustenance, that this right has not been extinguished, that the regulation prohibiting the sale of any fish constitutes a *prima facie* infringement of it, and that this infringement is not justified. Accordingly, I conclude that the appellant's conviction must be set aside.

1. Do the Sto:lo Possess an Aboriginal Right to Sell Fish Protected under Section 35(1) of the Constitution Act, 1982?

A. *Is a Prima Facie Right Established?*

I turn first to the principles which govern the inquiry into the existence of an aboriginal right.

(i) General Principles of Interpretation

This Court in *Sparrow*, *supra*, discussed the dual significance of s. 35(1) of the *Constitution Act, 1982* in the context of fishing. Section 35(1) is significant, first, because it entrenches aboriginal rights as of the date of its adoption in 1982. Prior to that date, aboriginal rights to fish were subject to regulation and extinguishment by unilateral government act. After the adoption of s. 35, these rights can be limited only by treaty. But s. 35(1) is significant in a second, broader sense. It may be seen as recognition of the right of aboriginal peoples to fair recognition of aboriginal rights and settlement of aboriginal claims. Thus Dickson C.J. and La Forest J. wrote in *Sparrow*, at p. 1105:

... s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with

qui serait incompatible avec l'utilisation responsable de celle-ci. Appliquant ces principes, je conclus que les Sto:lo possèdent un droit ancestral de pêcher commercialement pour pourvoir à leurs besoins fondamentaux, que ce droit n'a pas été éteint, que la disposition réglementaire interdisant complètement la vente de poisson constitue une atteinte à première vue à ce droit et que cette atteinte n'est pas justifiée. En conséquence, je conclus que la déclaration de culpabilité prononcée contre l'appelante doit être annulée.

1. Les Sto:lo possèdent-ils un droit ancestral de vendre du poisson qui est protégé par le par. 35(1) de la Loi constitutionnelle de 1982?

A. *A-t-on établi, à première vue, l'existence d'un tel droit?*

Je vais d'abord examiner les principes applicables pour déterminer l'existence d'un droit ancestral.

(i) Principes généraux d'interprétation

Dans *Sparrow*, précité, notre Cour a étudié, dans le contexte de la pêche, l'importance que revêt, à deux égards, le par. 35(1) de la *Loi constitutionnelle de 1982*. Le paragraphe 35(1) est important à un premier égard en ce qu'il constitutionnalise les droits ancestraux qui existaient à la date de son adoption en 1982. Avant cette date, les droits de pêche ancestraux pouvaient être réglementés et éteints par décision unilatérale de l'État. Depuis l'adoption de l'art. 35, ces droits ne peuvent être restreints que par traité. Toutefois, le par. 35(1) est également important à un autre égard, plus général celui-là. En effet, il peut être considéré comme la consécration du droit des peuples autochtones d'obtenir, en toute justice, la reconnaissance de leurs droits ancestraux et le règlement de leurs revendications. Voici d'ailleurs ce qu'ont écrit le juge en chef Dickson et le juge La Forest dans l'arrêt *Sparrow*, à la p. 1105:

... le par. 35(1) de la *Loi constitutionnelle de 1982* représente l'aboutissement d'une bataille longue et difficile à la fois dans l'arène politique et devant les tribunaux pour la reconnaissance de droits ancestraux. La forte représentation des associations autochtones et

the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible. . . . Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.

Quoting from Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95, at p. 100, Dickson C.J. and La Forest J. continued at p. 1106:

. . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

d'autres groupes soucieux du bien-être des peuples autochtones du Canada a rendu possible l'adoption du par. 35(1) [. . .] Le paragraphe 35(1) procure, tout au moins, un fondement constitutionnel solide à partir duquel des négociations ultérieures peuvent être entreprises. Il accorde également aux autochtones une protection constitutionnelle contre la compétence législative provinciale.

Le juge en chef Dickson et le juge La Forest ont poursuivi, à la p. 1106, en citant les propos suivants du professeur Lyon dans «An Essay on Constitutional Interpretation» (1988), 26 *Osgoode Hall L.J.* 95, à la p. 100:

[TRADUCTION] . . . le contexte de l'année 1982 nous fournit assurément une indication suffisante qu'il ne s'agit pas d'une simple codification de la jurisprudence portant sur les droits ancestraux qui existait en 1982. L'article 35 exige un règlement équitable en faveur des peuples autochtones. Il écarte les anciennes règles du jeu en vertu desquelles Sa Majesté établissait des cours de justice auxquelles elle refusait le pouvoir de mettre en doute Ses revendications souveraines.

Il n'est peut-être pas faux d'affirmer, à l'instar du Juge en chef, que le par. 35(1) vise deux objets: premièrement, reconnaître le fait que, avant l'arrivée des Européens, le territoire était occupé; et, deuxièmement, concilier l'affirmation de la souveraineté sur ce territoire avec cette occupation antérieure. Toutefois, en toute déférence, je suis d'avis que cette affirmation est incomplète. Comme l'attestent les passages précités de l'arrêt *Sparrow*, le par. 35(1) reconnaît non seulement l'occupation antérieure du territoire par les autochtones, mais également l'existence d'un régime juridique antérieur ayant donné naissance à des droits ancestraux qui subsistent, à moins d'avoir été éteints. Ce paragraphe vise non seulement à concilier ces droits avec la colonisation du territoire par les Européens et l'affirmation de leur souveraineté sur celui-ci, mais également à les concilier d'une manière propre à servir d'assise à un règlement juste et durable des revendications autochtones, compatible avec la norme élevée que le droit impose à l'État dans ses rapports avec les peuples autochtones.

Appliquant ces préceptes, notre Cour a déclaré, aux pp. 1106 et 1107, dans *Sparrow*, que le par. 35(1) doit recevoir une interprétation géné-

It may not be wrong to assert, as the Chief Justice does, that the dual purposes of s. 35(1) are first to recognize the fact that the land was occupied prior to European settlement and second, to reconcile the assertion of sovereignty with this prior occupation. But it is, with respect, incomplete. As the foregoing passages from *Sparrow* attest, s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.

Following these precepts, this Court in *Sparrow* decreed, at pp. 1106-7, that s. 35(1) be construed in a generous, purposive and liberal way. It repre-

sents "a solemn commitment that must be given meaningful content" (p. 1108). It embraces and confirms the fiduciary obligation owed by the government to aboriginal peoples (p. 1109). It does not oust the federal power to legislate with respect to aboriginals, nor does it confer absolute rights. Federal power is to be reconciled with aboriginal rights by means of the doctrine of justification. The federal government can legislate to limit the exercise of aboriginal rights, but only to the extent that the limitation is justified and only in accordance with the high standard of honourable dealing which the Constitution and the law imposed on the government in its relations with aboriginals (p. 1109).

To summarize, a court approaching the question of whether a particular practice is the exercise of a constitutional aboriginal right under s. 35(1) must adopt an approach which: (1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of aboriginal claims); (2) is liberal and generous toward aboriginal interests; (3) considers the aboriginal claim in the context of the historic way of life of the people asserting it; and (4) above all, is true to the position of the Crown throughout Canadian history as trustee or fiduciary for the first peoples of this country. Finally, I would join with the Chief Justice in asserting, as Mark Walters counsels in "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350, at pp. 413 and 412, respectively, that "a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives" of the "two vastly dissimilar legal cultures" of European and aboriginal societies. We apply the common law, but the common law we apply must give full recognition to the pre-existing aboriginal tradition.

reuse, libérale et fondée sur l'objet qu'il vise. Il constitue «un engagement solennel qui doit avoir un sens utile» (p. 1108). Il englobe et confirme l'obligation de fiduciaire de l'État envers les peuples autochtones (p. 1109). Il ne supprime pas le pouvoir du fédéral de légiférer à l'égard des autochtones, et les droits qu'il confère ne sont pas absolus. Le pouvoir fédéral doit être concilié avec les droits ancestraux par l'application de la doctrine de la justification. Le gouvernement fédéral peut légiférer afin de limiter l'exercice de droits ancestraux, mais seulement dans la mesure où cette limitation est justifiée et respecte la norme élevée — savoir celle d'agir honorablement — que la Constitution et les autres règles de droit imposent à l'État dans ses rapports avec les peuples autochtones (p. 1109).

En résumé, le tribunal qui est appelé à décider si une pratique donnée est l'exercice d'un droit ancestral protégé par la Constitution en vertu du par. 35(1) doit adopter une méthode (1) qui reconnaisse les deux objets du par. 35(1) (savoir empêcher l'extinction des droits ancestraux et constituer une assise solide en vue du règlement des revendications autochtones), (2) qui soit libérale et généreuse envers les intérêts des autochtones, (3) qui considère le droit ancestral revendiqué dans le contexte du mode de vie historique du peuple qui l'invoque; (4) et, par-dessus tout, qui soit respectueuse du rôle de fiduciaire que l'État joue depuis toujours auprès des premiers habitants du pays. Finalement, je souscris aux propos du Juge en chef qui affirme, conformément à l'opinion émise par Mark Walters, dans «British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*» (1992), 17 *Queen's L.J.* 350, aux pp. 413 et 412 respectivement, qu'[TRADUCTION] «une conception moralement et politiquement défendable des droits ancestraux intégrera [les] deux points de vue juridiques», qui émanent des «deux cultures juridiques extrêmement dissemblables» des sociétés européennes et autochtones. Nous appliquons la common law, mais la common law que nous appliquons doit reconnaître pleinement la tradition autochtone préexistante.

(ii) The Right Asserted — the Right to Fish for Commercial Purposes

233 The first step is to ascertain the aboriginal right which is asserted by Mrs. Van der Peet. Are we concerned with the right to fish, the right to sell fish on a small sustenance-related level, or commercial fishing?

234 The Chief Justice and Justice L'Heureux-Dubé state that this appeal does not raise the issue of the right of the Sto:lo to engage in commercial fishery. They argue that the sale of one or two fish to a neighbour cannot be considered commerce, and that the British Columbia courts erred in treating it as such.

235 I agree that this case was defended on the ground that the fish sold by Mrs. Van der Peet were sold for purposes of sustenance. This was not a large corporate money-making activity. In the end, as will be seen, I agree with Justice L'Heureux-Dubé that a large operation geared to producing profits in excess of what the people have historically taken from the river might not be constitutionally protected.

236 This said, I see little point in labelling Mrs. Van der Peet's sale of fish something other than commerce. When one person sells something to another, that is commerce. Commerce may be large or small, but commerce it remains. On the view I take of the case, the critical question is not whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.

237 Making an artificial distinction between the exchange of fish for money or other goods on the one hand and for commercial purposes on the other, may have serious consequences, if not in

(ii) Le droit revendiqué — le droit de pêcher à des fins commerciales

La première étape consiste à déterminer quel est le droit ancestral revendiqué par M^{me} Van der Peet. S'agit-il du droit de pêcher, de celui de vendre, sur une petite échelle, du poisson à des fins de subsistance ou encore du droit de pêcher commercialement?

Le Juge en chef et le juge L'Heureux-Dubé disent que le présent pourvoi ne soulève pas la question du droit des Sto:lo de pratiquer la pêche commerciale. Ils affirment que la vente de quelques poissons à un voisin ne saurait être assimilée à un acte de commerce et que les tribunaux de la Colombie-Britannique ont commis une erreur en pensant ainsi.

Je suis aussi d'avis que la défense de M^{me} Van der Peet repose sur l'argument qu'elle a vendu le poisson à des fins de subsistance. Il ne s'agissait pas d'une activité lucrative d'une grosse entreprise commerciale. En fin de compte, comme nous le verrons, je suis d'accord avec le juge L'Heureux-Dubé qu'une opération de grande envergure, visant la réalisation de bénéfices excédant ce que les autochtones ont historiquement tiré de l'exploitation du fleuve pourrait ne pas bénéficier de la protection de la Constitution.

Cela dit, je vois peu d'intérêt à qualifier autrement que d'acte de commerce la vente de poisson faite par M^{me} Van der Peet. Quand une personne vend quelque chose à autrui, c'est du commerce. Le commerce peut se faire sur une grande ou sur une petite échelle, mais ça reste du commerce. À mon sens, la question cruciale qui se pose n'est pas de savoir si, en l'espèce, la vente du poisson est ou non un acte de commerce, mais bien si elle peut être justifiée en tant qu'exercice d'un droit ancestral plus fondamental, qui serait la poursuite, par les autochtones concernés, de l'utilisation historique de la ressource.

Le fait d'établir une distinction artificielle entre l'échange de poisson contre de l'argent ou d'autres biens, d'une part, et l'échange de poisson à des fins commerciales, d'autre part, pourrait avoir des

this case, in others. If the aboriginal right at issue is defined as the right to trade on a massive, modern scale, few peoples may be expected to establish a commercial right to fish. As the Chief Justice observes in *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, “[t]he claim to an aboriginal right to exchange fish commercially places a more onerous burden” on the aboriginal claimant “than a claim to an aboriginal right to exchange fish for money or other goods” (para. 20). In the former case, the trade must be shown to have existed pre-contact “on a scale best characterized as commercial” (para. 20). With rare exceptions (see the evidence in *R. v. Gladstone*, [1996] 2 S.C.R. 723, released concurrently) aboriginal societies historically were not interested in massive sales. Even if they had been, their societies did not afford them mass markets.

(iii) Aboriginal Rights versus the Exercise of Aboriginal Rights

It is necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right. Rights are generally cast in broad, general terms. They remain constant over the centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.

If a specific modern practice is treated as the right at issue, the analysis may be foreclosed before it begins. This is because the modern practice by which the more fundamental right is exercised may not find a counterpart in the aboriginal culture of two or three centuries ago. So if we ask whether there is an aboriginal right to a particular kind of trade in fish, i.e., large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs,

conséquences sérieuses, sinon dans la présente espèce, alors dans d’autres affaires. Si le droit ancestral en cause est défini comme étant le droit de commercer massivement, au sens où on l’entend aujourd’hui, peu de peuples autochtones pourraient vraisemblablement établir un droit de pratiquer la pêche commerciale. Comme le Juge en chef le fait observer dans l’arrêt *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672 «[l]a revendication du droit ancestral d’échanger du poisson commercialement impose» à l’autochtone qui revendique le droit un fardeau plus lourd «que la revendication du droit d’échanger du poisson contre de l’argent ou d’autres biens» (par. 20). Dans la première hypothèse, il faut prouver que le commerce était pratiqué avant le contact avec les Européens et «sur une échelle qu’il convient de qualifier de commerciale» (par. 20). Sauf rares exceptions (voir la preuve dans *R. c. Gladstone*, [1996] 2 R.C.S. 723 rendu à la même date), historiquement les autochtones n’étaient pas intéressés à effectuer des ventes massives. D’ailleurs, même s’ils l’avaient été, les sociétés dans lesquelles ils vivaient ne constituaient pas des marchés de masse.

(iii) Droits ancestraux et exercice de tels droits

Il est nécessaire, au départ, de faire une distinction entre un droit ancestral et l’exercice d’un tel droit. Les droits sont généralement énoncés en termes larges et généraux. Ils ne changent pas au fil des siècles. L’exercice des droits, en revanche, peut prendre diverses formes et varier selon les lieux et les époques.

Si une pratique moderne spécifique est considérée comme étant le droit en cause, l’analyse peut alors devenir sans objet, avant même d’avoir commencé, car il est possible que la pratique moderne par laquelle est exercé le droit plus fondamental n’ait pas eu d’équivalent dans la culture autochtone qui existait il y a deux ou trois siècles. Par conséquent, si nous nous demandons s’il existe un droit ancestral de pratiquer un type particulier de commerce du poisson, par exemple d’en faire le commerce sur une grande échelle, la réponse sera négative dans la plupart des cas. Au contraire, si

the answer may be quite different. Having defined the basic underlying right in general terms, the question then becomes whether the modern practice at issue may be characterized as an exercise of the right.

nous nous demandons s'il existe un droit ancestral d'utiliser les ressources halieutiques en vue de pourvoir aux besoins alimentaires, vestimentaires ou autres, il est bien possible que la réponse soit tout à fait différente. Une fois le droit fondamental sous-jacent défini en termes généraux, la question devient alors de savoir si la pratique moderne en cause peut être qualifiée d'exercice de ce droit.

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This is how we reconcile the principle that aboriginal rights must be ancestral rights with the uncompromising insistence of this Court that aboriginal rights not be frozen. The rights are ancestral; they are the old rights that have been passed down from previous generations. The exercise of those rights, however, takes modern forms. To fail to recognize the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies in their ancient modes and deny to them the right to adapt, as all peoples must, to the changes in the society in which they live.

Voilà de quelle façon nous concilions le principe que les droits des peuples autochtones qui sont reconnus et confirmés au par. 35(1) doivent être des droits ancestraux et l'insistance indéfectible de notre Cour sur le principe que les droits ancestraux ne sont pas figés. Il s'agit de droits ancestraux, c'est-à-dire des droits anciens qui ont été transmis par les générations précédentes. Toutefois, l'exercice de ces droits prend des formes modernes. Ne pas reconnaître la distinction entre les droits et la façon contemporaine dont ils sont exercés équivaut à figer les sociétés autochtones dans leurs anciens modes de vie et à les priver du droit qu'elles ont, à l'instar de tous les autres peuples, de s'adapter aux changements du monde dans lequel elles vivent.

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I share the concern of L'Heureux-Dubé J. that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no aboriginal right where a different analysis might find one. By insisting that Mrs. Van der Peet's modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right.

Je partage la préoccupation exprimée par le juge L'Heureux-Dubé que, dans sa définition des droits en cause, le Juge en chef applique un trop fort degré de particularisation, ce qui lui permet de conclure à l'inexistence d'un droit ancestral là où une analyse différente aurait pu mener au résultat contraire. En insistant pour que la pratique moderne de M^{me} Van der Peet en matière de vente de poisson ait eu son équivalent dans les pratiques des Sto:lo avant le contact avec les Européens, il condamne effectivement les Sto:lo à exercer leur droit précisément comme ils le faisaient il y a des siècles, et exclut toute conclusion que la vente constitue l'exercice d'un droit ancestral.

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To constitute a right under s. 35(1) of the *Constitution Act, 1982*, the right must be of constitutional significance. A right of constitutional significance may loosely be defined as a right which has priority over ordinary legal principles. It is a maxim which sets the boundaries within which the law must operate. While there were no formal constitutional guarantees of aboriginal rights prior to 1982, we may nevertheless discern certain princi-

Pour constituer un droit visé au par. 35(1) de la *Loi constitutionnelle de 1982*, le droit doit avoir une importance constitutionnelle. Un droit d'importance constitutionnelle peut être défini de façon générale comme un droit qui a priorité sur les principes juridiques ordinaires. Il s'agit d'une maxime qui fixe les limites à l'intérieur desquelles le droit doit s'appliquer. Même si les droits ancestraux n'étaient pas formellement garantis par la Consti-

ples relating to aboriginal peoples which were so fundamental as to have been generally observed by those charged with dealing with aboriginal peoples and with making and executing the laws that affected them.

The activity for which constitutional protection is asserted in this case is selling fish caught in the area of the Fraser River where the Sto:lo traditionally fished for the purpose of sustaining the people. The question is whether this activity may be seen as the exercise of a right which has either been recognized or which so resembles a recognized right that it should, by extension of the law, be so recognized.

(iv) The Time Frame

The Chief Justice and L'Heureux-Dubé J. differ on the time periods one looks to in identifying aboriginal rights. The Chief Justice stipulates that for a practice to qualify as an aboriginal right it must be traceable to pre-contact times and be identifiable as an "integral" aspect of the group's culture at that early date. Since the barter of fish was not shown to be more than an incidental aspect of Sto:lo society prior to the arrival of the Europeans, the Chief Justice concludes that it does not qualify as an aboriginal right.

L'Heureux-Dubé J., by contrast, minimizes the historic origin of the alleged right. For her, all that is required is that the practice asserted as a right have constituted an integral part of the group's culture and social organization for a period of at least 20 to 50 years, and that it continue to be an integral part of the culture at the time of the assertion of the right.

My own view falls between these extremes. I agree with the Chief Justice that history is important. A recently adopted practice would generally not qualify as being aboriginal. Those things which have in the past been recognized as aboriginal rights have been related to the traditional prac-

tution avant 1982, nous pouvons néanmoins dégager certains principes touchant les peuples autochtones qui étaient si fondamentaux qu'ils étaient généralement observés par ceux qui étaient chargés de traiter avec les peuples autochtones et de rédiger et d'appliquer des lois les concernant.

L'activité à l'égard de laquelle la protection de la Constitution est revendiquée en l'espèce est la vente de poisson pris dans le secteur du fleuve Fraser où les Sto:lo ont traditionnellement pêché pour subvenir aux besoins des leurs. Il s'agit de décider si cette activité peut être assimilée à l'exercice d'un droit qui soit a été reconnu, soit ressemble à tel point à un droit reconnu qu'il devrait, par extension de la loi, être reconnu comme tel.

(iv) La période de référence

Le Juge en chef et le juge L'Heureux-Dubé ne s'entendent pas sur la période à prendre en considération pour identifier les droits ancestraux. Le Juge en chef affirme que pour qu'une pratique soit considérée comme un droit ancestral elle doit remonter à l'époque qui a précédé le contact avec les Européens et avoir fait «partie intégrante», dans ces temps anciens, de la culture du groupe visé. Comme il n'a pas été établi que le troc de poisson était autre chose qu'un aspect accessoire de la société Sto:lo avant l'arrivée des Européens, le Juge en chef conclut que cette pratique ne constitue pas un droit ancestral.

À l'opposé, le juge L'Heureux-Dubé minimise l'importance des origines historiques du droit revendiqué. Pour elle, tout ce qui est requis c'est que la pratique qui, affirme-t-on, serait un droit, ait fait partie intégrante de l'organisation sociale et de la culture du groupe concerné pendant une période d'au moins 20 à 50 ans, et qu'elle continue de faire partie intégrante de la culture au moment où le droit est revendiqué.

Mon point de vue se situe entre ces deux pôles extrêmes. Je suis d'accord avec le Juge en chef pour dire que l'histoire est un facteur important. Une pratique d'adoption récente ne saurait généralement être qualifiée d'ancestrale. Les pratiques qui, dans le passé, ont été reconnues comme étant

tices of aboriginal peoples. For this reason, this Court has always been at pains to explore the historical origins of alleged aboriginal rights. For example, in *Sparrow*, this Court began its inquiry into the aboriginal right to fish for food with a review of the fishing practices of the Musqueam Band prior to European contact.

des droits ancestraux se rapportaient aux pratiques traditionnelles des peuples autochtones. Pour cette raison, notre Cour s'est toujours efforcée d'examiner les origines historiques des droits ancestraux revendiqués. Par exemple, dans *Sparrow*, notre Cour a commencé son examen du droit ancestral de pêcher à des fins alimentaires par l'étude des pratiques des Musqueams en matière de pêche avant le contact avec les Européens.

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I cannot agree with the Chief Justice, however, that it is essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question. As Brennan J. (as he then was) put it in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1, at p. 58, "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory." The French version of s. 35(1) aptly captures the governing concept. "*Les droits existants — ancestraux ou issus de traités* —" tells us that the rights recognized and affirmed by s. 35(1) must be rooted in the historical or ancestral practices of the aboriginal people in question. This Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, adopted a similar approach: Dickson J. (as he then was) refers at p. 376 to "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right. The governing concept is simply the traditional customs and laws of people prior to imposition of European law and customs. What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people. Most often, that law or tradition will be traceable to time immemorial; otherwise it would not be an ancestral aboriginal law or custom. But date of contact is not the only

Toutefois, je ne peux souscrire à l'avis du Juge en chef qu'il est essentiel qu'une pratique remonte à l'époque qui a précédé le contact avec les Européens pour être reconnue comme un droit constitutionnel. Les droits ancestraux ont leur origine non pas dans le moment magique du contact avec les Européens, mais dans les lois et coutumes traditionnelles du peuple autochtone en cause. Comme l'a dit le juge Brennan (tel était alors son titre) dans l'arrêt *Mabo c. Queensland [No. 2]* 1992, 175 C.L.R. 1, à la p. 58, [TRADUCTION] «Le titre aborigène tire son origine et son contenu des coutumes et des lois traditionnelles observées et reconnues par les habitants autochtones d'un territoire.» Le texte français du par. 35(1) rend bien le principe directeur en la matière. En effet, les mots «[I]es droits existants — ancestraux ou issus de traités —» nous indiquent que les droits reconnus et confirmés par le par. 35(1) doivent avoir leur source dans les pratiques historiques ou ancestrales des autochtones concernés. Dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335, notre Cour a appliqué un principe analogue: le juge Dickson (plus tard juge en chef) a décrit, à la p. 376, le «titre aborigène comme un droit, en common law, découlant de l'occupation et de la possession historiques par les Indiens de leurs terres tribales». On ne trouve, ni dans le par. 35(1) ni dans la jurisprudence, aucune indication que le contact avec les Européens serait la date décisive pour établir l'existence d'un droit ancestral. Le principe directeur est tout simplement fondé sur les coutumes et les lois que respectait le peuple en question avant que ne lui soient imposées celles des Européens. Ce qui doit être prouvé c'est l'existence d'une continuité entre la pratique moderne en cause et une loi ou coutume traditionnelle du peuple autochtone. La plupart du temps, il sera possible de retracer les

moment to consider. What went before and after can be relevant too.

My concern is that we not substitute an inquiry into the precise moment of first European contact — an inquiry which may prove difficult — for what is really at issue, namely the ancestral customs and laws observed by the indigenous peoples of the territory. For example, there are those who assert that Europeans settled the eastern maritime regions of Canada in the 7th and 8th centuries A.D. To argue that aboriginal rights crystallized then would make little sense; the better question is what laws and customs held sway before superimposition of European laws and customs. To take another example, in parts of the west of Canada, over a century elapsed between the first contact with Europeans and imposition of “Canadian” or “European” law. During this period, many tribes lived largely unaffected by European laws and customs. I see no reason why evidence as to the laws and customs and territories of the aboriginals in this interval should not be considered in determining the nature and scope of their aboriginal rights. This approach accommodates the specific inclusion in s. 35(1) of the *Constitution Act, 1982* of the aboriginal rights of the Métis people, the descendants of European explorers and traders and aboriginal women.

Not only must the proposed aboriginal right be rooted in the historical laws or customs of the people, there must also be continuity between the historic practice and the right asserted. As Brennan J. put it in *Mabo*, at p. 60:

The common law can, by reference to the traditional laws and customs of an indigenous people, identify and

origines de cette loi ou tradition aux temps immémoriaux; autrement, il ne s’agirait pas d’une loi ou coutume ancestrale autochtone. Cependant, la date du contact avec les Européens n’est pas le seul moment à prendre en considération. Ce qui s’est passé avant et après cette date peut aussi être pertinent.

Mon inquiétude est qu’on substitue un examen fondé sur le moment précis du contact avec les Européens — examen qui peut s’avérer difficile — à la véritable question litigieuse, savoir les coutumes et lois ancestrales observées par les peuples autochtones habitant le territoire. Par exemple, d’aucuns affirment que les Européens ont colonisé les régions maritimes de l’Est du Canada aux VII^e et VIII^e siècles après Jésus-Christ. Il serait peu logique de soutenir que les droits ancestraux se sont cristallisés à ce moment-là. Il est préférable de se demander quelles sont les lois et coutumes qui avaient cours avant qu’on leur surimpose les lois et coutumes européennes. Pour donner un autre exemple, mentionnons que, dans certaines régions de l’Ouest canadien, il s’est écoulé plus d’un siècle entre le premier contact avec les Européens et l’assujettissement au droit «canadien» ou «européen». Durant cette période, de nombreuses tribus ont, dans une large mesure, vécu sans être touchées par les lois et coutumes européennes. Je ne vois aucune raison de ne pas prendre en considération, afin de déterminer la nature et la portée de leurs droits ancestraux, la preuve concernant les lois et coutumes respectées par les autochtones et les territoires occupés par ces derniers durant cet intervalle. Cette méthode est compatible avec l’inclusion expresse, au par. 35(1) de la *Loi constitutionnelle de 1982*, des droits de Métis, qui sont les descendants d’explorateurs et de marchands européens et de femmes autochtones.

Non seulement le droit ancestral proposé doit avoir sa source dans les lois et coutumes historiques du peuple concerné, mais il faut également qu’il y ait continuité entre la pratique historique et le droit revendiqué. Comme l’a dit le juge Brennan dans l’arrêt *Mabo*, à la p. 60:

[TRADUCTION] La common law peut, par référence aux lois et coutumes traditionnelles d’un peuple autochtone,

protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.

The continuity requirement does not require the aboriginal people to provide a year-by-year chronicle of how the event has been exercised since time immemorial. Indeed, it is not unusual for the exercise of a right to lapse for a period of time. Failure to exercise it does not demonstrate abandonment of the underlying right. All that is required is that the people establish a link between the modern practice and the historic aboriginal right.

identifier et protéger les droits et intérêts des autochtones auxquels les premières donnent naissance. Toutefois, quand, par suite de la marche du temps, les coutumes et les lois traditionnelles ont, dans les faits, cessé d'être observées, le fondement du titre aborigène a disparu.

L'exigence de continuité n'oblige pas les autochtones à faire une chronique indiquant comment, année après année, le droit a été exercé depuis les temps immémoriaux. De fait, il n'est pas exceptionnel qu'un droit cesse d'être exercé pendant un certain temps. Le fait de ne pas exercer un droit ne prouve pas que celui-ci a été abandonné. Tout ce que les autochtones sont requis de faire, c'est d'établir un lien entre la pratique moderne et le droit historique qu'ils revendiquent.

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While aboriginal rights will generally be grounded in the history of the people asserting them, courts must, as I have already said, take cognizance of the fact that the way those rights are practised will evolve and change with time. The modern exercise of a right may be quite different from its traditional exercise. To deny it the status of a right because of such differences would be to deny the reality that aboriginal cultures, like all cultures, change and adapt with time. As Dickson C.J. and La Forest J. put it in *Sparrow*, at p. 1093 "[t]he phrase 'existing aboriginal rights' [in s. 35(1) of the *Constitution Act, 1982*] must be interpreted flexibly so as to permit their evolution over time".

Même si les droits ancestraux trouvent généralement leur origine dans l'histoire du peuple qui les revendique, les tribunaux doivent, comme je l'ai dit plus tôt, tenir compte du fait que la façon dont ces droits sont exercés évolue et change avec le temps. La façon dont un droit est exercé aujourd'hui peut être très différente de son exercice traditionnel. Refuser de reconnaître un droit en raison de telles différences serait nier la réalité que les cultures autochtones, à l'instar de toutes les autres cultures, changent avec le temps et s'adaptent. Comme l'ont dit le juge en chef Dickson et le juge La Forest dans *Sparrow*, à la p. 1093, «[l']expression «droits ancestraux existants» [au par. 35(1) de la *Loi constitutionnelle de 1982*] doit recevoir une interprétation souple de manière à permettre à ces droits d'évoluer avec le temps».

(v) The Procedure for Determining the Existence of an Aboriginal Right

(v) La méthode permettant de déterminer l'existence d'un droit ancestral

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Aboriginal peoples, like other peoples, define themselves through a myriad of activities, practices and claims. A few of these, the *Canadian Charter of Rights and Freedoms* tells us, are so fundamental that they constitute constitutional "rights" of such importance that governments cannot trench on them without justification. The problem before this Court is how to determine what activities, practices and claims fall within this class of constitutionally protected rights.

Comme les autres peuples, les peuples autochtones se définissent par une myriade de pratiques, d'activités et de droits, dont un certain nombre, nous dit la *Charte canadienne des droits et libertés*, ont un caractère si fondamental qu'ils sont des «droits» constitutionnels d'une importance telle que l'État ne peut leur porter atteinte sans justification. Le problème que notre Cour doit résoudre est de déterminer quelles sont les activités, pratiques et droits qui relèvent de la catégorie des droits protégés par la Constitution.

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The first and obvious category of constitutionally protected aboriginal rights and practices are those which had obtained legal recognition prior to the adoption of s. 35(1) of the *Constitution Act, 1982*. Section 35(1) confirms “existing” aboriginal rights. Rights granted by treaties or recognized by the courts prior to 1982 must, it follows, remain rights under s. 35(1).

But aboriginal rights under s. 35(1) are not confined to rights formally recognized by treaty or the courts before 1982. As noted above, this Court has held that s. 35(1) “is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples”: *Sparrow*, at p. 1106, quoting Noel Lyon, “An Essay on Constitutional Interpretation”, *supra*, at p. 100. This poses the question of what new, previously unrecognized aboriginal rights may be asserted under s. 35(1).

The Chief Justice defines aboriginal rights as specific pre-contact practices which formed an “integral part” of the aboriginal group’s “specific distinct culture”. L’Heureux-Dubé J., adopting a “dynamic” rights approach, extends aboriginal rights to any activity, broadly defined, which forms an integral part of a distinctive aboriginal group’s culture and social organization, regardless of whether the activity pre-dates colonial contact or not. In my respectful view, while both these approaches capture important facets of aboriginal rights, neither provides a satisfactory test for determining whether an aboriginal right exists.

(vi) The “Integral-Incidental” Test

I agree with the Chief Justice, at para. 46, that to qualify as an aboriginal right “an activity must be an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group

La première catégorie évidente de droits et pratiques autochtones protégés par la Constitution est formée de ceux qui avaient été reconnus en droit avant l’adoption du par. 35(1) de la *Loi constitutionnelle de 1982*. Le paragraphe 35(1) confirme les droits ancestraux «existants». Il s’ensuit que les droits issus de traités ou reconnus par les tribunaux avant 1982 restent des droits visés au par. 35(1).

Toutefois, les droits ancestraux visés au par. 35(1) ne se limitent pas aux droits reconnus formellement par traité ou par les tribunaux avant 1982. Comme il a été indiqué précédemment, notre Cour a statué que le par. 35(1) n’est pas «une simple codification de la jurisprudence portant sur les droits ancestraux qui existait en 1982. L’article 35 exige un règlement équitable en faveur des peuples autochtones»: *Sparrow*, à la p. 1106, citation des propos de Noel Lyon dans «An Essay on Constitutional Interpretation», *loc. cit.*, à la p. 100. Il faut donc se demander quels droits ancestraux nouveaux, non déjà reconnus, peuvent être revendiqués en vertu du par. 35(1).

Le Juge en chef définit les droits ancestraux comme étant les pratiques particulières qui datent d’avant le contact avec les Européens et faisaient «partie intégrante» de la «culture distinctive spécifique» du groupe autochtone visé. Adoptant une méthode fondée sur le caractère «dynamique» des droits, le juge L’Heureux-Dubé élargit la définition de droits ancestraux à toute activité, largement définie, qui fait partie intégrante de l’organisation sociale et de la culture distinctive d’un groupe d’autochtones, peu importe que l’activité précède ou non le contact avec les Européens. En toute déférence, même si ces deux approches tiennent compte de certaines facettes importantes des droits ancestraux, ni l’une ni l’autre ne constituent un critère satisfaisant pour déterminer si un droit ancestral existe.

(vi) Le critère de la «partie intégrante ou accessoire»

Je conviens avec le Juge en chef qui a dit, au par. 46, que pour constituer un droit ancestral, «une activité doit être un élément d’une coutume, pratique ou tradition faisant partie intégrante de la

claiming the right". I also agree with L'Heureux-Dubé J. that an aboriginal right must be "integral" to a "distinctive aboriginal group's culture and social organization". To say this is simply to affirm the foundation of aboriginal rights in the laws and customs of the people. It describes an essential quality of an aboriginal right. But, with respect, a workable legal test for determining the extent to which, if any, commercial fishing may constitute an aboriginal right, requires more. The governing concept of integrality comes from a description in the *Sparrow* case where the extent of the aboriginal right (to fish for food) was not seriously in issue. It was never intended to serve as a test for determining the extent of disputed exercises of aboriginal rights.

culture distinctive du groupe autochtone qui revendique le droit en question». Je conviens aussi avec le juge L'Heureux-Dubé qu'un droit ancestral doit faire «partie intégrante» de «l'organisation sociale et de la culture distinctive du groupe autochtones concerné». Dire cela, c'est simplement confirmer que le fondement des droits ancestraux réside dans les lois et les coutumes du peuple visé. C'est définir un attribut essentiel d'un droit ancestral. En toute déférence, toutefois, cela ne suffit pas pour constituer un critère juridique applicable pour déterminer, le cas échéant, la mesure dans laquelle la pêche commerciale peut constituer un droit ancestral. Le principe directeur de partie intégrante découle d'une description faite dans *Sparrow*, affaire où l'étendue du droit ancestral en cause (savoir celui de pêcher à des fins alimentaires) n'était pas vraiment en litige. Ce principe ne s'est jamais voulu un critère pour déterminer la portée d'exercices contestés de droits ancestraux.

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My first concern is that the proposed test is too broad to serve as a legal distinguisher between constitutional and non-constitutional rights. While the Chief Justice in the latter part of his reasons seems to equate "integral" with "not incidental", the fact remains that "integral" is a wide concept, capable of embracing virtually everything that an aboriginal people customarily did. *The Shorter Oxford English Dictionary*, vol. 1 (3rd ed. 1973), offers two definitions of "integral": 1. "Of or pertaining to a whole . . . constituent, component"; and 2. "Made up of component parts which together constitute a unity". To establish a practice as "integral" to a group's culture, it follows, one must show that the practice is part of the unity of practices which together make up that culture. This suggests a very broad definition: anything which can be said to be part of the aboriginal culture would qualify as an aboriginal right protected by the *Constitution Act, 1982*. This would confer constitutional protection on a multitude of activities, ranging from the trivial to the vital. The Chief Justice attempts to narrow the concept of "integral" by emphasizing that the proposed right must be part of what makes the group "distinctive", the "specific" people which they are, stopping short, however, of asserting that the practice must be unique

Ma première préoccupation est que le critère proposé est trop large pour servir à distinguer, en droit, les droits garantis par la Constitution de ceux qui ne le sont pas. Bien que, dans la dernière partie de ses motifs, le Juge en chef semble assimiler «partie intégrante» à «élément non accessoire», il n'en reste pas moins que la notion de «partie intégrante» est large et capable d'englober pratiquement tout ce qu'un peuple autochtone faisait sur une base coutumière. Le *Shorter Oxford English Dictionary*, vol. 1 (3^e éd. 1973), donne deux acceptions du mot anglais «*integral*» («partie intégrante»): [TRADUCTION] 1. «Relatif au tout [...] composant, élément constitutif»; 2. «Composé d'éléments constitutifs contribuant à l'intégrité d'un ensemble». Il s'ensuit que, pour établir qu'une pratique fait «partie intégrante» de la culture d'un groupe, il faut démontrer qu'elle fait partie de l'ensemble des pratiques qui forment cette culture. Cela laisse supposer une définition très large: toute chose qui peut être considérée comme faisant partie de la culture autochtone constituerait un droit ancestral protégé par la *Loi constitutionnelle de 1982*. Bénéficieraient ainsi de la protection de la Constitution une multitude d'activités allant des plus banales aux plus vitales. Le Juge en chef tente de restreindre la notion de «partie inté-

to the group and adhere to none other. But the addition of concepts of distinctness and specificity do not, with respect, remedy the overbreadth of the test. Minor practices, falling far short of the importance which we normally attach to constitutional rights, may qualify as distinct or specific to a group. Even the addition of the notion that the characteristic must be central or important rather than merely "incidental", fails to remedy the problem; it merely poses another problem, that of determining what is central and what is incidental to a people's culture and social organization.

The problem of overbreadth thus brings me to my second concern, the problem of indeterminacy. To the extent that one attempts to narrow the test proposed by the Chief Justice by the addition of concepts of distinctiveness, specificity and centrality, one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right.

Finally, the proposed test is, in my respectful opinion, too categorical. Whether something is integral or not is an all or nothing test. Once it is concluded that a practice is integral to the people's culture, the right to pursue it obtains unlimited protection, subject only to the Crown's right to impose limits on the ground of justification. In this appeal, the Chief Justice's exclusion of "commercial fishing" from the right asserted masks the lack of internal limits in the integral test. But the logic of the test remains ineluctable, for all that: assum-

grante» en soulignant que le droit proposé doit faire partie de ce qui rend le groupe «distinctif», de ce qui en fait le peuple «spécifique» qu'il est, sans toutefois aller jusqu'à affirmer que la pratique doit être propre à ce groupe et n'appartenir à aucun autre. Cependant, l'addition des notions de caractère distinctif et de spécificité ne contrebalance pas, en toute déférence, la portée excessive du critère. Des pratiques mineures, qui n'ont pas l'importance que nous associons normalement aux droits de nature constitutionnelle, pourraient constituer des pratiques distinctes d'un groupe ou des pratiques spécifiques à celui-ci. Même l'ajout du facteur qui exige que la caractéristique soit fondamentale ou importante et non pas simplement «accessoire» ne résout pas le problème. Au contraire, elle ne fait que créer un problème supplémentaire, celui de déterminer ce qui est fondamental pour l'organisation sociale et la culture d'un peuple, et ce qui est accessoire.

Le problème de la portée excessive m'amène à faire état de ma deuxième préoccupation, savoir le problème de l'indétermination. Chercher à restreindre le critère proposé par le Juge en chef en y intégrant les notions de caractère distinctif, de spécificité et de caractère fondamental, c'est se buter au problème des conceptions individuelles de ce qui est distinctif, spécifique ou fondamental. Recourir à de telles notions comme balises des droits, c'est permettre que la détermination de ces droits soit teintée par les vues subjectives du décideur plutôt que fondée sur des normes objectives, c'est aussi susciter l'incertitude et la contestation dans l'examen visant à déterminer si une pratique donnée constitue un droit.

Finalement, le critère proposé est, en toute déférence, trop catégorique. Décider si une chose fait partie intégrante d'une autre, c'est appliquer le critère du tout ou rien. Une fois qu'il a été jugé qu'une pratique fait partie intégrante de la culture du peuple concerné, le droit de continuer cette pratique jouit alors d'une protection illimitée, sous réserve seulement du droit de l'État d'imposer des limites justifiées. Dans le présent pourvoi, l'exclusion par le Juge en chef de la «pêche commerciale» du droit revendiqué masque l'absence de

ing that another people in another case establishes that commercial fishing was integral to its ancestral culture, that people will, on the integral test, logically have an absolute priority over non-aboriginal and other less fortunate aboriginal fishers, subject only to justification. All others, including other native fishers unable to establish commercial fishing as integral to their particular cultures, may have no right to fish at all.

limite intrinsèque dans le critère de la partie intégrante. La logique du critère n'en demeure pas moins inéluctable malgré tout: à supposer qu'un autre peuple, dans une autre affaire, établisse que la pêche commerciale faisait partie intégrante de sa culture ancestrale, logiquement ce peuple bénéficiera alors, suivant le critère de la partie intégrante, de la priorité absolue sur les pêcheurs non autochtones et sur les autres pêcheurs autochtones moins chanceux, sous réserve seulement de l'existence de limites justifiées. Tous les autres pêcheurs, y compris les pêcheurs autochtones incapables d'établir que la pêche commerciale faisait partie intégrante de leur culture particulière, pourraient bien n'avoir aucun droit de pêche que ce soit.

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The Chief Justice recognizes the all or nothing logic of the "integral" test in relation to commercial fishing rights in his reasons in *Gladstone*, *supra*. Having determined in that case that an aboriginal right to commercial fishing is established, he notes at para. 61 that unlike the Indian food fishery, which is defined in terms of the peoples' need for food, the right to fish commercially "has no internal limitations". Reasoning that where the test for the right imposes no internal limit on the right, the court may do so, he adopts a broad justification test which would go beyond limiting the use of the right in ways essential to its exercise as envisioned in *Sparrow*, to permit partial reallocation of the aboriginal right to non-natives. The historically based test for aboriginal rights which I propose, by contrast, possesses its own internal limits and adheres more closely to the principles that animated *Sparrow*, as I perceive them.

Dans ses motifs dans l'arrêt *R. c. Gladstone*, précité, rendu à la même date, le Juge en chef reconnaît la logique du tout ou rien dont procède le critère de la «partie intégrante» en matière de droits de pêche commerciale. Après avoir conclu, dans cet arrêt, à l'existence d'un droit de pêche commerciale, il fait remarquer, au par. 61, que, contrairement à la pêche pratiquée par les Indiens à des fins alimentaires, qui est définie en fonction des besoins alimentaires des gens concernés, le droit de pêcher commercialement «n'est pas assorti de limite intrinsèque». Faisant le raisonnement que, dans les cas où l'application du critère de détermination de l'existence d'un droit révèle que celui-ci n'est pas assorti de limite intrinsèque, le tribunal peut en imposer une, le Juge en chef adopte un large critère de justification qui ne ferait pas que limiter, comme cela est envisagé dans *Sparrow*, l'usage du droit aux fins essentielles à son exercice, mais permettrait la réaffectation partielle du droit ancestral à des non-autochtones. Par contraste, le critère fondé sur l'histoire que je propose d'appliquer à l'égard des droits ancestraux comporte ses propres limites intrinsèques et respecte davantage les principes sur lesquels repose, selon moi, l'arrêt *Sparrow*.

(vii) The Empirical Historic Approach

(vii) L'approche empirico-historique

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The tests proposed by my colleagues describe qualities which one would expect to find in aboriginal rights. To this extent they may be informative and helpful. But because they are overinclusive,

Les critères proposés par mes collègues définissent les attributs que sont censés posséder les droits ancestraux. Dans cette mesure, ils peuvent être informatifs et utiles. Toutefois, comme ils ont

indeterminate, and ultimately categorical, they fall short, in my respectful opinion, of providing a practically workable principle for identifying what is embraced in the term "existing aboriginal rights" in s. 35(1) of the *Constitution Act, 1982*.

In my view, the better approach to defining aboriginal rights is an empirical approach. Rather than attempting to describe *a priori* what an aboriginal right is, we should look to history to see what sort of practices have been identified as aboriginal rights in the past. From this we may draw inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1). Confronted by a particular claim, we should ask, "Is this like the sort of thing which the law has recognized in the past?". This is the time-honoured methodology of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis.

Just as there are two fundamental types of scientific reasoning — reasoning from first principles and empirical reasoning from experience — so there are two types of legal reasoning. The approach adopted by the Chief Justice and L'Heureux-Dubé J. in this appeal may be seen as an example of reasoning from first principles. The search is for a governing principle which will control all future cases. Given the complexity and sensitivity of the issue of defining hitherto undefined aboriginal rights, the pragmatic approach typically adopted by the common law — reasoning from the experience of decided cases and recognized rights — has much to recommend it. In this spirit, and bearing in mind the important truths captured by the "integral" test proposed by the Chief Justice and L'Heureux-Dubé J., I turn to the question of

une portée excessive, qu'ils sont indéterminés et, en fin de compte, catégoriques, ils ne sauraient, en toute déférence, constituer un principe applicable, dans la pratique, pour cerner ce qui est visé par l'expression «droits ancestraux existants» au par. 35(1) de la *Loi constitutionnelle de 1982*.

À mon avis, la meilleure façon de définir les droits ancestraux consiste à appliquer une approche empirique. Plutôt que d'essayer de définir *a priori* ce qu'est un droit ancestral, nous devons étudier l'histoire pour voir quelles sortes de pratiques ont été considérées comme des droits ancestraux dans le passé. Il est alors possible d'en tirer des inférences sur ce qui peut constituer un droit ancestral visé au par. 35(1). Lorsque nous sommes saisis d'une revendication donnée, nous devons nous demander: «S'agit-il d'une chose analogue à celles qui ont été reconnues en droit dans le passé?». C'est la méthode consacrée en common law. Le tribunal appelé à trancher un point de droit nouveau examine les solutions apportées dans le passé dans des cas analogues. Il évalue la nouvelle situation à la lumière des décisions rendues jusqu'à et décide de la qualification appropriée. Ainsi, les principes juridiques évoluent de manière progressive et pragmatique.

Tout comme il y a deux types fondamentaux de raisonnement scientifique — le raisonnement fondé sur des postulats de base et le raisonnement empirique, fondé sur l'expérience — il existe deux types de raisonnement juridique. L'approche adoptée par le Juge en chef et le juge L'Heureux-Dubé dans le présent pourvoi peut être considérée comme un exemple de raisonnement fondé sur des postulats de base. On cherche un principe directeur qui sera applicable dans tous les cas ultérieurs. Vu le caractère complexe et délicat de la question de la définition de droits ancestraux qui n'ont encore jamais été définis, l'approche pragmatique généralement appliquée en common law — le raisonnement fondé sur l'expérience découlant des précédents et des droits reconnus — présente maints avantages. Dans cet esprit, et compte tenu des vérités importantes qui ressortent du critère de la «partie intégrante» proposé par le Juge en chef et par le juge L'Heureux-Dubé, je vais maintenant

what the common law and Canadian history tell us about aboriginal rights.

(viii) The Common Law Principle: Recognition of Pre-Existing Rights and Customs

The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread — the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement.

examiner ce que nous enseignent la common law et l'histoire du Canada au sujet des droits ancestraux.

(viii) Le principe de common law: la reconnaissance des coutumes et droits préexistants

L'histoire des rapports entre les Européens et la common law, d'une part, et les peuples autochtones, d'autre part, s'étale sur une longue période. Comme on peut s'y attendre, les principes régissant ces rapports n'ont pas toujours été appliqués uniformément durant cette longue histoire. Et pourtant, cette histoire, depuis les tout débuts jusqu'à nos jours, est illuminée par un fil d'or — la reconnaissance par la common law des lois et coutumes ancestrales des peuples autochtones qui occupaient le territoire avant la colonisation européenne.

For centuries, it has been established that upon asserting sovereignty the British Crown accepted the existing property and customary rights of the territory's inhabitants. Illustrations abound. For example, after the conquest of Ireland, it was held in *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516, that the Crown did not take actual possession of the land by reason of conquest and that pre-existing property rights continued. Similarly, Lord Sumner wrote in *In re Southern Rhodesia*, [1919] A.C. 211, at p. 233 that "it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected [pre-existing aboriginal rights] and forborne to diminish or modify them". Again, Lord Denning affirmed the same rule in *Oyekan v. Adele*, [1957] 2 All E.R. 785, at p. 788:

Il est établi que, pendant des siècles, lorsqu'elle affirmait sa souveraineté sur un territoire, la Couronne britannique reconnaissait les droits de propriété et les droits fondés sur la coutume existants de ses occupants. Les exemples abondent. Ainsi, après la conquête de l'Irlande, il a été décidé dans l'arrêt *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516, que la Couronne n'avait pas effectivement pris possession des terres par la conquête et que les droits de propriété préexistants continuaient d'exister. De même, dans *In re Southern Rhodesia*, [1919] A.C. 211, à la p. 233, lord Sumner a écrit [TRADUCTION] «qu'il faut présumer, en l'absence de confiscation expresse ou de loi d'expropriation ultérieure, que le conquérant a respecté [les droits ancestraux préexistants] et a renoncé à les restreindre ou à les modifier». Lord Denning a confirmé cette règle dans *Oyekan c. Adele*, [1957] 2 All E.R. 785, à la p. 788:

In inquiring . . . what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests,

[TRADUCTION] En se demandant . . . quels droits sont reconnus, il existe un principe directeur. Ce principe est le suivant: Les tribunaux présumeront que la Couronne britannique veut que l'on respecte intégralement les droits de propriété des habitants. Par conséquent, bien qu'en sa qualité de souverain, elle puisse adopter des lois lui permettant d'acquérir de force des terres à des fins publiques, la Couronne britannique verra à ce qu'une juste indemnité soit accordée à chacun des habitants qui possède un intérêt en vertu du droit autochtone;

even though those interests are of a kind unknown to English law. . . . [Emphasis added.]

Most recently in *Mabo*, the Australian High Court, after a masterful review of Commonwealth and American jurisprudence on the subject, concluded that the Crown must be deemed to have taken the territories of Australia subject to existing aboriginal rights in the land, even in the absence of acknowledgment of those rights. As Brennan J. put it at p. 58: "an inhabited territory which became a settled colony was no more a legal desert than it was 'desert uninhabited'. . . ." Once the "fictions" of *terra nullius* are stripped away, "[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to [the] laws and customs" of the indigenous people.

In Canada, the Courts have recognized the same principle. Thus in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 at p. 328, Judson J. referred to the asserted right "to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished". In the same case, Hall J. (dissenting on another point) rejected at p. 416 as "wholly wrong" "the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer". Subsequent decisions in this Court are consistent with the view that the Crown took the land subject to pre-existing aboriginal rights and that such rights remain in the aboriginal people, absent extinguishment or surrender by treaty.

In *Guerin*, *supra*, this Court re-affirmed this principle, stating at pp. 377-78:

In recognizing that the Proclamation is not the sole source of Indian title the *Calder* decision went beyond the judgment of the Privy Council in *St. Catherine's*

et les tribunaux déclareront que chaque habitant a droit à une indemnité selon son intérêt, même si pareil intérêt est d'un genre inconnu en droit anglais . . . [Je souligne.]

Récemment, dans l'arrêt *Mabo*, la Haute Cour d'Australie, après un exposé remarquable de la jurisprudence des pays du Commonwealth et des États-Unis sur la question, a conclu que Sa Majesté doit être considérée comme ayant pris possession des territoires de l'Australie, sous réserve des droits ancestraux existants sur ces terres, même en l'absence de reconnaissance de tels droits. Comme l'a dit le juge Brennan, à la p. 58: [TRADUCTION] «un territoire habité, devenu une colonie, n'était pas davantage un désert au sens de la loi qu'il n'était dans les faits un «désert» . . . ». Une fois écartées les «fictions» découlant de la notion de territoire sans maître (*terra nullius*), [TRADUCTION] «[l]a nature et les attributs du titre aborigène doivent être déterminés en tant que question de fait, eu égard [aux] lois et coutumes» des autochtones visés.

Au Canada, les tribunaux ont reconnu le même principe. Ainsi, dans l'arrêt *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313 à la p. 328, le juge Judson a dit que le droit revendiqué était celui «de continuer à vivre sur leurs terres comme l'avaient fait leurs ancêtres et que ce droit n'a jamais été juridiquement éteint». À la page 416 du même arrêt, le juge Hall (dissident sur un autre point) a rejeté comme étant «entièrement erronée» «la proposition qu'après la conquête ou la découverte, les peuples aborigènes n'ont aucun droit à l'exception de ceux qui leur sont par la suite accordés ou reconnus par le conquérant ou le découvreur». Les décisions subséquentes de notre Cour sont compatibles avec le point de vue que l'État a pris possession des terres, sous réserve des droits ancestraux préexistants, et que les autochtones conservent ces droits, en l'absence d'extinction ou de cession par traité.

Dans l'arrêt *Guerin*, précité, notre Cour a réaffirmé ce principe et déclaré ceci, aux pp. 377 et 378:

En reconnaissant que la Proclamation ne constitue pas l'unique fondement du titre indien, l'arrêt *Calder* va plus loin que l'arrêt du Conseil privé *St. Catherine's*

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Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect *Calder* is consistent with the position of Chief Justice Marshall in the leading American cases of *Johnson v. M'Intosh*, 8 Wheaton 543 (1823), and *Worcester v. State of Georgia*, 6 Peters 515 (1832), cited by Judson and Hall JJ. in their respective judgments.

In *Johnson v. M'Intosh* Marshall C.J., although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected. [Emphasis added.]

This Court's judgment in *Sparrow*, *supra*, reaffirmed that approach.

(ix) The Nature of the Interests and Customs Recognized by the Common Law

This much is clear: the Crown, upon discovering and occupying a "new" territory, recognized the law and custom of the aboriginal societies it found and the rights in the lands they traditionally occupied that these supported. At one time it was suggested that only legal interests consistent with those recognized at common law would be recognized. However, as Brennan J. points out in *Mabo*, at p. 59, that rigidity has been relaxed since the decision of the Privy Council in *Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399, "[t]he general principle that the common law will recognize a customary title only if it be consistent with the common law is subject to an exception in favour of traditional native title".

Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46, où lord Watson a reconnu l'existence du titre aborigène, mais a affirmé que celui-ci avait son origine dans la Proclamation royale. À cet égard, l'arrêt *Calder* est compatible avec le point de vue exprimé par le juge en chef Marshall dans les arrêts de principe américains *Johnson v. M'Intosh*, 8 Wheaton 543 (1823), et *Worcester v. State of Georgia*, 6 Peters 515 (1832), que les juges Judson et Hall ont cités dans leurs motifs respectifs.

Dans l'arrêt *Johnson v. M'Intosh*, le juge en chef Marshall, tout en reconnaissant que la Proclamation royale de 1763 constitue l'un des fondements du titre indien, a néanmoins estimé que les droits des Indiens sur les terres qu'ils avaient traditionnellement occupées avant la colonisation européenne existaient avant les revendications de souveraineté de différentes nations européennes sur les territoires du continent nord-américain et qu'ils ont continué d'exister après ces revendications. Selon le principe de la découverte, sur lequel reposaient ces revendications, les terres situées dans une région donnée appartenaient en dernière analyse à la nation qui en avait fait la découverte et qui en avait réclamé la possession. Sous ce rapport du moins, les droits des Indiens sur leurs terres ont été manifestement diminués, mais leurs droits d'occupation et de possession sont restés inchangés. [Je souligne.]

Notre Cour a réaffirmé ce point de vue dans *Sparrow*, précité.

(ix) La nature des intérêts et coutumes reconnus par la common law

Une chose est claire, lorsqu'elle découvrait et occupait un «nouveau» territoire, la Couronne reconnaissait les lois et coutumes des sociétés autochtones qui y vivaient, ainsi que les droits sur les terres que ces dernières avaient traditionnellement occupées et qui dérivait de ces lois et coutumes. Il a été dit que seuls seraient reconnus les intérêts juridiques coïncidant avec ceux reconnus par la common law. Toutefois, comme le juge Brennan le souligne dans l'arrêt *Mabo*, à la p. 59, cette attitude rigide s'est atténuée depuis l'arrêt du Conseil privé *Tijani c. Secretary, Southern Nigeria*, [1921] 2 A.C. 399: [TRADUCTION] «[l]e principe général que la common law ne reconnaît un titre fondé sur la coutume que s'il est compatible avec la common law souffre une exception dans le cas du titre aborigène traditionnel».

It may now be affirmed with confidence that the common law accepts all types of aboriginal interests, “even though those interests are of a kind unknown to English law”: *per* Lord Denning in *Oyekan*, *supra*, at p. 788. What the laws, customs and resultant rights are “must be ascertained as a matter of fact” in each case, *per* Brennan J. in *Mabo*, at p. 58. It follows that the Crown in Canada must be taken as having accepted existing native laws and customs and the interests in the land and waters they gave rise to, even though they found no counterpart in the law of England. In so far as an aboriginal people under internal law or custom had used the land and its waters in the past, so it must be regarded as having the continuing right to use them, absent extinguishment or treaty.

This much appears from the *Royal Proclamation of 1763*, R.S.C., 1985, App. II, No. 1, which set out the rules by which the British proposed to govern the territories of much of what is now Canada. The Proclamation, while not the sole source of aboriginal rights, recognized the presence of aboriginals as existing occupying peoples. It further recognized that they had the right to use and alienate the rights they enjoyed the use of those territories. The assertion of British sovereignty was thus expressly recognized as not depriving the aboriginal people of Canada of their pre-existing rights; the maxim of *terra nullius* was not to govern here. Moreover, the Proclamation evidences an underlying concern for the continued sustenance of aboriginal peoples and their descendants. It stipulated that aboriginal people not be permitted to sell their land directly but only through the intermediary of the Crown. The purpose of this stipulation was to ensure that the aboriginal peoples obtained a fair exchange for the rights they enjoyed in the territories on which they had traditionally lived — an exchange which would ensure the sustenance not only of the current generation but also of generations to come. (See *Guerin*, *supra*, at p. 376; see also Brian Slaterry, “Under-

Il est désormais possible d'affirmer avec confiance que la common law accepte tous les types d'intérêts autochtones, [TRADUCTION] «même si [les] intérêts [en question] sont d'un genre inconnu en droit anglais»: lord Denning dans l'arrêt *Oyekan*, précité, à la p. 788. La question de savoir quels sont ces lois et ces coutumes, ainsi que les droits qui en découlent, «doi[t] être déterminé[e] en tant que question de fait» dans chaque cas, le juge Brennan dans l'arrêt *Mabo*, à la p. 58. Il s'ensuit qu'il faut considérer que, au Canada, la Couronne a accepté les lois et coutumes autochtones existantes, ainsi que les intérêts dans les terres et les eaux auxquels elles donnaient naissance, même s'ils n'avaient pas d'équivalents dans le droit d'Angleterre. Dans la mesure où un peuple autochtone avait, en vertu de ses lois ou coutumes internes, utilisé les terres et les eaux s'y trouvant dans le passé, il doit être considéré comme ayant toujours le droit de les utiliser, en l'absence d'extinction ou de traité.

Voilà ce qui ressort de la *Proclamation royale de 1763*, L.R.C. (1985), app. II, n° 1, qui énonce les règles selon lesquelles les Britanniques se proposaient de gouverner une grande partie des territoires qui constituent aujourd'hui le Canada. Bien qu'elle ne soit pas l'unique source des droits ancestraux, la Proclamation a reconnu la présence des autochtones en tant que peuples occupant les territoires. Elle a aussi reconnu qu'ils avaient le droit d'utiliser ces territoires et de se départir de ces droits d'usage. Il y est donc expressément reconnu que l'affirmation de la souveraineté britannique n'avait pas pour effet de priver les autochtones du Canada de leurs droits préexistants; la règle du territoire sans maître ne devrait pas s'appliquer ici. De plus, la Proclamation atteste le souci d'assurer aux peuples autochtones et à leurs descendants la possibilité de pourvoir à leur subsistance. Il y est stipulé que les autochtones ne sont pas autorisés à vendre leurs terres directement, mais qu'ils doivent le faire seulement par l'entremise de Sa Majesté. Cette stipulation visait à faire en sorte que les peuples autochtones reçoivent une juste contrepartie en échange des droits dont ils jouissaient sur les terres où ils avaient vécu traditionnellement — contrepartie qui assurerait la sub-

standing Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.)

271 The stipulation against direct sale to Europeans was coupled with a policy of entering into treaties with various aboriginal peoples. The treaties typically sought to provide the people in question with a land base, termed a reserve, as well as other benefits enuring to the signatories and generations to come — cash payments, blankets, foodstuffs and so on. Usually the treaties conferred a continuing right to hunt and fish on Crown lands. Thus the treaties recognized that by their own laws and customs, the aboriginal people had lived off the land and its waters. They sought to preserve this right in so far as possible as well as to supplement it to make up for the territories ceded to settlement.

272 These arrangements bear testimony to the acceptance by the colonizers of the principle that the aboriginal peoples who occupied what is now Canada were regarded as possessing the aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding — the *Grundnorm* of settlement in Canada — was that the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them. (In making this comment, I do not foreclose the possibility that other arguments might be made with respect to areas in Canada settled by France.)

273 The same notions held sway in the colony of British Columbia prior to union with Canada in 1871. An early governor, Governor Douglas, pro-

sistance non seulement de la génération cédant les droits mais celle des générations futures. (Voir *Guerin*, précité, à la p. 376; voir aussi Brian Slattery, «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727.)

La stipulation interdisant la vente directe aux Européens s'ajoutait à une politique visant la conclusion de traités avec les peuples autochtones. Les traités avaient généralement pour but de fournir aux autochtones concernés une assise territoriale, appelée réserve, ainsi que des avantages pour les signataires et leurs descendants — paiements en espèces, couvertures, denrées alimentaires et autres choses du genre. D'ordinaire, les traités conféraient un droit permanent de chasse et de pêche sur les terres domaniales. Les traités reconnaissaient donc le fait que, suivant leurs propres lois et coutumes, les autochtones tiraient leur subsistance du territoire et des eaux s'y trouvant, et ils visaient à préserver ce droit dans toute la mesure du possible et à le compléter pour compenser les territoires cédés à des fins de colonisation.

Ces dispositions témoignent de l'acceptation par les colonisateurs du principe que les peuples autochtones qui occupaient ce qui est maintenant le Canada étaient considérés comme possédant le droit ancestral de tirer leur subsistance de leurs terres et des ressources des forêts et des cours d'eau, dans la mesure où ils l'avaient fait traditionnellement. La stipulation essentielle — la norme fondamentale de la colonisation au Canada — était que les peuples autochtones ne pouvaient être privés des moyens de subsistance qu'ils tiraient traditionnellement des terres et des eaux y adjacentes que par un traité solennel conclu avec Sa Majesté, à des conditions garantissant à ceux-ci ainsi qu'à leurs descendants des moyens de remplacer la subsistance qu'ils tiraient, depuis les temps ancestraux, des terres, forêts et cours d'eau. (En faisant cette observation, je n'exclus pas la possibilité que d'autres arguments puissent être présentés relativement aux régions du pays colonisées par la France.)

Les mêmes notions avaient cours dans la colonie de la Colombie-Britannique avant son union avec le Canada en 1871. Un des premiers gouverneurs,

nounced a policy of negotiating solemn treaties with the aboriginal peoples similar to that pursued elsewhere in Canada. Tragically, that policy was overtaken by the less generous views that accompanied the rapid settlement of British Columbia. The policy of negotiating treaties with the aboriginals was never formally abandoned. It was simply overridden, as the settlers, aided by administrations more concerned for short-term solutions than the duty of the Crown toward the first peoples of the colony settled where they wished and allocated to the aboriginals what they deemed appropriate. This did not prevent the aboriginal peoples of British Columbia from persistently asserting their right to an honourable settlement of their ancestral rights — a settlement which most of them still await. Nor does it negate the fundamental proposition acknowledged generally throughout Canada's history of settlement that the aboriginal occupants of particular territories have the right to use and be sustained by those territories.

Generally speaking, aboriginal rights in Canada were group rights. A particular aboriginal group lived on or controlled a particular territory for the benefit of the group as a whole. The aboriginal rights of such a group inure to the descendants of the group, so long as they maintain their connexion with the territory or resource in question. In Canada, as in Australia, "many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it" (p. 59). But "[w]here a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence" (*Mabo*, at pp. 59-60).

Douglas, a établi une politique de négociation de traités solennels avec les peuples autochtones analogue à celle appliquée ailleurs au Canada. Tragiquement, cette politique a été écartée par la vision moins généreuse qui a accompagné la colonisation rapide de la Colombie-Britannique. La politique de négociation de traités avec les autochtones n'a jamais été officiellement abandonnée. Elle a simplement été foulée aux pieds parce que les colons, avec l'appui d'administrations plus soucieuses d'appliquer des solutions à court terme que de respecter les obligations de la Couronne envers les premiers habitants de la colonie, se sont établis là où ils le voulaient et ils n'ont accordé aux autochtones que ce qu'ils jugeaient convenable. Cela n'a pas empêché les peuples autochtones de la Colombie-Britannique de faire valoir avec ténacité leur droit d'obtenir un règlement honorable de leurs droits ancestraux — règlement que la plupart d'entre eux attendent encore. Cela n'invalide pas non plus la proposition fondamentale, généralement reconnue tout au long de l'histoire de la colonisation du pays, que les occupants autochtones de territoires donnés ont le droit d'utiliser ces territoires et d'en tirer leur subsistance.

De façon générale, les droits ancestraux au Canada étaient des droits collectifs. Un groupe d'autochtones particulier habitait un territoire ou exerçait sa domination sur celui-ci au profit de l'ensemble du groupe. Les droits ancestraux de ce groupe échoient aux descendants du groupe, tant que ceux-ci maintiennent des liens avec le territoire ou la ressource en question. Au Canada, tout comme en Australie, [TRADUCTION] «de nombreux clans ou groupes d'autochtones ont été physiquement séparés de leur territoire traditionnel et ils ont cessé d'être rattachés à celui-ci» (p. 59). Toutefois, [TRADUCTION] «[q]uand un clan ou un groupe a continué de reconnaître les lois et (si c'était matériellement possible) d'observer les coutumes fondées sur ses traditions, maintenant ainsi de façon substantielle ses liens traditionnels avec le territoire, il est possible d'affirmer que le titre communautaire traditionnel de ce clan ou groupe a continué d'exister» (arrêt *Mabo*, aux pp. 59 et 60).

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It thus emerges that the common law and those who regulated the British settlement of this country predicated dealings with aboriginals on two fundamental principles. The first was the general principle that the Crown took subject to existing aboriginal interests in the lands they traditionally occupied and their adjacent waters, even though those interests might not be of a type recognized by British law. The second, which may be viewed as an application of the first, is that the interests which aboriginal peoples had in using the land and adjacent waters for their sustenance were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for its sustenance may be seen as a fundamental aboriginal right. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the *Constitution Act, 1982*.

(x) The Right to Fish for Sale

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Against this background, I come to the issue at the heart of this case. Do aboriginal people enjoy a constitutional right to fish for commercial purposes under s. 35(1) of the *Constitution Act, 1982*? The answer is yes, to the extent that the people in question can show that it traditionally used the fishery to provide needs which are being met through the trade.

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If an aboriginal people can establish that it traditionally fished in a certain area, it continues to have a similar right to do so, barring extinguishment or treaty. The same justice that compelled those who drafted treaties with the aboriginals in the nineteenth century to make provision for the continuing sustenance of the people from the land, compels those dealing with aboriginals with whom treaties were never made, like the Sto:lo, to make similar provision.

Il ressort donc de ces observations que la common law et les responsables de la colonisation britannique de notre pays ont fondé leurs rapports avec les autochtones sur deux principes fondamentaux. Le premier était le principe général que Sa Majesté prenait possession du territoire sous réserve des droits existants des autochtones sur les terres qu'ils avaient traditionnellement occupées et sur les eaux y adjacentes, même s'il ne s'agissait pas de droits appartenant à un type reconnu par le droit britannique. Le second, qui peut être considéré comme une application du premier, est que les droits des peuples autochtones d'utiliser les terres et les eaux y adjacentes pour assurer leur subsistance ne devaient leur être enlevés que par traité solennel et moyennant octroi à ceux-ci et à leurs descendants d'une juste indemnité. Ce droit des autochtones visés d'utiliser les terres et les eaux y adjacentes comme ils l'avaient fait traditionnellement pour assurer leur subsistance peut être considéré comme un droit ancestral fondamental. Il trouve appui dans la common law et dans l'histoire du pays. Il est possible d'affirmer avec confiance que ce droit est constitutionnalisé au par. 35(1) de la *Loi constitutionnelle de 1982*.

(x) Le droit de pêcher en vue de la vente

Après avoir exposé le contexte, j'aborde maintenant la question qui est au cœur du présent pourvoi. Les autochtones possèdent-ils, en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*, un droit constitutionnel de pêcher à des fins commerciales? La réponse est oui, dans la mesure où les autochtones concernés peuvent démontrer qu'ils ont traditionnellement utilisé la pêche pour pourvoir à des besoins qui sont satisfaits par le commerce.

Si des autochtones peuvent établir qu'ils ont traditionnellement pêché dans un certain secteur, ils continuent d'avoir le droit de le faire, sauf extinction ou traité. Le même sentiment de justice qui obligeait ceux qui rédigeaient les traités conclus avec les autochtones au XIX^e siècle à inclure dans ceux-ci des dispositions pour que les autochtones puissent continuer à tirer leur subsistance du territoire oblige ceux qui transigent avec des autochtones qui n'ont jamais conclu de traité, comme les Sto:lo, à prendre de telles mesures.

The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained from the portion of the river or sea. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration. At its base, the right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for the traditional needs, albeit in their modern form. However, if the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.

The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource. In most cases, one would expect the aboriginal right to trade to be confined to what is necessary to provide basic housing, transportation, clothing and amenities — the modern equivalent of what the aboriginal people in question formerly took from the land or the fishery, over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers. On this principle, where the aboriginal people can demonstrate that they historically have drawn a moderate livelihood from the fishery, the aboriginal right to a "moderate livelihood" from the fishery may be established (as Lambert J.A. concluded in the British Columbia

Le droit de pêche ancestral peut être défini comme étant le droit de continuer à tirer du fleuve, de la rivière ou de la mer en question ce que les autochtones concernés ont traditionnellement tiré du secteur exploité. Si les autochtones démontrent qu'ils ont traditionnellement tiré leur subsistance du fleuve, de la rivière ou de la mer, ils ont alors à première vue le droit de continuer à le faire, s'ils n'ont pas, par traité, échangé ce droit contre autre chose. Essentiellement, ce n'est pas le droit de faire du commerce, mais le droit de continuer d'utiliser la ressource de la manière traditionnelle, afin de pourvoir aux besoins traditionnels, quoique sous leur forme moderne. Toutefois, si les autochtones démontrent que le commerce est la seule manière d'utiliser la ressource de façon à leur permettre de se procurer l'équivalent moderne de ce qu'ils ont traditionnellement tiré de celle-ci, il s'ensuit qu'ils devraient être autorisés à faire le commerce de cette ressource dans la mesure nécessaire pour obtenir des biens et des commodités de remplacement. Dans ce contexte, le commerce n'est rien d'autre que la méthode ou la pratique par laquelle est exercé le droit plus fondamental qui consiste à tirer sa subsistance de la ressource.

Le droit d'échanger les produits du territoire et des eaux y adjacentes contre d'autres biens n'est pas illimité. Ce droit est la poursuite de l'exploitation historique de la ressource par les autochtones visés. Il n'y a donc rien qui justifie d'élargir le droit au-delà de ce qui est nécessaire pour permettre aux autochtones de se procurer des biens de remplacement raisonnables à la place de ceux qu'ils ont traditionnellement obtenus pour la ressource. Dans la plupart des cas, il est permis de penser que le droit ancestral de commercer se limite à ce qui est nécessaire pour pourvoir aux besoins de base en matière de logement, de transport, d'habillement et de commodités de la vie — l'équivalent moderne de ce que les autochtones en question tiraient dans le passé du territoire ou de la pêche, en sus de leurs besoins alimentaires et rituels. Au-delà de ces besoins, les pêcheurs autochtones n'ont aucun droit de priorité sur les non-autochtones qui pratiquent la pêche commerciale ou sportive. Suivant ce principe, si les autochtones peuvent démontrer qu'ils ont histori-

Court of Appeal). However, there is no automatic entitlement to a moderate or any other livelihood from a particular resource. The inquiry into what aboriginal rights a particular people possess is an inquiry of fact, as we have seen. The right is established only to the extent that the aboriginal group in question can establish historical reliance on the resource. For example, evidence that a people used a water resource only for occasional food and sport fishing would not support a right to fish for purposes of sale, much less to fish to the extent needed to provide a moderate livelihood. There is, on this view, no generic right of commercial fishing, large-scale or small. There is only the right of a particular aboriginal people to take from the resource the modern equivalent of what by aboriginal law and custom it historically took. This conclusion echoes the suggestion in *Jack v. The Queen*, [1980] 1 S.C.R. 294, approved by Dickson C.J. and La Forest J. in *Sparrow*, of a "limited" aboriginal priority to commercial fishing.

quement tiré une subsistance convenable de la pêche, il est alors possible d'établir l'existence d'un droit ancestral de tirer une «subsistance convenable» de la pêche (comme l'a conclu le juge Lambert de la Cour d'appel de la Colombie-Britannique). Cependant, il n'existe pas automatiquement de droit de tirer une subsistance convenable ou autre d'une ressource particulière. Comme nous l'avons vu, l'examen de la nature des droits ancestraux que possède un peuple donné porte sur les faits. L'existence du droit n'est établie que dans la mesure où le peuple autochtone en cause peut démontrer qu'il a traditionnellement exploité la ressource. Par exemple, la preuve qu'un peuple utilisait des eaux seulement à des fins d'occupation traditionnelle de pêche occasionnelle à des fins alimentaires et sportives n'appuierait pas l'existence du droit de pêcher en vue de vendre du poisson, et encore moins de pêcher dans la mesure requise pour s'assurer une subsistance convenable. À mon avis, il n'existe pas de droit général de pêche commerciale, à quelque échelle que ce soit. Le seul droit qui existe est celui que possède un peuple autochtone particulier de tirer de la ressource l'équivalent moderne de ce qu'il en a historiquement tiré suivant les lois et coutumes autochtones. Cette conclusion reprend l'opinion qui a été émise dans *Jack c. La Reine*, [1980] 1 R.C.S. 294, et approuvée par le juge en chef Dickson et le juge La Forest dans *Sparrow*, et suivant laquelle les autochtones jouissant d'une priorité «restreinte» en matière de pêche commerciale.

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A further limitation is that all aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. These aboriginal rights are founded on the right of the people to use the land and adjacent waters. There can be no use, on the long term, unless the product of the lands and adjacent waters is maintained. So maintenance of the land and the waters comes first. To this may be added a related limitation. Any right, aboriginal or other, by its very nature carries with it the obligation to use it responsibly. It cannot be used, for example, in a way which harms people, aboriginal or non-aboriginal. It is up to the Crown to establish a regulatory regime which respects these objectives. In the analytic framework usually

Une autre limite est que tous les droits ancestraux sur les terres et les eaux y adjacentes sont assujettis aux restrictions imposées pour des fins de conservation. Ces droits ancestraux sont fondés sur le droit des autochtones concernés d'utiliser les terres et les eaux y adjacentes. À long terme cette utilisation est impossible à moins de protéger les produits tirés des terres et des eaux adjacentes à celles-ci. La protection des terres et des eaux vient donc au premier rang. À tout cela, s'ajoute une limite connexe. En effet, tout droit — ancestral ou autre — emporte de par sa nature même l'obligation de l'utiliser de façon responsable. Par exemple, il ne peut être utilisé d'une manière préjudiciable à autrui, qu'il s'agisse ou non d'autoch-

used in cases such as this, the right of the government to limit the aboriginal fishery on grounds such as these is treated as a matter of justifying a limit on a "*prima facie*" aboriginal right. Following this framework, I will deal with it in greater detail under the heading of justification.

(xi) Is an Aboriginal Right to Sell Fish for Commerce Established in this Case?

I have concluded that subject to conservation needs, aboriginal peoples may possess a constitutional right under s. 35(1) of the *Constitution Act, 1982*, to use a resource such as a river site beside which they have traditionally lived to provide the modern equivalent of the amenities which they traditionally have obtained from the resource, whether directly or indirectly, through trade. The question is whether, on the evidence, Mrs. Van der Peet has established that the Sto:lo possessed such a right.

The evidence establishes that by custom of the aboriginal people of British Columbia, the Sto:lo have lived since time immemorial at the place of their present settlement on the banks of the Fraser River. It also establishes that as a fishing people, they have for centuries used the fish from that river to sustain themselves. One may assume that the forest and vegetation on the land provided some of their shelter and clothing. However, their history indicates that even in days prior to European contact, the Sto:lo relied on fish, not only for food and ceremonial purposes, but also for the purposes of obtaining other goods through trade. Prior to contact with Europeans, this trade took place with other tribes; after contact, sales on a larger scale were made to the Hudson's Bay Company, a practice which continued for almost a century. In summary, the evidence conclusively establishes that over many centuries, the Sto:lo have used the fishery not only for food and ceremonial purposes, but

tones. Il incombe à l'État d'établir un régime de réglementation qui respecte ces objectifs. Conformément au cadre d'analyse habituellement appliqué dans les cas comme celui qui nous occupe, le droit de l'État de restreindre la pêche autochtone pour des motifs de cet ordre soulève la question de la justification des limites apportées à un droit ancestral dont l'existence a été établie à première vue. Appliquant ce cadre, je vais étudier ce point plus en détail lorsque je traiterai de la justification.

(xi) L'existence d'un droit ancestral de vendre du poisson commercialement a-t-elle été établie en l'espèce?

J'ai conclu que, sous réserve des besoins de conservation, il est possible que des peuples autochtones possèdent, en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*, le droit constitutionnel d'utiliser une ressource tel un secteur dans une rivière au bord de laquelle ils ont traditionnellement vécu, pour en tirer l'équivalent moderne des commodités de la vie qu'ils ont traditionnellement obtenues au moyen de cette ressource, directement ou indirectement, par voie d'échange. Il s'agit de décider si, d'après la preuve, M^{me} Van der Peet a établi que les Sto:lo possèdent un tel droit.

La preuve établit que, selon la coutume des autochtones de la Colombie-Britannique, les Sto:lo vivent depuis des temps immémoriaux au lieu de leur établissement actuel sur les berges du fleuve Fraser. La preuve démontre également que, en tant que pêcheurs, ils utilisent depuis des siècles le poisson de ce fleuve pour assurer leur subsistance. Il est permis de supposer qu'ils ont tiré des forêts et de la végétation une partie des choses nécessaires pour se loger et se vêtir. Toutefois, leur histoire indique que, même avant l'arrivée des Européens, les Sto:lo exploitaient le poisson non seulement à des fins alimentaires et rituelles, mais également pour obtenir d'autres biens par voie d'échange. Avant le contact avec les Européens, ces échanges avaient lieu avec d'autres tribus. Après le contact, des ventes à une plus grande échelle ont été faites à la Compagnie de la Baie d'Hudson, pratique qui s'est poursuivie pendant presque un siècle. En résumé, la preuve établit

also to satisfy a variety of other needs. Unless that right has been extinguished, and subject always to conservation requirements, they are entitled to continue to use the river for these purposes. To the extent that trade is required to achieve this end, it falls within that right.

283 I agree with L'Heureux-Dubé J. that the scale of fishing evidenced by the case at bar falls well within the limit of the traditional fishery and the moderate livelihood it provided to the Sto:lo.

284 For these reasons I conclude that Mrs. Van der Peet's sale of the fish can be defended as an exercise of her aboriginal right, unless that right has been extinguished.

B. *Is the Aboriginal Right Extinguished?*

285 The Crown has never concluded a treaty with the Sto:lo extinguishing its aboriginal right to fish. However, it argues that any right the Sto:lo people possess to fish commercially was extinguished prior to 1982 through regulations limiting commercial fishing by licence. The appellant, for her part, argues that general regulations controlling the fishery do not evidence the intent necessary to establish extinguishment of an aboriginal right.

286 For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": *Sparrow*, *supra*, at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, 476 U.S. 734 (1986), at pp. 739-40: "[w]hat is essential [to satisfy the "clear and plain" test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

décisivement que, pendant des siècles, les Sto:lo ont pêché non seulement à des fins alimentaires et rituelles, mais aussi pour satisfaire divers autres besoins. À moins que ce droit ait été éteint, et sous réserve toujours des exigences en matière de conservation, les Sto:lo ont le droit de continuer d'exploiter le fleuve à ces fins. Dans la mesure où le commerce est nécessaire pour réaliser cet objectif, il fait partie de ce droit.

Je conviens avec le juge L'Heureux-Dubé que l'ampleur des activités de pêche révélées par la preuve reste bien en deçà des limites de la pêche traditionnelle pratiquée par les Sto:lo et de la subsistance convenable qu'ils en tiraient.

Pour ces motifs, je conclus que la vente du poisson par Mme Van der Peet peut être justifiée comme étant l'exercice de son droit ancestral, à moins que ce droit ait été éteint.

B. *Le droit ancestral a-t-il été éteint?*

L'État n'a jamais conclu avec les Sto:lo de traité éteignant leur droit de pêche ancestral. Le ministère public soutient toutefois que tout droit des Sto:lo de pêcher commercialement a été éteint avant 1982 par voie de règlements limitant la pêche commerciale aux activités pratiquées en vertu de permis. Pour sa part, l'appelante affirme que des règlements généraux visant à contrôler la pêche n'attestent pas l'intention nécessaire pour établir l'extinction d'un droit ancestral.

Pour qu'une mesure législative ou réglementaire éteigne un droit ancestral, cette intention doit être «claire et expresse»: *Sparrow*, précité, à la p. 1099. Le critère appliqué au Canada en matière d'extinction des droits ancestraux s'inspire du critère américain énoncé dans l'arrêt *United States c. Dion*, 476 U.S. 734 (1986), aux pp. 739 et 740: [TRADUCTION] «[c]e qui est essentiel [pour satisfaire au critère de l'intention «claire et expresse»], c'est une preuve claire que [l'État] a réellement pris en considération le conflit entre la mesure qu'il entend prendre, d'une part, et les droits issus de traités des Indiens, d'autre part, et qu'il a choisi de résoudre ce conflit en abrogeant le traité» ou le droit.

Following this approach, this Court in *Sparrow* rejected the Crown's argument that pre-1982 regulations imposing conditions on the exercise of an aboriginal right extinguished it to the extent of the regulation. To accept that argument, it reasoned at p. 1091, would be to elevate such regulations as applied in 1982 to constitutional status and to "incorporate into the Constitution a crazy patchwork of regulations". Rejecting this "snapshot" approach to constitutional rights, the Court distinguished between regulation of the exercise of a right, and extinguishment of the right itself.

In this case, the Crown argues that while the regulatory scheme may not have extinguished the aboriginal right to fish for food (*Sparrow*) it nevertheless extinguished any aboriginal right to fish for sale. It relies in particular on Order in Council, P.C. 2539, of September 11, 1917, which provided:

Whereas it is represented that since time immemorial, it has been the practice of the Indians of British Columbia to catch salmon by means of spears and otherwise after they have reached the upper non-tidal portions of the rivers;

And whereas while after commercial fishing began it became eminently desirable that all salmon that succeeded in reaching the upper waters should be allowed to go on to their spawning beds unmolested, in view of the great importance the Indians attached to their practice of catching salmon they have been permitted to do so for their own food purposes only. . . .

And whereas the Department of the Naval Service is informed that the Indians have concluded that this regulation is ineffective, and this season arrangements are being made by them to carry on fishing for commercial purposes in an extensive way;

And whereas it is considered to be in the public interest that this should be prevented and the Minister of the Naval Service, after consultation with the Department of Justice on the subject, recommends that action as follows be taken;

Appliquant cette approche, notre Cour a, dans *Sparrow*, rejeté l'argument du ministère public que les règlements d'avant 1982 qui assujétissaient l'exercice d'un droit ancestral à certaines conditions avaient eu pour effet d'éteindre ce droit dans la mesure des conditions imposées. Accepter cet argument, a raisonné notre Cour, à la p. 1091, reviendrait à conférer un statut constitutionnel aux règlements applicables en 1982 et à «introduire dans la Constitution un ensemble de règlements disparates». Rejetant l'application de cette approche «ponctuelle» aux droits constitutionnels, notre Cour a établi une distinction entre la réglementation de l'exercice d'un droit et l'extinction du droit lui-même.

En l'espèce, le ministère public prétend que, bien que le régime de réglementation n'ait peut-être pas éteint le droit ancestral de pêcher à des fins alimentaires (*Sparrow*), il a néanmoins éteint tout droit ancestral de pêcher à des fins de vente. Le ministère public se fonde en particulier sur le décret C.P. 2539 du 11 septembre 1917, qui prévoyait ceci:

[TRADUCTION] Attendu qu'on fait valoir que, depuis des temps immémoriaux, les Indiens de la Colombie-Britannique ont pour pratique de capturer le saumon au harpon ou par d'autres moyens après que le poisson a atteint les parties supérieures des eaux sans marée des cours d'eau;

Et attendu que, depuis le début de la pêche commerciale, il est devenu éminemment souhaitable que tous les saumons qui réussissent à remonter dans ces eaux puissent atteindre indemnes les frayères, vu la grande importance que les Indiens attachent à cette pratique, il leur a été permis de le faire pour se nourrir seulement . . .

Et attendu que le ministère du Service naval a été informé que les Indiens ont conclu que le présent règlement est inefficace, et que, cette saison, ils font des préparatifs en vue de pêcher à des fins commerciales sur une grande échelle;

Et attendu qu'il est jugé être dans l'intérêt public d'empêcher ces activités, et que le ministère du Service naval, après avoir consulté le ministère de la Justice à cet égard, recommande que soient prises les mesures suivantes;

Therefore His Excellency the Governor General in Council, under the authority of section 45 of the Fisheries Act, 4-5 George V, Chapter 8, is pleased to order and it is hereby ordered as follows: —

2. An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose

À ces causes, il plaît à Son Excellence le Gouverneur général en conseil, sous l'empire de l'article 45 de la *Loi des pêcheries*, 4-5 George V, chapitre 8, de décréter ce qui suit:

2. Les Indiens avec la permission de l'inspecteur en chef des pêcheries, peuvent en tout temps capturer du poisson destiné à leur alimentation et à celle de leur famille, mais il leur est défendu de faire servir à d'autres fins, le poisson ainsi capturé

289 The argument that Regulation 2539 extinguished any aboriginal right to fish commercial faces two difficulties. The first is the absence of any indication that the government of the day considered the aboriginal right on the one hand, and the effect of its proposed action on that right on the other, as required by the "clear and plain" test. There is no recognition in the words of the regulation of any aboriginal right to fish. They acknowledge no more than an aboriginal "practice" of fishing for food. The regulation takes note of the aboriginal position that the regulations confining them to food fishing are "ineffective". However, it does not accept that position. It rather rejects it and affirms that free fishing by natives for sale will not be permitted. This does not meet the test for regulatory extinction of aboriginal rights which requires: acknowledgment of right, conflict of the right proposed with policy, and resolution of the two.

290 The second difficulty the Crown's argument encounters is that the passage quoted does not present a full picture of the regulatory scheme imposed. To determine the intent of Parliament, one must consider the statute as a whole: *Driedger on the Construction of Statutes* (3rd ed. 1994). Similarly, to determine the intent of the Governor in Council making a regulation, one must look to the effect of a regulatory scheme as a whole.

291 The effect of Regulation 2539 was that Indians were no longer permitted to sell fish caught pursuant to their right to fish for food. However, Regu-

L'argument que le règlement 2539 a éteint tout droit ancestral de pêche commerciale se heurte à deux difficultés. La première est l'absence de toute indication que le gouvernement d'alors a, comme l'exige le critère de l'intention «claire et expresse», pris en considération le droit ancestral, d'une part, et l'effet sur ce droit de la mesure qu'il se proposait de prendre, d'autre part. Le texte du règlement ne reconnaît d'aucune façon l'existence de quelque droit de pêche ancestral. On y reconnaît tout au plus l'existence d'une «pratique» des autochtones de pêcher à des fins alimentaires. Le règlement constate la position des autochtones que le règlement qui ne les autorise qu'à pêcher pour se nourrir est «inefficace». Toutefois, cette position n'est pas acceptée, mais au contraire rejetée, et on déclare que les autochtones ne seront pas libres de pêcher dans le but de vendre du poisson. Cela ne satisfait pas au critère de l'extinction des droits ancestraux par voie de réglementation, critère qui comprend trois éléments: la reconnaissance de l'existence du droit; un conflit entre le droit et la politique proposée; la résolution du conflit.

La seconde difficulté à laquelle se bute l'argument du ministère public est que le passage cité ne présente pas un tableau complet du régime de réglementation imposé. Pour dégager l'intention du législateur fédéral, il faut examiner une loi dans son ensemble: *Driedger on the Construction of Statutes* (3^e éd. 1994). De même, pour établir quelle était l'intention du gouverneur en conseil lorsqu'il a pris un règlement, il faut tenir compte de l'effet de l'ensemble du régime de réglementation.

L'effet du règlement 2539 était que les Indiens n'étaient désormais plus autorisés à vendre le poisson pris en vertu de leur droit de pêcher à des fins

lation 2539 was only a small part of a much larger regulatory scheme, dating back to 1908, in which aboriginal peoples played a significant part. While the 1917 regulation prohibits aboriginal peoples from selling fish obtained under their food rights, it did not prevent them from obtaining licences to fish commercially under the general regulatory scheme laid down in 1908 and modified through the years. In this way, the regulations recognized the aboriginal right to participate in the commercial fishery. Instead of barring aboriginal fishers from the commercial fishery, government regulations and policy before and after 1917 have consistently given them preferences in obtaining the necessary commercial licences. Far from extinguishing the aboriginal right to fish, this policy may be seen as tacit acceptance of a "limited priority" in aboriginal fishers to the commercial fishery of which Dickson J. spoke in *Jack* and which was approved in *Sparrow*.

Evidence of the participation in commercial fishing by aboriginal people prior to the regulations in 1917 in commercial fishing was discussed by Dickson J. in *Jack*, *supra*. That case was concerned with the policy of the Colonialists prior to Confederation. Without repeating the entirety of that discussion here, it is sufficient to note the conclusion reached at p. 311:

... the Colony gave priority to the Indian fishery as an appropriate pursuit for the coastal Indians, primarily for food purposes and, to a lesser extent, for barter purposes with the white residents.

This limited priority for aboriginal commercial fishing is reflected in the government policy of extending preferences to aboriginals engaged in the fishery. The 1954 Regulations, as amended in 1974, provided for reduced licensing fees for aboriginal fishers. For example, either a gill-net fishing licence that would cost a non-aboriginal fisher \$2,000, or a seine fishing licence that would cost a non-native fisher \$200, would cost a native

alimentaires. Toutefois, le règlement 2539 n'était qu'une petite partie d'un régime de réglementation beaucoup plus large, datant de 1908 et dans le cadre duquel les peuples autochtones jouaient un rôle important. Même si le règlement de 1917 interdit aux autochtones de vendre du poisson pris en vertu de leur droit de pêcher à des fins alimentaires, il ne les empêche pas d'obtenir des permis de pêche commerciale sous l'empire du régime général établi en 1908 et modifié au fil des ans. Vu sous cet angle, le règlement reconnaissait le droit des autochtones de participer à la pêche commerciale. Au lieu d'interdire la pêche commerciale aux pêcheurs autochtones, la réglementation et la politique gouvernementales, tant avant qu'après 1917, leur ont continuellement accordé des mesures préférentielles en vue de l'obtention des permis de pêche commerciale requis. Il est possible d'affirmer que, loin d'éteindre le droit de pêche ancestral, cette politique peut être considérée comme une acceptation tacite de la [TRADUCTION] «priorité restreinte» des pêcheurs autochtones en matière de pêche commerciale dont a fait état le juge Dickson dans l'arrêt *Jack* et qui a été approuvée dans *Sparrow*.

La preuve de la participation des autochtones à la pêche commerciale avant la réglementation, en 1917, de la pêche commerciale a été examinée par le juge Dickson dans *Jack*, précité. Cette affaire portait sur la politique des colonialistes avant la Confédération. Sans répéter l'intégralité des propos du juge Dickson, il suffit de citer la conclusion qu'il tire, à la p. 311:

... la colonie accordait la priorité à la pêche par les Indiens des régions côtières parce qu'elle leur permettait d'abord de se nourrir et, à un degré moindre, de faire du troc avec les Blancs.

Cette priorité restreinte accordée à la pêche commerciale autochtone ressort de la politique de l'État qui consiste à prendre des mesures préférentielles en faveur des autochtones qui participent à cette pêche. Le règlement de 1954, modifié en 1974, fixait des droits de permis réduits pour ces derniers. Par exemple, les permis de pêche au filet maillant et les permis de pêche à la seine qui coûtaient respectivement 2 000 \$ et 200 \$ aux

fisher \$10. Moreover, the evidence available indicates that there has been significant aboriginal participation in the commercial fishery. Specifically, a review of aboriginal participation in the commercial fishery for 1985 found that 20.5 per cent of the commercial fleet was Indian-owned or Indian-operated and that that segment of the commercial fleet catches 27.7 per cent of the commercial catch. Since the regulatory scheme is cast in terms of individual rights, it has never expressly recognized the right of a particular aboriginal group to a specific portion of the fishery. However, it has done so implicitly by granting aboriginal fishers preferences based on their membership in an aboriginal group.

pêcheurs non autochtones ne coûtaient que 10 \$ aux pêcheurs autochtones. De plus, la preuve disponible indique que les autochtones participent de façon importante à la pêche commerciale. De façon plus précise, une étude sur la participation des autochtones à la pêche commerciale en 1985 a révélé que 20,5 pour 100 de la flotte commerciale appartenait à des Indiens ou était exploitée par des Indiens, et que cette partie de la flotte comptait pour 27,7 pour 100 des prises commerciales. Comme le régime de réglementation est établi en fonction des droits individuels, on n'y a jamais reconnu expressément le droit d'un groupe particulier d'autochtones à une part déterminée de la pêche. Toutefois, cette reconnaissance découle implicitement des mesures préférentielles accordées aux pêcheurs autochtones du fait de leur appartenance à un groupe autochtone.

294 It thus emerges that the regulatory scheme in place since 1908, far from extinguishing the aboriginal right to fish for sale, confirms that right and even suggests recognition of a limited priority in its exercise. I conclude that the aboriginal right of the Sto:lo to fish for sustenance has not been extinguished.

Il s'ensuit donc que, loin d'avoir éteint le droit ancestral de pêcher à des fins de vente, le régime de réglementation en place depuis 1908 confirme ce droit et tend même à reconnaître une priorité restreinte à l'exercice de ce droit. Je conclus que le droit ancestral des Sto:lo de pêcher à des fins de subsistance n'a pas été éteint.

295 The remaining questions are whether the regulation infringes the Sto:lo's aboriginal right to fish for trade to supplement the fish they took for food and ceremonial purposes and, if so, whether that infringement constitutes a justifiable limitation on the right.

Les questions qu'il reste à trancher sont celles de savoir si la disposition réglementaire en cause porte atteinte au droit ancestral des Sto:lo de prendre, à des fins de vente, du poisson en sus de celui qu'ils prenaient à des fins alimentaires et rituelles, et, dans l'affirmative, si cette atteinte constitue une limitation justifiable de ce droit.

2. Is the Aboriginal Right Infringed?

2. Y a-t-il atteinte au droit ancestral?

296 The right established, the next inquiry, following *Sparrow*, is whether the regulation constitutes a *prima facie* infringement of the aboriginal right. If it does, the inquiry moves on to the question of whether the *prima facie* infringement is justified.

Une fois l'existence du droit établie, l'étape suivante de l'examen prévu par l'arrêt *Sparrow* consiste à déterminer si le règlement constitue une atteinte à première vue au droit ancestral. Dans l'affirmative, il faut ensuite se demander si l'atteinte à première vue est justifiée.

297 The test for *prima facie* infringement prescribed by *Sparrow* is "whether the legislation in question has the effect of interfering with an existing aboriginal right" (p. 1111). If it has this effect, the *prima facie* infringement is made out. Having set

Le critère de l'atteinte à première vue, prescrit par l'arrêt *Sparrow*, consiste à déterminer «si la loi en question a pour effet de porter atteinte à un droit ancestral existant» (p. 1111). Si oui, l'atteinte à première vue est établie. Après avoir énoncé ce

out this test, Dickson C.J. and La Forest J. supplement it by stating that the court should consider whether the limit is unreasonable, whether it imposes undue hardship, and whether it denies to the holders of the right their "preferred means of exercising that right" (p. 1112). These questions appear more relevant to the stage two justification analysis than to determining the *prima facie* right; as the Chief Justice notes in *Gladstone* (at para. 43), they seem to contradict the primary assertion that a measure which has the effect of interfering with the aboriginal right constitutes a *prima facie* violation. In any event, I agree with the Chief Justice that a negative answer to the supplementary questions does not negate a *prima facie* infringement.

The question is whether the regulatory scheme under which Mrs. Van der Peet stands charged has the "effect" of "interfering with an existing aboriginal right", in this case the right of the Sto:lo to sell fish to the extent required to provide for needs they traditionally by native law and custom took from the section of the river whose banks they occupied. The inquiry into infringement in a case like this may be viewed in two stages. At the first stage, the person charged must show that he or she had a *prima facie* right to do what he or she did. That established, it falls to the Crown to show that the regulatory scheme meets the particular entitlement of the Sto:lo to fish for sustenance.

The first requirement is satisfied in this case by demonstration of the aboriginal right to sell fish prohibited by regulation. The second requirement, however, has not been satisfied. Notwithstanding the evidence that aboriginal fishers as a class enjoy a significant portion of the legal commercial market and that considerable fish caught as "food fish" is illegally sold, the Crown has not established that the existing regulations satisfy the particular right of the Sto:lo to fish commercially for sustenance.

critère, le juge en chef Dickson et le juge La Forest le complètent en déclarant que le tribunal doit se demander si la restriction est déraisonnable, si elle est indûment rigoureuse et si elle refuse aux titulaires du droit le recours à «leur moyen préféré de l'exercer» (p. 1112). Or, ces questions semblent plus pertinentes pour la seconde étape de l'analyse, celle de la justification, que pour l'établissement du droit à première vue. Comme le souligne le Juge en chef dans l'arrêt *Gladstone* (au par. 43), ces questions semblent contredire l'assertion de départ selon laquelle une mesure qui a pour effet de porter atteinte au droit ancestral constitue une violation à première vue. Quoiqu'il en soit, je conviens avec le Juge en chef qu'une réponse négative aux questions supplémentaires n'exclut pas de l'existence d'une atteinte à première vue.

La question qui se pose en l'espèce est de savoir si le régime de réglementation en vertu duquel Mme Van der Peet est accusée a «pour effet» de «porter atteinte à un droit ancestral existant», en l'occurrence le droit des Sto:lo de vendre du poisson dans la mesure nécessaire pour pourvoir aux besoins qu'ils ont traditionnellement satisfaits en exploitant, conformément aux lois et coutumes autochtones, le secteur du fleuve dont ils occupaient les berges. Dans un cas comme la présente espèce, l'examen de la question de l'atteinte peut être considéré comme comportant deux étapes. Au cours de la première étape, la personne accusée doit établir qu'elle avait, à première vue, le droit de faire ce qu'elle a fait. Une fois ce droit établi, il incombe alors au ministère public de prouver que le régime de réglementation respecte le droit particulier des Sto:lo de pêcher à des fins de subsistance.

En l'espèce, la première condition est remplie par la preuve de l'existence du droit ancestral de vendre du poisson qui est interdit par le règlement. Toutefois, la deuxième condition n'est pas remplie. En effet, malgré la preuve que les pêcheurs autochtones jouissent, collectivement, d'une part importante du marché commercial légal et qu'une quantité considérable de poisson pris «à des fins alimentaires» est vendue illégalement, le ministère public n'a pas établi que la réglementation exis-

The issue is not the quantity of fish currently caught, which may or may not satisfy the band's sustenance requirements. The point is rather that the Crown, by denying the Sto:lo the right to sell any quantity of fish, denies their limited aboriginal right to sell fish for sustenance. The conclusion of *prima facie* infringement of the collective aboriginal right necessarily follows.

tante respecte le droit particulier des Sto:lo de pêcher commercialement à des fins de subsistance. Le litige ne porte pas sur la quantité de poisson qui est prise présentement, quantité qui peut ou non satisfaire les besoins de la bande pour assurer sa subsistance. Il s'agit plutôt de savoir si, en niant aux Sto:lo le droit de vendre toute quantité de poisson, l'État les prive de leur droit ancestral restreint de vendre du poisson à des fins de subsistance. D'où la conclusion inéluctable qu'il y a atteint à première vue au droit ancestral collectif.

300 The Crown argued that regulation of a fishery to meet the sustenance needs of a particular aboriginal people is administratively unworkable. The appellant responded with evidence of effective regulation in the State of Washington of aboriginal treaty rights to sustenance fishing. I conclude that the sustenance standard is not so inherently indeterminate that it cannot be regulated. It is for the Crown, charged with administering the resource, to determine effective means to regulate its lawful use. The fact that current regulations fail to do so confirms the infringement, rather than providing a defence to it.

Le ministère public a fait valoir qu'il est administrativement impossible de réglementer une pêche de manière à respecter les besoins d'un peuple autochtone particulier à des fins de subsistance. L'appelante a répliqué en présentant des éléments de preuve indiquant que, dans l'État de Washington, on réglemente de façon efficace les droits issus de traités des autochtones de pêcher à des fins de subsistance. J'en conclus que la norme des besoins en matière de subsistance n'est pas si intrinsèquement indéterminée qu'elle ne peut être réglementée. Il appartient à l'État, qui est chargé de la gestion de la ressource, de mettre en œuvre des moyens efficaces d'en réglementer l'utilisation légale. Le fait que la réglementation actuelle soit déficiente à cet égard confirme l'atteinte, au lieu de la justifier.

3. Is the Government's Limitation of Mrs. Van der Peet's Right to Fish for Sustenance Justified?

3. La restriction par l'État du droit de M^{me} Van der Peet de pêcher à des fins de subsistance est-elle justifiée?

301 Having concluded that the Sto:lo possess a limited right to engage in fishing for commerce and that the regulation constitutes a *prima facie* infringement of this right, it remains to consider whether the infringement is justified. The inquiry into justification is in effect an inquiry into the extent the state can limit the exercise of the right on the ground of policy.

Après avoir conclu que les Sto:lo possèdent un droit restreint de pêcher à des fins commerciales et que le règlement constitue une atteinte à première vue à ce droit, il reste à se demander si cette atteinte est justifiée. L'examen de la question de la justification revient en fait à se demander dans quelle mesure l'État peut, pour des considérations de politique générale, restreindre l'exercice du droit.

302 Just as I parted company with the Chief Justice on the issue of what constitutes an aboriginal right, so I must respectfully dissent from his view of what constitutes justification. Having defined the right at issue in such a way that it possesses no

Tout comme je me suis dissociée des propos du Juge en chef sur la question de savoir ce qui constitue un droit ancestral, je dois également, en toute déférence, exprimer ma dissidence à l'égard de son opinion sur ce qui constitue une justification.

internal limits, the Chief Justice compensates by adopting a large view of justification which cuts back the right on the ground that this is required for reconciliation and social harmony: *Gladstone*, at paras. 73 to 75. I would respectfully decline to adopt this concept of justification for three reasons. First, it runs counter to the authorities, as I understand them. Second, it is indeterminate and ultimately more political than legal. Finally, if the right is more circumspectly defined, as I propose, this expansive definition of justification is not required. I will elaborate on each of these difficulties in turn, arguing that they suggest a more limited view of justification: that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use.

I turn first to the authorities. The doctrine of justification was elaborated in *Sparrow*. Dickson C.J. and La Forest J. endorsed a two-part test. First, the Crown must establish that the law or regulation at issue was enacted for a "compelling and substantial" (p. 1113) purpose. Conserving the resource was cited as such a purpose. Also valid, "would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves" (p. 1113). Second, the government must show that the law or regulation is consistent with the fiduciary duty of the Crown toward aboriginal peoples. This means, Dickson C.J. and La Forest J. held, that the Crown must demonstrate that it has given the aboriginal fishery priority in a manner consistent with the views of Dickson J. (as he then was) in *Jack*: absolute priority to the Crown to act in accordance with conservation; clear priority to Indian food fishing; and "limited priority" for aboriginal commercial fishing "over the competing

Ayant défini le droit en cause de telle manière que celui-ci ne comporte aucune limite intrinsèque, le Juge en chef compense en adoptant une conception large de la justification, qui ampute le droit pour le motif que cela est nécessaire à des fins de réconciliation et d'harmonie sociales: *Gladstone*, aux par. 73 à 75. En toute déférence, je refuse d'adopter cette conception de la justification, et ce pour trois raisons. Premièrement, elle est, à mon sens, contraire à la jurisprudence. Deuxièmement, elle est indéterminée et, en dernière analyse, elle est plus politique que juridique. Enfin, si le droit est délimité avec plus de circonspection, comme je le propose, cette définition élargie de la justification n'est pas nécessaire. Je vais expliciter chacune de ces difficultés, en faisant valoir qu'elles suggèrent une conception plus limitée de la justification, savoir qu'il est loisible à l'État d'interdire l'exploitation de la ressource qui est incompatible avec son utilisation continue et responsable.

Je vais d'abord examiner la jurisprudence. La doctrine de la justification a été élaborée dans l'arrêt *Sparrow*. Le juge en chef Dickson et le juge La Forest y ont approuvé un critère à deux volets. Premièrement, le ministère public doit établir que la loi ou le règlement en cause vise un objectif «impérieux et réel» (p. 1113). La conservation de la ressource a été mentionnée comme étant un objectif de cette nature. Seraient également valides des objectifs «visant apparemment à empêcher l'exercice de droits visés au par. 35(1) lorsque cet exercice nuirait à l'ensemble de la population ou aux peuples autochtones eux-mêmes» (p. 1113). Deuxièmement, le ministère public doit démontrer que la loi ou le règlement est compatible avec l'obligation de fiduciaire qu'assume l'État envers les peuples autochtones. Cela signifie, de conclure le juge en chef Dickson et le juge La Forest, que l'État doit prouver qu'il a donné priorité à la pêche autochtone d'une manière compatible avec l'opinion formulée par le juge Dickson (plus tard Juge en chef) dans l'arrêt *Jack*: priorité absolue à l'État pour agir en conformité avec des objectifs de conservation; priorité manifeste à la pêche pratiquée par les Indiens à des fins alimentaires; et «priorité restreinte» à la pêche commerciale autochtone

demands of commercial and sport fishing” (p. 311).

«[sur les besoins de] la pêche commerciale et sportive» (p. 311).

304 The Chief Justice interprets the first requirement of the *Sparrow* test for justification, a compelling and substantial purpose, as extending to any goal which can be justified for the good of the community as a whole, aboriginal and non-aboriginal. This suggests that once conservation needs are met, the inquiry is whether the government objective is justifiable, having regard to regional interests and the interests of non-aboriginal fishers. The Chief Justice writes in *Gladstone* (at para. 75):

... I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. [Emphasis added.]

Le Juge en chef estime que la première exigence du critère de justification établi dans *Sparrow*, savoir l'existence d'un objectif impérieux et réel, vise tout objectif qui peut être justifié comme étant pour le bien de l'ensemble de la collectivité, autochtone et non autochtone. Cela donne à penser que, une fois les besoins en matière de conservation assurés, l'examen vise à déterminer si l'objectif gouvernemental est justifiable, eu égard aux intérêts régionaux et à ceux des pêcheurs non autochtones. Le Juge en chef écrit ceci, dans l'arrêt *Gladstone* (au par. 75):

... je dirais qu'en ce qui concerne la répartition de ressources halieutiques données, une fois que les objectifs de conservation ont été respectés, des objectifs tels que la poursuite de l'équité sur les plans économique et régional ainsi que la reconnaissance du fait que, historiquement, des groupes non autochtones comptent sur ces ressources et participent à leur exploitation, sont le genre d'objectifs susceptibles (du moins dans les circonstances appropriées) de satisfaire à cette norme. [Je souligne.]

305 Leaving aside the undefined limit of “proper circumstances”, the historical reliance of the participation of non-aboriginal fishers in the fishery seems quite different from the compelling and substantial objectives this Court described in *Sparrow* — conservation of the resource, prevention of harm to the population, or prevention of harm to the aboriginal people themselves. These are indeed compelling objectives, relating to the fundamental conditions of the responsible exercise of the right. As such, it may safely be said that right-thinking persons would agree that these limits may properly be applied to the exercise of even constitutionally entrenched rights. Conservation, for example, is the condition upon which the right to use the resource is itself based; without conservation, there can be no right. The prevention of harm to others is equally compelling. No one can be permitted to exercise rights in a way that will harm others. For example, in the domain of property, the common law has long provided remedies against those who

Indépendamment des contours indéfinis de la notion de «circonstances appropriées», la reconnaissance du fait que, historiquement, des pêcheurs non autochtones ont compté sur cette pêcherie et ont participé à son exploitation semble assez différent des objectifs impérieux et réels mentionnés par notre Cour dans *Sparrow* — conservation de la ressource ou prévention des activités nuisibles à l'ensemble de la population ou aux autochtones eux-mêmes. Voilà effectivement des objectifs impérieux, se rapportant aux conditions fondamentales de l'exercice responsable du droit en question. En conséquence, on peut sans crainte affirmer que toute personne sensée conviendrait que ces limites peuvent à juste titre s'appliquer même à l'exercice de droits inscrits dans la Constitution. La conservation, par exemple, est la condition sur laquelle repose le droit même d'exploiter la ressource, car sans conservation, point de droit. La prévention des activités nuisibles a également un caractère impérieux. En effet, nul ne peut être autorisé à exercer des droits d'une manière qui nuise à autrui. Ainsi, en droit des biens, la com-

pollute streams or use their land in ways that detrimentally affect others.

Viewed thus, the compelling objectives foreseen in *Sparrow* may be seen as united by a common characteristic; they constitute the essential pre-conditions of any civilized exercise of the right. It may be that future cases may endorse limitation of aboriginal rights on other bases. For the purposes of this case, however, it may be ventured that the range of permitted limitation of an established aboriginal right is confined to the exercise of the right rather than the diminution, extinguishment or transfer of the right to others. What are permitted are limitations of the sort that any property owner or right holder would reasonably expect — the sort of limitations which must be imposed in a civilized society if the resource is to be used now and in the future. They do not negate the right, but rather limit its exercise. The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.

The Chief Justice, while purporting to apply the *Sparrow* test for justification, deviates from its second requirement as well as the first, in my respectful view. Here the stipulations are that the limitation be consistent with the Crown's fiduciary duty to the aboriginal people and that it reflect the priority set out by Dickson J. in *Jack*. The duty of a

mon law reconnaît depuis longtemps des recours contre ceux qui polluent un cours d'eau ou exploitent leurs biens-fonds d'une manière nuisible à autrui.

Vus sous cet angle, les objectifs impérieux envisagés dans *Sparrow* peuvent être considérés comme possédant tous une caractéristique commune: ils constituent des préalables essentiels à tout exercice civilisé du droit en question. Il est possible que, dans des instances futures, des limites imposées à des droits ancestraux soient acceptées sur d'autres fondements. Toutefois, aux fins de la présente espèce, on peut dire que les différentes limites qui peuvent être imposées à un droit ancestral établi concernent l'exercice de ce droit et non sa dilution, son extinction ou son transfert à autrui. Sont permises les limites du genre de celles auxquelles tout propriétaire foncier ou titulaire d'un droit s'attendrait raisonnablement d'être assujéti — savoir le type de limites qui doivent être imposées dans une société civilisée pour assurer l'exploitation présente et future de la ressource. Ces limites n'ont pas pour effet de dénier le droit, mais plutôt de restreindre son exercice. En revanche, le fait d'élargir la notion d'objectif impérieux à des considérations telles que l'équité sur les plans économique et régional et les intérêts des pêcheurs non autochtones aurait pour effet de dénier le droit de pêche ancestral lui-même, pour le motif qu'une telle mesure est nécessaire pour concilier les droits ancestraux et d'autres intérêts, et ainsi assurer le bien de l'ensemble de la collectivité. Ce ne sont pas là des limites nécessaires à l'exercice responsable du droit en cause, mais plutôt de limites fondées sur les exigences économiques des non-autochtones. Il ne s'agit pas de limites du même ordre que la conservation des ressources ou la prévention des activités nuisibles, objectifs qui ont été approuvés dans *Sparrow*.

En toute déférence, même s'il se propose d'appliquer le critère de justification établi dans *Sparrow*, le Juge en chef s'écarte de la seconde exigence de ce critère tout comme de la première. En l'occurrence, cette exigence veut que la limite soit conforme à l'obligation de fiduciaire que l'État assume envers les autochtones et qu'elle tienne

fiduciary, or trustee, is to protect and conserve the interest of the person whose property is entrusted to him. In the context of aboriginal rights, this requires that the Crown not only preserve the aboriginal people's interest, but also manage it well: *Guerin*. The Chief Justice's test, however, would appear to permit the constitutional aboriginal fishing right to be conveyed by regulation, law or executive act to non-native fishers who have historically fished in the area in the interests of community harmony and reconciliation of aboriginal and non-aboriginal interests. Moreover, the Chief Justice's scheme has the potential to violate the priority scheme for fishing set out in *Jack*. On his test, once conservation is satisfied, a variety of other interests, including the historical participation of non-native fishers, may justify a variety of regulations governing distribution of the resource. The only requirement is that the distribution scheme "take into account" the aboriginal right. Such an approach, I fear, has the potential to violate not only the Crown's fiduciary duty toward native peoples, but also to render meaningless the "limited priority" to the non-commercial fishery endorsed in *Jack* and *Sparrow*.

compte de l'ordre de priorité établi par le juge Dickson dans l'arrêt *Jack*. L'obligation d'un fiduciaire ou administrateur du bien d'autrui est de protéger et de préserver les intérêts de la personne dont les biens lui sont confiés. Dans le contexte des droits ancestraux, cette obligation emporte non seulement que l'État préserve les intérêts des autochtones, mais aussi qu'il les gère bien: *Guerin*. Or le critère du Juge en chef semble permettre que le droit de pêche ancestral reconnu par la Constitution soit accordé, par règlement, loi ou acte de l'exécutif, aux pêcheurs non autochtones qui ont historiquement pêché dans la région visée, au nom de l'harmonie sociale et de la conciliation des intérêts autochtones et non autochtones. Qui plus est, le critère du Juge en chef est susceptible de violer l'ordre de priorité en matière de pêche établi dans *Jack*. D'après le critère du Juge en chef, une fois les besoins de conservation pris en considération, divers autres intérêts, dont la participation historique des pêcheurs non autochtones à l'exploitation de la ressource, peuvent justifier la prise de règlements régissant la répartition de la ressource. La seule exigence est que le mécanisme de répartition «tienne compte» du droit ancestral. Une telle approche, je le crains, est susceptible de violer non seulement l'obligation de fiduciaire de l'État envers les peuples autochtones, mais aussi de priver de toute signification la «priorité restreinte» reconnue à la pêche commerciale dans les arrêts *Jack* et *Sparrow*.

308 Put another way, the Chief Justice's approach might be seen as treating the guarantee of aboriginal rights under s. 35(1) as if it were a guarantee of individual rights under the *Charter*. The right and its infringement are acknowledged. However, the infringement may be justified if this is in the interest of Canadian society as a whole. In the case of individual rights under the *Charter*, this is appropriate because s. 1 of the *Charter* expressly states that these rights are subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, in the case of aboriginal rights guaranteed by s. 35(1) of the *Constitutional Act, 1982*, the framers of s. 35(1) deliberately chose not to subordinate the exercise of aboriginal rights to the good of

En d'autres termes, l'approche du Juge en chef pourrait être interprétée comme traitant la garantie applicable aux droits ancestraux prévue au par. 35(1) comme s'il s'agissait de la garantie des droits individuels prévue par la *Charte*. Le droit et l'atteinte à celui-ci sont reconnus. Toutefois, l'atteinte peut être justifiée si elle est dans l'intérêt de l'ensemble de la société canadienne. Dans le cas des droits individuels protégés par la *Charte*, cela est approprié étant donné que l'article premier de la *Charte* prévoit expressément que ces droits peuvent être restreints «par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique». Toutefois, dans le cas des droits ancestraux garantis par le par. 35(1)

society as a whole. In the absence of an express limitation on the rights guaranteed by s. 35(1), limitations on them under the doctrine of justification must logically and as a matter of constitutional construction be confined, as *Sparrow* suggests, to truly compelling circumstances, like conservation, which is the *sine qua non* of the right, and restrictions like preventing the abuse of the right to the detriment of the native community or the harm of others — in short, to limitations which are essential to its continued use and exploitation. To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s. 1 into s. 35(1), contrary to the intention of the framers of the Constitution.

A second objection to the approach suggested by the Chief Justice is that it is indeterminate and ultimately may speak more to the politically expedient than to legal entitlement. The imprecision of the proposed test is apparent. "In the right circumstances", themselves undefined, governments may abridge aboriginal rights on the basis of an undetermined variety of considerations. While "account" must be taken of the native interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed. Courts may properly be expected, the Chief Justice suggests, not to be overly strict in their review; as under s. 1 of the *Charter*, the courts should not negate the government decision, so long as it represents a "reasonable" resolution of conflicting interests. This, with respect, falls short of the "solid constitutional base upon which subsequent

de la *Loi constitutionnelle de 1982*, les rédacteurs ont délibérément choisi de ne pas subordonner l'exercice des droits ancestraux au bien de l'ensemble de la société. En l'absence de limitation expresse des droits garantis par le par. 35(1), les limites qui leur sont imposées en vertu de la doctrine de la justification doivent, logiquement et conformément aux règles d'interprétation constitutionnelle, uniquement viser, comme l'indique l'arrêt *Sparrow*, des circonstances véritablement impérieuses telle la conservation, condition *sine qua non* de l'existence du droit en question, et des restrictions comme la prévention des exercices abusifs du droit nuisibles à la communauté autochtone ou à d'autres — en bref, les restrictions essentielles à l'utilisation et à l'exploitation continues de la ressource visée par le droit. En toute déférence, suivre la voie préconisée par le Juge en chef revient, pour les tribunaux, à considérer que s'applique au par. 35(1) l'équivalent de l'article premier, contrairement à l'intention des rédacteurs de la Constitution.

Une deuxième objection à l'approche préconisée par le Juge en chef est qu'elle est indéterminée et que, en dernière analyse, elle tient davantage de l'expédient politique que de la reconnaissance de droits. L'imprécision du critère proposé est manifeste. «Dans les circonstances appropriées» — circonstances elles-mêmes non définies —, les gouvernements pourraient restreindre des droits ancestraux pour une gamme indéterminée de considérations. Bien qu'il faille «tenir compte» des intérêts des autochtones et de l'obligation de fiduciaire de l'État, l'étendue de cette obligation n'est pas précisée. À la limite, toute mesure que le gouvernement estimerait nécessaire pour concilier les intérêts des autochtones et des non-autochtones pourrait être jugée acceptable. Dans des cas moins extrêmes, le résultat dépendra d'une doctrine qui reste à établir. En cas de contestation judiciaire, il est possible de prévoir que l'examen serait axé sur le caractère socialement justifiable de la mesure plutôt que sur les droits garantis. On peut à juste titre s'attendre, comme le suggère le Juge en chef, à ce que les tribunaux ne se montrent pas trop stricts dans leur examen. Tout comme dans les cas où ils sont appelés à appliquer l'article premier de

negotiations can take place” of which Dickson C.J. and La Forest J. wrote in *Sparrow*, at p. 1105.

la *Charte*, les tribunaux ne devraient pas annuler la décision du gouvernement dans la mesure où elle représente une solution «raisonnable» à un conflit d'intérêts opposés. En toute déférence, cela ne constitue pas le «fondement constitutionnel solide à partir duquel des négociations ultérieures peuvent être entreprises», dont ont fait état le juge en chef Dickson et le juge La Forest dans l'arrêt *Sparrow*, à la p. 1105.

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My third observation is that the proposed departure from the principle of justification elaborated in *Sparrow* is unnecessary to provide the “reconciliation” of aboriginal and non-aboriginal interests which is said to require it. The Chief Justice correctly identifies reconciliation between aboriginal and non-aboriginal communities as a goal of fundamental importance. This desire for reconciliation, in many cases long overdue, lay behind the adoption of s. 35(1) of the *Constitution Act, 1982*. As *Sparrow* recognized, one of the two fundamental purposes of s. 35(1) was the achievement of a just and lasting settlement of aboriginal claims. The Chief Justice also correctly notes that such a settlement must be founded on reconciliation of aboriginal rights with the larger non-aboriginal culture in which they must, of necessity, find their exercise. It is common ground that “. . . a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives” of the “two vastly dissimilar legal cultures” of European and aboriginal cultures: Walters, *supra*, at pp. 413 and 412, respectively. The question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does.

Ma troisième observation est que la dérogation proposée à la norme de justification établie dans *Sparrow* n'est pas, contrairement à ce qu'on prétend, nécessaire à la «conciliation» des intérêts des autochtones et des non-autochtones. Le Juge en chef a raison de dire que la réconciliation entre les communautés autochtones et non autochtones est un objectif d'une importance fondamentale. Ce désir de réconciliation qui, dans de nombreux cas, tarde depuis trop longtemps a inspiré l'adoption du par. 35(1) de la *Loi constitutionnelle de 1982*. Comme il a été reconnu dans *Sparrow*, l'un des deux objets fondamentaux du par. 35(1) était la réalisation d'un règlement juste et durable des revendications autochtones. Le Juge en chef souligne aussi à juste titre qu'un tel règlement doit reposer sur la conciliation des droits ancestraux avec la culture non autochtone plus large dans laquelle ils doivent, par nécessité, être exercés. Il est bien établi qu' [TRADUCTION] «une conception moralement et politiquement défendable des droits ancestraux intégrera [les . . .] points de vue [. . .]» de «deux cultures juridiques extrêmement dissimilaires», les cultures européenne et autochtone: Walters, *loc. cit.*, aux pp. 413 et 412 respectivement. La question est de savoir comment s'accomplira cette conciliation des cultures juridiques différentes des peuples autochtones et non autochtones. Plus particulièrement, est-ce que l'objectif de conciliation des intérêts des autochtones et des non-autochtones exige que nous permettions à l'État de demander que le droit ancestral soit transféré à des non-autochtones, avec l'aval des tribunaux, sans le consentement des autochtones concernés, sans conclusion d'un traité et sans indemnisation? Je ne peux imaginer que ce soit le cas.

My reasons are twofold. First, as suggested earlier, if we adopt a conception of aboriginal rights founded in history and the common law rather than what is "integral" to the aboriginal culture, the need to adopt an expansive concept of justification diminishes. As the Chief Justice observes, the need to expand the *Sparrow* test stems from the lack of inherent limits on the aboriginal right to commercial fishing he finds to be established in *Gladstone*. On the historical view I take, the aboriginal right to fish for commerce is limited to supplying what the aboriginal people traditionally took from the fishery. Since these were not generally societies which valued excess or accumulated wealth, the measure will seldom, on the facts, be found to exceed the basics of food, clothing and housing, supplemented by a few amenities. This accords with the "limited priority" for aboriginal commercial fishing that this Court endorsed in *Sparrow*. Beyond this, commercial and sports fishermen may enjoy the resource as they always have, subject to conservation. As suggested in *Sparrow*, the government should establish what is required to meet what the aboriginal people traditionally by law and custom took from the river or sea, through consultation and negotiation with the aboriginal people. In normal years, one would expect this to translate to a relatively small percentage of the total commercial fishing allotment. In the event that conservation concerns virtually eliminated commercial fishing, aboriginal commercial fishing, limited as it is, could itself be further reduced or even eliminated.

On this view, the right imposes its own internal limit — equivalence with what by ancestral law and custom the aboriginal people in question took from the resource. The government may impose

Mes raisons sont de deux ordres. Premièrement, si, comme il a été suggéré précédemment, nous adoptons une conception des droits ancestraux fondée sur l'histoire et la common law plutôt que sur la notion de «partie intégrante» de la culture autochtone, le besoin de recourir à un critère élargi de justification diminue. Comme le fait observer le Juge en chef, la nécessité d'élargir le critère établi dans *Sparrow* découle du fait que le droit ancestral de pêche commerciale qu'il a jugé établi dans *Gladstone* ne comporte pas de limites intrinsèques. Or, suivant le point de vue historique que j'adopte, le droit ancestral de pêcher à des fins commerciales ne vise qu'à procurer aux autochtones ce qu'ils ont traditionnellement tiré de l'exploitation de la pêcherie. Comme il ne s'agissait généralement pas de sociétés qui valorisaient l'accumulation de surplus ou de richesses, les besoins à combler dépasseront rarement, dans les faits, les choses essentielles, c'est-à-dire la nourriture, le vêtement et le logement, complétées par quelques commodités de la vie. Cette conclusion est conforme à la «priorité restreinte» reconnue à la pêche commerciale autochtone par notre Cour dans *Sparrow*. Une fois ces priorités respectées, les pêcheurs commerciaux et sportifs peuvent jouir de la ressource comme ils l'ont toujours fait, sous réserve des exigences de conservation. Comme il a été suggéré dans *Sparrow*, l'État devrait établir, par voie de consultations et de négociations, les quantités requises pour procurer aux autochtones concernés ce qu'ils ont traditionnellement tiré de l'exploitation de la rivière, du fleuve ou de la mer conformément à leurs lois et coutumes. Au cours des années normales, on peut s'attendre à ce que cela se traduise par un pourcentage relativement peu élevé des prises totales accordées à la pêche commerciale. Dans l'hypothèse où, pour des besoins de conservation, il faudrait supprimer pratiquement toute pêche commerciale, la pêche commerciale autochtone, déjà restreinte comme elle l'est, pourrait elle-même être réduite davantage, voire supprimée.

De ce point de vue, le droit comporte sa propre limite intrinsèque, savoir l'équivalent de ce que, conformément aux lois et coutumes ancestrales, les autochtones concernés tiraient de la ressource.

additional limits under the rubric of justification to ensure that the right is exercised responsibly and in a way that preserves it for future generations. There is no need to impose further limits on it to affect reconciliation between aboriginal and non-aboriginal peoples.

L'État peut, en respectant le critère de justification, imposer des limites additionnelles visant à faire en sorte que le droit soit exercé de façon responsable et de manière à en assurer la jouissance aux générations futures. Il n'est cependant nul besoin de limiter davantage le droit pour permettre la réconciliation des autochtones et des non-autochtones.

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The second reason why it is unnecessary to adopt the broad doctrine of justification proposed by the Chief Justice is that other means, yet unexploited, exist for resolving the different legal perspectives of aboriginal and non-aboriginal people. In my view, a just calibration of the two perspectives starts from the premise that full value must be accorded to such aboriginal rights as may be established on the facts of the particular case. Only by fully recognizing the aboriginal legal entitlement can the aboriginal legal perspective be satisfied. At this stage of the process — the stage of defining aboriginal rights — the courts have an important role to play. But that is not the end of the matter. The process must go on to consider the non-aboriginal perspective — how the aboriginal right can be legally accommodated within the framework of non-aboriginal law. Traditionally, this has been done through the treaty process, based on the concept of the aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together. At this stage, the stage of reconciliation, the courts play a less important role. It is for the aboriginal peoples and the other peoples of Canada to work out a just accommodation of the recognized aboriginal rights. This process — definition of the rights guaranteed by s. 35(1) followed by negotiated settlements — is the means envisioned in *Sparrow*, as I perceive it, for reconciling the aboriginal and non-aboriginal legal perspectives. It has not as yet been tried in the case of the Sto:lo. A century and one-half after European settlement, the Crown has yet to conclude a treaty with them. Until we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more

La seconde raison pour laquelle il n'est pas nécessaire de recourir au critère élargi de justification proposé par le Juge en chef est qu'il existe d'autres moyens, encore inexploités, de concilier les points de vue juridiques différents des autochtones et des non-autochtones. À mon avis, la recherche d'un juste équilibre entre les deux points de vue part du postulat qu'il faut accorder leur pleine valeur aux droits ancestraux dont les faits d'une espèce particulière établissent l'existence. Ce n'est qu'en reconnaissant pleinement les droits ancestraux des autochtones que leur point de vue juridique pourra être respecté. À cette étape du processus — la définition des droits ancestraux — les tribunaux ont un rôle important à jouer. Mais le processus ne s'arrête pas là. Il doit se poursuivre par la prise en considération du point de vue non autochtone, c'est-à-dire l'examen de la question de savoir comment le droit ancestral en cause peut juridiquement s'inscrire dans le cadre du droit non autochtone. Traditionnellement, cela s'est fait par voie de traité, conclu au terme de négociations entre le peuple autochtone concerné et l'État et visant à trouver une solution équitable à leurs intérêts divergents, compte tenu du fait historique qu'ils sont irrémédiablement tenus de cohabiter. À cette étape, celle de la conciliation, les tribunaux jouent un rôle moins important. En effet, il appartient aux peuples autochtones et aux autres habitants du Canada de trouver un juste compromis à l'égard des droits ancestraux reconnus. Ce processus — c'est-à-dire la définition des droits garantis par le par. 35(1), suivie de règlements négociés — est, à mon sens, le moyen envisagé dans *Sparrow* pour concilier les points de vue juridiques des autochtones et des non-autochtones. Il n'a pas encore été mis à l'épreuve dans le cas des Sto:lo. Un siècle et demi après l'arrivée des Européens, l'État n'a pas encore conclu de traité avec les

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radical methods of reconciliation possessing the potential to erode aboriginal rights seriously.

I have argued that the broad approach to justification proposed by the Chief Justice does not conform to the authorities, is indeterminate, and is, in the final analysis unnecessary. Instead, I have proposed that justifiable limitation of aboriginal rights should be confined to regulation to ensure their exercise conserves the resource and ensures responsible use. There remains a final reason why the broader view of justification should not be accepted. It is, in my respectful opinion, unconstitutional.

The Chief Justice's proposal comes down to this. In certain circumstances, aboriginals may be required to share their fishing rights with non-aboriginals in order to effect a reconciliation of aboriginal and non-aboriginal interests. In other words, the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown's fiduciary duty to safeguard aboriginal rights and property. But my concern is more fundamental. How, without amending the Constitution, can the Crown cut down the aboriginal right? The exercise of the rights guaranteed by s. 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from aboriginals to non-aboriginals, would be to diminish the substance of the right that s. 35(1) of the *Constitution Act, 1982* guarantees to the aboriginal people. This no court can do.

Sto:lo. Tant que les moyens traditionnels de conciliation des points de vue juridiques des autochtones et des non-autochtones n'auront pas été épuisés, il paraît difficile d'affirmer qu'il est nécessaire que les tribunaux proposent des méthodes de conciliation plus radicales, susceptibles de miner gravement les droits ancestraux.

J'ai avancé que le critère élargi de justification proposé par le Juge en chef n'est pas conforme à la jurisprudence, qu'il est indéterminé et, en dernière analyse, qu'il est inutile. Au lieu de ce critère, j'ai suggéré que seraient justifiables les limites qui seraient imposées aux droits ancestraux uniquement pour en réglementer l'exercice afin d'assurer la conservation de la ressource et l'utilisation responsable de celle-ci. Il y a une dernière raison pour laquelle le critère élargi de justification ne devrait pas être retenu. En toute déférence, il est inconstitutionnel.

La proposition du Juge en chef peut se résumer ainsi. Dans certaines circonstances, les autochtones peuvent être requis de partager leurs droits de pêche avec des non-autochtones au nom de la conciliation des intérêts des autochtones et des non-autochtones. En d'autres termes, l'État peut accorder à d'autres une portion d'un droit ancestral de pêche, et ce non pas par traité ou avec le consentement des autochtones visés, mais de son propre chef, par décision unilatérale. J'ai dit précédemment que cette méthode était susceptible de violer l'obligation de fiduciaire qu'a l'État de protéger les droits et les biens autochtones. Mais ma préoccupation est plus fondamentale. Comment, sans modifier la Constitution, l'État peut-il diminuer le droit ancestral? L'exercice des droits garantis par le par. 35(1) peut être assujéti à des limites raisonnables, visant à ce que ceux-ci soient utilisés de façon responsable. Mais les droits eux-mêmes ne peuvent être diminués que par traité ou modification constitutionnelle. Enlever les avantages du droit ancestral à des autochtones pour les attribuer à des non-autochtones aurait pour effet de diminuer la substance du droit que le par. 35(1) de la *Loi constitutionnelle de 1982* garantit aux autochtones. Cela, aucun tribunal ne peut le faire.

I therefore conclude that a government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Specifically, limits that have the effect of transferring the resource from aboriginal people without treaty or consent cannot be justified. Short of repeal of s. 35(1), such transfers can be made only with the consent of the aboriginal people. It is for the governments of this country and the aboriginal people to determine if this should be done, not the courts. In the meantime, it is the responsibility of the Crown to devise a regulatory scheme which ensures the responsible use of the resource and provides for the division of what remains after conservation needs have been met between aboriginal and non-aboriginal peoples.

J'en arrive par conséquent à la conclusion que la restriction par le gouvernement d'un droit ancestral peut être justifiée, pourvu qu'elle vise à assurer la conservation de la ressource et l'exercice responsable du droit. La validité de restrictions qui iraient plus loin ne saurait être sauvegardée pour le motif que celles-ci sont nécessaires pour assurer la réconciliation ou la paix sociales. Plus précisément, des restrictions ayant pour effet de retirer à des autochtones la jouissance de la ressource pour la transférer à d'autres, et ce sans conclure de traite avec les premiers ou obtenir leur consentement, ne sauraient être justifiées. À moins d'abrogation du par. 35(1), pareils transferts ne peuvent survenir qu'avec le consentement des autochtones visés. C'est aux gouvernements de ce pays et aux autochtones qu'il revient d'en décider, non aux tribunaux. Dans l'intervalle, l'État a la responsabilité de concevoir un régime de réglementation assurant l'utilisation responsable de la ressource et pourvoyant à la répartition, entre les autochtones et les non-autochtones, de ce qui est disponible après avoir tenu compte des besoins de conservation.

The picture of aboriginal rights that emerges resembles that put forward by Dickson J. (as he then was) in *Jack* and endorsed in *Sparrow*. Reasoning from the premise that the *British Columbia Terms of Union*, R.S.C., 1985, App. II, No. 10, required the federal government to adopt an aboriginal "policy as liberal" as that of the colonial government of British Columbia, Dickson J. opined at p. 311:

Le tableau des droits ancestraux qui se dégage de ce qui précède ressemble à celui brossé par le juge Dickson (plus tard Juge en chef) dans *Jack* et approuvé dans *Sparrow*. Partant du postulat que les *Conditions de l'adhésion de la Colombie-Britannique*, L.R.C. (1985), app. II, n° 10, exigeaient du gouvernement fédéral qu'il adopte une «ligne de conduite aussi libérale» que celle du gouvernement colonial de la Colombie-Britannique, le juge Dickson a exprimé l'avis suivant, à la p. 311:

... one could suggest that "a policy as liberal" would require clear priority to Indian food fishing and some priority to limited commercial fishing over the competing demands of commercial and sport fishing. Finally, there can be no serious question that conservation measures for the preservation of the resource — effectively unknown to the regulatory authorities prior to 1871 — should take precedence over any fishing, whether by Indians, sportsmen, or commercial fishermen.

... il est permis de penser qu'on entendait par l'expression «une ligne de conduite aussi libérale», accorder la première priorité à la pêche par les Indiens à des fins d'alimentation et une certaine priorité à une pêche commerciale restreinte, [sur les besoins de] la pêche commerciale et sportive. Finalement, il est clair que les mesures destinées à la protection des ressources — totalement absentes des textes réglementaires avant 1871 — priment sur tout genre de pêche, qu'il s'agisse de la pêche par les Indiens, de pêche commerciale ou sportive.

The relationship between the relative interests in a fishery with respect to which an aboriginal right has been established in the full sense, that is of

Les rapports entre les divers intérêts dans une pêcherie à l'égard de laquelle a été établie l'existence d'un droit ancestral au sens plein du terme

food, ceremony and articles to meet other needs obtained directly from the fishery or through trade and barter of fish products, may be summarized as follows:

1. The state may limit the exercise of the right of the aboriginal people, for purposes associated with the responsible use of the right, including conservation and prevention of harm to others;
2. Subject to these limitations, the aboriginal people have a priority to fish for food, ceremony, as well as supplementary sustenance defined in terms of the basic needs that the fishery provided to the people in ancestral times;
3. Subject to (1) and (2) non-aboriginal peoples may use the resource.

In times of plentitude, all interests may be satisfied. In times of limited stocks, aboriginal food fishing will have priority, followed by additional aboriginal commercial fishing to satisfy the sustenance the fishery afforded the particular people in ancestral times. The aboriginal priority to commercial fishing is limited to satisfaction of these needs, which typically will be confined to basic amenities. In this sense, the right to fish for commerce is a "limited" priority. If there is insufficient stock to satisfy the entitlement of all aboriginal peoples after required conservation measures, allocations must be made between them. Allocations between aboriginal peoples may also be required to ensure that upstream bands are allowed their fair share of the fishery, whether for food or supplementary sustenance. All this is subject to the overriding power of the state to limit or indeed, prohibit fishing in the interests of conservation.

— savoir le droit de pêcher à des fins alimentaires et rituelles et pour satisfaire d'autres besoins qui étaient comblés directement par l'exploitation de la pêcherie ou par la vente et l'échange du poisson et des produits du poisson — peuvent se résumer ainsi:

1. L'État peut limiter l'exercice du droit des autochtones visés à des fins liées à l'exercice responsable du droit, y compris la conservation de la ressource et la prévention des activités nuisibles à autrui;
2. sous réserve de ces limites, les autochtones visés ont la priorité pour pêcher à des fins alimentaires et rituelles, ainsi qu'à des fins supplémentaires de subsistance, c'est-à-dire pour satisfaire les besoins fondamentaux que la pêcherie permettait à leurs ancêtres de combler;
3. sous réserve des par. (1) et (2), les non-autochtones peuvent exploiter la ressource.

En périodes d'abondance des stocks, tous les intérêts peuvent être comblés. En périodes de rareté, la pêche autochtone à des fins alimentaires aura la priorité, suivie d'un droit additionnel de pêcher commercialement à des fins de subsistance pour satisfaire les besoins que la pêcherie permettait à leurs ancêtres de combler. La priorité des autochtones en matière de pêche commerciale est restreinte à ce qui est requis pour satisfaire ces besoins, lesquels se limiteront d'ordinaire aux besoins fondamentaux. En ce sens, le droit de pêcher à des fins commerciales ne jouit que d'une priorité «restreinte». Si les stocks de poisson ne permettent pas de satisfaire les besoins des divers peuples autochtones concernés, une fois prises les mesures de conservation requises, la ressource doit alors être répartie entre ceux-ci. Il est également possible que, dans la répartition, il faille assurer aux bandes vivant en amont leur juste part de la pêche, que ce soit à des fins alimentaires ou à des fins supplémentaires de subsistance. Toutes ces mesures sont subordonnées au pouvoir prépondérant de l'État de limiter, voire de prohiber la pêche pour des fins de conservation de la ressource.

320 The consequence of this system of priorities is that the Crown may limit aboriginal fishing by aboriginal people found to possess a right to fish for sustenance on two grounds: (1) on the ground that a limited amount of fish is required to satisfy the basic sustenance requirement of the band, and (2) on the ground of conservation and other limits required to ensure the responsible use of the resource (justification).

321 Against this background, I return to the question of whether the regulation preventing the Sto:lo from selling any fish is justified. In my view it is not. No compelling purpose such as that proposed in *Sparrow* has been demonstrated. The denial to the Sto:lo of their right to sell fish for basic sustenance has not been shown to be required for conservation or for other purposes related to the continued and responsible exploitation of the resource. The regulation, moreover, violates the priorities set out in *Jack* and *Sparrow* and breaches the fiduciary duty of the Crown to preserve the rights of the aboriginal people to fish in accordance with their ancestral customs and laws by summarily denying an important aspect of the exercise of the right.

4. Conclusion

322 I would allow the appeal to the extent of confirming the existence in principle of an aboriginal right to sell fish for sustenance purposes, and set aside the appellant's conviction. I would answer the constitutional question as follows:

Question: Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

Ce régime de priorités a pour conséquence que l'État peut limiter le droit de pêcher à des fins de subsistance reconnu à une bande autochtone pour deux motifs: (1) parce qu'une quantité limitée de poisson est nécessaire pour satisfaire les besoins fondamentaux de la bande, et (2) pour des fins de conservation de la ressource et parce que d'autres restrictions sont nécessaires pour l'utilisation responsable de celle-ci (justification).

Sur cette toile de fond, je reviens à la question de savoir si la disposition réglementaire qui interdit complètement aux Sto:lo de vendre du poisson est justifiée. À mon avis, elle ne l'est pas. Aucun objectif impérieux du genre de ceux évoqués dans *Sparrow* n'a été établi. Il n'a pas été démontré qu'il était nécessaire, pour des fins de conservation de la ressource ou pour d'autres fins se rapportant à l'exploitation continue et responsable de celle-ci, de dénier au peuple Sto:lo le droit de vendre du poisson pour subvenir à ses besoins fondamentaux. Qui plus est, la disposition réglementaire viole l'ordre de priorité énoncé dans les arrêts *Jack* et *Sparrow* et elle contrevient à l'obligation de fiduciaire qu'a l'État de préserver les droits des autochtones concernés de pêcher conformément à leurs lois et coutumes ancestrales, en leur déniant sommairement un aspect important de l'exercice de ce droit.

4. Conclusion

Je suis d'avis d'accueillir le pourvoi et de confirmer l'existence en principe d'un droit ancestral de vendre du poisson à des fins de subsistance. J'annulerais la déclaration de culpabilité prononcée contre l'appelante et répondrais comme suit à la question constitutionnelle:

Question: Le paragraphe 27(5) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248, tel qu'il se lisait le 11 septembre 1987, est-il, dans les circonstances de la présente affaire, inopérant à l'égard de l'appelante en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'elle invoque?

Answer: Section 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, as invoked by the appellant.

Appeal dismissed, L'HEUREUX-DUBÉ and McLACHLIN JJ. dissenting.

Solicitors for the appellant: Mandell, Pinder, Vancouver.

Solicitor for the respondent: The Attorney General of Canada, Ottawa.

Solicitor for the intervenor the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervenor the Fisheries Council of British Columbia: J. Keith Lowes, Vancouver.

Solicitors for the intervenors the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation: Russell & DuMoulin, Vancouver.

Solicitors for the intervenor the First Nations Summit: Ratcliff & Company, North Vancouver.

Solicitors for the intervenors Delgamuukw et al.: Rush Crane, Guenther & Adams, Vancouver.

Solicitors for the intervenors Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner: Pape & Salter, Vancouver.

Réponse: Le paragraphe 27(5) du *Règlement de pêche général de la Colombie-Britannique*, DORS/84-248, tel qu'il se lisait le 11 septembre 1987, est, dans les circonstances de la présente affaire, inopérant à l'égard de l'appelante en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, en raison des droits ancestraux au sens de l'art. 35 de la *Loi constitutionnelle de 1982*, qu'elle invoque.

Pourvoi rejeté, les juges L'HEUREUX-DUBÉ et McLACHLIN sont dissidentes.

Procureurs de l'appelante: Mandell, Pinder, Vancouver.

Procureur de l'intimée: Le procureur général du Canada, Ottawa.

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

Procureur de l'intervenant le Fisheries Council of British Columbia: J. Keith Lowes, Vancouver.

Procureurs des intervenantes la British Columbia Fisheries Survival Coalition et la British Columbia Wildlife Federation: Russell & DuMoulin, Vancouver.

Procureurs de l'intervenant le First Nations Summit: Ratcliff & Company, North Vancouver.

Procureurs des intervenants Delgamuukw et autres: Rush Crane, Guenther & Adams, Vancouver.

Procureurs des intervenants Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese et Allan Gardner: Pape & Salter, Vancouver.

**Roger William, on his own behalf,
on behalf of all other members of the
Xeni Gwet'in First Nations Government
and on behalf of all other members of
the Tsilhqot'in Nation** *Appellant*

v.

**Her Majesty The Queen in Right of
the Province of British Columbia,
Regional Manager of the Cariboo
Forest Region and Attorney General
of Canada** *Respondents*

and

**Attorney General of Quebec,
Attorney General of Manitoba,
Attorney General for Saskatchewan,
Attorney General of Alberta,
Te'mexw Treaty Association,
Business Council of British Columbia,
Council of Forest Industries,
Coast Forest Products Association,
Mining Association of British Columbia,
Association for Mineral Exploration
British Columbia,
Assembly of First Nations,
Gitanyow Hereditary Chiefs of Gwass Hlaam,
Gamlaxyeltxw, Malii, Gwinuu, Haizimsque,
Watakhayetsxw, Luuxhon and
Wii'litswx, on their own behalf and
on behalf of all Gitanyow,
Hul'qumi'num Treaty Group,
Council of the Haida Nation,
Office of the Wet'suwet'en Chiefs,
Indigenous Bar Association in Canada,
First Nations Summit,
Tsawout First Nation,
Tsartlip First Nation,
Snuneymuxw First Nation,
Kwakiutl First Nation,
Coalition of Union of**

**Roger William, en son propre nom, au nom
de tous les autres membres du gouvernement
de la Première Nation Xeni Gwet'in et
au nom de tous les autres membres de la
Nation Tsilhqot'in** *Appelant*

c.

**Sa Majesté la Reine du chef de la
province de la Colombie-Britannique,
chef régional de la région de
Cariboo Forest et procureur général
du Canada** *Intimés*

et

**Procureur général du Québec,
procureur général du Manitoba,
procureur général de la Saskatchewan,
procureur général de l'Alberta,
Association du traité des Te'mexw,
Business Council of British Columbia,
Council of Forest Industries,
Coast Forest Products Association,
Mining Association of British Columbia,
Association for Mineral Exploration
British Columbia,
Assemblée des Premières Nations,
chefs héréditaires Gitanyow de Gwass Hlaam,
Gamlaxyeltxw, Malii, Gwinuu, Haizimsque,
Watakhayetsxw, Luuxhon et Wii'litswx,
en leur nom et au nom de tous les Gitanyow,
Groupe du traité Hul'qumi'num,
Conseil de la Nation haïda,
Bureau des chefs Wet'suwet'en,
Association du barreau autochtone
au Canada,
Sommet des Premières Nations,
Première Nation Tsawout,
Première Nation Tsartlip,
Première Nation Snuneymuxw,
Première Nation Kwakiutl,
Coalition de l'Union des chefs**

**British Columbia Indian Chiefs,
Okanagan Nation Alliance,
Shuswap Nation Tribal Council
and their member communities,
Okanagan, Adams Lake,
Neskonlith and Splatsh Indian Bands,
Amnesty International,
Canadian Friends Service Committee,
Gitxaala Nation, Chilko Resorts and
Community Association and Council
of Canadians** *Intervenors*

**INDEXED AS: TSILHQOT'IN NATION v. BRITISH
COLUMBIA**

2014 SCC 44

File No.: 34986.

2013: November 7; 2014: June 26.

Present: McLachlin C.J. and LeBel, Abella, Rothstein,
Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Aboriginal law — Aboriginal title — Land claims — Elements of test for establishing Aboriginal title to land — Rights and limitations conferred by Aboriginal title — Duties owed by Crown before and after Aboriginal title to land established — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether test for Aboriginal title requiring proof of regular and exclusive occupation or evidence of intensive and site-specific occupation — Whether trial judge erred in finding Aboriginal title established — Whether Crown breached procedural duties to consult and accommodate before issuing logging licences — Whether Crown incursions on Aboriginal interest justified under s. 35 Constitution Act, 1982 framework — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

Aboriginal law — Aboriginal title — Land claims — Provincial laws of general application — Constitutional

**indiens de la Colombie-Britannique,
l'Alliance des Nations de l'Okanagan,
le Conseil tribal de la Nation Shuswap
et leurs communautés membres,
bandes indiennes d'Okanagan,
d'Adams Lake, de Neskonlith et de Splatsh,
Amnistie internationale,
Secours Quaker canadien,
Nation Gitxaala, Chilko Resorts and
Community Association et Conseil
des Canadiens** *Intervenants*

**RÉPERTORIÉ : NATION TSILHQOT'IN c. COLOMBIE-
BRITANNIQUE**

2014 CSC 44

N° du greffe : 34986.

2013 : 7 novembre; 2014 : 26 juin.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

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

Droit des Autochtones — Titre ancestral — Revendications territoriales — Éléments du critère permettant d'établir l'existence du titre ancestral sur un territoire — Droits et restrictions rattachés au titre ancestral — Obligations de la Couronne avant et après la reconnaissance du titre ancestral — Province accordant un permis commercial de coupe de bois dans un secteur qu'une Première Nation semi-nomade considère être son territoire ancestral — Première Nation revendiquant le titre ancestral sur des terres — Le critère permettant d'établir l'existence du titre ancestral exige-t-il la preuve d'une occupation régulière et exclusive ou la preuve d'une occupation intensive d'un site spécifique? — Le juge de première instance a-t-il conclu par erreur à l'existence du titre ancestral? — La Couronne a-t-elle manqué à ses obligations procédurales de consulter et d'accommoder les Autochtones avant de délivrer les permis de coupe de bois? — Les atteintes portées par la Couronne aux intérêts des Autochtones sont-elles justifiées par le cadre d'analyse relatif à l'art. 35 de la Loi constitutionnelle de 1982? — Forest Act, R.S.B.C. 1995, ch. 157 — Loi constitutionnelle de 1982, art. 35.

Droit des Autochtones — Titre ancestral — Revendications territoriales — Lois provinciales d'application

constraints on provincial regulation of Aboriginal title land — Division of powers — Doctrine of interjurisdictional immunity — Infringement and justification framework under s. 35 Constitution Act, 1982 — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether provincial laws of general application apply to Aboriginal title land — Whether Forest Act on its face applies to Aboriginal title land — Whether application of Forest Act ousted by operation of Constitution — Whether doctrine of interjurisdictional immunity should be applied to lands held under Aboriginal title — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

For centuries the Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, have lived in a remote valley bounded by rivers and mountains in central British Columbia. It is one of hundreds of indigenous groups in B.C. with unresolved land claims. In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the Province reached an impasse and the original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim.

The Supreme Court of British Columbia held that occupation was established for the purpose of proving title by showing regular and exclusive use of sites or territory within the claim area, as well as to a small area outside that area. Applying a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established.

générale — Contraintes constitutionnelles sur la réglementation, par la province, du territoire visé par le titre ancestral — Partage des compétences — Doctrine de l'exclusivité des compétences — Atteinte et cadre d'analyse de la justification relatif à l'art. 35 de la Loi constitutionnelle de 1982 — Province accordant un permis commercial de coupe de bois dans un secteur qu'une Première Nation semi-nomade considère être son territoire ancestral — Première Nation revendiquant le titre ancestral sur le territoire — Les lois provinciales d'application générale s'appliquent-elles au territoire visé par le titre ancestral? — La Forest Act s'applique-t-elle à première vue au territoire visé par le titre ancestral? — La Constitution a-t-elle pour effet d'écarter l'application de la Forest Act? — La doctrine de l'exclusivité des compétences devrait-elle s'appliquer à des terres grevées du titre ancestral? — Forest Act, R.S.B.C. 1995, ch. 157 — Loi constitutionnelle de 1982, art. 35.

Depuis des siècles, la Nation Tsilhqot'in, un regroupement de six bandes semi-nomades ayant une culture et une histoire communes, vit dans une vallée éloignée entourée de rivières et de montagnes dans le centre de la Colombie-Britannique. Ce n'est qu'un groupe autochtone parmi des centaines en Colombie-Britannique dont les revendications territoriales ne sont pas réglées. En 1983, la province a accordé un permis commercial de coupe de bois sur des terres que les Tsilhqot'in considèrent faire partie de leur territoire ancestral. La bande s'y est opposée et a sollicité un jugement déclaratoire interdisant l'exploitation forestière commerciale sur le territoire. La négociation avec la province a mené à une impasse et la revendication territoriale initiale a été modifiée de manière à inclure une revendication du titre ancestral sur le territoire en cause au nom de tous les Tsilhqot'in. Les gouvernements fédéral et provincial ont contesté la revendication du titre.

La Cour suprême de la Colombie-Britannique a conclu que l'occupation était établie dans le but de fonder l'existence du titre par la démonstration d'une utilisation régulière et exclusive de certains sites ou du territoire revendiqué ainsi que d'un petit secteur à l'extérieur de ce territoire. Appliquant un critère plus restreint fondé sur l'occupation d'un site spécifique exigeant la preuve qu'au moment de l'affirmation de la souveraineté européenne, les ancêtres du groupe autochtone utilisaient intensément une parcelle de terrain spécifique dont les limites sont raisonnablement définies, la Cour d'appel de la Colombie-Britannique a conclu que l'existence du titre revendiqué par les Tsilhqot'in n'avait pas été établie.

Held: The appeal should be allowed and a declaration of Aboriginal title over the area requested should be granted. A declaration that British Columbia breached its duty to consult owed to the Tsilhqot'in Nation should also be granted.

The trial judge was correct in finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The claimant group, here the Tsilhqot'in, bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. Aboriginal title flows from occupation in the sense of regular and exclusive use of land. To ground Aboriginal title "occupation" must be sufficient, continuous (where present occupation is relied on) and exclusive. In determining what constitutes sufficient occupation, which lies at the heart of this appeal, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

In finding that Aboriginal title had been established in this case, the trial judge identified the correct legal test and applied it appropriately to the evidence. While the population was small, he found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in, which supports the conclusion of sufficient occupation. The geographic proximity between sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed also supports an inference of continuous occupation. And from the evidence that prior to the assertion of sovereignty the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it, he concluded that the Tsilhqot'in treated the land as exclusively theirs. The Province's criticisms of the trial judge's findings on the facts are primarily rooted in the erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. Moreover, it was the trial judge's task to sort out conflicting evidence and make findings of fact.

Arrêt : Le pourvoi est accueilli et la Cour reconnaît l'existence du titre ancestral sur le territoire que vise la revendication. La Cour déclare également que la Colombie-Britannique a manqué à son obligation de consultation envers la Nation Tsilhqot'in.

Le juge de première instance a eu raison de conclure que les Tsilhqot'in avaient établi l'existence du titre ancestral sur le territoire revendiqué en cause. Il incombe au groupe revendicateur, en l'espèce les Tsilhqot'in, d'établir l'existence du titre ancestral. Il faut déterminer la façon dont les droits et intérêts qui existaient avant l'affirmation de la souveraineté peuvent trouver leur juste expression en common law moderne. Le titre ancestral découle de l'occupation, c'est-à-dire d'une utilisation régulière et exclusive des terres. Pour fonder l'existence du titre ancestral, l'« occupation » doit être suffisante, continue (si l'occupation actuelle est invoquée) et exclusive. Pour déterminer ce qui constitue une occupation suffisante, l'exigence qui se trouve au cœur du présent pourvoi, il faut examiner la culture et les pratiques des Autochtones et les comparer, tout en tenant compte de leurs particularités culturelles, à ce qui était requis en common law pour établir l'existence d'un titre fondé sur l'occupation. L'occupation suffisante pour fonder l'existence d'un titre ancestral ne se limite pas aux lieux spécifiques d'établissement, mais s'étend aux parcelles de terre régulièrement utilisées pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation des ressources et sur lesquelles le groupe exerçait un contrôle effectif au moment de l'affirmation de la souveraineté européenne.

En concluant que l'existence du titre ancestral avait été établie en l'espèce, le juge de première instance a identifié le bon critère juridique et l'a correctement appliqué à la preuve. Le territoire était peu peuplé, mais il a relevé des éléments de preuve indiquant que les parties du territoire sur lesquelles il a conclu à l'existence du titre étaient régulièrement utilisées par les Tsilhqot'in, ce qui appuyait sa conclusion quant à la possession suffisante. La proximité géographique entre les sites à l'égard desquels une preuve d'occupation récente a été produite et ceux à l'égard desquels il existait une preuve directe d'occupation passée appuyait également l'inférence d'une occupation continue. Au vu de la preuve indiquant que les Tsilhqot'in, avant l'affirmation de la souveraineté, ont repoussé d'autres peuples de leurs terres et ont exigé que les étrangers qui désiraient passer sur leurs terres leur demandent la permission, il a conclu que les Tsilhqot'in considéraient qu'ils possédaient leurs terres en exclusivité. Les critiques de la province à l'endroit des conclusions de fait du juge de première

The presence of conflicting evidence does not demonstrate palpable and overriding error. The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. Absent demonstrated error, his findings should not be disturbed.

The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact). Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This s. 35

instance reposent principalement sur la thèse erronée voulant que le titre ancestral s'attache uniquement à des secteurs spécifiques occupés intensivement. En outre, il appartenait au juge de première instance de faire la part des éléments de preuve contradictoires et de tirer des conclusions de fait. La présence d'éléments de preuve contradictoires ne démontre pas l'existence d'une erreur manifeste et dominante. La province n'a pas démontré que les conclusions du juge de première instance ne sont pas étayées par la preuve ou qu'elles sont autrement erronées. Elle n'a pas non plus démontré que ses conclusions étaient arbitraires ou manquaient de précision. En l'absence d'une erreur manifeste, ses conclusions ne devraient pas être modifiées.

De par sa nature, le titre ancestral confère au groupe qui le détient le droit exclusif de déterminer l'utilisation qu'il est fait des terres et de bénéficier des avantages que procure cette utilisation, pourvu que les utilisations respectent la nature collective de ce droit et préservent la jouissance des terres pour les générations futures. Avant que l'existence du titre soit établie, la Couronne est tenue de consulter de bonne foi les groupes autochtones qui revendiquent le titre sur des terres au sujet de ses projets d'utilisation des terres et, s'il y a lieu, de trouver des accommodements aux intérêts de ces groupes. Le niveau de consultation et d'accommodement requis varie en fonction de la solidité de la revendication du groupe autochtone et de la gravité de l'effet préjudiciable éventuel du projet sur l'intérêt revendiqué.

Lorsque l'existence du titre ancestral a été établie, la Couronne doit non seulement se conformer à ses obligations procédurales, mais elle doit aussi justifier toute incursion sur les terres visées par le titre ancestral en s'assurant que la mesure gouvernementale proposée est fondamentalement conforme aux exigences de l'art. 35 de la *Loi constitutionnelle de 1982*. Elle doit à cette fin démontrer l'existence d'un objectif public réel et impérieux, et la compatibilité de la mesure gouvernementale avec l'obligation fiduciaire qu'a la Couronne envers le groupe autochtone. Le gouvernement doit donc agir d'une manière qui respecte le fait que le titre ancestral est un droit collectif inhérent aux générations actuelles et futures et que l'obligation fiduciaire de la Couronne insufflé une obligation de proportionnalité dans le processus de justification : l'atteinte doit être nécessaire pour atteindre l'objectif gouvernemental (lien rationnel); le gouvernement ne doit pas aller au-delà de ce qui est nécessaire pour atteindre cet objectif (atteinte minimale); et les effets préjudiciables sur l'intérêt autochtone ne doivent pas l'emporter sur les avantages qui devraient découler de cet objectif (proportionnalité de l'incidence).

framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

The alleged breach in this case arises from the issuance by the Province of licences affecting the land in 1983 and onwards, before title was declared. The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in.

While unnecessary for the disposition of the appeal, the issue of whether the *Forest Act* applies to Aboriginal title land is of pressing importance and is therefore addressed. As a starting point, subject to the constitutional constraints of s. 35 of the *Constitution Act, 1982* and the division of powers in the *Constitution Act, 1867*, provincial laws of general application apply to land held under Aboriginal title. As a matter of statutory construction, the *Forest Act* on its face applied to the land in question at the time the licences were issued. The British Columbia legislature clearly intended and proceeded on the basis that lands under claim remain "Crown land" for the purposes of the *Forest Act* at least until Aboriginal title is recognized. Now that title has been established, however, the timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. It remains open to the legislature to amend the Act to cover lands over which Aboriginal title has been established, provided it observes applicable constitutional restraints.

This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands, such as the *Forest Act*, is ousted by the s. 35 framework or by the limits on provincial power under the *Constitution Act, 1867*. Under s. 35, a right will be infringed by legislation if the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass this test and

Les allégations d'atteinte aux droits ou de manquement à l'obligation de consulter adéquatement le groupe peuvent être évitées par l'obtention du consentement du groupe autochtone en question. Ce cadre d'analyse relatif à l'art. 35 permet une conciliation rationnelle des droits ancestraux et des intérêts de tous les Canadiens.

En l'espèce, le manquement allégué découle de la délivrance, par la province, de permis de coupe de bois sur les terres à compter de 1983, avant que l'existence du titre soit reconnue. Le principe de l'honneur de la Couronne obligeait la province à consulter les Tsilhqot'in à propos des utilisations des terres et à trouver des accommodements à leurs intérêts. La province n'a fait ni l'un ni l'autre et a donc manqué à son obligation envers les Tsilhqot'in.

La question de l'application de la *Forest Act* aux terres visées par un titre ancestral revêt une grande importance, et bien qu'il ne soit pas nécessaire de la trancher pour les besoins du présent pourvoi, il convient de l'examiner. Comme point de départ, sous réserve des contraintes constitutionnelles qu'imposent l'art. 35 de la *Loi constitutionnelle de 1982* et le partage des compétences prévu dans la *Loi constitutionnelle de 1867*, les lois provinciales d'application générale s'appliquent aux terres détenues en vertu d'un titre ancestral. Suivant les règles d'interprétation législative, la *Forest Act* s'appliquait, à première vue, aux terres en question à l'époque où les permis ont été délivrés. Le législateur de la Colombie-Britannique entendait clairement que les terres revendiquées demeurent des « terres publiques » pour les besoins de la *Forest Act*, du moins jusqu'à ce que le titre ancestral soit reconnu; c'est sur quoi la province s'est fondée pour accorder le permis. Cependant, maintenant que l'existence du titre a été établie, la définition de « bois des terres publiques » ne s'applique plus au bois qui se trouve sur ces terres et la *Forest Act* ne s'applique plus à ces terres. Le législateur peut toujours modifier la *Forest Act* afin qu'elle s'applique au territoire sur lequel le titre ancestral a été établi, à la condition de respecter les contraintes constitutionnelles applicables.

Cela soulève la question de savoir si le cadre d'analyse relatif à l'art. 35, ou les limites à la compétence que la *Loi constitutionnelle de 1867* accorde à la province, écartent les lois provinciales régissant l'exploitation forestière, telle la *Forest Act*, qui sont à première vue censées s'appliquer aux terres visées par un titre ancestral. Aux termes de l'art. 35, une loi portera atteinte à un droit si la restriction est déraisonnable, si elle est indûment rigoureuse ou si elle refuse aux titulaires du droit le recours à leur moyen préféré de l'exercer. Une loi de nature réglementaire de portée générale, par

no infringement will result. However, the issuance of timber licences on Aboriginal title land is a direct transfer of Aboriginal property rights to a third party and will plainly be a meaningful diminution in the Aboriginal group's ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent.

Finally, for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, the framework under s. 35 displaces the doctrine of interjurisdictional immunity. There is no role left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*. The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.

In the result, provincial regulation of general application, including the *Forest Act*, will apply to exercises of Aboriginal rights such as Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. The result is a balance that

exemple une loi visant la gestion des forêts en prévenant les infestations de ravageurs ou les feux de forêt, satisfera souvent à ce critère et il n'en résultera aucune atteinte. Toutefois, la délivrance de permis de coupe de bois sur des terres grevées du titre ancestral constitue un transfert direct à des tiers de droits de propriété des Autochtones et entraîne manifestement une diminution significative du droit de propriété du groupe autochtone assimilable à une atteinte qui doit être justifiée dans les cas où les Autochtones n'y ont pas consenti.

Enfin, lorsqu'il s'agit de déterminer la validité d'une atteinte causée par l'application des lois provinciales à des terres visées par un titre ancestral, le cadre d'analyse relatif à l'art. 35 écarte la doctrine de l'exclusivité des compétences. L'application de la doctrine de l'exclusivité des compétences et la notion que les droits ancestraux font partie du contenu essentiel du pouvoir fédéral sur les « Indiens » prévu au par. 91(24) de la *Loi constitutionnelle de 1867* ne sont alors d'aucune utilité. La doctrine de l'exclusivité des compétences vise à faire en sorte que les deux niveaux de gouvernement soient en mesure de fonctionner sans que l'un empiète sur le contenu essentiel des domaines de compétence exclusive de l'autre. Cet objectif n'est pas en cause dans les affaires telles que celle qui nous occupe. Les droits ancestraux constituent une limite à l'exercice des compétences tant fédérales que provinciales. Le problème dans des cas comme celui-ci ne résulte pas d'une confrontation entre le pouvoir des provinces et celui du gouvernement fédéral mais plutôt d'une tension entre le droit des titulaires du titre ancestral d'utiliser leurs terres comme ils l'entendent et la volonté de la province de réglementer ces terres au même titre que toutes les autres terres dans la province. La doctrine de l'exclusivité des compétences — fondée sur l'idée que les contextes réglementaires peuvent être divisés en compartiments étanches — va souvent à l'encontre de la réalité moderne. Notre société devient plus complexe, et pour être efficace, la réglementation exige de plus en plus la coopération des régimes fédéral et provincial interreliés. La doctrine de l'exclusivité des compétences peut contrecarrer une telle coopération.

En conséquence, la réglementation provinciale d'application générale, notamment la *Forest Act*, s'appliquera à l'exercice des droits ancestraux tels que le titre ancestral sur des terres, sous réserve de l'application du cadre d'analyse relatif à l'art. 35 qui permet de justifier une atteinte. Ce critère soigneusement conçu vise à concilier la loi d'application générale et les droits ancestraux avec la délicatesse qu'exige l'art. 35 de la *Loi constitutionnelle de 1982*, et il est plus équitable et pratique du point de vue de la politique générale que l'inapplicabilité générale

preserves the Aboriginal right while permitting effective regulation of forests by the province. In this case, however, the Province's land use planning and forestry authorizations under the *Forest Act* were inconsistent with its duties owed to the Tsilhqot'in people.

Cases Cited

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **distinguished:** *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915; **referred to:** *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Western Australia v. Ward* (2002), 213 C.L.R. 1; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *R. v. Marshall*, [1999] 3 S.C.R. 533; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 11.
Constitution Act, 1867, ss. 91, 92, 109.
Constitution Act, 1982, Part I, Part II, s. 35.
Forest Act, R.S.B.C. 1996, c. 157, s. 1 “Crown land”, “Crown timber”, “private land”.
Royal Proclamation (1763) (reprinted in R.S.C. 1985, App. II, No. 1).

Authors Cited

Black's Law Dictionary, 9th ed. St. Paul, Minn.: West, 2009, “vested”.
 Hogg, Peter W. “The Constitutional Basis of Aboriginal Rights”, in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw*. Aurora, Ont.: Canada Law Book, 2009, 3.
 McNeil, Kent. “Aboriginal Title and the Supreme Court: What's Happening?” (2006), 69 *Sask. L. Rev.* 281.

qu'impose la doctrine de l'exclusivité des compétences. Il en résulte un équilibre qui préserve le droit ancestral tout en permettant une réglementation efficace des forêts par la province. En l'espèce toutefois, le projet d'aménagement du territoire prévu par la province et les autorisations d'exploitation forestière qu'elle a accordées en vertu de la *Forest Act* étaient incompatibles avec les obligations qu'elle avait envers le peuple Tsilhqot'in.

Jurisprudence

Arrêts appliqués : *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; **distinction d'avec l'arrêt :** *R. c. Morris*, 2006 CSC 59, [2006] 2 R.C.S. 915; **arrêts mentionnés :** *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Western Australia c. Ward* (2002), 213 C.L.R. 1; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78; *R. c. Marshall*, 2005 CSC 43, [2005] 2 R.C.S. 220; *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650; *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536; *R. c. Marshall*, [1999] 3 R.C.S. 533; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Marine Services International Ltd. c. Ryan (Succession)*, 2013 CSC 44, [2013] 3 R.C.S. 53; *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 11.
Forest Act, R.S.B.C. 1996, ch. 157, art. 1 « Crown land » (terres publiques), « Crown timber » (bois des terres publiques), « private land » (terres privées).
Loi constitutionnelle de 1867, art. 91, 92, 109.
Loi constitutionnelle de 1982, partie I, partie II, art. 35.
Proclamation royale (1763) (reproduite dans L.R.C. 1985, app. II, n° 1).

Doctrine et autres documents cités

Black's Law Dictionary, 9th ed. St. Paul, Minn. : West, 2009, « vested » (dévolu).
 Hogg, Peter W. « The Constitutional Basis of Aboriginal Rights », in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw*. Aurora, Ont. : Canada Law Book, 2009, 3.
 McNeil, Kent. « Aboriginal Title and the Supreme Court : What's Happening? » (2006), 69 *Sask. L. Rev.* 281.

McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon Press, 1989.

Slattery, Brian. "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

Ziff, Bruce. *Principles of Property Law*, 5th ed. Toronto: Carswell, 2010.

APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Tysoe and Groberman JJ.A.), 2012 BCCA 285, 33 B.C.L.R. (5th) 260, 324 B.C.A.C. 214, 551 W.A.C. 214, [2012] 3 C.N.L.R. 333, [2012] 10 W.W.R. 639, 26 R.P.R. (5th) 67, [2012] B.C.J. No. 1302 (QL), 2012 CarswellBC 1860, upholding the order of Vickers J., 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, 65 R.P.R. (4th) 1, [2007] B.C.J. No. 2465 (QL), 2007 CarswellBC 2741. Appeal allowed.

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McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon Press, 1989.

Slattery, Brian. « Understanding Aboriginal Rights » (1987), 66 *R. du B. can.* 727.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

Ziff, Bruce. *Principles of Property Law*, 5th ed. Toronto: Carswell, 2010.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Levine, Tysoe et Groberman), 2012 BCCA 285, 33 B.C.L.R. (5th) 260, 324 B.C.A.C. 214, 551 W.A.C. 214, [2012] 3 C.N.L.R. 333, [2012] 10 W.W.R. 639, 26 R.P.R. (5th) 67, [2012] B.C.J. No. 1302 (QL), 2012 CarswellBC 1860, qui a confirmé l'ordonnance du juge Vickers, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, 65 R.P.R. (4th) 1, [2007] B.C.J. No. 2465 (QL), 2007 CarswellBC 2741. Pourvoi accueilli.

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Gregory J. McDade, c.r., et *F. Matthew Kirchner*, pour les intervenants Chilko Resorts and Community Association et le Conseil des Canadiens.

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The judgment of the Court was delivered by

Version française du jugement de la Cour rendu
par

THE CHIEF JUSTICE —

LA JUGE EN CHEF —

I. Introduction

I. Introduction

[1] What is the test for Aboriginal title to land? If title is established, what rights does it confer? Does the British Columbia *Forest Act*, R.S.B.C. 1996, c. 157, apply to land covered by Aboriginal title? What are the constitutional constraints on provincial regulation of land under Aboriginal

[1] Quel critère permet d'établir l'existence d'un titre ancestral sur un territoire? Si l'existence d'un titre est établie, quels droits confère-t-il? La *Forest Act*, R.S.B.C. 1996, ch. 157, de la Colombie-Britannique s'applique-t-elle aux terres visées par un titre ancestral? Quelles contraintes

title? Finally, how are broader public interests to be reconciled with the rights conferred by Aboriginal title? These are among the important questions raised by this appeal.

[2] These reasons conclude:

- Aboriginal title flows from occupation in the sense of regular and exclusive use of land.
- In this case, Aboriginal title is established over the area designated by the trial judge.
- Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.
- Where title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests.
- Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.
- In this case, the Province's land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot'in people.

constitutionnelles sont imposées à la réglementation, par la province, des terres visées par un titre ancestral? Enfin, comment concilier l'intérêt public général et les droits conférés par un titre ancestral? Voilà quelques questions importantes soulevées dans le présent pourvoi.

[2] Voici les conclusions tirées dans les présents motifs :

- Le titre ancestral découle de l'occupation, c'est-à-dire d'une utilisation régulière et exclusive des terres.
- En l'espèce, l'existence d'un titre ancestral est établie à l'égard du territoire désigné par le juge de première instance.
- Le titre ancestral confère le droit d'utiliser et de contrôler le territoire et de tirer les avantages qui en découlent.
- Lorsque le titre est revendiqué, mais que son existence n'a pas encore été établie, l'art. 35 de la *Loi constitutionnelle de 1982* oblige la Couronne à consulter le groupe qui revendique ce titre et, s'il y a lieu, à trouver des accommodements à ses intérêts.
- Une fois établie l'existence du titre ancestral, l'art. 35 de la *Loi constitutionnelle de 1982* permet d'y porter atteinte seulement si le groupe autochtone y consent ou si l'atteinte est justifiée par un objectif public réel et impérieux et si elle est compatible avec l'obligation fiduciaire de la Couronne envers le groupe autochtone; lorsqu'il s'agit de déterminer la validité d'une atteinte causée par l'application des lois provinciales aux terres visées par un titre ancestral, ce cadre d'analyse écarte la doctrine de l'exclusivité des compétences.
- En l'espèce, le projet d'aménagement du territoire de la province et les autorisations d'exploitation forestière accordées par elle étaient incompatibles avec les obligations qu'elle avait envers le peuple Tsilhqot'in.

II. The Historic Backdrop

[3] For centuries, people of the Tsilhqot'in Nation — a grouping of six bands sharing common culture and history — have lived in a remote valley bounded by rivers and mountains in central British Columbia. They lived in villages, managed lands for the foraging of roots and herbs, hunted and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the land has always been theirs.

[4] Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises, but, with minor exceptions, this did not happen in British Columbia. The Tsilhqot'in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.

[5] The issue of Tsilhqot'in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest licence to cut trees in part of the territory at issue. The Xeni Gwet'in First Nations government (one of the six bands that make up the Tsilhqot'in Nation) objected and sought a declaration prohibiting commercial logging on the land. The dispute led to the blockade of a bridge the forest company was upgrading. The blockade ceased when the Premier promised that there would be no further logging without the consent of the Xeni Gwet'in. Talks between the Ministry of Forests and the Xeni Gwet'in ensued, but reached an impasse over the Xeni Gwet'in claim to a right of first refusal to logging. In 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people.

[6] The claim is confined to approximately five percent of what the Tsilhqot'in — a total of about

II. Le contexte historique

[3] Depuis des siècles, le peuple de la nation Tsilhqot'in — un regroupement de six bandes ayant une culture et une histoire communes — vit dans une vallée éloignée entourée de rivières et de montagnes dans le centre de la Colombie-Britannique. Les membres de cette nation ont vécu dans des villages, géré des terres pour y récolter des végétaux à racine et des herbes; ils ont chassé et piégé. Ils ont repoussé les envahisseurs et imposé des conditions aux marchands européens qui entraient sur leur territoire. De leur point de vue, le territoire leur a toujours appartenu.

[4] La Couronne a conclu presque partout au Canada des traités en vertu desquels les peuples autochtones ont renoncé à leurs revendications territoriales en échange de réserves et d'autres promesses, mais, à quelques exceptions près, ce n'est pas ce qui s'est produit en Colombie-Britannique. La nation Tsilhqot'in n'est qu'un groupe autochtone parmi des centaines en Colombie-Britannique dont les revendications territoriales ne sont pas réglées.

[5] La question du titre des Tsilhqot'in est demeurée latente jusqu'en 1983, quand la province a accordé à Carrier Lumber Ltd. un permis d'exploitation forestière l'autorisant à abattre des arbres dans une partie du territoire en question. Le gouvernement de la Première Nation Xeni Gwet'in (une des six bandes qui constituent la nation Tsilhqot'in) s'y est opposé et a sollicité un jugement déclaratoire interdisant l'exploitation forestière commerciale sur le territoire. Le litige a mené au barrage d'un pont que l'entreprise forestière voulait moderniser. Le barrage a été levé quand le premier ministre a promis qu'il n'y aurait aucune autre exploitation forestière sans le consentement des Xeni Gwet'in. Le ministère des Forêts et les Xeni Gwet'in ont négocié, mais ils n'ont pu s'entendre sur le droit de premier refus revendiqué par les Xeni Gwet'in à l'égard de l'exploitation forestière. En 1998, la revendication initiale a été modifiée de manière à inclure une revendication du titre ancestral au nom de tous les Tsilhqot'in.

[6] La revendication se limite à environ cinq pour cent de ce que les Tsilhqot'in — approximativement

3,000 people — regard as their traditional territory. The area in question is sparsely populated. About 200 Tsilhqot'in people live there, along with a handful of non-indigenous people who support the Tsilhqot'in claim to title. There are no adverse claims from other indigenous groups. The federal and provincial governments both oppose the title claim.

[7] In 2002, the trial commenced before Vickers J. of the British Columbia Supreme Court, and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. He found that the Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. However, for procedural reasons which are no longer relied on by the Province, he refused to make a declaration of title (2007 BCSC 1700, [2008] 1 C.N.L.R. 112).

[8] In 2012, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area claimed. For the rest of the claimed territory, the Tsilhqot'in were confined to Aboriginal rights to hunt, trap and harvest (2012 BCCA 285, 33 B.C.L.R. (5th) 260).

[9] The Tsilhqot'in now ask this Court for a declaration of Aboriginal title over the area designated by the trial judge, with one exception. A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court. With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot'in ask this Court to restore the trial judge's finding, affirm their title to the area he designated, and confirm that issuance of forestry licences on the

3 000 personnes — considèrent comme étant leur territoire traditionnel. Ce territoire est peu peuplé. Environ 200 membres des Tsilhqot'in y vivent, ainsi que quelques non-Autochtones qui appuient la revendication du titre des Tsilhqot'in. Aucun autre groupe autochtone n'a revendiqué un titre sur ce territoire. Les gouvernements fédéral et provincial s'opposent tous deux à la revendication du titre.

[7] Le procès a débuté en 2002 devant le juge Vickers de la Cour suprême de la Colombie-Britannique et a duré 339 jours sur une période de cinq ans. Le juge de première instance s'est rendu sur le territoire revendiqué et a entendu de nombreux témoignages des aînés, des historiens et d'autres experts. Il a conclu que les Tsilhqot'in avaient droit, en principe, à un jugement déclarant l'existence d'un titre ancestral sur une partie du territoire revendiqué ainsi que sur un petit secteur à l'extérieur de ce territoire. Cependant, pour des raisons d'ordre procédural que la province n'invoque plus, il a refusé dans son jugement de déclarer l'existence d'un titre ancestral (2007 BCSC 1700, [2008] 1 C.N.L.R. 112).

[8] En 2012, la Cour d'appel de la Colombie-Britannique a conclu que l'existence du titre revendiqué par les Tsilhqot'in n'avait pas été établie, mais n'a pas écarté la possibilité que les Tsilhqot'in puissent éventuellement établir l'existence d'un titre sur certains sites à l'intérieur du territoire revendiqué. En ce qui concerne le reste du territoire revendiqué, les Tsilhqot'in n'ont obtenu que les droits ancestraux de chasse, de piégeage et de récolte (2012 BCCA 285, 33 B.C.L.R. (5th) 260).

[9] Les Tsilhqot'in demandent maintenant à notre Cour de reconnaître l'existence du titre ancestral sur le territoire désigné par le juge de première instance, sous réserve d'une exception. Sur une petite partie du territoire désigné par le juge se trouvent des terrains privés ou des terres submergées à l'égard desquels la reconnaissance du titre ancestral n'est pas demandée devant notre Cour. Pour ce qui est des terres désignées par le juge qui ne sont pas des terrains privés ou des terres submergées, les Tsilhqot'in demandent à notre Cour de rétablir les conclusions du juge de première instance, de

land unjustifiably infringed their rights under that title.

III. The Jurisprudential Backdrop

[10] In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. Although the majority in *Calder* divided on whether title had been extinguished, its affirmation of Aboriginal rights to land led the Government of Canada to begin treaty negotiations with First Nations without treaties — mainly in British Columbia — resuming a policy that had been abandoned in the 1920s: P. W. Hogg, “The Constitutional Basis of Aboriginal Rights”, in M. Morellato, ed., *Aboriginal Law Since Delgamuukw* (2009), 3.

[11] Almost a decade after *Calder*, the enactment of s. 35 of the *Constitution Act, 1982* “recognized and affirmed” existing Aboriginal rights, although it took some time for the meaning of this section to be fully fleshed out.

[12] In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, this Court confirmed the potential for Aboriginal title in ancestral lands. The actual dispute concerned government conduct with respect to reserve lands. The Court held that the government had breached a fiduciary duty to the Musqueam Indian Band. In a concurring opinion, Justice Dickson (later Chief Justice) addressed the theory underlying Aboriginal title. He held that the Crown acquired radical or underlying title to all the land in British Columbia at the time of sovereignty. However, this title was burdened by the “pre-existing legal right” of

confirmer qu’ils possèdent le titre ancestral sur le secteur qu’il a désigné et de confirmer que la délivrance de permis d’exploitation forestière sur les terres a indûment porté atteinte aux droits que leur confère ce titre.

III. Le contexte jurisprudentiel

[10] En 1973, la Cour suprême du Canada a marqué le début de l’ère moderne du droit inhérent aux terres ancestrales en statuant que les droits fonciers des Autochtones avaient subsisté à l’établissement des Européens et qu’ils étaient toujours valides s’ils n’avaient pas été éteints par traité ou autrement : *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313. Bien que les juges majoritaires dans *Calder* étaient divisés quant à savoir si le titre avait été éteint, leur confirmation des droits fonciers ancestraux a incité le gouvernement du Canada à entamer des négociations avec les Premières Nations non assujetties à des traités en vue de conclure des traités — principalement en Colombie-Britannique — reprenant ainsi une politique qui avait été abandonnée dans les années 1920 : P. W. Hogg, « The Constitutional Basis of Aboriginal Rights », dans M. Morellato, dir., *Aboriginal Law Since Delgamuukw* (2009), 3.

[11] Presque 10 ans après l’arrêt *Calder*, les droits existants des Autochtones ont été « reconnus et confirmés » avec l’adoption de l’art. 35 de la *Loi constitutionnelle de 1982*, bien qu’il ait fallu un certain temps pour bien préciser le sens de cette disposition.

[12] Dans l’arrêt *Guerin c. La Reine*, [1984] 2 R.C.S. 335, notre Cour a confirmé qu’il était possible que les Autochtones détiennent un titre sur les terres ancestrales. Le litige se rapportait à la conduite du gouvernement à l’égard de terres situées sur une réserve. La Cour a conclu que le gouvernement avait manqué à une obligation fiduciaire envers la bande indienne Musqueam. Dans une opinion concourante, le juge Dickson (plus tard Juge en chef) a examiné la théorie sous-jacente au titre ancestral. Selon lui, la Couronne a acquis un titre absolu ou sous-jacent sur toutes les terres situées

Aboriginal people based on their use and occupation of the land prior to European arrival (pp. 379-82). Dickson J. characterized this Aboriginal interest in the land as “an independent legal interest” (at p. 385), which gives rise to a *sui generis* fiduciary duty on the part of the Crown.

[13] In 1990, this Court held that s. 35 of the *Constitution Act, 1982* constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown with respect to those rights: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The Court held that under s. 35, legislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a “compelling and substantial” purpose and account for the “priority” of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (pp. 1113-19).

[14] The principles developed in *Calder*, *Guerin* and *Sparrow* were consolidated and applied in the context of a claim for Aboriginal title in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown’s relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.

[15] The Court in *Delgamuukw* summarized the content of Aboriginal title by two propositions, one positive and one negative. Positively, “[A]boriginal

en Colombie-Britannique au moment de l’affirmation de la souveraineté. Cependant, ce titre était grevé du « droit, en *common law*, qui existait déjà » que détiennent les peuples autochtones du fait de leur utilisation et de leur occupation des terres avant l’arrivée des Européens (p. 379-382). Le juge Dickson a affirmé que le droit des Autochtones sur leurs terres avait « une existence juridique indépendante » (p. 385), lequel donne naissance à une obligation fiduciaire *sui generis* de la Couronne.

[13] En 1990, notre Cour a conclu que l’art. 35 de la *Loi constitutionnelle de 1982* accordait une protection constitutionnelle à tous les droits ancestraux qui n’avaient pas été éteints avant le 17 avril 1982 et imposait à la Couronne une obligation fiduciaire relativement à ces droits : *R. c. Sparrow*, [1990] 1 R.C.S. 1075. La Cour a déclaré que, sous le régime de l’art. 35, un texte de loi ne peut porter atteinte aux droits protégés par cet article que si l’atteinte résiste à une analyse de la justification en deux étapes : le texte de loi doit poursuivre un objectif « impérieux et réel » et doit reconnaître la « priorité » du droit ancestral en cause qui découle de l’obligation fiduciaire imposée à la Couronne (p. 1113-1119).

[14] Les principes établis dans les arrêts *Calder*, *Guerin* et *Sparrow* ont été réunis et appliqués dans le contexte d’une revendication du titre ancestral dans l’arrêt *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010. Notre Cour a confirmé le caractère *sui generis* des droits et des obligations auxquels la relation entre la Couronne et les peuples autochtones donne naissance, et elle a déclaré que ce qui rend le titre ancestral unique est le fait qu’il découle d’une possession *antérieure* à l’affirmation de la souveraineté britannique, contrairement aux autres domaines, comme le fief simple, qui ont pris naissance *par la suite*. Il faut accorder une importance égale à la common law et au point de vue des Autochtones au moment d’évaluer une revendication du titre ancestral.

[15] Dans l’arrêt *Delgamuukw*, la Cour a résumé le contenu du titre ancestral au moyen de deux énoncés, l’un positif et l’autre négatif. De façon

title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures” (para. 117). Negatively, the “protected uses must not be irreconcilable with the nature of the group’s attachment to that land” (*ibid.*) — that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

[16] The Court in *Delgamuukw* confirmed that infringements of Aboriginal title can be justified under s. 35 of the *Constitution Act, 1982* pursuant to the *Sparrow* test and described this as a “necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part” (at para. 161), quoting *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 73. While *Sparrow* had spoken of *priority* of Aboriginal rights infringed by regulations over non-aboriginal interests, *Delgamuukw* articulated the “different” (at para. 168) approach of involvement of Aboriginal peoples — varying depending on the severity of the infringement — in decisions taken with respect to their lands.

[17] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the Court applied the *Delgamuukw* idea of involvement of the affected Aboriginal group in decisions about its land to the situation where development is proposed on land over which Aboriginal title is asserted but has not yet been established. The Court affirmed a spectrum of consultation. The Crown’s duty to consult and accommodate the asserted Aboriginal interest “is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (para. 39). Thus, the idea of proportionate balancing implicit in *Delgamuukw* reappears in *Haida*. The Court in

positive, « le titre aborigène comprend le droit d’utiliser et d’occuper de façon exclusive les terres détenues en vertu de ce titre pour diverses fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante d’une culture autochtone distinctive » (par. 117). De façon négative, ces « utilisations protégées ne doivent pas être incompatibles avec la nature de l’attachement qu’a le groupe concerné pour ces terres » (*ibid.*) — c’est-à-dire que le titre appartient au groupe et qu’il ne peut pas être aliéné d’une manière qui prive les générations futures du contrôle et du bénéfice des terres.

[16] Dans *Delgamuukw*, la Cour a confirmé que les atteintes au titre ancestral peuvent être justifiées au regard de l’art. 35 de la *Loi constitutionnelle de 1982* suivant le critère énoncé dans l’arrêt *Sparrow* et a décrit les droits ancestraux comme un « élément nécessaire de la conciliation de l’existence des sociétés autochtones avec la communauté politique plus large à laquelle ces dernières appartiennent » (par. 161), citant *R. c. Gladstone*, [1996] 2 R.C.S. 723, par. 73. Alors que dans l’arrêt *Sparrow* il était question de la *priorité* des droits ancestraux violés par des dispositions réglementaires sur les intérêts non autochtones, l’arrêt *Delgamuukw* a exposé « autrement » (au par. 168) l’approche selon laquelle les peuples autochtones participent — participation qui varie en fonction de la gravité de l’atteinte — à la prise des décisions concernant leurs terres.

[17] Dans l’arrêt *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, la Cour a appliqué l’idée exprimée dans l’arrêt *Delgamuukw*, soit que le groupe autochtone visé participe à la prise des décisions concernant ses terres, à un cas où il est proposé que des activités d’exploitation soient menées sur des terres sur lesquelles le titre ancestral est revendiqué mais n’est pas encore établi. La Cour a reconnu un continuum de consultation. L’obligation de la Couronne de consulter les Autochtones et de trouver des accommodements aux droits qu’ils revendiquent « dépend de l’évaluation préliminaire de la solidité de la preuve étayant l’existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le

Haida stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation.

[18] The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
- Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
- Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.
- Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
- Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal.

IV. Pleadings in Aboriginal Land Claims Cases

[19] The Province, to its credit, no longer contends that the claim should be barred because of

titre » (par. 39). Ainsi, la notion de mise en balance proportionnée qui ressort implicitement de l'arrêt *Delgamuukw* est reprise dans *Nation haïda*. Dans ce dernier arrêt, la Cour a indiqué que la Couronne n'avait pas seulement une obligation morale, mais une obligation légale de négocier de bonne foi dans le but de régler les revendications territoriales (par. 25). Le principe directeur ne repose pas sur les intérêts opposés mais sur la conciliation.

[18] Les arrêts que nous venons d'examiner établissent un certain nombre de postulats qui touchent à des questions soulevées en l'espèce, notamment :

- Le titre absolu ou sous-jacent de la Couronne est assujéti aux droits qu'ont les Autochtones sur les terres où ils sont établis.
- Le titre ancestral confère au groupe autochtone le droit d'utiliser et de contrôler le territoire, et de bénéficier des avantages qu'il procure.
- Les gouvernements peuvent porter atteinte aux droits ancestraux que confère le titre ancestral, mais seulement dans la mesure où ils peuvent démontrer que les atteintes poursuivent un objectif impérieux et réel et qu'elles sont compatibles avec l'obligation fiduciaire qu'a la Couronne envers le groupe.
- L'exploitation des ressources sur des terres revendiquées dont le titre n'a pas été établi exige du gouvernement qu'il consulte la nation autochtone revendicatrice.
- Les gouvernements ont l'obligation légale de négocier de bonne foi dans le but de régler les revendications de terres ancestrales.

C'est dans ce contexte que j'aborde les questions soulevées dans le présent pourvoi.

IV. Les actes de procédure dans les instances relatives aux revendications territoriales des Autochtones

[19] À sa décharge, la province ne soutient plus que la revendication doive être rejetée en raison

defects in the pleadings. However, it may be useful to address how to approach pleadings in land claims, in view of their importance to future land claims.

[20] I agree with the Court of Appeal that a functional approach should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice. A number of considerations support this approach.

[21] First, in a case such as this, the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude.

[22] Second, in these cases, the evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified. The Court of Appeal correctly recognized that determining whether Aboriginal title is made out over a pleaded area is not an “all or nothing” proposition (at para. 117):

The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. . . . [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting. [para. 118]

[23] Third, cases such as this require an approach that results in decisions based on the best

de vices qui entachent les actes de procédure. Cependant, il peut être utile de déterminer l’approche à adopter à l’égard des actes de procédure dans les revendications territoriales compte tenu de leur importance pour de futures revendications territoriales.

[20] Je suis d’accord avec la Cour d’appel pour dire qu’il convient d’adopter une approche fonctionnelle à l’égard des actes de procédure dans les affaires intéressant les Autochtones. Les actes de procédure visent à fournir aux parties et au tribunal un aperçu des allégations importantes et de la réparation sollicitée. Quand les actes de procédure permettent l’atteinte de cet objectif, en l’absence d’un préjudice évident, il ne faut pas tenir compte des vices mineurs. Un certain nombre de considérations étayent cette approche.

[21] Premièrement, dans un cas comme celui qui nous occupe, les principes juridiques sont parfois ambigus de prime abord, de sorte qu’il est difficile de formuler la demande avec exactitude.

[22] Deuxièmement, en de telles circonstances, la preuve quant à la façon dont le territoire était utilisé peut être incertaine au départ, mais à mesure que la demande progresse, des aînés se manifestent et les services d’experts sont retenus. Pendant le procès, les pratiques historiques du groupe autochtone en question sont exposées, vérifiées et précisées. La Cour d’appel a reconnu à juste titre que la question de savoir si le bien-fondé de la revendication d’un titre ancestral est établi sur un territoire n’est pas une affaire de [TRADUCTION] « tout ou rien » (par. 117) :

[TRADUCTION] L’occupation des territoires traditionnels par les Premières Nations avant l’affirmation de la souveraineté de la Couronne n’était pas une occupation fondée sur le régime Torrens, ni sur des limites précises. Sauf dans les cas où il existait des limites naturelles infranchissables (ou quasi infranchissables), les limites d’un territoire traditionnel étaient habituellement mal définies et variables. [. . .] [Par conséquent] il serait trop exigeant de demander une preuve du titre ancestral qui reflète précisément la revendication. [par. 118]

[23] Troisièmement, les cas comme celui-ci requièrent une approche qui permet de rendre des

evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

V. Is Aboriginal Title Established?

A. *The Test for Aboriginal Title*

[24] How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test.

[25] As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on “occupation” prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

[26] The test was set out in *Delgamuukw*, per Lamer C.J., at para. 143:

In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

décisions fondées sur la meilleure preuve disponible, et non sur ce qu’un avocat a pu envisager quand il a rédigé la demande initiale. L’enjeu n’est rien de moins que la possibilité pour le groupe autochtone et ses descendants d’obtenir justice et la conciliation des intérêts du groupe et de la société en général. Le formalisme à l’égard des actes de procédure ne servirait aucun de ces objectifs. L’intérêt public général commande que les questions relatives aux revendications territoriales et aux droits soient tranchées dans le respect du fond du litige. Ce n’est qu’ainsi que peut se réaliser la conciliation dont notre Cour a fait état dans *Delgamuukw*.

V. L’existence du titre ancestral est-elle établie?

A. *Le critère applicable en matière de titre ancestral*

[24] Comment les tribunaux devraient-ils déterminer si un groupe autochtone semi-nomade détient un titre sur des terres? Notre Cour n’a jamais répondu directement à cette question. Les tribunaux d’instance inférieure ne se sont pas entendus sur l’approche qu’il convient d’adopter. Nous devons donc maintenant préciser le critère.

[25] Je le répète, le critère relatif au titre ancestral énoncé dans l’arrêt *Delgamuukw* est fondé sur l’« occupation » antérieure à l’affirmation de la souveraineté européenne. Pour fonder le titre ancestral, l’occupation doit posséder trois caractéristiques : elle doit être *suffisante*, elle doit être *continue* (si l’occupation actuelle est invoquée) et elle doit être *exclusive*.

[26] Le critère a été énoncé par le juge en chef Lamer dans l’arrêt *Delgamuukw*, par. 143 :

Pour établir le bien-fondé de la revendication d’un titre autochtone, le groupe autochtone qui revendique ce titre doit satisfaire aux exigences suivantes : (i) il doit avoir occupé le territoire avant l’affirmation de la souveraineté; (ii) si l’occupation actuelle est invoquée comme preuve de l’occupation avant l’affirmation de la souveraineté, il doit exister une continuité entre l’occupation actuelle et l’occupation antérieure à l’affirmation de la souveraineté; (iii) au moment de l’affirmation de la souveraineté, cette occupation doit avoir été exclusive.

[27] The trial judge in this case held that “occupation” was established for the purpose of proving title by showing regular and exclusive use of sites or territory. On this basis, he concluded that the Tsilhqot’in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.

[28] The Court of Appeal disagreed and applied a narrower test for Aboriginal title — site-specific occupation. It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.

[29] For semi-nomadic Aboriginal groups like the Tsilhqot’in, the Court of Appeal’s approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge’s approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.

[30] Against this backdrop, I return to the requirements for Aboriginal title: sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.

[31] Should the three elements of the *Delgamuukw* test be considered independently, or as related aspects of a single concept? The High Court of Australia has expressed the view that there is little merit in considering aspects of occupancy separately. In *Western Australia v. Ward* (2002), 213 C.L.R. 1, the court stated as follows, at para 89:

[27] En l’espèce, le juge de première instance a conclu que l’« occupation » était établie dans le but de fonder le titre par la démonstration d’une utilisation régulière et exclusive de certains sites ou du territoire. De ce fait, il a estimé que les Tsilhqot’in avaient établi l’existence d’un titre non seulement sur des villages et des sites utilisés pour la récolte de végétaux à racine et de fruits, mais sur des territoires plus vastes que leurs ancêtres utilisaient régulièrement et exclusivement pour la chasse, la pêche et d’autres activités.

[28] La Cour d’appel a rejeté cette conclusion et a appliqué un critère plus restreint à l’égard du titre ancestral — celui de l’occupation d’un site spécifique. Elle a conclu que, pour faire la preuve d’une occupation suffisante établissant l’existence d’un titre, un groupe autochtone doit démontrer qu’au moment de l’affirmation de la souveraineté européenne, ses ancêtres utilisaient *intensément* une parcelle de terrain spécifique dont les limites sont raisonnablement définies.

[29] Pour des groupes autochtones semi-nomades comme les Tsilhqot’in, la démarche de la Cour d’appel lui permet de reconnaître un titre sur de petites parcelles entourées de territoires plus vastes où le groupe possède seulement le droit ancestral d’exercer certaines activités comme la chasse et le piégeage. Par contre, suivant la démarche retenue par le juge de première instance, le groupe détiendrait un titre sur l’ensemble du territoire régulièrement et exclusivement utilisé par ses ancêtres au moment de l’affirmation de la souveraineté européenne.

[30] Dans ce contexte, je reviens sur les exigences de la preuve du titre ancestral : une occupation suffisante avant l’affirmation de la souveraineté, une occupation continue (si l’occupation actuelle est invoquée) et une occupation historique exclusive.

[31] Les trois éléments du critère énoncé dans l’arrêt *Delgamuukw* devraient-ils être examinés séparément ou comme les aspects interreliés d’un concept unique? La Haute Cour d’Australie s’est dite d’avis qu’il y a peu d’intérêt à examiner séparément les aspects de l’occupation. Dans l’affaire *Western Australia c. Ward* (2002), 213 C.L.R. 1, cette cour a indiqué ce qui suit au para. 89 :

The expression “possession, occupation, use and enjoyment . . . to the exclusion of all others” is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of “possession” of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

[32] In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

1. Sufficiency of Occupation

[33] The first requirement — and the one that lies at the heart of this appeal — is that the occupation be *sufficient* to ground Aboriginal title. It is clear from *Delgamuukw* that not every passing traverse or use grounds title. What then constitutes *sufficient* occupation to ground title?

[34] The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

[TRADUCTION] L'expression « possession, occupation, utilisation et jouissance [. . .] à l'exclusion de toute autre personne » est une expression composite qui vise à décrire une mesure particulière de contrôle de l'accès aux terres. Décomposer l'expression en ses éléments constitutifs risque d'induire en erreur. Plus particulièrement, parler de « possession » des terres, une possession distincte de la possession à l'exclusion de toute autre personne, attire l'attention sur le contenu de la notion de possession en common law et sur toute notion de contrôle de l'accès que l'on pourrait considérer comme y étant liée, plutôt que sur ce qu'il nous incombe de faire, à savoir déterminer comment les droits et intérêts que les Autochtones possédaient en vertu des lois ou coutumes traditionnelles peuvent trouver leur juste expression en common law.

[32] À mon avis, les concepts de suffisance, de continuité et d'exclusivité offrent un angle intéressant pour apprécier la question du titre ancestral. Cela étant dit, le tribunal doit veiller à ne pas perdre de vue la perspective autochtone, ou à ne pas la dénaturer, en assimilant les pratiques ancestrales aux concepts rigides de la common law, ce qui irait à l'encontre de l'objectif qui consiste à traduire fidèlement les droits que possédaient les Autochtones avant l'affirmation de la souveraineté en droits juridiques contemporains équivalents. La suffisance, la continuité et l'exclusivité ne sont pas des fins en soi, mais plutôt des façons de savoir si l'existence du titre ancestral est établie.

1. La suffisance de l'occupation

[33] La première exigence — et celle qui se trouve au cœur du présent pourvoi — est celle selon laquelle l'occupation doit être *suffisante* pour fonder un titre ancestral. Il ressort clairement de l'arrêt *Delgamuukw* que le titre ne peut se fonder sur la présence passagère sur un territoire ou sur son utilisation passagère. Alors, en quoi consiste une occupation *suffisante* pour fonder un titre?

[34] Il faut aborder la question de l'occupation suffisante en tenant compte à la fois de la common law et du point de vue des Autochtones (*Delgamuukw*, par. 147); voir aussi *R. c. Van der Peet*, [1996] 2 R.C.S. 507.

[35] The Aboriginal perspective focuses on laws, practices, customs and traditions of the group (*Delgamuukw*, at para. 148). In considering this perspective for the purpose of Aboriginal title, “one must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed”: B. Slattery, “Understanding Aboriginal Rights” (1987), 66 *Can. Bar Rev.* 727, at p. 758, quoted with approval in *Delgamuukw*, at para. 149.

[36] The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.

[37] Sufficiency of occupation is a context-specific inquiry. “[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” (*Delgamuukw*, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.

[38] To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There

[35] Le point de vue des Autochtones est axé sur les règles de droit, les pratiques, les coutumes et les traditions du groupe (*Delgamuukw*, par. 148). Dans l’examen de ce point de vue, [TRADUCTION] « il faut tenir compte de la taille, du mode de vie, des ressources matérielles et des habiletés technologiques du groupe concerné, ainsi que de la nature des terres revendiquées » : B. Slattery, « Understanding Aboriginal Rights » (1987), 66 *R. du B. can.* 727, p. 758, cité avec approbation dans *Delgamuukw*, par. 149.

[36] La common law comporte la notion de possession et de contrôle des terres. En common law, la notion de possession ne se limite pas aux sites physiquement occupés, comme une maison, mais s’étend aux terres environnantes qui sont utilisées et sur lesquelles un contrôle effectif est exercé.

[37] La suffisance de l’occupation est une question qui tient au contexte. « L’occupation [...] peut être prouvée par différents faits, allant de la construction de bâtiments à l’utilisation régulière de secteurs bien définis du territoire pour y pratiquer la chasse, la pêche ou d’autres types d’exploitation de ses ressources, en passant par la délimitation et la culture de champs » (*Delgamuukw*, par. 149). L’intensité et la fréquence de l’utilisation peuvent varier en fonction des caractéristiques du groupe autochtone qui revendique le titre et en fonction de la nature du territoire sur lequel le titre est revendiqué. En l’espèce, par exemple, le territoire, bien que vaste, était ingrat et ne pouvait assurer la subsistance que de 100 à 1 000 personnes. Le fait que le groupe autochtone ne comptait qu’environ 400 personnes doit être pris en compte dans le contexte de la capacité d’utilisation du territoire pour déterminer si l’utilisation régulière de secteurs bien définis est établie.

[38] Pour établir une occupation suffisante des terres dans le but de fonder l’existence d’un titre, le groupe autochtone en question doit démontrer qu’il a toujours agi de façon à informer les tiers qu’il détenait la terre pour ses propres besoins. Cette norme n’exige pas une preuve de l’utilisation notoire ou visible qui s’apparente à la preuve d’une revendication de possession adversative, mais

must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

[39] In *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78, at paras. 135-38, Cromwell J.A. (as he then was), in reasoning I adopt, likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain. Cromwell J.A. cites (at para. 136) the following extract from K. McNeil, *Common Law Aboriginal Title* (1989), at pp. 198-200:

What, then, did one have to do to acquire a title by occupancy? . . . [I]t appears . . . that . . . a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts "being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider". There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation — it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the

l'occupation ne peut pas non plus être purement subjective ou interne. Il faut une preuve d'une forte présence des Autochtones sur les terres revendiquées, qui se manifeste par des actes d'occupation qui pourraient raisonnablement être interprétés comme une preuve que les terres en question ont appartenu au groupe revendicateur ou que ce groupe y exerçait son contrôle ou une gestion exclusive. Je le répète, les actes nécessaires pour indiquer la présence permanente d'un groupe sur des terres et son intention de conserver et d'utiliser les terres pour ses besoins dépendent de son mode de vie et de la nature des terres. Pour établir l'occupation, il suffira peut-être de montrer que des champs ont été cultivés, que des habitations ont été érigées, que des travaux ont été effectués et qu'il y a eu une présence constante sur certaines parties du territoire, mais ce n'est pas essentiel. La notion d'occupation doit aussi refléter le mode de vie des peuples autochtones, y compris ceux qui étaient nomades ou semi-nomades.

[39] Dans l'arrêt *R. c. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78, par. 135-138, le juge Cromwell (maintenant juge de notre Cour), pour des motifs que j'approuve, établit un parallèle entre la suffisance de l'occupation nécessaire pour établir l'existence d'un titre ancestral et les exigences de l'occupation ordinaire en common law. En common law, un occupant ordinaire est une personne qui revendique la possession d'une terre sur laquelle personne n'a un intérêt actuel ou pour laquelle l'existence du titre est incertaine. Le juge Cromwell cite (au par. 136) le passage suivant tiré de l'ouvrage de K. McNeil, *Common Law Aboriginal Title* (1989), p. 198-200 :

[TRADUCTION] Alors, que fallait-il faire pour acquérir un titre fondé sur l'occupation? [. . .] [I]l semble [. . .] [qu']une entrée occasionnelle, par exemple le fait pour une personne de sillonner un territoire pour y chasser ou y faire du commerce, ou de le parcourir d'un bout à l'autre, ne faisait pas d'elle un occupant, puisque ces actes n'« étaient que passagers et qu'ils visaient une fin particulière, qu'ils ne laissaient aucune marque d'une appropriation ou d'une intention de posséder à son usage distinct ». Il doit donc y avoir eu une entrée réelle et un ou des actes permettant de conclure à l'existence de l'intention d'occuper le territoire. Fait important, les actes et

vacant estate, for the law cast it upon him by virtue of his occupation alone. . . .

Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one's own purposes are evidence of occupation. Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used. [Emphasis added.]

[40] Cromwell J.A. in *Marshall* went on to state that this standard is different from the doctrine of constructive possession. The goal is not to *attribute* possession in the absence of physical acts of occupation, but to define the quality of the physical acts of occupation that demonstrate possession at law (para. 137). He concluded:

I would adopt, in general terms, Professor McNeil's analysis that the appropriate standard of occupation, from the common law perspective, is the middle ground between the minimal occupation which would permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner. . . . Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly, . . . it is impossible to confine the evidence to the very precise spot on which the cutting was done: Pollock and Wright at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant. [para. 138]

[41] In summary, what is required is a culturally sensitive approach to sufficiency of occupation

l'intention devaient se rapporter seulement à l'occupation — il était pour ainsi dire inutile pour un occupant éventuel de revendiquer, ou même de souhaiter acquérir, le domaine vacant, puisque le titre lui est conféré par la loi du seul fait de son occupation. . .

D'autres indices de ce qui constitue une occupation peuvent être dégagés de certaines affaires portant sur des terres sur lesquelles le titre est incertain. En général, toute activité sur une terre ou en lien avec une terre qui laisse voir une intention de la détenir ou de l'utiliser pour ses propres fins constitue une preuve d'occupation. Outre les actes évidents, comme délimiter la terre, la cultiver, s'y livrer à des activités minières, de construction ou d'entretien, et empêcher les intrus d'y entrer, bien d'autres actes peuvent être invoqués, comme couper des arbres ou de l'herbe, pêcher dans des cours d'eau, ou même parcourir la région. L'importance accordée à ces actes dépend en partie de la nature des terres et des fins auxquelles elles peuvent raisonnablement être utilisées. [Je souligne.]

[40] Dans *Marshall*, le juge Cromwell a ensuite déclaré que cette norme est différente de la doctrine de la possession de droit. Le but n'est pas d'*attribuer* la possession en l'absence d'actes d'occupation, mais de définir la qualité des actes d'occupation qui démontrent la possession en droit (par. 137). Il a conclu comme suit :

[TRADUCTION] J'adopterais, de façon générale, l'analyse faite par le professeur McNeil selon laquelle la norme d'occupation appropriée, en common law, se trouve à mi-chemin entre la norme minimale d'occupation qui permettrait à une personne de poursuivre un intrus et la norme la plus stricte à laquelle il faut satisfaire pour établir un titre obtenu par possession adversative opposable au véritable propriétaire. [. . .] Lorsque, comme en l'espèce, il est question d'un vaste territoire qui n'a pas été cultivé, des actes tels que l'établissement constant, bien que changeant, et l'utilisation générale pour la pêche, la chasse et la cueillette devraient se voir accorder plus de poids que s'il était question d'un territoire délimité et cultivé. L'aspect sans doute le plus éloquent, [. . .] il est impossible de limiter la preuve à l'endroit bien précis où la coupe a eu lieu : Pollock et Wright, p. 32. La question est plutôt de savoir si les actes d'occupation dans certains lieux démontrent que le revendicateur occupait tout le secteur. [par. 138]

[41] En résumé, la preuve de l'occupation doit procéder d'une approche visant à déterminer le

based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.

[42] There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is “sufficient” use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.

[43] The Province argues that this Court in *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, rejected a territorial approach to title, relying on a comment by Professor K. McNeil that the Court there “appears to have rejected the territorial approach of the Court of Appeal” (“Aboriginal Title and the Supreme Court: What’s Happening?” (2006), 69 *Sask. L. Rev.* 281, cited in *British Columbia factum*, para. 100). In fact, this Court in *Marshall*; *Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be “proof of sufficiently regular and exclusive use” of the land in question, a requirement established in *Delgamuukw*.

caractère suffisant de l’occupation qui soit adaptée aux particularités culturelles et qui repose sur les points de vue du groupe autochtone en question — ses règles de droit, ses pratiques, sa taille, son savoir-faire technologique et la nature de la terre — ainsi que sur la notion de possession qui établit l’existence d’un titre en common law. Il est impossible d’énumérer chaque indice d’occupation qui pourrait s’appliquer dans un cas déterminé. Le critère de la common law en matière de possession — lequel exige une intention d’occuper ou de conserver la terre pour les besoins de l’occupant — doit être pris en compte tout comme le point de vue du groupe autochtone qui, selon sa taille et son mode de vie, pourrait concevoir la possession de la terre d’une façon quelque peu différente de la possession en common law.

[42] La jurisprudence et la doctrine ne donnent pas à penser que le titre ancestral se limite à certains villages ou à des fermes, comme l’a conclu la Cour d’appel. Au contraire, suivant une approche qui tient compte des particularités culturelles, l’utilisation régulière des terres pour la chasse, la pêche, le piégeage et la cueillette constitue une utilisation « suffisante » pour fonder un titre ancestral dans la mesure où cette utilisation, eu égard aux faits de l’espèce, révèle une intention de la part du groupe autochtone de détenir ou de posséder les terres d’une manière comparable à celle exigée pour établir l’existence d’un titre en common law.

[43] La province plaide que dans *R. c. Marshall*; *R. c. Bernard*, 2005 CSC 43, [2005] 2 R.C.S. 220, notre Cour a rejeté une approche territoriale à l’égard du titre; elle s’appuie sur une remarque du professeur K. McNeil selon laquelle la Cour [TRADUCTION] « semble avoir rejeté l’approche territoriale de la Cour d’appel » (« Aboriginal Title and the Supreme Court : What’s Happening? » (2006), 69 *Sask. L. Rev.* 281, cité dans le mémoire de la Colombie-Britannique, par. 100). En fait, dans *Marshall*; *Bernard*, notre Cour n’a pas rejeté l’approche fondée sur le territoire, mais a seulement estimé (au par. 72) qu’il fallait « la preuve d’une utilisation suffisamment régulière et exclusive » du territoire en question, une exigence établie dans l’arrêt *Delgamuukw*.

[44] The Court in *Marshall; Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. While “[n]ot every nomadic passage or use will ground title to land”, the Court confirmed that *Delgamuukw* contemplates that “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” could suffice (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; sufficient occupation is a “question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used” (*ibid.*).

2. Continuity of Occupation

[45] Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises — continuity between present and pre-sovereignty occupation.

[46] The concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact (*Van der Peet*, at para. 65). The same applies to Aboriginal title. Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.

3. Exclusivity of Occupation

[47] The third requirement is *exclusive* occupation of the land at the time of sovereignty. The

[44] Dans *Marshall; Bernard*, notre Cour a confirmé que les groupes nomades et semi-nomades peuvent établir l’existence d’un titre s’ils établissent une possession physique suffisante d’un territoire, ce qui constitue une question de fait. « Le passage dans un territoire ou son utilisation dans le cadre d’un mode de vie nomade ne fondera pas nécessairement un titre sur celui-ci », mais la Cour a confirmé que, selon l’arrêt *Delgamuukw*, « l’utilisation régulière de secteurs bien définis du territoire pour y pratiquer la chasse, la pêche ou d’autres types d’exploitation de ses ressources » peut être suffisante (par. 66). Bien que la question consistait à savoir si le critère de la common law relatif à la possession avait été respecté, la Cour n’a pas nié la nécessité de tenir compte du point de vue du groupe autochtone en question; la possession suffisante est une « question de fait qui dépend de l’ensemble des circonstances, en particulier de la nature du territoire et de la façon dont il a été utilisé collectivement » (*ibid.*).

2. La continuité de l’occupation

[45] Le fait que l’occupation actuelle soit invoquée comme preuve de l’occupation antérieure à l’affirmation de la souveraineté donne lieu à une deuxième condition — la continuité entre l’occupation actuelle et l’occupation antérieure à l’affirmation de la souveraineté.

[46] Le concept de la continuité n’exige pas que les groupes autochtones fassent la preuve d’une continuité parfaite entre leurs pratiques, coutumes et traditions actuelles et celles qui existaient avant le contact avec les Européens (*Van der Peet*, par. 65). Il en va de même pour le titre ancestral. La continuité signifie simplement que, pour qu’une preuve de l’occupation actuelle permette de conclure à l’occupation antérieure à l’affirmation de la souveraineté, l’occupation actuelle doit tirer son origine de l’époque antérieure à l’affirmation de la souveraineté. Il appartient au juge des faits d’examiner cette question.

3. L’exclusivité de l’occupation

[47] La troisième exigence est l’occupation *exclusive* des terres au moment de l’affirmation de la

Aboriginal group must have had “the intention and capacity to retain exclusive control” over the lands (*Delgamuukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title*, at p. 204 (emphasis added)). Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

[48] Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

[49] As with sufficiency of occupation, the exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society. The Court in *Delgamuukw* explained as follows, at para. 157:

A consideration of the [A]boriginal perspective may also lead to the conclusion that trespass by other [A]boriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the [A]boriginal group asserting title. For example, the [A]boriginal group asserting the claim to

souveraineté. Le groupe autochtone doit avoir eu « l'intention et [. . .] la capacité de garder le contrôle exclusif » des terres (*Delgamuukw*, par. 156, citant McNeil, *Common Law Aboriginal Title*, p. 204 (je souligne)). L'utilisation régulière, mais non exclusive, peut donner naissance à des droits ancestraux usufruituaires; en ce qui concerne le titre ancestral, l'utilisation doit avoir été exclusive.

[48] L'exclusivité doit s'entendre au sens de l'intention et de la capacité de contrôler le territoire. Le fait que d'autres groupes ou des particuliers se soient trouvés sur le territoire ne nie pas nécessairement l'exclusivité de l'occupation. La question de savoir si le groupe revendicateur avait l'intention et la capacité de contrôler le territoire au moment de l'affirmation de la souveraineté est une question de fait qui relève du juge de première instance et qui dépend de divers facteurs tels que les caractéristiques du groupe, la nature des autres groupes de la région et les caractéristiques du territoire en question. L'exclusivité peut être établie au moyen d'une preuve démontrant que les autres groupes ont été exclus du territoire, ou d'une preuve démontrant que certains groupes n'avaient accès au territoire qu'avec la permission du groupe revendicateur. Le fait qu'une permission était demandée, et qu'elle était accordée ou refusée, ou que des traités ont été conclus avec d'autres groupes, peut démontrer l'intention et la capacité de contrôler le territoire. Même le fait que l'occupation n'ait jamais été contestée peut permettre de conclure que le groupe avait l'intention et la capacité de contrôler le territoire.

[49] Tout comme c'était le cas de la suffisance de l'occupation, il faut aborder l'exigence de l'exclusivité en tenant compte de la common law et du point de vue des Autochtones, ainsi que du contexte et des caractéristiques de la société autochtone. Dans l'arrêt *Delgamuukw*, la Cour a expliqué ce qui suit au par. 157 :

La prise en considération du point de vue des [A]utochtones peut également amener à conclure qu'une intrusion par d'autres groupes autochtones ne fait pas obstacle à l'occupation exclusive du territoire visé par le groupe autochtone qui en revendique le titre, et que la présence autorisée de ces autres groupes peut renforcer cette

[A]boriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, [A]boriginal laws under which permission may be granted to other [A]boriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the [A]boriginal nations in question, those treaties would also form part of the [A]boriginal perspective.

4. Summary

[50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) “sufficient occupation” of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

B. *Was Aboriginal Title Established in This Case?*

[51] The trial judge applied a test of regular and exclusive use of the land. This is consistent with

occupation exclusive. À titre d'exemple, le groupe autochtone qui revendique le titre aborigène peut avoir, en matière d'intrusion, des règles de droit qui sont des preuves de l'occupation exclusive, de sorte que la présence d'intrus n'est pas considérée comme une preuve à l'encontre de l'exclusivité. De plus, l'existence de règles de droit autochtones en vertu desquelles d'autres groupes autochtones peuvent être autorisés à utiliser les terres ou même à y résider temporairement étayerait la conclusion d'occupation exclusive. De fait, si cette permission a fait l'objet de traités entre les nations autochtones concernées, ces traités feraient également partie du point de vue des [A]utochtones.

4. Résumé

[50] Il incombe au groupe revendicateur d'établir l'existence du titre ancestral. Il faut déterminer la façon dont les droits et intérêts qui existaient avant l'affirmation de la souveraineté peuvent trouver leur juste expression en common law moderne. Dans l'examen de la question de savoir si l'existence d'un titre ancestral est établie, les conditions générales sont les suivantes : (1) une « occupation suffisante » du territoire revendiqué afin d'établir l'existence d'un titre au moment de l'affirmation de la souveraineté européenne; (2) la continuité de l'occupation lorsque l'occupation actuelle est invoquée; et (3) l'exclusivité de l'occupation historique. Pour déterminer ce qui constitue une occupation suffisante, il faut examiner la culture et les pratiques des Autochtones et les comparer, tout en tenant compte de leurs particularités culturelles, à ce qui était requis en common law pour établir l'existence d'un titre fondé sur l'occupation. L'occupation suffisante pour fonder l'existence d'un titre ancestral ne se limite pas aux lieux spécifiques d'établissement, mais s'étend aux parcelles de terre régulièrement utilisées pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation des ressources et sur lesquelles le groupe exerçait un contrôle effectif au moment de l'affirmation de la souveraineté européenne.

B. *L'existence du titre ancestral a-t-elle été établie en l'espèce?*

[51] Le juge de première instance a appliqué un critère fondé sur l'utilisation régulière et exclusive

the correct legal test. This leaves the question of whether he applied it appropriately to the evidence in this case.

[52] Whether the evidence in a particular case supports Aboriginal title is a question of fact for the trial judge: *Marshall; Bernard*. The question therefore is whether the Province has shown that the trial judge made a palpable and overriding error in his factual conclusions.

[53] I approach the question through the lenses of sufficiency, continuity and exclusivity discussed above.

[54] I will not repeat my earlier comments on what is required to establish sufficiency of occupation. Regular use of the territory suffices to establish sufficiency; the concept is not confined to continuously occupied village sites. The question must be approached from the perspective of the Aboriginal group as well as the common law, bearing in mind the customs of the people and the nature of the land.

[55] The evidence in this case supports the trial judge's conclusion of sufficient occupation. While the population was small, the trial judge found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in. The Court of Appeal did not take serious issue with these findings.

[56] Rather, the Court of Appeal based its rejection of Aboriginal title on the legal proposition that regular use of territory could not ground Aboriginal title — only the regular presence on or intensive occupation of particular tracts would suffice. That view, as discussed earlier, is not supported by the jurisprudence; on the contrary, *Delgamuukw* affirms a territorial use-based approach to Aboriginal title.

du territoire. Son critère est conforme au bon critère juridique. Reste à savoir s'il l'a correctement appliqué à la preuve dont il disposait.

[52] La question de savoir si la preuve présentée dans une affaire donnée permet de conclure à l'existence d'un titre ancestral est une question de fait que doit trancher le juge de première instance : *Marshall; Bernard*. Il s'agit donc de savoir si la province a démontré que le juge de première avait commis une erreur manifeste et dominante dans ses conclusions de fait.

[53] J'aborde la question sous les angles susmentionnés de la suffisance, de la continuité et de l'exclusivité.

[54] Je ne répéterai pas les commentaires que j'ai formulés précédemment sur ce qui est requis pour établir la suffisance de l'occupation. L'utilisation régulière du territoire suffit pour établir la suffisance; le concept ne se limite pas aux villages qui ont été occupés de façon continue. Il faut aborder la question en tenant compte du point de vue du groupe autochtone et de la common law, sans oublier les coutumes du peuple et la nature du territoire.

[55] La preuve en l'espèce appuie la conclusion du juge de première instance quant à l'occupation suffisante. Le territoire était peu peuplé, mais le juge de première instance a relevé des éléments de preuve indiquant que les parties du territoire sur lesquelles il a conclu à l'existence du titre étaient régulièrement utilisées par les Tsilhqot'in. La Cour d'appel n'a pas vraiment contesté ces conclusions.

[56] La Cour d'appel a plutôt fondé son rejet de l'existence du titre ancestral sur la proposition de droit selon laquelle l'utilisation régulière du territoire ne pouvait pas fonder le titre ancestral — seules la présence régulière sur des parcelles spécifiques ou leur occupation intensive étaient suffisantes. Cette interprétation, comme je l'ai déjà mentionné, ne trouve pas d'appui dans la jurisprudence; l'arrêt *Delgamuukw* confirme plutôt à l'égard du titre ancestral une approche fondée sur l'utilisation du territoire.

[57] This brings me to continuity. There is some reliance on present occupation for the title claim in this case, raising the question of continuity. The evidence adduced and later relied on in parts 5 to 7 of the trial judge's reasons speak of events that took place as late as 1999. The trial judge considered this direct evidence of more recent occupation alongside archeological evidence, historical evidence, and oral evidence from Aboriginal elders, all of which indicated a continuous Tsilhqot'in presence in the claim area. The geographic proximity between sites for which evidence of recent occupation was tendered, and those for which direct evidence of historic occupation existed, further supported an inference of continuous occupation. Paragraph 945 states, under the heading of "Continuity", that the "Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion". I see no reason to disturb this finding.

[58] Finally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.

[59] The Province goes on to argue that the trial judge's conclusions on how particular parts of the land were used cannot be sustained. The Province says:

- The boundaries drawn by the trial judge are arbitrary and contradicted by some of the evidence (factum, at paras. 141-42).
- The trial judge relied on a map the validity of which the Province disputes (para. 143).

[57] Cela m'amène à la continuité. La revendication du titre présentée en l'espèce est fondée dans une certaine mesure sur l'occupation actuelle, ce qui soulève la question de la continuité. La preuve produite et acceptée ensuite dans les parties 5 à 7 des motifs du juge de première instance se rapporte aux événements qui remontent jusqu'en 1999. Le juge de première instance a pris en considération cette preuve directe d'une occupation plus récente conjointement avec la preuve archéologique, la preuve historique et les témoignages d'aînés, qui indiquaient tous une présence continue des Tsilhqot'in dans la région visée par la revendication. La proximité géographique entre les sites à l'égard desquels une preuve d'occupation récente a été produite et ceux à l'égard desquels il existait une preuve directe d'occupation passée renforçait l'inférence d'une occupation continue. Au paragraphe 945, il est indiqué, sous la rubrique [TRADUCTION] « Continuité », que « le peuple Tsilhqot'in a occupé le secteur revendiqué de façon continue avant et après l'affirmation de la souveraineté ». Je ne vois aucune raison de modifier cette conclusion.

[58] Enfin, j'en viens à l'exclusivité. Le juge de première instance a conclu que les Tsilhqot'in, avant l'affirmation de la souveraineté, ont repoussé d'autres peuples de leurs terres et ont exigé que les étrangers qui désiraient passer sur leurs terres leur demandent la permission. Il en a conclu que les Tsilhqot'in considéraient qu'ils possédaient leurs terres en exclusivité. Il n'y a aucune raison de modifier cette conclusion.

[59] La province plaide en outre que les conclusions du juge de première instance quant à la manière dont certaines parties du territoire étaient utilisées ne peuvent être retenues. La province affirme ce qui suit :

- Les limites du territoire établies par le juge de première instance sont arbitraires et contredites par certains éléments de preuve (mémoire, par. 141-142).
- Le juge de première instance s'est fondé sur une carte dont la province conteste la validité (par. 143).

- The Tsilhqot'in population, that the trial judge found to be 400 at the time of sovereignty assertion, could not have physically occupied the 1,900 sq. km of land over which title was found (para. 144).
- The trial judge failed to identify specific areas with adequate precision, instead relying on vague descriptions (para. 145).
- A close examination of the details of the inconsistent and arbitrary manner in which the trial judge defined the areas subject to Aboriginal title demonstrates the unreliability of his approach (para. 147).
- Le peuple Tsilhqot'in qui, selon le juge de première instance, comptait 400 personnes au moment de l'affirmation de la souveraineté, ne pouvait pas occuper les 1 900 km² de terres sur lesquelles l'existence d'un titre a été établie (par. 144).
- Le juge de première instance n'a pas identifié des secteurs de manière suffisamment précise; il s'est plutôt appuyé sur de vagues descriptions (par. 145).
- Un examen attentif de la façon incohérente et arbitraire dont le juge de première instance a défini les secteurs grevés d'un titre ancestral démontre le manque de fiabilité de son approche (par. 147).

[60] Most of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. The concern with the small size of the Tsilhqot'in population in 1846 makes sense only if one assumes a narrow test of intensive occupation and if one ignores the character of the land in question which was mountainous and could not have sustained a much larger population. The alleged failure to identify particular areas with precision likewise only makes sense if one assumes a narrow test of intensive occupation. The other criticisms amount to pointing out conflicting evidence. It was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error.

[61] The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. The trial judge was faced with the herculean task of drawing conclusions from a huge

[60] La plupart des critiques de la province à l'égard des conclusions de fait du juge de première instance reposent sur la thèse erronée voulant que le titre ancestral s'attache uniquement à des secteurs spécifiques occupés intensivement. La préoccupation que suscite la petite taille de la population des Tsilhqot'in en 1846 n'a de sens que si l'on adopte le critère étroit de l'occupation intensive et que l'on ne tient pas compte de la nature du territoire en question, un territoire montagneux qui n'aurait pas pu assurer la subsistance d'une population beaucoup plus importante. De même, l'allégation selon laquelle le juge de première instance aurait omis d'identifier certains secteurs avec précision n'a de sens que si l'on adopte le critère étroit de l'occupation intensive. Les autres critiques ne servent qu'à souligner le caractère contradictoire de la preuve. Il appartenait au juge de première instance de faire la part des éléments de preuve contradictoires et de tirer des conclusions de fait. La présence d'éléments de preuve contradictoires ne démontre pas l'existence d'une erreur manifeste et dominante.

[61] La province n'a pas démontré que les conclusions du juge de première instance ne sont pas étayées par la preuve ou qu'elles sont autrement erronées. Elle n'a pas non plus démontré que ses conclusions étaient arbitraires ou manquaient de précision. Le juge de première instance avait la

body of evidence produced over 339 trial days spanning a five-year period. Much of the evidence was historic evidence and therefore by its nature sometimes imprecise. The trial judge spent long periods in the claim area with witnesses, hearing evidence about how particular parts of the area were used. Absent demonstrated error, his findings should not be disturbed.

[62] This said, I have accepted the Province's invitation to review the maps and the evidence and evaluate the trial judge's conclusions as to which areas support a declaration of Aboriginal title. For ease of reference, I attach a map showing the various territories and how the trial judge treated them (Appendix; see Appellant's factum, "Appendix A"). The territorial boundaries drawn by the trial judge and his conclusions as to Aboriginal title appear to be logical and fully supported by the evidence.

[63] The trial judge divided the claim area into six regions and then considered a host of individual sites within each region. He examined expert archeological evidence, historical evidence and oral evidence from Aboriginal elders referring to these specific sites. At some of these sites, although the evidence did suggest a Tsilhqot'in presence, he found it insufficient to establish regular and exclusive occupancy. At other sites, he held that the evidence did establish regular and exclusive occupancy. By examining a large number of individual sites, the trial judge was able to infer the boundaries within which the Tsilhqot'in regularly and exclusively occupied the land. The trial judge, in proceeding this way, made no legal error.

[64] The Province also criticises the trial judge for offering his opinion on areas outside the claim area. This, the Province says, went beyond the

tâche colossale de tirer des conclusions à partir d'une quantité énorme d'éléments de preuve produits au cours d'un procès de 339 jours étalé sur une période de cinq ans. Une grande partie de la preuve était historique et donc, de par sa nature, parfois imprécise. Le juge de première instance a passé de longues périodes de temps dans le territoire revendiqué en compagnie de témoins et a entendu des témoignages sur la façon dont différents secteurs étaient utilisés. En l'absence d'une erreur manifeste, ses conclusions ne devraient pas être modifiées.

[62] Cela étant dit, j'ai accepté la proposition de la province d'examiner les cartes et les éléments de preuve et d'apprécier les conclusions du juge de première instance au sujet des secteurs auxquels devrait s'appliquer un jugement déclarant l'existence d'un titre ancestral. Par souci de clarté, je joins en annexe une carte qui montre les divers territoires et la façon dont le juge de première instance les a considérés (Annexe; voir l'annexe « A » du mémoire de l'appelant). Les limites territoriales définies par le juge de première instance et ses conclusions quant au titre ancestral semblent logiques et entièrement étayées par la preuve.

[63] Le juge de première instance a divisé le territoire revendiqué en six régions et a ensuite examiné de nombreux sites à l'intérieur de chaque région. Il a examiné des éléments de preuve archéologique et historique ainsi que les récits oraux des aînés autochtones faisant état de ces sites. À certains de ces sites, bien que la preuve donnait à penser que les Tsilhqot'in y avaient été présents, il a conclu que la preuve ne permettait pas d'établir une occupation régulière et exclusive. À d'autres sites, il a estimé que la preuve établissait une telle occupation. Après avoir examiné un grand nombre de sites, le juge de première instance a pu inférer les limites à l'intérieur desquelles les Tsilhqot'in occupaient régulièrement et exclusivement le territoire. En procédant de cette façon, le juge de première instance n'a commis aucune erreur.

[64] La province critique également le juge de première instance parce qu'il a donné son avis sur des terres qui se trouvent à l'extérieur du territoire

mandate of a trial judge who, should pronounce only on pleaded matters.

[65] In my view, this criticism is misplaced. It is clear that no declaration of title could be made over areas outside those pleaded. The trial judge offered his comments on areas outside the claim area, not as binding rulings in the case, but to provide assistance in future land claims negotiations. Having canvassed the evidence and arrived at conclusions on it, it made economic and practical sense for the trial judge to give the parties the benefit of his views. Moreover, as I noted earlier in discussing the proper approach to pleadings in cases where Aboriginal title is at issue, these cases raise special considerations. Often, the ambit of a claim cannot be drawn with precision at the commencement of proceedings. The true state of affairs unfolds only gradually as the evidence emerges over what may be a lengthy period of time. If at the end of the process the boundaries of the initial claim and the boundaries suggested by the evidence are different, the trial judge should not be faulted for pointing that out.

[66] I conclude that the trial judge was correct in his assessment that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty. There was ample direct evidence of occupation at sovereignty, which was additionally buttressed by evidence of more recent continuous occupation.

VI. What Rights Does Aboriginal Title Confer?

[67] As we have seen, *Delgamuukw* establishes that Aboriginal title “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes” (para. 117), including non-traditional purposes, provided these

revendiqué. Selon la province, cela outrepassait le mandat d'un juge de première instance, qui doit se prononcer seulement sur les questions soulevées.

[65] À mon avis, cette critique est inappropriée. Il est évident qu'aucun jugement déclarant l'existence d'un titre n'aurait pu être rendu à l'égard de terres se trouvant à l'extérieur du territoire revendiqué. Les commentaires du juge de première instance à propos de secteurs non revendiqués n'étaient pas de la nature d'une décision, mais visaient simplement à fournir des pistes pour de futures négociations relatives aux revendications territoriales. Après avoir examiné la preuve et en avoir tiré des conclusions, il était logique, sur les plans économique et pratique, que le juge de première instance donne son opinion aux parties. De plus, ainsi que je l'ai fait remarquer lorsque je me suis penchée sur l'approche qu'il convient d'adopter à l'égard des actes de procédure dans les cas où un titre ancestral est en cause, ces affaires soulèvent des considérations particulières. Souvent, la portée d'une revendication ne peut être établie avec précision au début des procédures. La situation s'éclaircit au fur et à mesure que les éléments de preuve se dégagent sur une période qui peut être longue. Si, à la fin du processus, les limites de la revendication initiale et les limites établies suivant la preuve sont différentes, il ne faudrait pas reprocher au juge de première instance de le souligner.

[66] J'estime que le juge de première instance a eu raison de conclure que l'occupation des Tsilhqot'in était suffisante et exclusive au moment de l'affirmation de la souveraineté. Il y avait amplement d'éléments de preuve démontrant une occupation antérieure à l'affirmation de la souveraineté, et cette preuve était renforcée par des éléments de preuve démontrant une occupation continue plus récente.

VI. Quels droits confère le titre ancestral?

[67] Je le rappelle, l'arrêt *Delgamuukw* établit que le titre ancestral « comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour diverses fins » (par. 117), y compris des fins non traditionnelles, dans la mesure

uses can be reconciled with the communal and on-going nature of the group's attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).

[68] I will first discuss the legal characterization of the Aboriginal title. I will then offer observations on what Aboriginal title provides to its holders and what limits it is subject to.

A. *The Legal Characterization of Aboriginal Title*

[69] The starting point in characterizing the legal nature of Aboriginal title is Dickson J.'s concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation of 1763*. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

[70] The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it: s. 109 of the *Constitution Act, 1867*; *Delgamuukw*. As we have seen, *Delgamuukw* establishes that Aboriginal title gives "the right to exclusive use and occupation of the land . . . for a variety of purposes", not confined to traditional or "distinctive" uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. As such, the Crown does

où ces utilisations peuvent se concilier avec la nature collective et continue de l'attachement qu'a le groupe pour le territoire visé. Sous réserve de cette limite intrinsèque, le groupe qui détient le titre a le droit de choisir les utilisations qui sont faites de ces terres et de bénéficier des avantages économiques qu'elles procurent (par. 166).

[68] Je vais d'abord examiner la qualification juridique du titre ancestral. J'exposerai ensuite mes observations sur ce que le titre ancestral confère à ses titulaires et sur les limites auxquelles il est assujéti.

A. *La qualification juridique du titre ancestral*

[69] Le point de départ de la qualification de la nature juridique du titre ancestral est le jugement concordant du juge Dickson dans l'arrêt *Guerin*, dont il est question précédemment. Au moment de l'affirmation de la souveraineté européenne, la Couronne a acquis un titre absolu ou sous-jacent sur toutes les terres de la province. Ce titre était toutefois grevé des droits préexistants des peuples autochtones qui occupaient et utilisaient les terres avant l'arrivée des Européens. La doctrine de la *terra nullius* (selon laquelle nul ne possédait la terre avant l'affirmation de la souveraineté européenne) ne s'est jamais appliquée au Canada, comme l'a confirmé la *Proclamation royale* de 1763. Le droit des Autochtones sur les terres qui grève le titre sous-jacent de la Couronne a une existence juridique indépendante qui donne naissance à une obligation fiduciaire de la part de la Couronne.

[70] Le contenu du titre sous-jacent de la Couronne est ce qui reste après la soustraction du titre ancestral : art. 109 de la *Loi constitutionnelle de 1867*; *Delgamuukw*. Comme nous l'avons déjà vu, l'arrêt *Delgamuukw* établit que le titre ancestral accorde « le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour diverses fins », lesquelles ne se limitent pas aux utilisations traditionnelles ou « distinctives » (par. 117). Autrement dit, le titre ancestral est un intérêt bénéficiaire sur les terres : *Guerin*, p. 382. En termes simples, les titulaires du titre ont droit aux avantages associés aux terres — de les utiliser,

not retain a beneficial interest in Aboriginal title land.

[71] What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements — a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act, 1982*.

[72] The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title “is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts”.

B. *The Incidents of Aboriginal Title*

[73] Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land.

d'en jouir et de profiter de leur développement économique. Par conséquent, la Couronne ne conserve pas un intérêt bénéficiaire sur les terres visées par un titre ancestral.

[71] Alors, que reste-t-il du titre absolu ou sous-jacent de la Couronne sur les terres détenues en vertu d'un titre ancestral? Il ressort de la doctrine et de la jurisprudence deux éléments connexes — une obligation fiduciaire de la Couronne envers les Autochtones à l'égard des terres ancestrales et le droit de porter atteinte au titre ancestral si le gouvernement peut démontrer que l'atteinte est justifiée dans l'intérêt général du public en vertu de l'art. 35 de la *Loi constitutionnelle de 1982*. Dans l'arrêt *Delgamuukw*, la Cour a dit qu'il s'agissait d'un processus de conciliation des intérêts autochtones et de l'intérêt général du public en vertu de l'art. 35 de la *Loi constitutionnelle de 1982*.

[72] Les caractéristiques du titre ancestral découlent de la relation particulière entre la Couronne et le groupe autochtone en question. C'est cette relation qui rend le titre ancestral *sui generis*, ou unique. Le titre ancestral est ce qu'il est — le résultat unique de la relation historique entre la Couronne et le groupe autochtone en question. Des analogies avec d'autres formes de propriété — par exemple, la propriété en fief simple — peuvent être utiles pour mieux comprendre certains aspects du titre ancestral. Cependant, elles ne peuvent pas dicter précisément en quoi il consiste ou ne consiste pas. Comme le juge La Forest l'a indiqué dans *Delgamuukw*, par. 190, le titre ancestral « n'équivaut pas à la propriété en fief simple et il ne peut pas non plus être décrit au moyen des concepts traditionnels du droit des biens ».

B. *Les attributs du titre ancestral*

[73] Le titre ancestral confère des droits de propriété semblables à ceux associés à la propriété en fief simple, y compris le droit de déterminer l'utilisation des terres, le droit de jouissance et d'occupation des terres, le droit de posséder les terres, le droit aux avantages économiques que procurent les terres et le droit d'utiliser et de gérer les terres de manière proactive.

[74] Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

[75] The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.

[76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

[74] Cependant, le titre ancestral comporte une restriction importante — il s'agit d'un titre collectif détenu non seulement pour la génération actuelle, mais pour toutes les générations futures. Cela signifie qu'il ne peut pas être cédé, sauf à la Couronne, ni être grevé d'une façon qui empêcherait les générations futures du groupe d'utiliser les terres et d'en jouir. Les terres ne peuvent pas non plus être aménagées ou utilisées d'une façon qui priverait de façon substantielle les générations futures de leur utilisation. Il peut être possible d'apporter certaines modifications — même permanentes — aux terres. La question de savoir si une utilisation particulière est irrécilable avec la possibilité pour les générations futures de bénéficier des terres constituera une question qu'il faudra trancher lorsqu'elle se posera.

[75] Les droits et restrictions afférents au titre ancestral découlent de l'intérêt que ce titre confère, intérêt qui découle à son tour de l'occupation autochtone à l'époque de la souveraineté européenne et qui grève le titre sous-jacent revendiqué par la Couronne au moment de l'affirmation de la souveraineté. Le titre ancestral postérieur à l'affirmation de la souveraineté reflète le fait que les Autochtones occupaient le territoire avant l'affirmation de la souveraineté, avec tous les attributs que constituent les droits d'utilisation et de jouissance qui existaient avant l'affirmation de la souveraineté et qui composaient le titre collectif détenu par les ancêtres du groupe revendicateur — notamment le droit de contrôler l'utilisation des terres. Cependant, les utilisations ne se limitent pas aux utilisations et aux coutumes antérieures à l'affirmation de la souveraineté; tout comme les autres propriétaires fonciers, les titulaires du titre ancestral des temps modernes peuvent utiliser leurs terres de façon moderne, s'ils le veulent.

[76] Le droit de contrôler la terre que confère le titre ancestral signifie que les gouvernements et les autres personnes qui veulent utiliser les terres doivent obtenir le consentement des titulaires du titre ancestral. Si le groupe autochtone ne consent pas à l'utilisation, le seul recours du gouvernement consiste à établir que l'utilisation proposée est justifiée en vertu de l'art. 35 de la *Loi constitutionnelle de 1982*.

C. *Justification of Infringement*

[77] To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.

[78] The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.

[79] The degree of consultation and accommodation required lies on a spectrum as discussed in *Haida*. In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right. "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties" (para. 37). The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.

[80] Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast,

C. *La justification de l'atteinte*

[77] Pour justifier qu'il puisse passer outre aux volontés du groupe qui détient le titre ancestral au motif que l'atteinte sert l'intérêt général du public, le gouvernement doit établir : (1) qu'il s'est acquitté de son obligation procédurale de consultation et d'accommodement; (2) que ses actes poursuivaient un objectif impérieux et réel; et (3) que la mesure gouvernementale est compatible avec l'obligation fiduciaire qu'a la Couronne envers le groupe : *Sparrow*.

[78] L'obligation de consultation est une obligation procédurale que fait naître l'honneur de la Couronne avant que l'existence du titre soit confirmée. Lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle ou réelle du titre ancestral et qu'elle envisage une mesure susceptible d'avoir un effet préjudiciable sur ce titre, elle est tenue de consulter le groupe qui revendique le titre ancestral et, s'il y a lieu, de trouver des accommodements au droit ancestral. L'obligation de consultation doit être respectée avant la prise de mesures pouvant avoir un effet préjudiciable sur le droit.

[79] L'obligation de consultation et d'accommodement se situe à l'intérieur d'un continuum, comme il en a été question dans l'arrêt *Nation haïda*. En général, le niveau de consultation et d'accommodement nécessaire est proportionnel à la solidité de la revendication et à la gravité de l'incidence négative que la mesure gouvernementale proposée aurait sur le droit revendiqué. « Une revendication douteuse ou marginale peut ne requérir qu'une simple obligation d'informer, alors qu'une revendication plus solide peut faire naître des obligations plus contraignantes » (par. 37). Le niveau de consultation et d'accommodement nécessaire est le plus élevé lorsque l'existence du titre a été établie. Lorsque la consultation ou l'accommodement est jugé insuffisant, la décision du gouvernement peut être suspendue ou annulée.

[80] Lorsque l'existence du titre ancestral n'est pas établie, l'honneur de la Couronne lui impose une obligation procédurale de consultation et, s'il y a lieu, d'accommodement de l'intérêt autochtone

where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

[81] I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. As stated in *Gladstone*, at para. 72:

... the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown. [Emphasis added.]

[82] As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are “all here to stay” and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.

[83] What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, per Lamer C.J., offered this:

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can

non encore établi. Par contre, lorsque l'existence du titre a été établie, la Couronne doit non seulement se conformer à ses obligations procédurales, mais doit aussi s'assurer que la mesure gouvernementale proposée est fondamentalement conforme aux exigences de l'art. 35 de la *Loi constitutionnelle de 1982*. Pour cela, le gouvernement doit poursuivre un objectif impérieux et réel et il doit démontrer que la mesure proposée est compatible avec l'obligation fiduciaire de la Couronne envers le groupe autochtone.

[81] Je conviens avec la Cour d'appel que l'objectif impérieux et réel du gouvernement doit être examiné du point de vue des Autochtones ainsi que du point de vue de l'intérêt général du public. Comme il est indiqué au par. 72 de l'arrêt *Gladstone* :

... sont considérés comme des objectifs impérieux et réels les objectifs visant soit la reconnaissance de l'occupation antérieure de l'Amérique du Nord par les peuples autochtones soit — et, à l'étape de la justification, ce genre d'objectifs pourrait bien être le plus pertinent — la conciliation de cette occupation avec l'affirmation par Sa Majesté de sa souveraineté sur ce territoire. [Je souligne.]

[82] Comme l'explique la Cour dans l'arrêt *Delgamuukw*, le processus de conciliation des intérêts autochtones avec l'intérêt général de la société dans son ensemble constitue la raison d'être du principe de la justification. Les Autochtones et les non-Autochtones sont « tous ici pour y rester » et doivent forcément favoriser un processus de conciliation (par. 186). Pour constituer un objectif impérieux et réel, l'objectif général du public invoqué par le gouvernement doit poursuivre l'objectif de conciliation, compte tenu des intérêts autochtones et de l'objectif général du public.

[83] Quels objectifs peuvent justifier une atteinte au titre ancestral? Dans *Delgamuukw*, le juge en chef Lamer a fait les remarques suivantes au nom de la Cour :

Depuis *Gladstone*, l'éventail d'objectifs législatifs qui peuvent justifier une atteinte au titre aborigène est assez large. La plupart de ces objectifs peuvent être rattachés

be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community” (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydro-electric 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, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para. 165.]

[84] If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown’s fiduciary duty towards Aboriginal people.

[85] The Crown’s fiduciary duty in the context of justification merits further discussion. The Crown’s underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown’s fiduciary or trust obligation to the group. This impacts the justification process in two ways.

[86] First, the Crown’s fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

[87] Second, the Crown’s fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown’s fiduciary duty

à la conciliation de l’occupation antérieure de l’Amérique du Nord par les peuples autochtones avec l’affirmation de la souveraineté de la Couronne, ce qui nécessite la reconnaissance du fait que les « sociétés autochtones distinctives existent au sein d’une communauté sociale, politique et économique plus large, communauté dont elles font partie » (au par. 73). À mon avis, l’extension de l’agriculture, de la foresterie, de l’exploitation minière et de l’énergie hydroélectrique, le développement économique général de l’intérieur de la Colombie-Britannique, la protection de l’environnement et des espèces menacées d’extinction, ainsi que la construction des infrastructures et l’implantation des populations requises par ces fins, sont des types d’objectifs compatibles avec cet objet et qui, en principe, peuvent justifier une atteinte à un titre aborigène. Toutefois, la question de savoir si une mesure ou un acte donné du gouvernement peut être expliqué par référence à l’un de ces objectifs est, en dernière analyse, une question de fait qui devra être examinée au cas par cas. [Je souligne; soulignement dans l’original omis; par. 165.]

[84] Si le gouvernement démontre qu’il poursuit un objectif impérieux et réel, il doit ensuite prouver que l’atteinte proposée au droit ancestral est compatible avec l’obligation fiduciaire de la Couronne envers les peuples autochtones.

[85] Dans le contexte de la justification, l’obligation fiduciaire de la Couronne mérite une analyse plus approfondie. Le titre sous-jacent de la Couronne sur les terres est détenu au profit du groupe autochtone et encadré par l’obligation fiduciaire de la Couronne envers le groupe. Cela influence le processus de justification de deux façons.

[86] Premièrement, l’obligation fiduciaire de la Couronne signifie que le gouvernement doit agir d’une manière qui respecte le fait que le titre ancestral est un droit collectif inhérent aux générations actuelles et futures. L’intérêt bénéficiaire sur les terres que détient le groupe autochtone est dévolu à l’ensemble des membres du groupe titulaire du titre. Les atteintes au titre ancestral ne peuvent donc pas être justifiées si elles priveront de façon substantielle les générations futures des avantages que procurent les terres.

[87] Deuxièmement, l’obligation fiduciaire de la Couronne insufflé une obligation de proportionnalité dans le processus de justification. Il ressort

to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida's* insistence that the Crown's duty to consult and accommodate at the claims stage "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39).

[88] In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

D. Remedies and Transition

[89] Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails

implicitement de l'obligation fiduciaire qu'a la Couronne envers le groupe autochtone que l'atteinte doit être nécessaire pour atteindre l'objectif gouvernemental (lien rationnel), que le gouvernement ne va pas au-delà de ce qui est nécessaire pour atteindre cet objectif (atteinte minimale) et que les effets préjudiciables sur l'intérêt autochtone ne l'emportent pas sur les avantages qui devraient découler de cet objectif (proportionnalité de l'incidence). L'exigence de proportionnalité est inhérente au processus de conciliation énoncé dans l'arrêt *Delgamuukw* et elle a été reprise dans l'arrêt *Nation haïda*, où la Cour insiste sur le fait que l'obligation de la Couronne de consulter et d'accommoder à l'étape des revendications « dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre » (par. 39).

[88] En résumé, le titre ancestral confère au groupe qui le détient le droit exclusif de déterminer l'utilisation qu'il est fait des terres et le droit de bénéficier des avantages que procure cette utilisation, sous réserve d'une seule exception, soit que les utilisations respectent sa nature collective et préservent la jouissance des terres pour les générations futures. Lorsque le gouvernement porte atteinte au titre ancestral sans le consentement du groupe titulaire du titre, il doit le faire en respectant l'obligation procédurale de la Couronne de consulter le groupe. L'atteinte doit également être justifiée par la poursuite d'un objectif public impérieux et réel et elle doit être compatible avec l'obligation fiduciaire qu'a la Couronne envers le groupe autochtone.

D. Mesures de réparation et période transitoire

[89] Avant que l'existence du titre soit établie par un jugement déclaratoire ou une entente, la Couronne est tenue de consulter de bonne foi les groupes autochtones qui revendiquent le titre sur des terres au sujet de ses projets d'utilisation des terres et, s'il y a lieu, de trouver des accommodements aux intérêts de ces groupes. Le niveau de consultation et d'accommodement requis varie en fonction de la solidité de la revendication du groupe autochtone et de la gravité de l'effet

to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37.

[90] After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

[91] The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

préjudiciable éventuel sur l'intérêt revendiqué. Le manquement par la Couronne à son obligation de consultation peut donner lieu à diverses mesures de réparation, notamment une injonction, des dommages-intérêts ou une ordonnance enjoignant la tenue de consultations ou la prise de mesures d'accommodement : *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650, par. 37.

[90] Une fois l'existence du titre ancestral sur des terres établie par un jugement déclaratoire ou une entente, le gouvernement doit demander le consentement du groupe autochtone titulaire du titre pour ses projets d'aménagement du territoire. En l'absence de consentement, les projets d'aménagement sur les terres assujetties au titre ne peuvent aller de l'avant si le gouvernement ne s'est pas acquitté de son obligation de consultation et ne peut justifier une atteinte à ce titre aux termes de l'art. 35 de la *Loi constitutionnelle de 1982*. Les mesures de réparation habituelles en cas d'atteinte à des intérêts sur des terres sont disponibles, en les adaptant au besoin en fonction de la nature particulière du titre ancestral et de l'obligation fiduciaire de la Couronne envers les titulaires du titre ancestral.

[91] Il s'ensuit d'un point de vue pratique que des obligations différentes puissent être applicables au fil du temps dans un cas donné. À l'étape de la revendication, avant que soit établie l'existence du titre ancestral, le gouvernement a une obligation de consulter de bonne foi le groupe en cause et, s'il y a lieu, d'accommoder ses intérêts. Alors que la validité de la revendication devient plus apparente, le niveau requis de consultation et d'accommodement augmente proportionnellement. Lorsqu'une revendication est particulièrement solide — par exemple, peu avant qu'un tribunal confirme l'existence du titre — il faut bien prendre soin de préserver l'intérêt autochtone en attendant le règlement définitif de la revendication. Enfin, une fois l'existence du titre établie, le gouvernement ne peut réaliser, sur les terres grevées d'un titre ancestral, un projet d'aménagement auquel le groupe titulaire du titre n'a pas consenti à moins qu'il se soit acquitté de son obligation de consultation et que le projet d'aménagement soit justifié au sens de l'art. 35 de la *Loi constitutionnelle de 1982*.

[92] Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

E. *What Duties Were Owed by the Crown at the Time of the Government Action?*

[93] Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong *prima facie* claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum described in *Haida* and required significant consultation and accommodation in order to preserve the Tsilhqot'in interest.

[94] With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

[92] Une fois l'existence du titre établie, il peut être nécessaire pour le gouvernement de réévaluer sa conduite passée compte tenu de cette nouvelle réalité afin de s'acquitter fidèlement par la suite de son obligation fiduciaire envers le groupe titulaire du titre. Par exemple, si, avant que le titre ancestral soit établi, le gouvernement a entrepris un projet sans le consentement du groupe autochtone, il peut être tenu de l'annuler une fois l'existence du titre établie si la poursuite du projet porte indûment atteinte aux droits des Autochtones. De même, si une loi a été valablement adoptée avant que l'existence du titre soit établie, elle pourra être déclarée inapplicable pour l'avenir dans la mesure où elle porte injustement atteinte au titre ancestral.

E. *Quelles étaient les obligations de la Couronne au moment de la prise de la mesure gouvernementale?*

[93] Avant le jugement déclarant l'existence du titre ancestral, la province était tenue de consulter les Tsilhqot'in et de trouver des accommodements aux intérêts qu'ils revendiquaient. Au moment de la prise de la mesure gouvernementale contestée, la revendication du titre sur les terres par les Tsilhqot'in était à première vue solide et l'obligation de consultation de la Couronne se situait au haut du continuum décrit dans *Nation haïda* et exigeait un niveau élevé de consultation et d'accommodement afin de préserver les intérêts des Tsilhqot'in.

[94] Maintenant qu'un jugement a reconnu l'existence du titre, le peuple Tsilhqot'in détient un titre ancestral sur la partie du territoire désignée par le juge de première instance, sous réserve de l'exception indiquée au par. 9 des présents motifs. Cela donne au peuple Tsilhqot'in, sous réserve des limites inhérentes au titre collectif détenu au bénéfice des générations futures, le droit de déterminer les utilisations des terres et de bénéficier des avantages économiques qu'elles procurent. Comme nous l'avons déjà vu, il ne s'agit pas simplement d'un droit de premier refus sur la gestion des terres de la Couronne ou sur les plans de leur utilisation. Il s'agit plutôt du droit d'utiliser et de gérer les terres de façon proactive.

VII. Breach of the Duty to Consult

[95] The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.

[96] The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.

[97] I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

VIII. Provincial Laws and Aboriginal Title

[98] As discussed, I have concluded that the Province breached its duty to consult and accommodate the Tsilhqot'in interest in the land. This is sufficient to dispose of the appeal.

[99] However, the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere. It is therefore appropriate that we deal with it.

VII. Le manquement à l'obligation de consultation

[95] En l'espèce, le manquement allégué découle de la délivrance, par la province, de permis permettant à des tiers de mener des activités forestières et de construire des infrastructures connexes sur les terres à compter de 1983, avant que l'existence du titre soit reconnue. Au cours de cette période, les Tsilhqot'in détenaient sur les terres un intérêt qui n'était pas encore légalement reconnu. Le principe de l'honneur de la Couronne obligeait la province à les consulter à propos des utilisations des terres et à trouver des accommodements à leurs intérêts. La province n'a fait ni l'un ni l'autre et a manqué à son obligation envers les Tsilhqot'in.

[96] La Couronne a manqué à son obligation de consultation quand ses représentants ont planifié l'enlèvement du bois. L'inclusion des terres visées par un titre ancestral dans une région d'approvisionnement en bois, l'autorisation de blocs de coupe sur les terres visées par un titre ancestral dans le cadre d'un plan d'aménagement forestier et la délivrance de permis de coupe ont eu lieu sans aucune consultation significative avec les Tsilhqot'in.

[97] J'ajoute ceci. Les gouvernements et particuliers qui proposent d'utiliser ou d'exploiter la terre, que ce soit avant ou après une déclaration de titre ancestral, peuvent éviter d'être accusés de porter atteinte aux droits ou de manquer à l'obligation de consulter adéquatement le groupe en obtenant le consentement du groupe autochtone en question.

VIII. Les lois provinciales et le titre ancestral

[98] Je le rappelle, j'ai conclu que la province a manqué à son obligation de consulter les Tsilhqot'in et de trouver des accommodements à leur intérêt sur les terres. Cela suffit à trancher le pourvoi.

[99] Cependant, les parties ont présenté des observations détaillées sur l'application de la *Forest Act* aux terres visées par un titre ancestral. Les tribunaux d'instance inférieure ont traité de cette question, laquelle prend une grande importance pour le peuple des Tsilhqot'in et pour les autres groupes autochtones de la Colombie-Britannique et d'ailleurs. Il convient donc que nous l'examinions.

[100] The following questions arise: (1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how? (2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title? and (3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada? I will discuss each of these questions in turn.

A. *Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?*

[101] Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

[102] As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

[103] Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act, 1982*. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

[100] Les questions qui se posent sont les suivantes : (1) Les lois provinciales d'application générale s'appliquent-elles aux terres visées par un titre ancestral et, dans l'affirmative, comment s'appliquent-elles? (2) À première vue, la *Forest Act* de la Colombie-Britannique s'applique-t-elle aux terres visées par un titre ancestral? Et (3) si, à première vue, la *Forest Act* s'applique, son application est-elle écartée par l'application de la Constitution du Canada? Je vais examiner successivement chacune de ces questions.

A. *Les lois provinciales d'application générale s'appliquent-elles aux terres visées par un titre ancestral?*

[101] De façon générale, les lois provinciales d'application générale s'appliquent aux terres visées par un titre ancestral. Cependant, comme nous le verrons, cet énoncé est assorti de limites constitutionnelles importantes.

[102] En règle générale, les gouvernements provinciaux ont le pouvoir de réglementer l'utilisation des terres situées à l'intérieur de la province. Cette règle s'applique à toutes les terres, qu'elles soient détenues par le gouvernement, par des propriétaires privés ou par les titulaires d'un titre ancestral. Le fondement de ce pouvoir réside dans le par. 92(13) de la *Loi constitutionnelle de 1867*, lequel accorde à la province le pouvoir de légiférer en matière de propriété et de droits civils dans la province.

[103] Le pouvoir provincial de réglementer les terres détenues en vertu d'un titre ancestral est constitutionnellement limité de deux façons. Premièrement, il est limité par l'art. 35 de la *Loi constitutionnelle de 1982*. Aux termes de cet article, toute atteinte aux droits découlant du titre ancestral doit poursuivre un objectif gouvernemental impérieux et réel et doit être compatible avec la relation fiduciaire entre la Couronne et les titulaires du titre. Deuxièmement, le pouvoir d'une province de réglementer les terres visées par un titre ancestral peut aussi, dans certains cas, être limité par le pouvoir fédéral sur les « Indiens et les terres réservées pour les Indiens » prévu au par. 91(24) de la *Loi constitutionnelle de 1867*.

[104] This Court suggested in *Sparrow* that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. As stated in *Gladstone*:

Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [para. 43]

[105] It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. This said, when conflicts arise, the foregoing template serves to resolve them.

[106] Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.

B. Does the Forest Act on its Face Apply to Aboriginal Title Land?

[107] Whether a statute of general application such as the *Forest Act* was intended to apply to lands subject to Aboriginal title — the question

[104] Dans l'arrêt *Sparrow*, notre Cour a laissé entendre que les facteurs suivants seront pertinents au moment de déterminer si une loi d'application générale entraîne une diminution appréciable d'un droit ancestral, ce qui donne lieu à une atteinte : (1) si la restriction imposée par la loi est déraisonnable; (2) si la loi est indûment rigoureuse; et (3) si la loi refuse aux titulaires du droit le recours à leur moyen préféré d'exercer ce droit (p. 1112). Les trois facteurs doivent être pris en compte; par exemple, même s'il est jugé que les lois d'application générale ne sont pas déraisonnables ou indûment rigoureuses, cela ne signifie pas qu'il ne peut pas y avoir d'atteinte au titre ancestral. Comme la Cour l'a affirmé dans l'arrêt *Gladstone* :

Le simple fait qu'on réponde par la négative à l'une de ces questions [formulées dans l'arrêt *Sparrow*] n'empêche pas le tribunal de conclure à l'existence d'une atteinte à première vue. Cette réponse négative n'est qu'un des facteurs que le tribunal doit prendre en considération pour déterminer s'il y a eu atteinte à première vue. [par. 43]

[105] On peut prévoir que les lois et règlements d'application générale visant à protéger l'environnement ou à assurer, à long terme, la santé des forêts de la Colombie-Britannique seront habituellement raisonnables, qu'ils ne seront pas, directement ou indirectement, indûment rigoureux et qu'ils ne refuseront pas au groupe autochtone leur moyen préféré d'exercer leur droit. Et il faut espérer que les groupes autochtones et le gouvernement provincial collaboreront pour assurer la pérennité de l'environnement naturel qui leur est si important. Cela dit, lorsque survient un conflit, l'analyse qui précède sert à le régler.

[106] Sous réserve de ces contraintes constitutionnelles, les lois provinciales d'application générale s'appliquent aux terres détenues en vertu d'un titre ancestral.

B. À première vue, la Forest Act s'applique-t-elle aux terres visées par un titre ancestral?

[107] À ce stade-ci, la question de savoir si une loi d'application générale telle la *Forest Act* était censée s'appliquer aux terres visées par un titre

at this point — is always a matter of statutory interpretation.

[108] The basic rule of statutory interpretation is that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1.

[109] Under the *Forest Act*, the Crown can only issue timber licences with respect to “Crown timber”. “Crown timber” is defined as timber that is on “Crown land”, and “Crown land” is defined as “land, whether or not it is covered by water, or an interest in land, vested in the Crown” (s. 1). The Crown is not empowered to issue timber licences on “private land”, which is defined as anything that is not Crown land. The Act is silent on Aboriginal title land, meaning that there are three possibilities: (1) Aboriginal title land is “Crown land”; (2) Aboriginal title land is “private land”; or (3) the *Forest Act* does not apply to Aboriginal title land at all. For the purposes of this appeal, there is no practical difference between the latter two.

[110] If Aboriginal title land is “vested in the Crown”, then it falls within the definition of “Crown land” and the timber on it is “Crown timber”.

[111] What does it mean for a person or entity to be “vested” with property? In property law, an interest is vested when no condition or limitation stands in the way of enjoyment. Property can be vested in possession or in interest. Property is vested in possession where there is a present entitlement to enjoyment of the property. An example of this is a life estate. Property is vested in interest where there is a fixed right to taking possession in the future. A remainder interest is vested in interest but not

ancestral est toujours une question d’interprétation législative.

[108] Selon la règle fondamentale en matière d’interprétation législative, [TRADUCTION] « il faut interpréter les termes d’une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’économie de la loi, son objet et l’intention du législateur » : R. Sullivan, *Sullivan on the Construction of Statutes* (5^e éd. 2008), p. 1.

[109] Aux termes de la *Forest Act*, le gouvernement ne peut délivrer des permis de coupe que pour le [TRADUCTION] « bois des terres publiques », défini comme étant le bois qui se trouve sur les « terres publiques », lesquelles sont définies comme étant les « terres dévolues à la Couronne, qu’elles soient ou non recouvertes d’eau, ou un droit sur ces terres » (art. 1). Le gouvernement n’a pas le pouvoir de délivrer des permis de coupe de bois sur les « terres privées », elles-mêmes définies comme étant toutes les terres qui ne sont pas des terres publiques. La *Forest Act* ne fait pas mention des terres visées par un titre ancestral et nous laisse devant trois possibilités : (1) les terres visées par un titre ancestral sont des « terres publiques »; (2) les terres visées par un titre ancestral sont des « terres privées »; ou (3) la *Forest Act* ne s’applique nullement aux terres visées par un titre ancestral. Pour les besoins du présent pourvoi, il n’y a pas de différence en pratique entre les deux dernières possibilités.

[110] Si les terres visées par un titre ancestral sont « dévolues à la Couronne », la définition des « terres publiques » s’y applique et le bois qui s’y trouve est du « bois des terres publiques ».

[111] Que signifie pour une personne ou une entité le fait qu’un bien lui soit « dévolu »? En droit des biens, un intérêt est dévolu lorsqu’aucune condition ou restriction n’en restreint la jouissance. Un bien peut être dévolu en possession ou en intérêt. Un bien est dévolu en possession lorsque la personne a le droit actuel de jouir du bien. Le domaine viager en est un exemple. Un bien est dévolu en intérêt lorsque le droit d’en prendre possession ultérieurement est figé. Un intérêt

in possession: B. Ziff, *Principles of Property Law* (5th ed. 2010), at p. 245; *Black's Law Dictionary* (9th ed. 2009), *sub verbo* “vested”.

[112] Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the Crown's underlying title is limited to the fiduciary duty owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.

[113] The second consideration in statutory construction is more equivocal. Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use: *Haida*. At this stage, the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims.

[114] It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain “Crown land” under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands

résiduel est dévolu en intérêt mais non en possession : B. Ziff, *Principles of Property Law* (5^e éd. 2010), p. 245; *Black's Law Dictionary* (9^e éd. 2009), à l'article « *vested* » (dévolu).

[112] Le titre ancestral confère un droit sur les terres-mêmes, et la Couronne est tenue de justifier toute atteinte au titre. J'ai déjà expliqué que le contenu du titre sous-jacent de la Couronne se limite à l'obligation fiduciaire envers les Autochtones et au droit de porter atteinte au titre ancestral dans la mesure où l'atteinte est justifiée. On pourrait difficilement affirmer que la Couronne a le droit actuel de jouir des terres comme elle pourrait le faire dans le cas d'un bien dévolu en possession. De même, bien que le titre ancestral puisse être aliéné en faveur de la Couronne, cela ne confère pas un droit figé de jouir ultérieurement du titre comme elle pourrait le faire dans le cas d'un bien dévolu en intérêt. Il semblerait plutôt que par l'effet du titre ancestral, les terres en question sont dévolues au groupe autochtone.

[113] La deuxième considération en matière d'interprétation législative est plus équivoque. Le législateur peut-il avoir voulu que les vastes territoires de la province susceptibles d'être visés par un titre ancestral soient soustraits à la réglementation de l'exploitation forestière? Et que dire de la longue période pendant laquelle les revendications territoriales font l'objet de négociation et le titre ancestral demeure incertain? Pendant cette période, les groupes autochtones n'ont pas le droit de gérer les forêts; ils ont seulement droit qu'on les consulte et, s'il y a lieu, qu'on les accommode relativement à l'utilisation des terres : *Nation haïda*. À cette étape, le gouvernement peut continuer à gérer la ressource en question, mais l'honneur de la Couronne l'oblige à respecter la revendication non encore prouvée.

[114] Il semble ressortir clairement du dossier historique et du dossier en l'espèce que dans ce contexte évolutif, le législateur de la Colombie-Britannique s'est fondé sur le fait que les terres revendiquées demeurent des [TRADUCTION] « terres publiques » au sens de la *Forest Act*, du moins jusqu'à ce que le titre ancestral soit reconnu par un tribunal ou une entente. Autrement, personne

of hectares and represent a resource of enormous value. Looked at in this very particular historical context, it seems clear that the legislature must have intended the words “vested in the Crown” to cover at least lands to which Aboriginal title had not yet been confirmed.

[115] I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order*. To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are “vested” in the Aboriginal group and the lands are no longer Crown lands.

[116] Applied to this case, this means that as a matter of statutory construction, the lands in question were “Crown land” under the *Forest Act* at the time the forestry licences were issued. Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown. The timber on it no longer falls within the definition of “Crown timber” and the *Forest Act* no longer applies. I add the obvious — it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.

C. *Is the Forest Act Ousted by the Constitution?*

[117] The next question is whether the provincial legislature lacks the constitutional power to legislate with respect to forests on Aboriginal title land. Currently, the *Forest Act* applies to lands under claim, but not to lands over which Aboriginal title has been confirmed. However, the provincial

ne se serait occupé des forêts qui couvrent des centaines de milliers d’hectares et qui représentent une ressource d’une valeur inestimable. Compte tenu de ce contexte historique très particulier, il semble clair que le législateur doit avoir voulu que les mots « dévolues à la Couronne » s’appliquent au moins aux terres sur lesquelles l’existence du titre ancestral n’était pas encore confirmée.

[115] Je conclus que le législateur voulait que la *Forest Act* s’applique aux terres visées par une revendication de titre ancestral, *jusqu’à ce que l’existence du titre soit confirmée par une entente ou une ordonnance judiciaire*. Conclure autrement reviendrait à accepter que le législateur voulait que les forêts se trouvant sur ces terres ne soient pas du tout réglementées et minerait la prémisse sur laquelle était fondée l’obligation de consulter confirmée dans l’arrêt *Nation haïda*. Cependant, une fois que l’existence du titre ancestral est confirmée, les terres sont « dévolues » au groupe autochtone et ne sont plus des terres publiques.

[116] L’application de cette conclusion en l’espèce signifie que, selon les règles d’interprétation législative, les terres en question étaient des [TRADUCTION] « terres publiques » aux termes de la *Forest Act* au moment où les permis d’exploitation forestière ont été délivrés. Cependant, maintenant que l’existence du titre a été établie, l’intérêt bénéficiaire sur les terres est dévolu au groupe autochtone et non à la Couronne. La définition de « bois des terres publiques » ne s’applique plus au bois qui se trouve sur ces terres et la *Forest Act* ne s’y applique plus. J’aimerais préciser un point évident — le législateur peut toujours modifier la *Forest Act* afin qu’elle s’applique sur les terres visées par un titre ancestral, à la condition de respecter les contraintes constitutionnelles applicables.

C. *La Forest Act est-elle écartée par la Constitution?*

[117] La question suivante consiste à savoir si la Constitution permet au législateur provincial de légiférer sur les forêts qui se trouvent sur des terres visées par un titre ancestral. Actuellement, la *Forest Act* s’applique aux terres visées par une revendication du titre ancestral, mais pas aux terres

legislature could amend the Act so as to explicitly apply to lands over which title has been confirmed. This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands is ousted by the Constitution.

1. Section 35 of the *Constitution Act, 1982*

[118] Section 35 of the *Constitution Act, 1982* represents “the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights” (*Sparrow*, at p. 1105). It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.

[119] Section 35(1) states that existing Aboriginal rights are hereby “recognized and affirmed”. In *Sparrow*, this Court held that these words must be construed in a liberal and purposive manner. Recognition and affirmation of Aboriginal rights constitutionally entrenches the Crown’s fiduciary obligations towards Aboriginal peoples. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty. “[T]he best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights” (*Sparrow*, at p. 1109). Dickson C.J. and La Forest J. elaborated on this purpose as follows, at p. 1110:

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive

sur lesquelles l’existence de ce titre a été confirmée. Cependant, le législateur provincial pourrait modifier la *Forest Act* de manière à ce qu’elle s’applique explicitement aux terres sur lesquelles l’existence du titre ancestral a été confirmée. Cela soulève la question de savoir si la Constitution écarte les lois provinciales régissant l’exploitation forestière qui, à première vue, sont censées s’appliquer aux terres visées par un titre ancestral.

1. L’article 35 de la *Loi constitutionnelle de 1982*

[118] L’article 35 de la *Loi constitutionnelle de 1982* représente « l’aboutissement d’une bataille longue et difficile à la fois dans l’arène politique et devant les tribunaux pour la reconnaissance de droits ancestraux » (*Sparrow*, p. 1105). Il protège les droits ancestraux contre l’exercice, par les provinces et le fédéral, de leur compétence législative et prévoit un cadre qui facilite les négociations et la conciliation des intérêts autochtones avec ceux du public en général.

[119] Selon le par. 35(1), les droits ancestraux existants sont « reconnus et confirmés ». Dans *Sparrow*, notre Cour a conclu que ces mots devaient être interprétés de façon libérale en fonction de l’objet qu’ils visent. La reconnaissance et la confirmation des droits ancestraux consacrent dans la Constitution les obligations fiduciaires de la Couronne envers les peuples autochtones. Bien que les droits reconnus et confirmés ne soient pas absolus, l’art. 35 oblige la Couronne à concilier son pouvoir avec son obligation. « [L]a meilleure façon d’y parvenir est d’exiger la justification de tout règlement gouvernemental qui porte atteinte à des droits ancestraux » (*Sparrow*, p. 1109). Le juge en chef Dickson et le juge La Forest ont précisé cet objectif comme suit à la p. 1110 :

La reconnaissance constitutionnelle exprimée dans la disposition en cause permet donc, dans une certaine mesure, de contrôler la conduite du gouvernement et de limiter fortement le pouvoir du législateur. Bien qu’elle ne constitue pas une promesse d’immunité contre la réglementation gouvernementale dans une société qui, au XX^e siècle, devient de plus en plus complexe et interdépendante et où il est nécessaire

promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any [A]boriginal right protected under s. 35(1).

[120] Where legislation affects an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, two inquiries are required. First, does the legislation interfere with or infringe the Aboriginal right (this was referred to as *prima facie* infringement in *Sparrow*)? Second, if so, can the infringement be justified?

[121] A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and (3) the right to enjoy the economic fruits of the land (*Delgamuukw*, at para. 166).

[122] Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: *Gladstone*. As discussed, in *Sparrow*, the Court suggested that the following three factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112).

[123] General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardship, and not deny the holders of the right their preferred means of exercising it. In such cases, no infringement will result.

de protéger et de gérer les ressources épuisables, cette reconnaissance représente un engagement important de la part de la Couronne. Le gouvernement se voit imposer l'obligation de justifier toute mesure législative qui a un effet préjudiciable sur un droit ancestral protégé par le par. 35(1).

[120] Lorsqu'une mesure législative porte atteinte à un droit ancestral protégé par l'art. 35 de la *Loi constitutionnelle de 1982*, il faut se poser deux questions. Premièrement, la mesure porte-t-elle atteinte au droit ancestral (une atteinte à première vue, dans l'arrêt *Sparrow*)? Deuxièmement, dans l'affirmative, l'atteinte peut-elle être justifiée?

[121] Le tribunal doit d'abord examiner les caractéristiques ou les attributs du droit en question. Dans le cas du titre ancestral, trois attributs sont pertinents : (1) le droit d'utiliser et d'occuper les terres de façon exclusive; (2) le droit de choisir les utilisations qui peuvent être faites des terres, sous réserve de la restriction ultime que ces usages ne sauraient détruire la capacité de ces terres d'assurer la subsistance des générations futures des peuples autochtones; (3) le droit de bénéficier des avantages économiques que procurent les terres (*Delgamuukw*, par. 166).

[122] Ensuite, pour déterminer si la mesure législative porte atteinte au droit, le tribunal doit se demander si la mesure entraîne une diminution appréciable du droit : *Gladstone*. Comme je l'ai déjà expliqué, dans *Sparrow*, la Cour a laissé entendre que les trois facteurs suivants peuvent permettre de déterminer s'il y a eu atteinte : (1) si la restriction imposée par la loi est déraisonnable; (2) si la loi est indûment rigoureuse; et (3) si la loi refuse aux titulaires du droit le recours à leur moyen préféré de l'exercer (p. 112).

[123] Une loi de nature réglementaire de portée générale, par exemple une loi visant la gestion des forêts en prévenant les infestations de ravageurs ou les feux de forêt, satisfera souvent au critère énoncé dans *Sparrow* car elle sera raisonnable, ne sera pas indûment rigoureuse et ne refusera pas aux titulaires du droit le recours à leur moyen préféré de l'exercer. Dans un tel cas, il n'y a aucune atteinte.

[124] General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.

[125] As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

[126] While unnecessary for the disposition of this appeal, the issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed by the courts below, and I offer the following comments for the benefit of all parties going forward. I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province — the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation — were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle.

[124] Une loi de nature réglementaire de portée générale susceptible de modifier le mode d'exercice du droit ancestral diffère d'une loi qui a pour effet de céder à des tiers des droits de propriété des Autochtones. La délivrance de permis de coupe de bois sur des terres grevées du titre ancestral par exemple — un transfert direct à des tiers de droits de propriété des Autochtones — constituera manifestement une diminution significative du droit de propriété du groupe autochtone assimilable à une atteinte qui doit être justifiée dans les cas où les Autochtones n'y ont pas consenti.

[125] J'ai déjà expliqué que, pour justifier une atteinte, la Couronne doit démontrer : (1) qu'elle s'est acquittée de son obligation procédurale de consulter les titulaires d'un droit et de trouver des accommodements au droit, dans la mesure appropriée, à l'étape où l'atteinte était envisagée; (2) que l'atteinte poursuit un objectif législatif impérieux et réel dans l'intérêt du public; (3) que l'intérêt du public est proportionnel à tout effet négatif sur l'intérêt autochtone. Ce cadre permet une conciliation rationnelle des droits ancestraux et des intérêts de tous les Canadiens.

[126] Bien qu'il ne soit pas nécessaire de trancher cette question pour les besoins du présent pourvoi, les tribunaux d'instance inférieure ont abordé la question de savoir si la Colombie-Britannique poursuivait un objectif impérieux et réel en délivrant dans ce cas des permis de coupe, et je vais formuler les observations suivantes au bénéfice de toutes les parties éventuelles. Je conviens avec les tribunaux d'instance inférieure qu'il n'existait aucun objectif impérieux et réel en l'espèce. Le juge de première instance a conclu que les deux objectifs invoqués par la province — les avantages économiques liés à l'exploitation forestière sur les terres visées par une revendication du titre et la nécessité d'empêcher la propagation d'une infestation du dendroctone du pin ponderosa — n'étaient pas étayés par la preuve. Après avoir examiné les témoignages d'experts dont il disposait, il a conclu que les sites de coupe proposés n'étaient pas rentables et qu'ils ne visaient pas à empêcher la propagation du dendroctone du pin ponderosa.

[127] Before the Court of Appeal, the Province no longer argued that the forestry activities were undertaken to combat the mountain pine beetle, but maintained the position that the trial judge's findings on economic viability were unreasonable, because unless logging was economically viable, it would not have taken place. The Court of Appeal rejected this argument on two grounds: (1) levels of logging must sometimes be maintained for a tenure holder to keep logging rights, even if logging is not economically viable; and (2) the focus is the economic value of logging compared to the detrimental effects it would have on Tsilhqot'in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder. In short, the Court of Appeal found no error in the trial judge's reasoning on this point. I would agree. Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

2. The Division of Powers

[128] The starting point, as noted, is that, as a general matter, the regulation of forestry within the Province falls under its power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. To put it in constitutional terms, regulation of forestry is in "pith and substance" a provincial matter. Thus, the *Forest Act* is consistent with the division of powers unless it is ousted by a competing federal power, even though it may incidentally affect matters under federal jurisdiction.

[129] "Indians, and Lands reserved for the Indians" falls under federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. As such, forestry on Aboriginal title land falls under both

[127] Devant la Cour d'appel, la province ne prétendait plus que les activités forestières visaient à combattre l'infestation du dendroctone du pin ponderosa, mais elle a continué de soutenir que les conclusions du juge de première instance sur la rentabilité étaient déraisonnables parce que, si les travaux d'exploitation forestière n'avaient pas été rentables, ils n'auraient pas été effectués. La Cour d'appel a rejeté cet argument pour deux raisons : (1) les titulaires d'une tenure forestière doivent parfois maintenir l'exploitation forestière pour conserver leurs droits, même si ce n'est pas rentable; (2) l'accent porte sur la valeur économique de l'exploitation forestière par rapport aux effets préjudiciables qu'elle aurait sur les droits ancestraux des Tsilhqot'in, et non sur la rentabilité de l'exploitation forestière uniquement du point de vue du titulaire de la tenure forestière. En bref, la Cour d'appel n'a relevé aucune erreur dans le raisonnement du juge de première instance sur ce point. Je suis d'accord. Accorder à des tiers le droit de récolter du bois sur les terres des Tsilhqot'in constitue une atteinte grave qui ne sera pas justifiée à la légère. Si le gouvernement souhaite à l'avenir accorder de tels droits de récolte, il devra établir qu'il poursuit par la récolte un objectif impérieux et réel, ce qui n'a pas été fait en l'espèce.

2. Le partage des compétences

[128] Comme je l'ai déjà indiqué, le point de départ est que, de façon générale, la réglementation de l'exploitation forestière dans la province relève du pouvoir que le par. 92(13) de la *Loi constitutionnelle de 1867* accorde à la province en matière de propriété et de droits civils. Sur le plan constitutionnel, la réglementation de l'exploitation forestière est, « de par son caractère véritable », une compétence provinciale. Ainsi, la *Forest Act* respecte le partage des compétences à moins qu'elle soit écartée par une compétence fédérale, même si elle peut, de manière incidente, toucher les matières relevant de la compétence fédérale.

[129] « Les Indiens et les terres réservées pour les Indiens » relèvent de la compétence fédérale en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*. Par conséquent, les ressources forestières

the provincial power over forestry in the province and the federal power over “Indians”. Thus, for constitutional purposes, forestry on Aboriginal title land possesses a double aspect, with both levels of government enjoying concurrent jurisdiction. Normally, such concurrent legislative power creates no conflicts — federal and provincial governments cooperate productively in many areas of double aspect such as, for example, insolvency and child custody. However, in cases where jurisdictional disputes arise, two doctrines exist to resolve them.

[130] First, the doctrine of paramourcy applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament’s power over “Indians”, the latter would trump the former. No such inconsistency is alleged in this case.

[131] Second, the doctrine of interjurisdictional immunity applies where laws enacted by one level of government impair the protected core of jurisdiction possessed by the other level of government. Interjurisdictional immunity is premised on the idea that since federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act, 1867* are exclusive, each level of government enjoys a basic unassailable core of power on which the other level may not intrude. In considering whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity, the court must ask two questions. First, does the provincial legislation touch on a protected core of federal power? And second, would application of the provincial law significantly trammel or impair the federal power? (*Quebec (Attorney General) v.*

qui se trouvent sur des terres visées par un titre ancestral relèvent à la fois de la compétence provinciale en matière de ressources forestières dans la province et de la compétence fédérale sur les « Indiens ». Ainsi, sur le plan constitutionnel, les ressources forestières qui se trouvent sur les terres visées par un titre ancestral comportent un double aspect puisque les deux paliers de gouvernement exercent sur elles une compétence concurrente. Habituellement, une telle compétence concurrente ne crée pas de conflit — les gouvernements fédéral et provinciaux collaborent de manière productive dans plusieurs domaines qui comportent un double aspect, par exemple l’insolvabilité et la garde des enfants. Cependant, lorsque se présente un conflit de compétence, deux doctrines permettent de le résoudre.

[130] Premièrement, la doctrine de la prépondérance s’applique en cas de conflit ou d’incompatibilité entre une loi provinciale et une loi fédérale, en ce sens qu’il est impossible de se conformer aux deux textes de loi ou que la réalisation de l’objet d’une loi fédérale est entravée. Dans un tel cas, la loi fédérale l’emporte. Par conséquent, si l’application d’une loi provinciale valide, comme la *Forest Act*, entre en conflit avec une loi fédérale valide adoptée en vertu du pouvoir du Parlement sur les « Indiens », la seconde aurait priorité sur la première. On n’a allégué l’existence d’aucune incompatibilité de la sorte en l’espèce.

[131] Deuxièmement, la doctrine de l’exclusivité des compétences s’applique lorsque des lois adoptées par un palier de gouvernement entravent le contenu essentiel protégé d’une compétence de l’autre palier de gouvernement. Cette doctrine repose sur la prémisse que, puisque les compétences fédérales et provinciales prévues aux art. 91 et 92 de la *Loi constitutionnelle de 1867* sont exclusives, chaque palier de gouvernement exerce sa compétence sur un contenu minimum essentiel et irréductible auquel l’autre palier de gouvernement ne peut toucher. Pour déterminer si une loi provinciale comme la *Forest Act* est écartée par l’application de la doctrine de l’exclusivité des compétences, le tribunal doit se poser deux questions. Premièrement, la loi provinciale touche-t-elle un aspect du contenu essentiel protégé de la compétence fédérale? Et

Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 S.C.R. 536).

[132] The trial judge held that interjurisdictional immunity rendered the provisions of the *Forest Act* inapplicable to land held under Aboriginal title because provisions authorizing management, acquisition, removal and sale of timber on such lands affect the core of the federal power over “Indians”. He placed considerable reliance on *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, in which this Court held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of the federal power over “Indians”. It follows, the trial judge reasoned, that, since Aboriginal rights are akin to treaty rights, the Province has no power to legislate with respect to forests on Aboriginal title land.

[133] The reasoning accepted by the trial judge is essentially as follows. Aboriginal rights fall at the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. Interjurisdictional immunity applies to matters at the core of s. 91(24). Therefore, provincial governments are constitutionally prohibited from legislating in a way that limits Aboriginal rights. This reasoning leads to a number of difficulties.

[134] The critical aspect of this reasoning is the proposition that Aboriginal rights fall at the core of federal regulatory jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

[135] The jurisprudence on whether s. 35 rights fall at the core of the federal power to legislate with respect to “Indians” under s. 91(24) is somewhat mixed. While no case has held that Aboriginal

deuxièmement, l’application de la loi provinciale pourrait-elle entraver de façon importante la compétence fédérale? (*Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536).

[132] Le juge de première instance a conclu que l’exclusivité des compétences rendait les dispositions de la *Forest Act* inapplicables aux terres détenues en vertu d’un titre ancestral parce que les dispositions autorisant la gestion, l’acquisition, l’enlèvement et la vente du bois sur ces terres touchent au contenu essentiel de la compétence fédérale sur les « Indiens ». Il a accordé une grande importance à l’arrêt *R. c. Morris*, 2006 CSC 59, [2006] 2 R.C.S. 915, dans lequel la Cour a conclu que seul le Parlement a le pouvoir de déroger aux droits reconnus dans un traité parce que les droits issus de traités se rattachent au contenu essentiel de la compétence fédérale sur les « Indiens ». Le juge de première instance a donc estimé que, comme les droits ancestraux s’apparentent aux droits issus de traités, la province n’a pas le pouvoir de légiférer relativement aux forêts qui se trouvent sur les terres visées par un titre ancestral.

[133] Le raisonnement adopté par le juge de première instance est essentiellement le suivant. Les droits ancestraux font partie du contenu essentiel de la compétence fédérale prévue au par. 91(24) de la *Loi constitutionnelle de 1867*. La doctrine de l’exclusivité des compétences s’applique aux matières qui font partie du contenu essentiel du par. 91(24). Par conséquent, la Constitution empêche les gouvernements provinciaux de légiférer d’une manière qui limite les droits ancestraux. Ce raisonnement suscite un certain nombre de difficultés.

[134] La proposition suivant laquelle les droits ancestraux font partie du contenu essentiel de la compétence fédérale en matière de réglementation prévue au par. 91(24) de la *Loi constitutionnelle de 1867* constitue l’aspect crucial de ce raisonnement.

[135] La jurisprudence est quelque peu ambiguë quant à savoir si les droits visés à l’art. 35 font partie du contenu essentiel du pouvoir fédéral de faire des lois relatives aux « Indiens » prévu au

rights, such as Aboriginal title to land, fall at the core of the federal power under s. 91(24), this has been stated in *obiter dicta*. However, this Court has also stated in *obiter dicta* that provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified pursuant to s. 35 of the *Constitution Act, 1982* — this latter proposition being inconsistent with the reasoning accepted by the trial judge.

[136] In *R. v. Marshall*, [1999] 3 S.C.R. 533, this Court suggested that interjurisdictional immunity did not apply where provincial legislation conflicted with treaty rights. Rather, the s. 35 *Sparrow* framework was the appropriate tool with which to resolve the conflict:

... the federal and provincial governments [have the authority] within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives ... [para. 24]

[137] More recently however, in *Morris*, this Court distinguished *Marshall* on the basis that the treaty right at issue in *Marshall* was a commercial right. The Court in *Morris* went on to hold that interjurisdictional immunity prohibited any provincial infringement of the non-commercial treaty right in that case, whether or not such an infringement could be justified under s. 35 of the *Constitution Act, 1982*.

[138] Beyond this, the jurisprudence does not directly address the relationship between interjurisdictional immunity and s. 35 of the *Constitution Act, 1982*. The ambiguous state of the jurisprudence has created unpredictability. It is clear that where valid *federal* law interferes with an Aboriginal or treaty right, the s. 35 *Sparrow* framework governs the law's applicability. It is less clear, however, that

par. 91(24). Aucune décision n'a conclu que les droits ancestraux, par exemple le titre ancestral sur des terres, font partie du contenu essentiel de la compétence fédérale prévue au par. 91(24), mais on l'indique dans des remarques incidentes. Toutefois, notre Cour a également indiqué dans des remarques incidentes que la Constitution permet aux gouvernements provinciaux de porter atteinte aux droits ancestraux lorsque ces atteintes sont justifiées au sens de l'art. 35 de la *Loi constitutionnelle de 1982* — et cette proposition va à l'encontre du raisonnement que le juge de première instance a accepté.

[136] Dans l'arrêt *R. c. Marshall*, [1999] 3 R.C.S. 533, notre Cour a supposé que l'exclusivité des compétences ne s'appliquait pas en cas de conflit entre une loi provinciale et des droits issus d'un traité. Le cadre d'analyse relatif à l'art. 35 énoncé dans *Sparrow* a plutôt été retenu comme le moyen permettant de résoudre le conflit :

... les gouvernements fédéral et provinciaux [ont le pouvoir] de réglementer, dans les limites de leurs champs respectifs de compétences législatives, l'exercice du droit issu du traité, sous réserve du fait que la Constitution exige que les restrictions imposées à l'exercice de ce droit soient justifiées pour des raisons de conservation ou pour d'autres objectifs d'intérêt public réels et impérieux ... [par. 24]

[137] Plus récemment cependant, dans l'arrêt *Morris*, notre Cour a fait une distinction avec l'arrêt *Marshall* puisque le droit issu du traité en question dans *Marshall* était un droit de nature commerciale. Dans *Morris*, la Cour a conclu que l'exclusivité des compétences interdisait à la province de porter atteinte au droit issu du traité — un droit de nature non commerciale dans cette affaire — indépendamment du fait que l'atteinte puisse ou non être justifiée en vertu de l'art. 35 de la *Loi constitutionnelle de 1982*.

[138] Cela mis à part, la jurisprudence ne traite pas directement du lien entre l'exclusivité des compétences et l'art. 35 de la *Loi constitutionnelle de 1982*. L'ambiguïté de la jurisprudence a engendré l'imprévisibilité. Il est clair que lorsqu'une loi *fédérale* valide porte atteinte à un droit ancestral ou issu d'un traité, le cadre d'analyse relatif à l'art. 35 énoncé dans *Sparrow* régit l'applicabilité de la loi. Il est

it is so where valid *provincial* law interferes with an Aboriginal or treaty right. The jurisprudence leaves the following questions unanswered. Does interjurisdictional immunity prevent provincial governments from ever limiting Aboriginal rights even if a particular infringement would be justified under the *Sparrow* framework? Is provincial interference with Aboriginal rights treated differently than treaty rights? And, are commercial Aboriginal rights treated differently than non-commercial Aboriginal rights? No case has addressed these questions explicitly, as I propose to do now.

[139] As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.

[140] What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*? The answer is none.

[141] The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.

toutefois moins évident que ce soit le cas lorsqu'une loi *provinciale* valide porte atteinte à un droit ancestral ou issu d'un traité. La jurisprudence laisse sans réponse les questions suivantes : L'exclusivité des compétences empêche-t-elle absolument les gouvernements provinciaux de limiter les droits ancestraux même si le cadre d'analyse énoncé dans *Sparrow* permettrait de justifier l'atteinte en question? Une atteinte à un droit ancestral de la part de la province est-elle traitée différemment d'une atteinte à un droit issu d'un traité? Et les droits ancestraux de nature commerciale sont-ils traités différemment des droits ancestraux de nature non commerciale? Comme aucune décision n'a examiné explicitement ces questions, je propose de le faire maintenant.

[139] J'ai déjà indiqué que l'art. 35 de la *Loi constitutionnelle de 1982* impose des limites quant à la façon dont les gouvernements, tant fédéral que provinciaux, peuvent traiter les terres visées par un titre ancestral. Ces gouvernements ne peuvent faire des lois qui entraînent une diminution appréciable d'un droit ancestral ou issu d'un traité à moins que l'atteinte soit justifiée dans l'intérêt public général et qu'elle soit compatible avec l'obligation fiduciaire qu'a la Couronne envers le groupe autochtone. L'objectif consiste à protéger les droits ancestraux et issus d'un traité tout en permettant la conciliation des intérêts autochtones avec ceux de la société en général.

[140] Alors, à quoi peuvent encore servir l'application de la doctrine de l'exclusivité des compétences et la notion que les droits ancestraux font partie du contenu essentiel du pouvoir fédéral sur les « Indiens » prévu au par. 91(24) de la *Loi constitutionnelle de 1867*? Il faut répondre comme suit : elles ne servent à rien.

[141] La doctrine de l'exclusivité des compétences vise à faire en sorte que les deux niveaux de gouvernement soient en mesure de fonctionner sans que l'un empiète sur le contenu essentiel des domaines de compétence exclusive de l'autre. Cet objectif n'est pas en cause dans les affaires telles que celle qui nous occupe. Les droits ancestraux constituent une limite à l'exercice des compétences tant fédérales que provinciales.

[142] The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I *Charter* rights, are held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government's powers.

[143] An analogy with *Charter* jurisprudence may illustrate the point. Parliament enjoys exclusive jurisdiction over criminal law. However, its criminal law power is circumscribed by s. 11 of the *Charter* which guarantees the right to a fair criminal process. Just as Aboriginal rights are fundamental to Aboriginal law, the right to a fair criminal process is fundamental to criminal law. But we do not say that the right to a fair criminal process under s. 11 falls at the core of Parliament's criminal law jurisdiction. Rather, it is a *limit* on Parliament's criminal law jurisdiction. If s. 11 rights were held to be at the core of Parliament's criminal law jurisdiction such that interjurisdictional immunity applied, the result would be absurd: provincial breaches of s. 11 rights would be judged on a different standard than federal breaches, with only the latter capable of being saved under s. 1 of the *Charter*. This same absurdity would result if interjurisdictional immunity were applied to Aboriginal rights.

[142] Tout comme le fait la *Charte canadienne des droits et libertés*, la protection des droits ancestraux garantie à l'art. 35 de la *Loi constitutionnelle de 1982* vient limiter l'exercice des pouvoirs législatifs fédéraux et provinciaux. La *Charte* constitue la partie I de la *Loi constitutionnelle de 1982*, et la protection des droits ancestraux constitue la partie II. Les parties I et II sont apparentées et limitent toutes deux l'exercice des pouvoirs gouvernementaux, qu'ils soient fédéraux ou provinciaux. Les droits garantis à la partie II, tout comme les droits garantis par la *Charte* à la partie I, sont *opposables* au gouvernement — ils ont pour effet d'*interdire* certains types de réglementation que les gouvernements pourraient autrement imposer. Ces limites n'ont rien à voir avec la question de savoir si une activité fait partie du contenu essentiel des pouvoirs du gouvernement fédéral.

[143] Une analogie avec la jurisprudence relative à la *Charte* peut illustrer ce point. Le Parlement a une compétence exclusive en matière de droit criminel. Cependant, l'exercice de son pouvoir en droit criminel est circonscrit par l'art. 11 de la *Charte* qui garantit le droit à l'équité du processus criminel. Tout comme les droits ancestraux sont un aspect fondamental du droit autochtone, le droit à l'équité du processus criminel est un aspect fondamental du droit criminel. Mais nous ne disons pas que le droit à l'équité du processus criminel prévu à l'art. 11 fait partie du contenu essentiel de la compétence du Parlement en matière de droit criminel. Il s'agit plutôt d'une *limite* à la compétence du Parlement en matière de droit criminel. Si l'on considérait que les droits garantis à l'art. 11 font partie du contenu essentiel de la compétence du Parlement en matière de droit criminel de sorte que l'exclusivité des compétences s'applique, on aboutirait à un résultat absurde : les violations, par les provinces, des droits garantis à l'art. 11 seraient jugées suivant une norme différente de celle applicable aux violations par le gouvernement fédéral, et seules ces dernières seraient susceptibles d'être sauvegardées en vertu de l'article premier de la *Charte*. L'application de l'exclusivité des compétences aux droits ancestraux aboutirait au même résultat absurde.

[144] The doctrine of interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers; it does so by carving out areas of exclusive jurisdiction for each level of government. But the problem in cases such as this is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province.

[145] Moreover, application of interjurisdictional immunity in this area would create serious practical difficulties.

[146] First, application of interjurisdictional immunity would result in two different tests for assessing the constitutionality of provincial legislation affecting Aboriginal rights. Pursuant to *Sparrow*, provincial regulation is unconstitutional if it results in a meaningful diminution of an Aboriginal right that cannot be justified pursuant to s. 35 of the *Constitution Act, 1982*. Pursuant to interjurisdictional immunity, provincial regulation would be unconstitutional if it impaired an Aboriginal right, whether or not such limitation was reasonable or justifiable. The result would be dueling tests directed at answering the same question: How far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?

[147] Second, in this case, applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all. This might make it difficult, if not impossible, to deal effectively with problems such as

[144] La doctrine de l'exclusivité des compétences vise à régler les conflits entre les compétences provinciales et les compétences fédérales; elle y parvient en créant des domaines de compétence exclusive pour chaque palier de gouvernement. Cependant, le problème dans des cas comme celui-ci ne résulte pas d'une confrontation entre le pouvoir des provinces et ceux du gouvernement fédéral mais plutôt d'une tension entre le droit des titulaires du titre ancestral d'utiliser leurs terres comme ils l'entendent et la volonté de la province de réglementer ces terres au même titre que toutes les autres terres dans la province.

[145] En outre, l'application de la doctrine de l'exclusivité des compétences dans ce domaine créerait de sérieuses difficultés d'ordre pratique.

[146] Premièrement, l'application de l'exclusivité des compétences aurait pour effet d'établir deux critères différents pour l'appréciation de la constitutionnalité d'une loi provinciale touchant aux droits ancestraux. Suivant l'arrêt *Sparrow*, la réglementation provinciale est inconstitutionnelle si elle entraîne une diminution appréciable d'un droit ancestral qui ne saurait être justifiée au regard de l'art. 35 de la *Loi constitutionnelle de 1982*. Suivant la doctrine de l'exclusivité des compétences, la réglementation provinciale serait inconstitutionnelle si elle portait atteinte à un droit ancestral, peu importe que l'atteinte soit raisonnable ou justifiable. Il y aurait donc deux critères contradictoires censés répondre à la même question : Jusqu'où les gouvernements provinciaux peuvent-ils aller dans la réglementation de l'exercice des droits ancestraux protégés par l'art. 35?

[147] Deuxièmement, en l'espèce, appliquer la doctrine de l'exclusivité des compétences dans le but d'exclure la réglementation provinciale des forêts se trouvant sur les terres visées par un titre ancestral entraînerait des résultats inégaux et indésirables et pourrait créer des vides législatifs. Il en résulterait une réglementation morcelée en matière de ressources forestières — certaines régions de la province seraient assujetties aux lois provinciales et d'autres régions seraient réglementées par les lois

pests and fires, a situation desired by neither level of government.

[148] Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. In the case of forests on Aboriginal title land, courts would have to scrutinize provincial forestry legislation to ensure that it did not impair the core of federal jurisdiction over “Indians” and would also have to scrutinize any federal legislation to ensure that it did not impair the core of the province’s power to manage the forests. It would be no answer that, as in this case, both levels of government agree that the laws at issue should remain in force.

[149] This Court has recently stressed the limits of interjurisdictional immunity. “[C]onstitutional doctrine must facilitate, not undermine what this Court has called ‘co-operative federalism’” and as such “a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government” (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 24 and 37 (emphasis deleted)). Because of this, interjurisdictional immunity is of “limited application” and should be applied “with restraint”

fédérales ou ne seraient pas réglementées du tout. Cela pourrait rendre difficile, voire impossible, la résolution efficace de problèmes comme les ravageurs ou le feu : une situation souhaitée par ni l’un ni l’autre des paliers de gouvernement.

[148] La doctrine de l’exclusivité des compétences — fondée sur l’idée que les contextes réglementaires peuvent être divisés en compartiments étanches — va souvent à l’encontre de la réalité moderne. Notre société devient plus complexe, et pour être efficace, la réglementation exige de plus en plus la coopération des régimes fédéral et provincial interreliés. Les deux paliers de gouvernement possèdent des outils, compétences et expertises différents, et les doctrines plus souples du double aspect et de la prépondérance fédérale sont sensibles à cette réalité : suivant ces doctrines, on encourage la coopération intergouvernementale jusqu’au moment où survient un conflit qu’il faut régler. Par contre, la doctrine de l’exclusivité des compétences peut contrecarrer une telle coopération. Dans le cas des forêts qui se trouvent sur les terres visées par un titre ancestral, les tribunaux devraient examiner la loi provinciale sur les ressources forestières afin de s’assurer qu’elle ne porte pas atteinte au contenu essentiel de la compétence fédérale sur les « Indiens » et devraient également examiner la loi fédérale afin de s’assurer qu’elle ne porte pas atteinte au contenu essentiel du pouvoir provincial de gérer les forêts. Suggérer, comme en l’espèce, que les deux paliers de gouvernement conviennent que les lois en question devraient rester en vigueur ne règle pas la question.

[149] Notre Cour a récemment souligné les limites de l’exclusivité des compétences. Les doctrines constitutionnelles « doivent faciliter et non miner ce que notre Cour a appelé un “fédéralisme coopératif” » et, par conséquent, « les tribunaux privilégient, dans la mesure du possible, l’application régulière des lois édictées par les deux ordres de gouvernement » (*Banque canadienne de l’Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 24 et 37 (italiques dans l’original omis)). Pour cette raison, la doctrine de l’exclusivité des compétences

(paras. 67 and 77). These propositions have been confirmed in more recent decisions: *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

[150] *Morris*, on which the trial judge relied, was decided prior to this Court's articulation of the modern approach to interjurisdictional immunity in *Canadian Western Bank* and *Canadian Owners and Pilots Association*, and so is of limited precedential value on this subject as a result (see *Marine Services*, at para. 64). To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

[151] For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves

est d'une « application restreinte » et elle devrait être appliquée « avec retenue » (par. 67 et 77). Ces principes ont été confirmés dans des arrêts plus récents : *Marine Services International Ltd. c. Ryan (Succession)*, 2013 CSC 44, [2013] 3 R.C.S. 53; *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134.

[150] L'arrêt *Morris*, sur lequel le juge de première instance s'est appuyé, a été rendu avant que la Cour formule une approche moderne de l'application de la doctrine de l'exclusivité des compétences dans les arrêts *Banque canadienne de l'Ouest* et *Canadian Owners and Pilots Association* et, par conséquent, il confère peu de valeur jurisprudentielle sur ce sujet (voir *Marine Services*, par. 64). Dans la mesure où l'arrêt *Morris* appuie la proposition voulant qu'il soit catégoriquement interdit aux gouvernements provinciaux de réglementer l'exercice des droits ancestraux, il ne devrait plus être suivi. J'estime que, conformément aux commentaires formulés dans les arrêts *Sparrow* et *Delgamuukw*, la réglementation provinciale d'application générale s'appliquera à l'exercice des droits ancestraux, notamment au titre ancestral sur des terres, sous réserve de l'application du cadre d'analyse relatif à l'art. 35 qui permet de justifier une atteinte. Ce critère soigneusement conçu vise à concilier la loi d'application générale et les droits ancestraux avec la délicatesse qu'exige l'art. 35 de la *Loi constitutionnelle de 1982*, et il est plus équitable et pratique du point de vue de la politique générale que l'inapplicabilité générale qu'impose la doctrine de l'exclusivité des compétences.

[151] Pour ces raisons, je conclus que la doctrine de l'exclusivité des compétences ne devrait pas être appliquée dans les cas où les terres sont détenues en vertu du titre ancestral. C'est plutôt la démarche axée sur le critère fondé sur l'art. 35, énoncée dans *Sparrow*, qui devrait être retenue. Les lois provinciales d'application générale, y compris la *Forest Act*, devraient s'appliquer à moins qu'elles soient déraisonnables ou indûment rigoureuses ou qu'elles refusent aux titulaires du titre le recours à leur moyen préféré d'exercer leurs droits et

the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982*.

[152] The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government — an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this — but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

IX. Conclusion

[153] I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.

que ces restrictions ne puissent pas être justifiées conformément au cadre d'analyse de la justification décrit précédemment. Il en résulte un équilibre qui préserve le droit ancestral tout en assurant une réglementation efficace des forêts par la province, comme l'exige l'art. 35 de la *Loi constitutionnelle de 1982*.

[152] Le cadre d'analyse relatif à l'art. 35 s'applique à l'exercice des compétences tant provinciales que fédérales : *Sparrow*; *Delgamuukw*. Par conséquent, il offre un moyen exhaustif et rationnel de circonscrire les lois provinciales touchant les terres visées par un titre ancestral dans les limites fixées par la Constitution. La question qui se pose dans des cas comme celui-ci ne porte pas, à la base, sur le conflit entre les paliers fédéral et provincial de gouvernement — les doctrines de la prépondérance fédérale et de l'exclusivité des compétences permettent de traiter cette question selon que l'indique la jurisprudence — il s'agit plutôt de savoir dans quelle mesure le gouvernement provincial peut réglementer des terres visées par un titre ancestral ou faisant l'objet d'une revendication du titre ancestral. L'article 35 de la *Loi constitutionnelle de 1982* constitue le cadre approprié à l'intérieur duquel doit être considérée une telle question puisqu'il oblige directement le gouvernement à respecter ces droits ou à démontrer que l'atteinte se rapporte à la poursuite d'un objectif impérieux et réel et qu'elle est compatible avec son obligation fiduciaire envers les groupes autochtones.

IX. Conclusion

[153] Je suis d'avis d'accueillir le pourvoi et de rendre un jugement déclarant l'existence d'un titre ancestral sur la région en question, comme l'ont demandé les Tsilhqot'in. Je déclare également que la Colombie-Britannique a manqué à l'obligation de consultation qu'elle avait envers les Tsilhqot'in en raison du plan d'aménagement du territoire qu'elle a établi et des autorisations d'exploitation forestière qu'elle a accordées.

Appeal allowed.

Solicitors for the appellant: Rosenberg & Rosenberg, Vancouver; Woodward & Company, Victoria.

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Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

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

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Solicitors for the intervener the Te'mexw Treaty Association: Janes Freedman Kyle Law Corporation, Vancouver.

Solicitors for the interveners the Business Council of British Columbia, the Council of Forest Industries, the Coast Forest Products Association, the Mining Association of British Columbia and the Association for Mineral Exploration British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Arvay Finlay, Vancouver.

Solicitors for the interveners the Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and

Pourvoi accueilli.

Procureurs de l'appelant : Rosenberg & Rosenberg, Vancouver; Woodward & Company, Victoria.

Procureurs des intimés Sa Majesté la Reine du chef de la province de la Colombie-Britannique et le chef régional de la région de Cariboo Forest : Borden Ladner Gervais, Vancouver.

Procureur de l'intimé le procureur général du Canada : Procureur général du Canada, Saskatoon.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Procureur de l'intervenant le procureur général du Manitoba : Procureur général du Manitoba, Winnipeg.

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

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Solicitors for the intervener the Indigenous Bar Association in Canada: Nahwegahbow, Corbiere Genoodmagejig, Rama, Ontario; Gowling Lafleur Henderson, Ottawa.

Solicitors for the intervener the First Nations Summit: Mandell Pinder, Vancouver; Morgan & Associates, West Vancouver.

Solicitors for the interveners the Tsawout First Nation, the Tsartlip First Nation, the Snuneymuxw First Nation and the Kwakiutl First Nation: Devlin Gailus, Victoria.

Solicitors for the intervener the Coalition of the Union of British Columbia Indian Chiefs, the Okanagan Nation Alliance and the Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Spltasin Indian Bands: Mandell Pinder, Vancouver; University of British Columbia, Vancouver; Thompson Rivers University, Kamloops.

Solicitors for the interveners Amnesty International and the Canadian Friends Service Committee: Stockwoods, Toronto; Paul Joffe, Saint-Lambert, Quebec.

Solicitors for the intervener the Gitxaala Nation: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the interveners the Chilko Resorts and Community Association and the Council of Canadians: Ratcliff & Company, North Vancouver.

de tous les Gitanyow, et le Bureau des chefs Wet'suwet'en : Peter Grant & Associates, Vancouver.

Procureur de l'intervenant le Groupe du traité Hul'qumi'num : Robert B. Morales, Ladysmith, Colombie-Britannique.

Procureurs de l'intervenant le Conseil de la Nation haïda : White Raven Law Corporation, Surrey, Colombie-Britannique.

Procureurs de l'intervenante l'Association du barreau autochtone au Canada : Nahwegahbow, Corbiere Genoodmagejig, Rama, Ontario; Gowling Lafleur Henderson, Ottawa.

Procureurs de l'intervenant le Sommet des Premières Nations : Mandell Pinder, Vancouver; Morgan & Associates, West Vancouver.

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Procureurs de l'intervenante la Coalition de l'Union des chefs indiens de la Colombie-Britannique, l'Alliance des Nations de l'Okanagan, le Conseil tribal de la Nation Shuswap et leurs communautés membres, les bandes indiennes d'Okanagan, d'Adams Lake, de Neskonlith et de Spltasin : Mandell Pinder, Vancouver; University of British Columbia, Vancouver; Thompson Rivers University, Kamloops.

Procureurs des intervenants Amnistie internationale et Secours Quaker canadien : Stockwoods, Toronto; Paul Joffe, Saint-Lambert, Québec.

Procureurs de l'intervenante la Nation Gitxaala : Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs des intervenants Chilko Resorts and Community Association et le Conseil des Canadiens : Ratcliff & Company, North Vancouver.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *William v. British Columbia*,
2012 BCCA 285

Date: 20120627
No.: CA035617; CA035618; CA035620

Docket: CA035617

Between:

**Roger William, on his own behalf and on behalf of all
other members of the Xeni Gwet'in First Nations Government
and on behalf of all other members of the Tsilhqot'in Nation**

Respondent
(Plaintiff)

And

**Her Majesty the Queen in Right of the Province of British Columbia
and the Regional Manager of the Cariboo Forest Region**

Appellants
(Defendants)

And

The Attorney General of Canada

Respondent
(Defendant)

And

**B.C. Wildlife Federation and B.C. Seafood Alliance,
Treaty 8 First Nations, Chief Wilson and Chief Jules,
First Nations Summit and Te'mexw Treaty Association**

Intervenors

Docket: CA035618

Between:

**Roger William, on his own behalf and on behalf of all
other members of the Xeni Gwet'in First Nations Government
and on behalf of all other members of the Tsilhqot'in Nation**

Respondent
(Plaintiff)

And

The Attorney General of Canada

Appellant
(Defendant)

And

**Her Majesty the Queen in Right of the Province of British Columbia
and the Regional Manager of the Cariboo Forest Region**

Respondents
(Defendants)

And

**B.C. Wildlife Federation and B.C. Seafood Alliance,
Chief Wilson and Chief Jules, First Nations Summit
and Te'mexw Treaty Association**

Intervenors

Docket: CA035620

Between:

**Roger William, on his own behalf and on behalf of all
other members of the Xeni Gwet'in First Nations Government
and on behalf of all other members of the Tsilhqot'in Nation**

Appellant
(Plaintiff)

And

**Her Majesty the Queen in Right of the Province of British Columbia
and the Regional Manager of the Cariboo Forest Region and
The Attorney General of Canada**

Respondents
(Defendants)

And

**B.C. Wildlife Federation and B.C. Seafood Alliance,
Chief Wilson and Chief Jules, First Nations Summit
and Te'mexw Treaty Association**

Intervenors

Before: The Honourable Madam Justice Levine
 The Honourable Mr. Justice Tysoe
 The Honourable Mr. Justice Groberman

On Appeal from the Supreme Court of British Columbia, November 20, 2007
(*Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700,
Victoria Registry No. 90-0913)

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Counsel for Chief Wilson and Chief Jules:	M.L. Mandell, QC A.A. Walkem C.Y. Sharvit
Counsel for the First Nations Summit:	A.C. Pape J. Teillet R.B. Salter J. Copeland M.A. Louie
Counsel for Te'mexw Treaty Association :	R.J.M. Janes K. Brooks
Place and Date of Hearing:	Vancouver, British Columbia November 15-19 and 22, 2010
Place and Date of Judgment:	Vancouver, British Columbia June 27, 2012

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Madam Justice Levine

The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] These appeals concern the Aboriginal rights, including Aboriginal title, of the Xeni Gwet'in and the Tsilhqot'in First Nation in an area comprising approximately 438,000 ha. (4,380 km²) in the Chilcotin region of the west central interior of British Columbia.

I. The Plaintiff and the Claim Area

[2] Roger William, the plaintiff, is the former chief of the Xeni Gwet'in First Nations Government (formerly known as the Nemiah Valley Indian Band), a band recognized under the *Indian Act*, R.S.C. 1985, c. I-5. The Band has approximately 400 members, about half of whom live in the area that is the subject of this litigation. Of that number, almost all live on reserves.

[3] The Xeni Gwet'in is part of the Tsilhqot'in Nation. The Nation is made up of indigenous people who share a common culture and history and who speak the same proto-Athapaskan language (Tsilhqot'in). In addition to the Xeni Gwet'in, there are five other Tsilhqot'in bands: the Tl'etinqox-t'in Government Office (formerly the Anaham Band), the ?Esdilagh First Nation (formerly the Alexandria Band), the Stone Indian Band (also known as the Yunesit'in), the Alexis Creek Indian Band (also known as the Tsi Del Del or Redstone), and the Toosey Indian Band (also known as the Tl'esqox). In addition, some members of the Ulkatcho First Nation are Tsilhqot'in, though the majority of that band are Dakelh (Carrier). There are approximately 3,000 Tsilhqot'in people in total.

[4] The Tsilhqot'in consider their traditional territory to include a vast tract of the west central interior of British Columbia extending west from the portion of the Fraser River lying between Lillooet and Quesnel across the Chilcotin plateau to the Coast Mountain Range. The land is regarded by the Tsilhqot'in as belonging to the entire Nation. In the modern political structure of the Tsilhqot'in Nation, the Xeni Gwet'in are the caretakers of a portion of the territory lying in the southwest corner of the traditional territory, including the land that is in issue in this litigation.

[5] As much of the evidence referred to various landmarks by their Tsilhqot'in descriptions, and as the trial judge used those names in his reasons, I will, for the most part, follow that practice, providing the common name for the landmark, as well, when it is first mentioned.

[6] This litigation concerns Aboriginal title and rights in two areas (together, the "Claim Area"), described as Tachelach'ed (the Brittany Triangle) and the "Trapline Territory", excluding those parts of the areas that are currently Indian reserves. The Claim Area comprises only about five percent of what the Tsilhqot'in regard as their traditional territory.

[7] Tachelach'ed is a roughly triangular tract of land comprising 141,769 ha. It is bounded on the east by the Dasiqox (Taseko River) and on the west by the Tsilhqox (Chilko River) and the eastern shore of Tsilhqox Biny (Chilko Lake). The southern boundary of Tachelach'ed runs along the Nemiah Valley Road from the point where it crosses the Dasiqox at Davidson Bridge west to Xeni Biny (Konni Lake), then along the southern shore of Xeni Biny to Xeni Yeqox (Nemiah Creek), and along Xeni Yeqox to the point where it flows into Tsilhqox Biny.

[8] The Trapline Territory is defined as the area within Trapline Licence #0504T003 issued by British Columbia to the Xeni Gwet'in. It consists of two discontinuous tracts of land. The western portion of the Trapline Territory borders upon (and, to some extent, overlaps) Tachelach'ed, extending to the south and west of it, encompassing lands that surround Tsilhqox Biny. The smaller eastern portion of the Trapline Territory includes lands on the east side of nearby Dasiqox Biny (Taseko Lake). Maps 2 and 3 in Appendix A to the trial judge's reasons show the boundaries of Tachelach'ed and of the Trapline Territory.

[9] The Claim Area is located in a remote part of the Chilcotin and is mostly made up of undeveloped land. Ts'il?os (sometimes spelled "Ts'il-os") Provincial Park covers 233,000 ha. (39%) of the Claim Area. The smaller Nuntsi Provincial Park covers a further 20,570 ha. (3%) of the Claim Area.

II. Background to the Litigation

[10] This litigation was precipitated by proposed forestry activities in both Tachelach'ed and the Trapline Territory. Both areas are located in the Williams Lake Timber Supply Area within the Cariboo Forest Region.

[11] In 1983, the provincial Crown granted Carrier Lumber Ltd. a forest licence giving it rights to conduct logging activities within the Trapline Territory. The granting of a forest licence did not, itself, give Carrier Lumber a right to remove specific timber, but did assign rights to the company in accordance with the provisions of the *Forest Act* (now R.S.B.C. 1996, c. 157). In 1989, Carrier Lumber submitted a Forest Development Plan that proposed logging within the Trapline Territory. The Crown approved the plan and granted the company a cutting permit in respect of cut blocks in the Trapline Territory.

[12] The granting of cutting permits infuriated many members of the Xeni Gwet'in. As the trial judge found at para. 25:

Tsilhqot'in people were frustrated and angry. What they considered "their wood" was leaving the community without any economic benefit to Tsilhqot'in people. Over 40 families were on the Xeni Gwet'in housing wait list. The wait for housing was upwards to 25 years on Tsilhqot'in Reserves. There was also high unemployment. Forestry provided very few jobs for Tsilhqot'in people and the profits from harvesting the wood did not flow to their communities.

[13] In response to the proposed logging, the Xeni Gwet'in issued a declaration on August 23, 1989 covering an area that included the Claim Area. The declaration included the following provisions:

- a) There shall be no commercial logging. Only local cutting of trees for our own needs i.e., firewood, housing, fencing, native uses, etc.
- b) There shall be no mining or mining explorations.
- c) There shall be no commercial road building
- d) All-terrain vehicles and skidoos shall only be permitted for trapping purposes.
- e) There shall be no flooding or dam construction on Chilko, Taseko, and Tatlayoko lakes.
- f) This is the spiritual and economic homeland of our people. We will continue in perpetuity:

- i. To have and exercise our traditional rights of hunting, fishing, trapping, gathering, and natural resources.
 - ii. To carry on our traditional ranching way of life.
 - iii. To practice our traditional native medicine, religion, sacred, and spiritual ways.
- g) That we are prepared to share our Nemiah Aboriginal Wilderness Preserve with non-natives in the following ways:
 - i. With our permission visitors may come and view and photograph our beautiful land.
 - ii. We will issue permits, subject to our conservation rules, for hunting and fishing within our Preserve.
 - iii. The respectful use of our Preserve by canoeists, hikers, light campers, and other visitors is encouraged, subject to our system of permits.
- h) We are prepared to enforce and defend our Aboriginal rights in any way we are able.

[14] In December 1989, the Nemiah Valley Indian Band (as the Xeni Gwet'in First Nations Government was then known) commenced an action to stop the threat of logging within the Trapline Territory. That litigation was discontinued and replaced by another action (the "Trapline Territory Action") a few months later. In that action, the Band claimed Aboriginal trapping rights and sought to enjoin logging within the Trapline Territory.

[15] The immediate threat of logging in the Trapline Territory was resolved through consent orders in the Trapline Territory Action. The orders prohibited logging in the Trapline Territory (and activities in preparation for logging) pending the trial of the action.

[16] After the injunction was granted, forest companies turned their attention to the possibility of logging within Tachelach'ed. In order to access the area, they needed to upgrade a bridge across the Tsilhqox north of Tsilhqox Biny at a place known as "Henry's Crossing".

[17] On May 7, 1992, members of the Tsilhqot'in Nation established a blockade to prevent work on the bridge at Henry's Crossing. This led to a promise by the then-

premier of the province that there would be no further logging without the consent of the Xeni Gwet'in.

[18] In 1994, Ts'il'os Provincial Park was established over a large part of the Claim Area. While the Ministry of Forests and the Xeni Gwet'in continued to engage in discussions concerning logging elsewhere in Tachelach'ed, the talks reached an impasse. The main sticking point was control of forestry activities. The Xeni Gwet'in wished to have a right of first refusal on any logging that took place, while Ministry officials considered that they did not have jurisdiction to grant such a right.

[19] On June 25, 1998, the Band amended the claim in the Trapline Territory Action to include claims for Aboriginal title on behalf of the Tsilhqot'in Nation, damages for infringement of Aboriginal rights and title, compensation for breach of fiduciary duty, declarations concerning the issuance and use of certain forest licences, and injunctions restraining the provincial Crown from issuing cutting permits.

[20] On December 18, 1998, in response to proposed logging in Tachelach'ed, the Band commenced a separate action against the provincial Crown and others, seeking declarations similar to those sought in the Trapline Territory Action.

[21] In November 1999, Vickers J., sitting as a case management judge, made an order substituting the current plaintiff for the Band in both actions.

[22] In 2000, the Attorney General of Canada was added as a defendant in both actions. On November 27, 2001, the Supreme Court of British Columbia made an advance costs order requiring Canada and British Columbia to pay the plaintiff's costs of the litigation in both actions on an interim basis and in any event of the cause (2001 BCSC 1641). This Court dismissed an appeal from that order (2002 BCCA 434). The Supreme Court of Canada granted leave to appeal ([2002] S.C.C.A. No. 295), but remanded the case back to the trial court to be dealt with in accordance with its judgment in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371. The trial judge, on reconsidering

the matter, affirmed his original order (2004 BCSC 610). The costs order has ensured that the plaintiff has had the necessary resources to advance this difficult and expensive litigation.

[23] The two actions were consolidated into the present proceeding by consent. There were several amendments to the statement of claim along the way and the claims against the various forest companies were discontinued or dismissed.

[24] The trial of the action commenced in November 2002 and occupied 339 court days over a span of nearly five years. Twenty-four Tsilhqot'in witnesses testified and five additional Tsilhqot'in witnesses provided evidence by affidavit. The parties adduced expert evidence from a wide range of disciplines including anthropology, archeology, cartography and biology. A very large number of historical documents were entered as exhibits.

[25] Before turning to a more detailed discussion of the reasons for judgment, I would like to say a few words about the trial and the trial judge.

[26] This was very complex and difficult litigation. A great deal was at stake, and the parties were conscious of the fact that this case might set important precedents for Aboriginal title and rights claims. The funding order made by the case management judge meant that the opportunity existed for a very complete record to be constructed.

[27] The trial was a massive undertaking for the parties, their counsel, and for the trial judge. Mr. Justice Vickers was the presiding judge. He retired after giving the judgment, and, sadly, passed away shortly thereafter. One is struck, in reading the transcript of the proceedings, by the incredible patience and conscientiousness shown by the trial judge. His judgment is organized and comprehensive. While it extends to 458 pages, it is neither verbose nor tedious. It is a tribute to Vickers J.'s diligence and intellect that this case presents a suitable opportunity for this Court to address complex issues that go to the heart of Aboriginal rights and title. Mr. Justice

Vickers hoped that his judgment would assist the parties to settle their disputes without further litigation. In the final paragraph of his judgment, he said:

[1382] Reconciliation is a process. It is in the interests of all Canadians that we begin to engage in this process at the earliest possible date so that an honourable settlement with Tsilhqot'in people can be achieved.

[28] The parties attempted to reach a settlement following the trial, but ultimately found it necessary to proceed with the appeal (see *William v. British Columbia* (HMTQ), 2009 BCCA 83).

[29] Neither the fact that the parties were unable to resolve this matter short of appeal nor the fact that this Court differs from him on certain issues of law should be seen as diminishing Vickers J.'s achievements in this matter. That the parties do not take issue with any significant findings of fact made by the trial judge is a tribute to his thorough understanding and careful analysis of the evidence.

III. The Tsilhqot'in Nation

[30] The trial judge reviewed a great deal of ethnographic and historical evidence. He noted evidence that the Tsilhqot'in displaced Salish people in the Claim Area by about the middle of the 17th century, and accepted that the transition of the area from Salish to Tsilhqot'in territory was complete well before the first contact with European peoples. He concluded that the Tsilhqot'in have been present in the Claim Area for more than 250 years. This was, of course, before Captain George Vancouver stepped ashore and claimed all of the land that would later become British Columbia on behalf of the Crown in June 1792.

[31] It is not certain when the first European explorer met the Tsilhqot'in, but it is quite possible that it was in June 1808, when Simon Fraser met with some members of the Tsilhqot'in Nation (who were on horseback). On his return through the area the following month, he wrote that the Tsilhqot'in had not seen a white man before. The Tsilhqot'in traded with coastal Aboriginal groups, and it is apparent that European goods reached them before they encountered European explorers.

[32] The Tsilhqot'in continued to occupy their traditional territory (including the Claim Area) in 1846, when the Oregon Treaty put an end to American claims to what is now British Columbia. That date has, in cases such as *Calder v. Attorney-General of B.C.*, [1973] S.C.R. 313, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, been taken to be a significant one for the establishment of Aboriginal title, on the basis that it represents a recognition of Crown sovereignty as a matter of international law. The trial judge analyzed the matter and accepted, at para. 601, that the date the treaty was entered into should be treated as the crystallization date for a claim to Aboriginal title. While it is curious that a treaty that had no practical impact on relations between the Crown and the Tsilhqot'in can be seen as the defining moment for a claim of Aboriginal title, the parties do not, in this Court, challenge the determination to that effect, and the determination is in accordance with earlier case law.

[33] The trial judge had the benefit of historical evidence concerning Tsilhqot'in occupation of the territory from the time period immediately prior to 1846. The Hudson's Bay Company operated a trading post at Fort Chilcotin (about 15 km east of the northern boundary of the Claim Area) in 1829 and from 1831-1843 (though its detailed records only survive from the years 1837 to 1840, with most of the 1838 journals also missing). As well, Father Giovanni Nobili, a Jesuit Priest, journeyed through Tsilhqot'in territory and into the Claim Area in 1845. His journals confirm the presence of Tsilhqot'in people in the area at that time, and describe hunting, trapping and fishing activities and the presence of structures including lodges and bridges.

[34] The historical, ethnographic and archeological evidence depicts the Tsilhqot'in as a loosely-organized semi-nomadic group. The trial judge reviewed the evidence in great detail, and his findings are not challenged. In terms of a general overview, I reproduce the trial judge's summary of the socio-political structure of the Tsilhqot'in from paras. 356-363 of his judgment:

[356] Tsilhqot'in groups are less stratified and more egalitarian than many neighbouring First Nations. This may have been partly a result of the mobility

of Tsilhqot'in groups, which made both accumulation of wealth and rigid organizational structures unwieldy.

[357] Traditionally, no one leader of all Tsilhqot'in speakers was recognized. The enforcement of conformity to behavioural norms – to the extent that it occurred at all – occurred at the family or encampment level rather than at the level of band or nation. Prior to contact, as [anthropologist Robert] Lane wrote in his 1981 article ["Chilcotin", in Volume VI of the *Handbook of North American Indians* (Washington: Smithsonian Institution, 1981)] at p. 408:

Individuals had a high degree of autonomy. In theory, beyond the confines of the family, no one could force anyone else to do anything.

[358] Lane also discussed the social political structure of Tsilhqot'in people in [his unpublished thesis entitled *Cultural Relations of the Chilcotin Indians of West Central British Columbia* (Ph.D. Thesis, University of Washington, 1953)] at p. 166 as follows:

The Chilcotin had various subdivisions. The band was a loosely associated group of families who wintered in the vicinity of a certain lake or group of lakes. The band was usually named for the lake with which it was most intimately associated. There was a degree of mobility between neighbouring bands [...]

[359] He continued at pp. 170-171, as follows:

Within the band there were unnamed local groups, which can be called encampments. Each consisted of several families who usually, particularly in the winter time, camped together; and who often acted as the main cooperating group. Such groups were united by kinship, friendship or by economic dependence.

Several brothers and their families might form such a group; or parents and their families, and their children and their families. Several friends might form such a group and through intermarriage between the friends' families, the unity of the group would be perpetuated.

...

In these encampments there was a great deal of mobility. A family might remain in such an association for a season or a lifetime. Probably most families had constituted parts of several different local groups in the course of their existence.

Such a group had no definitely outlined territorial rights. However, it was recognized that the families in such a group had rights to certain winter camping sites, providing that they occupied them every season. However, when the usual occupants of such a site failed to use it for one or more winters, someone else could move in and claim it.

In much the same way, fish trap sites were regarded as belonging to the person who habitually used them. When the habitual user neglected to use them, someone else was free to do so. Band members tended to utilize for hunting and fishing purposes the suitable territories nearest to their wintering sites. However, there

were no explicitly defined band territories. In theory and to a lesser degree in fact, any family utilized any part of Chilcotin territory.

[360] I pause at this point to note that the latter observation concerning fish trap sites and the use of Tsilhqot'in territory was confirmed by the evidence at trial. Tsilhqot'in elders testified about family fish sites but at the same time were clear that all Tsilhqot'in people were entitled to utilize the entire Tsilhqot'in territory.

[361] Lane continued his observations at pp. 171-173 of this thesis:

At mid-winter all of a band might be concentrated in certain parts of the band territory, hunting around and fishing at various lakes. However, not all of the band would be at any particular lake. In the spring individual families scattered to hunt by themselves. Later in the season groups of families gathered at streams and lakes to fish the various runs of trout, whitefish, suckers and other small fish. In the summer when the salmon were running, large groups gathered at the river fishing sites but they were not necessarily members of the same band. Other large groups hunted and dug roots at certain places in the mountains but again all of the people in one area were not from one band. After the salmon fishing season, families again went off by themselves, to hunt or fish or gather until winter.

The band was a functioning unit only upon a few special occasions such as feasts and celebrations. It never gathered at one place for economic purposes. For about three months of the year, the encampment appears to have been the basic unit, above the family level. For about four months, the individual family lived nomadically and more or less by itself. During the two months or so of the spring fish runs, people gathered in greater numbers at specific sites on lakes. These people were usually from the same band. I call this grouping a "semi-band" because almost everybody at one such site was from the same band; but the entire band rarely gathered at one site.

During three months in the summer, the largest groups of people were together in the mountains and at salmon fishing sites in "mixed bands," composed of families from one or several bands.

... the Chilcotin had very vague concepts of ownership of territory. All Chilcotin had right to use all the Chilcotin territory. Bands occupied vaguely defined geographic areas. They did not "own" such areas. Hunting territories were also used rather than "owned" by members of certain bands Fishing sites involved somewhat more of a feeling of ownership. But such ownership also depended upon use.

[362] Lane noted at p. 174 of his dissertation that "among none of the Chilcotin's immediate neighbours do we find such a loose and flexible group organization". This description accords with socio-political structure described to me by Tsilhqot'in elders in the course of the trial.

[363] Tsilhqot'in people living in bands had a chief. The presence of several bands meant there was more than one chief. They met together as a group for feasts, celebrations or annual gatherings and there was no single person

who was the chief of the entire Tsilhqot'in people. Given their semi-nomadic nature, there was frequent movement for hunting, gathering and making the tools and clothing needed for survival. Thus, there appeared to be little time for art, in the way that was pursued by coastal Aboriginal people. There were no totems. There was no evidence of a crest system such as that described in *Delgamuukw*. There was no evidence of named ceremonial groups and no evidence of any honorific ranking system such as is found amongst some Aboriginal people. The oral traditions, stories and legends told from generation to generation provide the binding social fabric for Tsilhqot'in people.

[35] It should not be thought, however, that the Tsilhqot'in lacked a sense of the land belonging to the Nation. On this issue, the trial judge said, at para. 429:

I ... am satisfied that an examination of the historical records leads to a conclusion that Tsilhqot'in people did consider the land to be their land. They also had a concept of territory and boundaries, although this appears to have been enlarged following the movements of the mid-nineteenth century.

[36] The trial judge included in his historical summary several incidents in which the Tsilhqot'in prevented members of other nations from coming into their territory, as well as some in which Hudson's Bay Company personnel were excluded. In 1864, a road-building crew was killed while attempting to construct a road through Tsilhqot'in territory, an event which touched off what is known as the Tsilhqot'in War – a sad low point in relations between the Crown and the Tsilhqot'in Nation that culminated in several Tsilhqot'in Chiefs being executed. While the precise causes of the dispute are not clear, there is at least some indication that the Crown's use of land without seeking the permission of the Tsilhqot'in Nation was a factor.

IV. The Issues at Trial

[37] In June 2003 (during the trial), the parties filed their final amended pleadings. In the amended statement of claim, the plaintiff sought:

- a declaration that the Tsilhqot'in Nation has Aboriginal title to the Claim Area;
- a declaration that the Xenigwet'in has Aboriginal rights to hunt and trap in the Claim Area;

- a declaration that British Columbia does not have jurisdiction to authorize forestry activities within the Claim Area;
- declarations that British Columbia's authorization of forestry activities within the Claim Area unjustifiably infringed the Aboriginal title of the Tsilhqot'in Nation and the Aboriginal rights of the Xeni Gwet'in;
- injunctive relief restraining British Columbia from authorizing forestry activities in the Claim Area in the future;
- damages for unjustifiable infringement of the Aboriginal title of the Tsilhqot'in Nation and Aboriginal rights of the Xeni Gwet'in; and
- damages for breach of fiduciary duty.

[38] At para. 101 of the judgment, the trial judge summarized the issues in the proceeding as follows:

- a) Are the Tsilhqot'in people entitled to a declaration of Aboriginal title to all or part of the Claim Area?
- b) Are the Tsilhqot'in people entitled to a declaration of Aboriginal rights to hunt and trap birds and animals throughout all or part of the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses, inclusive of a right to capture and use horses for transportation and work?
- c) Are the Tsilhqot'in people entitled to a declaration of an Aboriginal right to trade in the furs, pelts and other animal products obtained from all or part of the Claim Area as a means of securing a moderate livelihood?
- d) Does the *Forest Act* apply to Aboriginal title lands?
- e) Does the issuing of forest licences, the granting of authorizations and any forest development activity unjustifiably infringe Aboriginal rights in the Claim Area?
- f) Are Tsilhqot'in people entitled to damages?
- g) Are any claims advanced statute barred or otherwise affected by the doctrines of Crown immunity or *laches*?

[39] He (1) dismissed the plaintiff's claims for declarations of Aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to Aboriginal title within the Claim Area; (2) dismissed the plaintiff's claims for damages without

prejudice to the Tsilhqot'in's right to make new damages claims in respect of Aboriginal title land; (3) declared that the Tsilhqot'in Nation has Aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the Claim Area "as a means of securing a moderate livelihood", as well as to capture and use horses; and (4) declared that forestry activities in the Claim Area unjustifiably infringed Tsilhqot'in Aboriginal rights.

V. The Issues on Appeal

[40] Three appeals have been taken from the trial judgment – one by the plaintiff, one by Canada and one by British Columbia. The appeals by the plaintiff and by Canada are concerned with Aboriginal title, while the British Columbia appeal is concerned with a number of issues surrounding Aboriginal rights claims.

[41] The plaintiff contends that the trial judge erred by failing to find that the Tsilhqot'in exclusively occupied the entire Claim Area at the date of assertion of sovereignty. He says that the trial judge should have declared the entire Claim Area to be subject to Tsilhqot'in Aboriginal title. In the alternative, the plaintiff argues that the trial judge erred in treating the title claim as an "all or nothing claim", such that he considered himself without jurisdiction to make an order finding a part of the Claim Area to be subject to Aboriginal title.

[42] Canada, in its appeal, argues that the judge was right to find the claim to be an "all or nothing claim" and was right to dismiss the Aboriginal title claim. It says, however, that the dismissal ought to have been final, and that the judge erred in dismissing the claim without prejudice to the plaintiff's ability to pursue geographically smaller claims within the Claim Area.

[43] British Columbia's appeal raises a number of issues concerning Aboriginal rights. First, it contends that the trial judge erred in identifying the Tsilhqot'in Nation as the holder of Aboriginal rights, and says that the judge ought to have confined himself to determining whether or not the Xeni Gwet'in held such rights.

[44] Second, it argues that the judge mischaracterized the extent of Aboriginal hunting and trapping rights by finding these to include a right to a harvestable surplus of all wildlife species. Such a ruling, British Columbia says, amounts to a finding of a right to a resource rather than a right to engage in a traditional activity.

[45] Third, it says that the trial judge failed to apply the appropriate burden of proof on the issue of infringement of Aboriginal rights. It contends that he effectively required the government to demonstrate that the logging activities would not interfere with Aboriginal hunting and trapping rights rather than placing the onus on the plaintiff to demonstrate interference.

[46] Fourth, it says that the trial judge erred in finding the province's consultations with the Tsilhqot'in to be insufficient; in particular, it says that the trial judge wrongly imposed a prerequisite to proper consultation, being the acknowledgement by the province of Tsilhqot'in Aboriginal rights.

[47] Fifth, it contends that the judge erred in considering whether the Tsilhqot'in possessed a right to trade skins and pelts to the extent of earning "a moderate livelihood" through hunting and trapping. It says that this claim was not pleaded, and the test for establishing rights to trade was not, in any event, made out on the evidence.

[48] Finally, British Columbia contends that the judge erred in considering whether the Tsilhqot'in have a right to capture horses for transportation and work purposes, as the claim was not properly pleaded. In any event, it says that the judge erred in finding the relevant practices to have existed pre-contact or, alternatively, in treating the right as a "contemporary extension" of pre-contact practices.

VI. The Reasons for Judgment of the Trial Judge

A. An "All or Nothing Claim"

[49] The first major issue addressed by the trial judge was a pleadings issue. In the statement of claim, the plaintiff sought two declarations of Aboriginal title – one in respect of Tachelach'ed (described in the prayer for relief as "the Brittany") and one

in respect of the Trapline Territory. The statement of claim did not explicitly seek declarations of Aboriginal title over portions of those territories in the event that the court was not persuaded that it existed throughout the Claim Area. In final argument, however, the plaintiff argued that a declaration could be made in respect of whatever parts of the Claim Area the court found to be subject to Aboriginal title.

[50] The judge considered whether, given those pleadings, the court could make a declaration of Aboriginal title in respect of a part of the Claim Area. He held that he could not. He described the pleadings as making an “all or nothing claim”, and found that it would be “prejudicial to the defendants” for the court to make a declaration in respect of a part of the Claim Area only.

B. The Proper Rights Holder

[51] The second issue considered by the trial judge was the identity of the holder of Aboriginal rights or title. While Aboriginal rights are communal rights held by a collective, it can be difficult to identify the extent of that collective. As the trial judge noted at para. 446, there are numerous different overlapping Aboriginal collectives:

In both historical and contemporary times, an individual can simultaneously be a member of a family, a clan or descent group, a hunting party, a band, and a nation.

[52] While the amended statement of claim sought a declaration of Aboriginal title on behalf of the Tsilhqot'in Nation and a declaration of Aboriginal rights on behalf of the Xeni Gwet'in First Nations Government, in his final argument the plaintiff sought declarations of both title and rights in the name of the Tsilhqot'in Nation.

[53] British Columbia argued that the collective rights in issue were held, if at all, at the level of the band, and that if Aboriginal rights or title were established, the proper rights holder would be the Xeni Gwet'in. This argument was based on historical and ethnographic evidence that established that decision-making typically took place at the encampment or band level, and that while there were local chiefs, the Tsilhqot'in did not have a national chief or political organization.

[54] The trial judge was not satisfied that the Xeni Gwet'in was a homogenous group that could be traced back to any single subgroup of the Tsilhqot'in Nation. He referred to evidence arising from the reserve allocation process to support his conclusion:

[465] The laying aside of ... reserves [for the "Nemaiah Valley Indians"] appears to have followed a request made by Hewitt Bostock, M.P. to James A. Smart, Deputy Superintendent General of Indian Affairs, in a letter dated July 27, 1899. ... Bostock referred to the people living in Xeni as "a number of Indians who have belonged to different tribes in that part of the country but who for one reason or another have left their own reservation or tribe and have gone to live in this valley". I conclude that the people from "different tribes" were all Tsilhqot'in people who are the ancestors of the modern day Xeni Gwet'in.

[55] Thus, if Aboriginal rights or title were properly held at the level of the band, tribe, or encampment, it would be difficult or impossible to find that the Xeni Gwet'in First Nations Government was the modern representative of that group. The judge found, however, that rights were held on a national level by the Tsilhqot'in. He noted that while the Tsilhqot'in did not, either historically or today, have any pan-national political structure, it did represent a distinct cultural group that recognized itself as holding collective entitlements:

[459] Tsilhqot'in people make no distinction amongst themselves at the band level as to their individual right to harvest resources. The evidence is that, as between Tsilhqot'in people, any person in the group can hunt or fish anywhere inside Tsilhqot'in territory. The right to harvest resides in the collective Tsilhqot'in community. Individual community members identify as Tsilhqot'in people first, rather than as band members.

...

[468] In the modern Tsilhqot'in political structure, Xeni Gwet'in people are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xeni, including Tachelach'ed. Other bands are considered to be the caretakers of the lands that surround their reserves. Still, the caretakers have no more rights to the land or the resources than any other Tsilhqot'in person.

[56] In British Columbia today, the combined effect of the reserve creation process and the *Indian Act* has tended to magnify the importance of bands. The judge discounted the idea that rights should be seen as being held at the level of the band:

[469] The setting aside of reserves and the establishment of bands was a convenience to government at both levels. The creation of bands did not alter

the true identity of the people. Their true identity lies in their Tsilhqot'in lineage, their shared language, customs, traditions and historical experiences. While band level organization may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot'in people.

[57] He concluded that the proper rights holder was the Tsilhqot'in Nation rather than the Xení Gwet'in First Nations Government:

[470] I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other subgroup within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation.

C. Aboriginal Title

[58] Having found the proper claimant to be the Tsilhqot'in Nation, the trial judge turned to the issue of whether the plaintiff's claim to Aboriginal title was made out. Citing *Delgamuukw*, he set out the test for Aboriginal title as requiring proof of exclusive occupation of the claimed lands by the Aboriginal group at the time of the assertion of Crown sovereignty. Referring to *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, he noted at para. 554 that Aboriginal title is not co-extensive with an Aboriginal group's traditional territory, and at para. 583 that occasional entry and use of land would not be sufficient to found a claim to title.

[59] The judge summarized a considerable body of evidence pointing to continuous occupation of the Claim Area by the Tsilhqot'in over a period of several hundred years. Dr. Richard G. Matson, an archeologist, provided an opinion to the effect that the Tsilhqot'in moved into Tachelach'ed by about 1645-1660, and into the Trapline Territory at about the same time or a little later. They had come from an area northwest of the Claim Area.

[60] The judge also reviewed the oral traditions of the Tsilhqot'in, including legends that were tied to landmarks within the Claim Area. While he acknowledged that many of the legends had analogs among other Aboriginal groups, he concluded,

at para. 665, that the names of geographic locations had been adapted to the circumstances of the Tsilhqot'in, and that "the references to lakes, rivers and other landmarks [within the Claim Area] formed a part of these legends for Tsilhqot'in people at the time of sovereignty assertion".

[61] The judge then turned to evidence with respect to the adoption of Tsilhqot'in place names in the Claim Area by European fur traders and settlers. The judge noted and accepted the opinions of archaeologist Morley Eldridge and anthropologist Dr. David Dinwoodie to the effect that the adoption of Tsilhqot'in names suggests that, by the time of European contact, the Tsilhqot'in had been in the area for a very lengthy period. Similarly, he accepted the evidence of Dr. Nancy J. Turner, an ethno-botanist and ethno-ecologist, to the effect that the presence in the Tsilhqot'in language of words to describe plants in the Claim Area, as well as the uses made of the plants by the Tsilhqot'in, suggest a presence in that area of more than 250 years.

[62] The evidence of Dr. Kenneth Brealey, a cartologist and historical geographer, was to the effect that a network of Tsilhqot'in trails in the Claim Area predated contact with Europeans. The judge accepted that opinion, and noted that John Dewhirst, a cultural anthropologist, was also of the view that the trail network was in existence prior to the date of the Oregon Treaty.

[63] In short, the judge had no difficulty accepting that the Tsilhqot'in were present in the Claim Area prior to 1846 and continued to be present at the time of the Oregon Treaty. He then turned to the question of the nature and extent of the occupation. He noted that there was no evidence of village sites that were occupied year round, only evidence of relatively small groupings of winter dwellings. There was also no evidence of cultivated fields, though the evidence did establish that the Tsilhqot'in harvested and, to some extent, managed naturally-occurring berries and root plants on mountain slopes.

[64] The judge characterized the positions of the parties with respect to Aboriginal title as follows:

[608] Both Canada and the Province argue that the evidence might support a declaration of Aboriginal title to smaller sites where specific Aboriginal activities or practices took place. For example, the Province says that hunting is a practice that will not ordinarily lead to utilization of the same area year after year. Most species of game animals roam the landscape and are taken by hunters on an opportunistic basis wherever they happen to be found. There may be certain exceptions where features of the natural landscape such as a salt lick or a narrow defile between mountains or cliffs attract animals and their hunters to the same place year after year, but these would seem to be the exception.

[609] Canada's approach to Aboriginal title is similar. For example, it says that salmon fishing might make it possible for a definite tract of land to be used on a regular basis if, for example, it could be shown that fishers would use a particular rock or promontory each year to spear or net spawning salmon. Canada says it was unable to locate any evidence in the transcripts with this level of specificity. It says that lake fishing would seem even less likely to satisfy the criteria since fish would be distributed throughout the lake, and fishers would be less likely to use any particular spots to fish for them. Once again, Canada was unable to locate any evidence in the transcripts that would satisfy these criteria.

[610] The plaintiff characterizes the foregoing arguments of the defendants as a postage stamp approach to Aboriginal title. I think that is a fair description. There is no evidence to support a conclusion that Aboriginal people ever lived this kind of postage stamp existence. Tsilhqot'in people were semi-nomadic and moved with the seasons over various tracts of land within their vast territory. It was government policy that caused them to alter their traditional lifestyle and live on reserves.

[65] The judge, in the result, rejected what was pejoratively described as the "postage stamp approach" of searching for evidence with respect to specific tracts of land. Instead, he appears to have adopted a broad-brush approach to occupation. While he reviewed the evidence in respect of many individual sites, his conclusions relate, instead, to broad geographical areas, which he considered to be more in keeping with the semi-nomadic traditions of the Tsilhqot'in. The judge analyzed the evidence with respect to sites in five broad regions – the Tsilhqox Corridor (effectively the western boundary of Tachelach'ed), the Xeni (the Nemiah Valley – effectively the southern boundary area of Tachelach'ed), Tachelach'ed (other than the Tsilhqox Corridor and the Xeni), the Western Trapline Territory, and the Eastern Trapline Territory.

[66] I do not intend, in this judgment, to review the judge's analysis with respect to each individual site. A reader interested in that level of detail should consult the trial

judgment at paras. 688-911. In order to give a flavour of the approach taken, however, I will describe the analysis undertaken with respect to the Tsilhqox Corridor, which the judge described at para. 707 as providing “the best evidence of residential sites that might qualify as village sites especially during the fall and winter months”.

[67] The judge undertook an extensive review of the evidence as it related to numerous specific sites, both inside and outside the Claim Area. His review included historical records, *viva voce* evidence, archaeological evidence, and evidence of place names. The nature of the evidence, however, made the trial judge’s task difficult. Historical documentation from the period of the Oregon Treaty was limited. *Viva voce* evidence related to a more recent period than the time of the assertion of Crown sovereignty. The archaeological evidence was generally unable to show occupation at a specific point in time – many of the pit dwellings in the area long predated the relevant period. The evidence established that, in addition to being semi-nomadic, the Tsilhqot’in migrated over time, so determining whether a specific site was occupied in or around 1846 generally involved a degree of speculation. Evidence of place names might establish some sort of presence in the general geographic area, but was of limited use in determining the nature of occupation.

[68] In respect of sites within the Claim Area, the judge found three specific sites along the Tsilhqox Corridor that were used by the Tsilhqot’in as dwelling places at or around the time of the Oregon Treaty.

[69] Tl’egwated is a site roughly parallel to the north end of Lhuy Nachasgwengulin (Little Eagle Lake). While most of the 15 or more pit houses found at the site were outside the Claim Area, some were within it. With respect to the site, the judge said:

[721] Some 169 pit features have been mapped on or near the site, including numerous pit houses of a very large size. The site, also known as Kigli Holes, is generally regarded as non-Athapaskan (Plateau Pithouse Tradition) in origin, but appears to have been partly occupied by Tsilhqot’in people prior to and at the time of sovereignty assertion. Both Dewhirst and Eldridge believe Tl’egwated to be the home of the “Tlo quot tock” Indians recorded as attached to Fort Chilcotin in the Hudson’s Bay Company census

of 1838. It may also mark the site where Father Nobili visited a relatively large concentration of Tsilhqot'in people in the winter of 1845

[722] On the evidence, I conclude that Tl'egwated can be identified with archeological site EIRw-4, and represents the site known to the Hudson's Bay Company as Tlo quot tock as well as the pit house village visited by Nobili

[70] A second site discussed by the judge is known as Nusay Bighinlin, near the point where Natasewed Yeqox (Brittany Creek) enters the Tsilhqox. He noted that there is a single pit house in the area, which appears to have pre-dated Tsilhqot'in entry into the Claim Area. However, a site approximately one kilometre south, dating to 500 years ago, was consistent with Tsilhqot'in occupation. The judge said:

[732] This would locate a presence of Tsilhqot'in people well before sovereignty assertion making it ... reasonable to infer, as I do, that there were Tsilhqot'in people one kilometre away, at the Nusay Bighinlin site, well before the assertion of sovereignty.

[71] The third site is Sul Gunlin, near the outlet of Tsilhqox Biny on its eastern shore. There was some evidence of Tsilhqot'in occupation of the site, but none that directly showed occupation around the time of the Oregon Treaty. The judge said:

[762] ...No archaeological or historical records were cited that would confirm Tsilhqot'in residence at this site *circa* 1846, but given its proximity to Biny Gwechugh [a site that was mostly outside the Claim Area, and was partly occupied in 1846], it is logical to infer, as I do, that this was a site used and occupied by Tsilhqot'in people at the time of sovereignty assertion.

[72] The judge's findings with respect to these specific sites, combined with his review of evidence relating to sites outside the Claim Area, led him to find that the entire Tsilhqox Corridor was occupied by the Tsilhqot'in in 1846:

[712] British Columbia says that as a result of the previous occupation of the Tsilhqox corridor by non-Tsilhqot'in people, and because the later reoccupation by Tsilhqot'in people did not extend to all sites or to all features in a given site, the presence of archaeological remains cannot, in itself, indicate a Tsilhqot'in dwelling site or even a Tsilhqot'in presence in an area. This would be true if one were to ignore the presence of Tsilhqot'in people at various locations as recorded in the historical documents. When [Hudson's Bay Company employees] and Father Nobili travelled the Tsilhqox corridor they recorded the fact that Tsilhqot'in people were in occupation of these winter dwellings. Thus, the logical inference to draw from the whole of the evidence is that during these times it was Tsilhqot'in people who occupied the

entire Tsilhqox corridor. There is no historical evidence of occupation by others during this critical historical period.

[73] The judge's conclusions with respect to specific sites in the areas other than the Tsilhqox Corridor were generally less categorical, though he did refer in considerable detail to a number of such sites.

[74] The judge found that the entirety of the Xeni was occupied by the Tsilhqot'in in 1846 in a manner sufficient to support a claim for Aboriginal title. The historical documentation with respect to the Xeni, however, was much less helpful than it was with respect to the Tsilhqox Corridor. At para. 764, the judge noted that "the Xeni sites do not appear in the historical documents until the turn of the last century". While he reviewed the evidence concerning a number of specific sites, it is not clear that he reached a conclusion regarding occupation in 1846 in respect of any of them. His conclusions with respect to Xeni as a whole were as follows:

[783] Much of the evidence concerning the use and occupation of the various places in Xeni relate to twentieth century activities. Oral history evidence provides an understanding of use and occupation in the nineteenth century. That evidence records use and occupation by the ?Esggidam [Tsilhqot'in ancestors], living in and about the valley, using the old trails, hunting, fishing and harvesting root and medicinal plants. There is also evidence of house pit depressions. I infer that these were the remains of pit houses in which Tsilhqot'in people lived. This entire area is also in close proximity to the head of Tsilhqox Biny where the evidence clearly shows Tsilhqot'in occupation pre-sovereignty.

[75] With respect to the rest of Tachelach'ed, the judge found that the requisite degree of Tsilhqot'in occupation was established only to the southern part of the area:

[792] As semi-nomadic people, there is no doubt that Tsilhqot'in people have derived subsistence from every quarter of Tachelach'ed. They have hunted, fished and moved about this area since before first contact with Europeans. It is a central part of their oral traditions, providing strength and continuity to their lives as Tsilhqot'in people. However, the entire area of [Tachelach'ed] does not qualify for a declaration of Tsilhqot'in Aboriginal title due to the absence of evidence with respect to the northern and central portions of the triangle. I later discuss those portions of Tachelach'ed that do warrant a finding of [Aboriginal] title.

[793] In reaching this conclusion, I have taken the following factors into account:

- Tachelach'ed is a vast area comprising almost 142,000 hectares.
- At the time of sovereignty assertion, the population of Tsilhqot'in people in this immediate area was approximately 300. That population could mainly be found along the Tsilhqox corridor, at the outlet area of Tsilhqox Biny and southward into Xenl. It is not possible to recreate today an accurate census for that period.
- Occupation of a more permanent nature during the winter season was confined to the lakes and rivers at the southern end of Tachelach'ed and towards the Tsilhqox.
- Other than the presence of [Hudson's Bay Company] traders, there is no evidence of occupation by others at the significant historical point of sovereignty assertion.
- Oral history evidence may be traced to the late nineteenth century and the twentieth century. It is extremely difficult to find oral history evidence to accurately connect to a period over 150 years ago.
- The oral history evidence does not demonstrate the same degree of use throughout the entire area. There appears to have been a much wider use at the southern end of the triangle and over towards the Tsilhqox than in other areas of Tachelach'ed.
- There is an absence of historical evidence concerning the interior of Tachelach'ed at the critical historical point.
- There is evidence of the remains of traditional housing in the interior of Tachelach'ed but no archaeological or anthropological evidence to tie these remains to Tsilhqot'in use at the time of sovereignty assertion. If the age of some of these remains were known, it might be easier to connect them to Tsilhqot'in use. Notwithstanding this absence of evidence, I am prepared to draw the inference and acknowledge the use of this housing by Tsilhqot'in people on a balance of probabilities but, once again, the time and extent of use is not known.

[794] In summary, there are areas within Tachelach'ed where I consider the use and occupation by Tsilhqot'in people at the time of sovereignty assertion to be sufficient to warrant a finding of Aboriginal title. The evidence does not lead to a finding of sufficient use and occupation throughout Tachelach'ed.

[76] With respect to the fourth area, the Western Trapline Territory, the trial judge again found Tsilhqot'in occupation in 1846 to have been insufficient to establish title over the entire area:

[825] ... The entire area of the Western Trapline does not qualify for a declaration of Tsilhqot'in Aboriginal title. While there is no doubt that there was a Tsilhqot'in presence in the entire area at the time of sovereignty assertion, much of the area was not occupied to the extent required to ground a declaration of Tsilhqot'in Aboriginal title. Once again, in considering the invitation of counsel to express an opinion on where Tsilhqot'in Aboriginal title

might lie, it is convenient to consider discrete smaller portions of the Western Trapline Territory.

[77] Finally, with respect to the Eastern Trapline Territory, the trial judge similarly concluded that Tsilhqot'in occupation in 1846 was insufficient to found Aboriginal title:

[893] I am satisfied Tsilhqot'in people were present in the Eastern Trapline Territory at the time of first contact. The area has been used by Tsilhqot'in people since that time for hunting, trapping, fishing and gathering of roots and berries. I am not able to find that any portion of the Eastern Trapline Territory was occupied at the time of sovereignty assertion to the extent necessary to ground a finding of Tsilhqot'in Aboriginal title....

[78] Based on these various findings, and on his preliminary conclusion that the claim was an "all or nothing claim", the trial judge declined to grant a declaration of Aboriginal title. He did, however, provide an opinion as to what areas he would have declared to have been subject to Aboriginal title had the case been pleaded in a manner that allowed a partial declaration to be granted. The "Opinion Area" encompassed the Tsilhqox Corridor, the Xeni, the rest of the southern portion of Tachelach'ed, and a part of the Western Trapline Territory. It included both land inside and outside the Claim Area, and encompassed roughly 40% of the Claim Area:

[959] The entire body of evidence in this case reveals village sites occupied for portions of each year. In addition, there were cultivated fields. These fields were not cultivated in the manner expected by European settlers. Viewed from the perspective of Tsilhqot'in people the gathering of medicinal and root plants and the harvesting of berries was accomplished in a manner that managed these resources to insure their return for future generations. These cultivated fields were tied to village sites, hunting grounds and fishing sites by a network of foot trails, horse trails and watercourses that defined the seasonal rounds. These sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title as follows:

- The Tsilhqox (Chilko River) Corridor from its outlet at Tsilhqox Biny (Chilko Lake) including a corridor of at least 1 kilometre on both sides of the river and inclusive of the river up to Gwetsilh (Siwash Bridge);
- Xeni, inclusive of the entire north slope of Ts'il?os. This slope of Ts'il?os provides the southern boundary, while the eastern shore of Tsilhqox Biny marks the western boundary. Gweqez Dzelh [Mt. Nemiah] and Xeni

Dwelh [Konni Mountain] combine to provide the northern boundary, while Tsiyi (Tsi ?Ezish Dzelh or Cardiff Mountain) marks the eastern boundary.

- North from Xenii into Tachelach'ed to a line drawn east to west from the points where Elkin Creek joins the Dasiqox (Taseko River) over to Nu Natase?ex [Mountain House] on the Tsilhqox. Elkin Creek is that water course draining Nabi Tsi Biny (Elkin Lake), flowing northeast to the Dasiqox;
- On the west, from Xenii across Tsilhqox Biny to Ch'a Biny [Big Lagoon] and then over to the point on Talhiqox Biny (Tatlayoko Lake) where the Western Trapline boundary touches the lake at the southeast shore, then following the boundary of the Western Trapline so as to include Gwedzin Biny (Cochin Lake);
- On the east from Xenii following the Dasiqox north to where it is joined by Elkin Creek; and
- With a northern boundary from Gwedzin Biny in a straight line to include the area north of Naghatalhchoz Biny (Big Eagle Lake or Chelquoit Lake) to Nu Natase?ex on the Tsilhqox where it joins the northern boundary of Tachelach'ed over to the Dasiqox at Elkin Creek.

D. The “Exclusivity” Requirement for Aboriginal Title

[79] In reaching his conclusion that the Tsilhqot'in Nation had demonstrated an entitlement to Aboriginal title over the Opinion Area, the judge was required to consider what had to be proven in order to show that the Nation had “exclusive” possession of the land in 1846. The question of what it means to “exclusively” occupy territory was a primary issue at trial.

[80] The trial judge summarized the plaintiff's position on exclusivity as follows:

[915] The plaintiff argues that Tsilhqot'in people had the capacity to control their territory and in fact did exercise such control. It is submitted that the evidence supports a conclusion that Tsilhqot'in people entered into treaties or bonds of peace from time to time, exercised control over the movements of non-Tsilhqot'in people in their territory, and enjoyed a reputation amongst their neighbours as a people who fiercely defended their land.

[916] Tsilhqot'in witnesses testified to their ancestors' use of scouts and runners to check for intruders and warn their communities. There is also some historical evidence of this practice, including the journals of Simon Fraser. On July 26, 1808 Simon Fraser recorded that “Chilkoetins ... had the information of our return from the lower parts of the river by messages across the Country”: *Letters and Journals of Simon Fraser*, pp. 124-125.

[917] Professor [Hamar] Foster, a legal historian, wrote in his report at p. 23 that the archival records show that “[t]o be safe” in Tsilhqot'in country, “one

had to be accompanied by Tsilhqot'in, paying what in effect was a 'toll' to enter and 'rent' if you wanted to stay and settle down".

...

[920] Military practices were also used to instil fear of Tsilhqot'in warriors. One such military practice was a policy of killing as many opponents as possible but at the same time, deliberately allowing one or two badly wounded opponents the opportunity to escape death. Upon their return, these badly wounded individuals would present the best evidence possible of the fierceness of Tsilhqot'in warriors. This worked to instill fear of Tsilhqot'in people in all those who might venture into Tsilhqot'in territory.

[81] The judge then went on to summarize and reject Canada's position on exclusivity:

[922] Canada is critical of the plaintiff's approach to this issue and says that a propensity for violence does not establish Tsilhqot'in exclusivity in the Claim Area. In the submission of Canada, the sparse Tsilhqot'in population would make it impossible for Tsilhqot'in people to maintain exclusive control over their traditional territory. Canada says it is more likely that after Tsilhqot'in people moved on from one location to another ... the land [was left] available for others to move in and exploit. Canada also argues that an abandonment of the Claim Area on a failure of a salmon run would make it impossible to maintain exclusive control, at least during such a period.

[923] There is nothing to indicate that Tsilhqot'in populations at any given time were small compared to their neighbours. In fact, early records of the [Hudson's Bay Company] appear to record a marginally larger number of Tsilhqot'in men trading at Fort Alexandria than the numbers of Dakelh (Carrier) men. I acknowledge the population was small given the size of the area, but it is fair to infer there were no large numbers of invaders on the edges of Tsilhqot'in territory.

[924] It is also important to place events in context. If an area was used to hunt, fish, and gather berries, root plants and medicines, the area would not be available for resource exploitation for at least another year. It would be highly unlikely that a neighbouring Aboriginal group would follow into an area that had already been exploited. Similarly, if the salmon run failed in any given area, there would be no possibility that any other group would move into such a distressful situation.

[82] Finally, the judge described the position put forth by British Columbia, which tied the concept of exclusivity to what it contended was the site-specific nature of Aboriginal title:

[925] British Columbia says the fundamental problem lies in the plaintiff's approach to proving Aboriginal title. According to this argument, the plaintiff failed to identify and establish pre-sovereignty occupation of any definite tracts of land within the Claim Area. British Columbia also says that the

plaintiff has approached the question of exclusivity from a territorial, rather than a site-specific, perspective.

[926] In his reply, the plaintiff argues that exclusivity does not require site-specific evidence of control directed at “each marsh meadow and berry patch”. What is required is effective control over the land in question.

[927] It is fair to say that the argument made by the plaintiff was directed towards a conclusion that Tsilhqot’in people had vigorously defended their territory and had closely monitored and controlled its use by others. British Columbia’s position is consistent with the view that site-specific definite tracts are required in the proof of Aboriginal title and thus proof of site-specific exclusivity is also required.

[83] While accepting that there was some merit in the approach suggested by British Columbia, the judge adopted a test for exclusivity that was, effectively, that suggested by the plaintiff:

[929] The question is: does the evidence [show] that Tsilhqot’in people at the time of sovereignty assertion exercised effective control of this land? Or, can a reasonable inference be drawn that Tsilhqot’in people could have excluded others had they chosen to do so? ...

[84] Applying that standard of exclusivity, the judge found that the Tsilhqot’in exclusively occupied all of the lands in the Opinion Area.

E. The Forest Act

[85] Having dealt with the claim to Aboriginal title, the judge next considered the applicability of the *Forest Act* to the Opinion Area. While the judge was not prepared to grant a declaration of title, he did find that the existence of Aboriginal title over the Opinion Area prevented the *Forest Act* from applying to it.

[86] He found that the timber on land that is subject to Aboriginal title is not “Crown timber” as defined in the *Forest Act*, because it is not “timber on Crown land”. The *Forest Act* adopts (subject to an exception which is not relevant to this case) the definition of “Crown land” set out in the *Land Act*, R.S.B.C. 1996, c. 245: “land vested in the government”. As a matter of statutory interpretation, the judge found that land subject to Aboriginal title is not vested in the government.

[87] He further held that, in any event, British Columbia did not have constitutional competence to regulate forestry on land subject to Aboriginal title. While the regulation of forestry is generally within the competence of the provincial government under s. 92A of the *Constitution Act, 1867*, he found that the doctrine of interjurisdictional immunity prevented provincial forestry legislation from applying on Aboriginal title lands. The regulation of forestry on such lands would go to the “core of Indianness”, and impermissibly affect the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

[88] The judge went on to consider whether, assuming the *Forest Act* did apply to lands in the Opinion Area, the Crown had administered it in a way that unjustifiably interfered with Aboriginal title. He found that it had.

[89] He held that any claim to justification must fail for a number of reasons. First, he found that British Columbia could not show a compelling and substantial objective in authorizing logging in the Claim Area. He commented that the exclusive focus of the *Forest Act* on timber values, to the exclusion of ecosystem management, resulted in a failure to properly balance the interests of the Tsilhqot’in against economic interests of the larger society. Further, he found that the province had failed to demonstrate that logging in the Claim Area was necessary or even economically viable.

[90] The judge was also critical of consultation efforts made on behalf of the Crown with respect to timber harvesting, saying at para. 1141 that “the failure of the Province to recognize and accommodate the claims being advanced for Aboriginal title and rights leads me to conclude that the Province has failed in its obligation to consult with the Tsilhqot’in people”.

[91] Accordingly, the judge found that the Crown had, in administering the *Forest Act*, unjustifiably infringed the plaintiff’s Aboriginal title in the Claim Area.

F. Aboriginal Rights (other than Title)

[92] The judge next turned to issues of Aboriginal rights other than title. British Columbia and Canada admitted the Xeni Gwet'in held Aboriginal rights "to hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial and cultural uses". At issue before the trial judge (in addition to the question of the proper rights holder, which I have already discussed) was whether the Tsilhqot'in also held rights to trade in skins and pelts and to capture horses for transportation and work purposes. The judge was also required to consider whether any Tsilhqot'in Aboriginal rights had been unjustifiably infringed.

[93] The date for the crystallization of Aboriginal rights is the date of European contact. The judge considered various possible dates, and concluded that a single date should apply throughout British Columbia. He noted that 1793 was significant in terms of European exploration of what later became British Columbia. In that year, Alexander Mackenzie completed his journey following the Peace, Fraser and Blackwater (West Road) Rivers and reached the shores of Dean Channel, near the present site of Bella Coola. Captain George Vancouver completed his survey of the coast of what is now British Columbia in the same year.

[94] The judge acknowledged that there is no clear evidence that Mackenzie encountered any Tsilhqot'in people during his expedition, and that it is very improbable that Vancouver met any on his voyages. The first documented contact between a European and the Tsilhqot'in was Simon Fraser's 1808 expedition. Still, the judge found that the extensive European exploration of what they called "New Caledonia" in 1793 should be taken to be the date of European contact with all First Nations in mainland British Columbia. The judge acknowledged, in any event, that the precise date of first contact was of minimal importance, as the evidence did not suggest any substantial changes in the practices of the Tsilhqot'in people in the years following 1793.

[95] With respect to the plaintiff's claim of a right to capture wild horses, the judge noted that wild horses (perhaps numbering up to 100) live in Tachelach'ed. While the judge took judicial notice that horses are not native to North America, and that they had been introduced by Europeans, he also noted the evidence that the Tsilhqot'in encountered by Simon Fraser in 1808 were already using horses for transportation. He drew the inference that wild horses had migrated into the Claim Area prior to 1793, and that the Tsilhqot'in were capturing and using horses for transportation and work before contact. In any event, the judge found that even if horses arrived in the area after contact, their capture and use was simply an extension of the Tsilhqot'in tradition of using plants and hunting and trapping animals in the Claim Area for their subsistence and livelihood.

[96] The judge found that the use of horses for work and transportation was integral to the Tsilhqot'in culture, and that it constituted an Aboriginal right.

[97] With respect to the right to trade in pelts and skins, the judge considered that at the time of contact, the Tsilhqot'in traded skins and pelts with neighbouring indigenous groups. He found that trade to have been a "way of life" integral to the Tsilhqot'in culture, not simply opportunistic or incidental. At para. 1263, he commented that Tsilhqot'in trade in skins and pelts was for the purpose of securing the necessities of life rather than to accumulate wealth. He found that trade in pelts and skins taken from the Claim Area was established as an Aboriginal right. At para. 1265, he characterized the right as one of trade as a means of securing a "moderate livelihood".

[98] The judge further held that the *Forest Act* applied to Crown lands over which Aboriginal rights (other than title) exist, and found that the statute could constitutionally apply to such lands. The province was required, however, to justify any infringements of Aboriginal rights resulting from the administration of the *Act*.

[99] The judge found that the administration of the *Forest Act* infringed Tsilhqot'in Aboriginal rights because both harvesting activities and silviculture practices reduce the diversity and abundance of wildlife:

[1288] Forest harvesting activities would injuriously affect the Tsilhqot'in right to hunt and trap in the Claim Area. The repercussions with respect to wildlife diversity and destruction of habitat are an unreasonable limitation on that right. For these reasons, I conclude that forest harvesting activities are a *prima facie* infringement on Tsilhqot'in hunting and trapping rights and thus demand justification.

[100] With respect to justification, the judge characterized, at para. 1286, the Crown's objective in administering the *Forest Act* and related legislation as being to "maximize the economic return from provincial forests". He found that "the protection and preservation of wildlife for the continued well-being of Aboriginal people is very low on the scale of priorities". He concluded that the infringement of Aboriginal rights was not justified:

[1294] ... A management scheme that manages solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot'in Aboriginal rights. To justify harvesting activities in the Claim Area, including silviculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. In the absence of such information, forestry activities are an unjustified infringement of Tsilhqot'in Aboriginal rights in the Claim Area. As I mentioned earlier, the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights.

[101] Towards the end of his judgment, the judge also dealt with certain issues that are not raised on these appeals – issues of limitation periods, *laches*, and Crown immunity.

[102] I will turn, now, to the issues on this appeal, which I will deal with in the same order as they were dealt with in the trial judgment.

VII. The "All or Nothing Claim"

[103] The first issue is the judge's determination that the claim for Aboriginal title was an "all or nothing claim".

A. Did the Amended Statement of Claim make an “All or Nothing Claim”?

[104] The issue arises from the amended statement of claim, a very concise document given the breadth of the claims advanced. The prayer for relief sought only the following declarations of Aboriginal title:

- a) A declaration that the Tsilhqot'in has existing aboriginal title to the Brittany;
[and]
- b) A declaration that the Tsilhqot'in has existing aboriginal title to the Trapline Territory.

[105] As the trial judge noted at para. 120, the amended statement of claim did not explicitly seek a declaration of Aboriginal title for portions of the Claim Area in the event that the court did not find the full claims to be made out. Interestingly, however, the statement of defence of British Columbia included the following pleading:

12. ... [T]he Provincial Defendants:

...

c.) say ... that if the Aboriginal activities that may have been practised by the Ancestral Tsilhqot'in Groups constituted occupation establishing Aboriginal title to any portions of the Brittany or the Trapline Territory, such occupation did not extend to the whole of the Brittany or the Trapline Territory, but only to limited portions thereof and put the Plaintiff to the strict proof of the location and extent of such limited portions

[106] The courts of this province have generally taken a functional approach to pleadings. Pleadings are designed to provide the parties and the court with an outline of the material allegations and the relief sought. Where they succeed in fulfilling that function, minor defects are generally overlooked, unless other parties are prejudiced by them.

[107] The trial judge did express the view, at para. 129, that “[t]o allow the plaintiff to now seek declarations over portions of the Claim Area would be prejudicial to the defendants”, but did not give any indication of why that would be so. Given that he felt the evidence was capable of fairly defining the Opinion Area, and that he used that area to find a violation of Aboriginal title, it is difficult to believe that the trial

judge had serious concerns with respect to trial fairness. He did not express specific concerns, nor, except as I will discuss below, have the defendants postulated any plausible ones on this appeal.

[108] In accepting that the amended statement of claim adopted an “all or nothing” approach, the trial judge placed a great deal of weight on the decision of the English Court of Appeal in *Biss v. Smallburgh Rural District Council*, [1965] Ch. 335 (C.A.). In that case, the plaintiffs sought a declaration that use of a 35-acre piece of land for caravan sites constituted a lawful non-conforming use under a regulatory statute. The trial judge found that only about nine acres of the parcel had been used as a caravan site before the enactment of the regulatory statute, and granted a declaration that the plaintiffs were entitled to a caravan licence in respect of that area only. On appeal, the Court found that the evidence did not support the granting of a declaration, either in respect of the 35-acre parcel or the 9-acre portion of it. The plaintiffs asked, however, that the Court make a declaration in respect of such smaller portion of the parcel as it was found to have been used as a caravan site at the relevant period.

[109] It is evident that Harman L.J. found the plaintiffs’ approach to the case to be a frustrating one. At 360-62, he said:

It seems to me perfectly hopeless on such evidence as there was to try to persuade the court that the whole 35 acres was a caravan site in March, 1960. Indeed, in this court that contention was after a time abandoned and it was no longer sought to obtain a declaration covering the whole 35 acres.

From then on the cross-appeal was conducted after the manner of a Dutch auction where the auctioneer starts at the top price and comes gradually down till he finds a bidder. So here various lines of demarcation were suggested, coming down at last to about three acres round the house, and we were treated to a minute review of the evidence in order to show that in particular there was considerable evidence of the stationing of caravans (a) on the area immediately to the south of the farmhouse, (b) between it and the sea, and (c) round about the first pylon carrying the electric power line to the house.

For myself I do not think that this is a legitimate way of conducting an action such as this. No suggestion was made of any amendment of the pleadings, which be it remembered dealt only with the 72 acres or the 35 acres as a whole, and I do not think that the remedy by declaration can properly be used

in this way. It is a useful method, but I think that he who seeks a declaration must make up his mind and set out in his pleading what that declaration is.

...

In my judgment a plaintiff ought not to be allowed to ask the court to make a declaration covering whatever area the court shall after the inquiry conclude ought to be counted as within the Act. This might be a legitimate method of conducting an inquiry before an inspector appointed by the Minister after service of an enforcement notice, but I think that it is not legitimate here.

Assuming, however, that I am wrong about that, have the plaintiffs proved to my satisfaction that any defined area ought to be treated as a caravan site?

...

A review of the evidence has satisfied me that the judge was right in his conclusion as to the whole 35 acres. He did not consider, because he was not asked to do so, the smaller areas to which our attention has been specially called. It seems to me, however, that he would have reached the like conclusions as to them and I think that he would have been right.

[110] The other two members of the Court agreed that the evidence did not establish any part of the land as a caravan site. Davies L.J., however, appears to have disagreed with Harman L.J. on the pleadings issue. At 369, he said:

Had the evidence proved that the plaintiffs were entitled to something less than their full claim, it would, I think, have been unfortunate if their failure to make, either originally or by amendment, the appropriate alternative claim should have deprived them of their right to a declaration; but this question does not in the event arise.

[111] The third member of the Court, Russell L.J., did not address the pleadings issue.

[112] The idea that a claim for a declaration must be pleaded with precision and that a court cannot grant a declaration that differs from the one sought is not supportable in law. As the plaintiff points out, in *Harrison-Broadley v. Smith*, [1964] 1 All E.R. 867 (C.A.), heard about two weeks before *Biss*, Harman L.J. himself agreed that a declaration could be granted notwithstanding that it had not been specifically sought in the statement of claim.

[113] The plaintiff also cites the discussion of *Biss* in *Lau Wing Hong & Others v. Wong Wor Hung & Another*, [2006] 4 HKLRD 671 (H.C.):

[144] It is apparent that the astringent comments of Harman LJ were *obiter* as the Court found no relief in terms of the proposed Declaration was available

[145] ... The fact that a Declaration is not specifically sought in the prayer for relief does not prevent one being granted [citations omitted]. It cannot be overlooked that, in an adverse possession case, the pleaded factual issues may permit of several possible variations and permutations as to the edges or boundaries of the disputed land at the material time. It would be unnecessarily demanding to require the party to plead in the prayer every precise possible variation of the underlying factual dispute that could be ultimately found to be proved. It would be like pleading all the results of the peeling of an onion – in which every single layer generates a slightly different and smaller variation of the one before it. The real test is whether there is genuine prejudice caused by this ambulatory approach. Here there was none. It will always be a matter of degree; but the Court should not indulge pedantry as being the same thing as prejudice.

...

[147] In *Zamir & Woolf: The Declaratory Judgment* (3rd ed., 2002), p. 284, the authors conclude that the *obiter* remarks of Harman LJ in *Biss* should not now be regarded as of general application. I agree as the emphasis in *Biss* was too austere. ... The authors also state:

In practice it frequently happens that it is only after the court has determined the facts that it will be possible to decide in what terms a declaration should be granted. As long as the parties are given an opportunity to address the court on any proposed declaration it is highly desirable that it should retain as wide a discretion as possible as to the precise terms in which a declaration is granted.

[148] These pragmatic considerations correctly represent the proper approach in Hong Kong. The position under Australian law, [PW] Young, *Declaratory Orders*, (2nd ed., 1984) pp. 54, 188; Canadian law, Lazar Sarna, *The Law of Declaratory Judgments* (2nd ed., 1988) p. 84 and New Zealand law, is to the same effect: *Manga v Attorney-General* [2000] 2 NZLR 65 at p. 84.

[114] As counsel for Canada points out, this case is not binding on this Court, but of course, the same can be said of *Biss* itself. In my view, the discussion in *Lau Wing Hong* is entirely persuasive. There is no general rule of pleading that either requires declarations to be pleaded precisely or that precludes a court from granting a declaration that is less sweeping than the one sought by the plaintiff. The issue in every case is whether the parties are prejudiced by the manner in which the case has proceeded.

[115] In *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, the Court granted a declaration, though none had been specifically sought in the pleadings. The Court accepted, at 647, that a “basket clause” in the prayer for relief was sufficient to permit a court to exercise its discretion to grant a declaration. The Court noted that the appellant had not been taken by surprise or prejudiced by the court’s decision to grant a declaration.

[116] The pleadings in the case before us also include a “basket clause” in the prayer for relief, which seeks “such further, other, equitable, and related relief, ... as to this Honourable Court may seem meet and just”. While I doubt that resort need be had to that clause in this case, *Native Women’s Assn.* clearly establishes that such a clause can be sufficient to cover a claim for a declaration.

[117] It follows that I do not agree with the trial judge’s ruling that the plaintiff’s claim was an “all or nothing claim”. The claim was sufficiently pleaded to allow the court to find that Aboriginal title had been proven in respect of only part of the Claim Area.

[118] As the plaintiff points out, flexibility in the granting of a declaration is particularly important in a case where Aboriginal title is claimed. The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. This was particularly the case with groups such as the Tsilhqot’in, who were semi-nomadic. To require proof of Aboriginal title precisely mirroring the claim would be too exacting. Indeed, the trial judge recognized this, and discussed the difficulty of defining boundaries at paras. 641-649 of his judgment:

[641] On several occasions during the course of the trial I remarked that the boundaries of Tachelach’ed and the Trapline Territories were entirely artificial. Tachelach’ed is bounded east and west by two rivers, the Tsilhqox and the Dasiqox, and on the south by a boundary characterized by a difference of opinion even amongst the people who live there. No one would suggest that the resource harvesting activities of Tsilhqot’in people ever stopped at the rivers. ...

[645] As the evidence unfolded it became apparent that in order to assert his claim, the plaintiff had to conform to the Eurocentric need to define boundaries. Traditional boundaries, surveyed with proper metes and bounds were not a possibility; some boundaries simply had to be found. The Trapline Territories provided convenient boundaries, even if they had little historical or anthropological relevance. They are, at least, relevant to the survival of a twentieth century Tsilhqot'in person. Tachelach'ed, on the eastern and western edges, provides natural geographic boundaries, rooted in oral traditions.

...

[647] Tsilhqot'in society, as described to me by several elder witnesses, displayed a high degree of territorial mobility and, until the twentieth century, appeared to place little or no reliance on European style cultivation. The fixing of reserves and the pressure to raise cattle brought such a "cultivation" component to Tsilhqot'in nomadism. Tsilhqot'in nomadism, characterized by Dr. Brealey as "relatively nomadic" or "semi nomadic" was centralized within Tsilhqot'in traditional territory. Tsilhqot'in people tended to follow the same seasonal patterns in ways that accommodated their kinship based society. They were semi-nomadic in the sense that there was a collective regrouping in one location each year as a respite from the dark and cold of winter. Tsilhqot'in nomadism also allowed people to move at short notice in the case of a periodic failure of the salmon run. In these circumstances large numbers moved to the west to winter with their neighbours the Nuxalk people.

[648] In Tsilhqot'in semi-nomadic society there were no boundaries in the sense that a boundary is currently understood with reference to set metes and bounds.

...

[649] In hindsight, I fully understand the need to postulate artificial boundaries. There is a contemporary societal demand for limits, even if those limits, measured against the whole, are entirely arbitrary. Boundary construction in Tsilhqot'in society was a social exercise. Their boundaries were and continue to be "recognized, understood and validated not by maps and plans, but from 'inside the collective'".

[119] The Opinion Area defined by the trial judge contained artificial boundaries based on a process of approximation. Although he found, for example, that the southern part of Tachelach'ed was occupied more intensively in 1846 by the Tsilhqot'in than the northern part, the precise placement of the boundary between the Opinion Area and other parts of the Claim Area was, in the end, arbitrary. It would have been miraculous if the plaintiff, in pleading his case, had fixed upon precisely the same boundary as the trial judge ultimately selected.

[120] In its argument, however, British Columbia raises an issue that is, in my view, of considerable importance. Where a trial has proceeded on a certain theory of Aboriginal title, it would be prejudicial to the defendants if the plaintiff were given the right to assert a completely different theory in argument.

[121] The difficulty is well-illustrated by *Delgamuukw*. In that case, the plaintiffs asserted that 51 Gitksan and Wet'suwet'en houses each had individual claims to particular territories. Among the difficulties with the assertion was that claims of individual houses conflicted with one another, making it impossible for the court to conclude that a particular house had exclusive possession of its claimed territory. On appeal, the plaintiffs attempted to eliminate the problem by amalgamating the claims of the Gitksan houses and amalgamating the claims of the Wet'suwet'en houses. The Supreme Court of Canada held that to allow such a change in the theory of the case at the appeal stage would be unfair:

[76] ... The appellants argue that the respondents did not experience prejudice since the collective and individual claims are related to the extent that the territory claimed by each nation is merely the sum of the individual claims of each House; the external boundaries of the collective claims therefore represent the outer boundaries of the outer territories. Although that argument carries considerable weight, it does not address the basic point that the collective claims were simply not in issue at trial. To frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants' case.

[122] In the case before us, the plaintiff's case was based on a territorial theory of Aboriginal title. He postulated that "occupation", for the purpose of an Aboriginal title claim, could be established by showing that the Tsilhqot'in moved through the territory in various patterns at and around the date of the assertion of sovereignty. He further asserted that the anecdotal evidence of attempts by the Tsilhqot'in to repel others who sought to use the land was sufficient evidence of "exclusivity" to found title.

[123] British Columbia and Canada rejected the territorial theory of Aboriginal title, instead taking the view that Aboriginal title could only be demonstrated over smaller tracts of land (like village sites, cultivated fields, and specific trapping or fishing sites)

that were occupied by a First Nation intensively and, if not continuously, at least regularly. This theory of Aboriginal title was not the theory upon which the plaintiff presented his case, and it would not have been fair to any of the parties for the trial judge to attempt to identify particular areas of land within the Claim Area that qualified as candidates for Aboriginal title on the theory espoused by the defendants. Indeed, on this appeal, the plaintiff agrees that if Aboriginal title cannot be proven through a broad territorial claim, then the judge was right to dismiss the claim.

[124] The Supreme Court of Canada's decision in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, was released after the oral hearing of the appeal in this case, and, accordingly, we have not had the benefit of submissions with respect to it. It seems to me, however, that it supports the idea that a court should address the question of whether lesser rights than were claimed have been proven when the lesser rights are of the same nature as those claimed, are capable of clear definition, and can be considered without prejudicing the defendants. In accordance with those principles, the trial judge was entitled to consider whether a lesser territorial entitlement than was claimed had been proven. On the other hand, if he had considered site-specific title claims on a theory different than the one advanced at trial, he would have been in contravention of those principles.

[125] In my view, the trial judge, in discussing the Opinion Area, was not adopting the theory of Aboriginal title advanced by the defendants. Rather, he appears to have accepted that Aboriginal title could be claimed on a territorial basis, and did not demand proof of intensive occupation of particular sites. While he found that the degree of occupation proven by the plaintiff sufficed to found a claim of title in only part of the Claim Area, he did so on the basis of the territorial theory on which the case was presented.

[126] It follows that if the territorial theory is the correct basis on which to assess Aboriginal title, the judge could properly have granted a declaration covering a more limited territory than the one claimed by the plaintiff, and should have done so. On

the other hand, if Aboriginal title must be established on the basis of more intensive physical occupation of specific sites, the current litigation did not provide a proper basis for such a finding. I will address this issue further in my discussion of the nature of proof of Aboriginal title.

B. Does dismissal of the title claim found a cause of action estoppel?

[127] Canada argues that the judge was wrong to dismiss the Aboriginal title claim on a “without prejudice” basis. It contends that any claim to title within the Claim Area must be *res judicata* based on the doctrine of cause of action estoppel deriving from *Henderson v. Henderson* (1843), 3 Hare 100. In that case, at 115, the Vice-Chancellor described the rule as follows:

[W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[128] I would reject Canada’s contention. The claim before the court was a claim for Aboriginal title based on a territorial theory. The case was one of the most complex ever adjudicated in this country. To suggest that the plaintiff ought to have been compelled to bring other, site-specific claims within the same litigation lacks reality. Such claims did not “belong to the subject of litigation” in this case. They would have raised much different factual issues, and would have required a much longer and more unwieldy trial. It would not have been in the interests of justice to have such claims adjudicated in this proceeding.

[129] The doctrine of *res judicata*, including cause of action estoppel, is concerned with abuse of process (see the comment of Lord Keith of Kinkel in *Arnold v. National Westminster Bank Plc.*, [1991] 2 A.C. 93 at 110 (H.L.)). I do not think that it can

possibly be argued, in the context of the present case, that the plaintiff's decision to proceed with a territorial claim rather than a narrower site-specific claim was an abuse of process. As I will discuss, Aboriginal title has been a bit of a moving target in Canadian law, and it would be unfair to fault a person in the position of the plaintiff for choosing to pursue one theory of title rather than another.

[130] I recognize that the doctrine of cause of action estoppel normally requires a plaintiff to bring all related claims together in a single action, and I do not wish to cast any doubt on that proposition. In the unique circumstances of this case, however, it would have been completely impractical for site-specific title claims to be joined with the territorial claim that was advanced. For that reason, further site-specific claims to Aboriginal title in the territory would not constitute abuses of process, and are not barred by the doctrine of *res judicata*.

[131] There are, in the result, only two possible conclusions with respect to the judge's dismissal of the title claim. If the plaintiff was correct in asserting a territorial claim, the judge ought to have granted a declaration with respect to a more limited territory than the entire Claim Area. On the other hand, if a territorial claim is not a tenable basis for asserting Aboriginal title, the dismissal of the territorial claim cannot form the basis of cause of action estoppel so as to bar any future site-specific claim based on a different theory of title.

VIII. The Proper Rights Holder

[132] The second issue that arises on this appeal is whether the trial judge erred in finding that the proper rights holder was the Tsilhqot'in Nation. The plaintiff's claim was brought on behalf of both the Xeni Gwet'in and the Tsilhqot'in, but the relief sought in respect of the two entities was different: the plaintiff sought a declaration of Aboriginal title on behalf of the Tsilhqot'in, and a declaration of other Aboriginal rights on behalf of the Xeni Gwet'in. In closing argument, he sought to advance claims for declarations of Aboriginal rights on behalf of the Tsilhqot'in as well as the Xeni Gwet'in. The trial judge allowed the plaintiff to proceed in that manner and ultimately found that the Tsilhqot'in Nation was the proper rights holder.

[133] British Columbia contended that it was prejudiced in its defence by the plaintiff's decision to modify his claim in the course of final argument. It said that if it had known that claims for Aboriginal rights were being advanced on behalf of the Tsilhqot'in Nation, it could have concentrated effort on exposing conflicting interests of different subgroups within the Tsilhqot'in Nation, with a view to demonstrating that particular Aboriginal rights are not held collectively by all Tsilhqot'in people.

[134] The trial judge rejected the assertion that British Columbia had suffered procedural or evidentiary prejudice:

[1220] ... The evidence in this case leads to one conclusion: all Tsilhqot'in people were entitled to utilize the entire Tsilhqot'in territory in the course of their seasonal rounds. The Xení Gwet'in people are Tsilhqot'in people, distinguished only by their nascent group and the fact of their location at the time reserves were set aside.

[1221] This fact comes as no surprise and it cannot be prejudicial to British Columbia to acknowledge that it was Tsilhqot'in people who hunted, trapped and traded throughout the Claim Area and beyond before the arrival of European people.

[135] On appeal, British Columbia renews the argument that the plaintiff's late change of position caused it prejudice. I am not persuaded that this argument can succeed. The question of how members of the Tsilhqot'in Nation shared land-based rights was fully canvassed at trial, albeit with an emphasis on Aboriginal title rather than other Aboriginal rights. In the circumstances, it is difficult to accept that British Columbia was prejudiced by the late change in the plaintiff's position. In any event, it seems to me that the judge was in an ideal position to assess British Columbia's contention that it might have approached the case differently had the Aboriginal rights claims been advanced, from the outset, on behalf of the Tsilhqot'in.

[136] While the plaintiff did not formally apply to amend the statement of claim to assert his claim to Aboriginal rights on behalf of the Tsilhqot'in Nation, that was, effectively, what he was seeking and what the judge tacitly allowed. It was within the judge's discretion to allow such an amendment. Absent a demonstrated error in the manner in which the judge exercised his discretion, this Court should not interfere with his decision. In my view, no error has been demonstrated. In particular, British

Columbia has not shown that the judge was wrong in finding that it suffered no prejudice as a result of the late change in the relief sought.

[137] While I would uphold the judge's determination that British Columbia suffered no evidentiary or procedural prejudice as a result of the plaintiff being allowed to argue that Aboriginal rights are held by the Tsilhqot'in Nation rather than by the Xeni Gwet'in, that is not the end of the matter. British Columbia argues that, as a matter of law, the Tsilhqot'in Nation cannot properly be described as the rights holder.

[138] British Columbia points to serious practical problems that it will face as a result of a finding that rights are held at the level of the Tsilhqot'in Nation rather than at the level of the Xeni Gwet'in. It notes, for example, that it has granted exclusive commercial trapping rights to the Xeni Gwet'in in the Trapline Territory. It says that it has done so on the understanding that the Xeni Gwet'in are the holders of Aboriginal rights to trap in that area.

[139] More importantly, British Columbia says that a finding that Aboriginal rights are held on behalf of the Tsilhqot'in Nation will wrongly assign rights to an entity that has no governing or decision-making body, and which has no established power structure by which it can designate people who are authorized to speak on behalf of the collective. Indeed, it contends that the judge's conclusions on the evidence "would not support a finding that there existed one Tsilhqot'in Nation".

[140] British Columbia's position that the Tsilhqot'in Nation lacks political structure is supported by the findings of the trial judge. He found that there was, traditionally, no pan-Tsilhqot'in governing body. While five Tsilhqot'in bands have, in recent years, incorporated an organization known as the Tsilhqot'in National Government under the *Canada Corporations Act*, R.S.C. 1970, c. C-32, it does not represent all Tsilhqot'in people. The Tl'esqox (or Toosey Indian Band) is not a member, nor is the Ulkatcho First Nation which, though predominately Carrier, also includes many Tsilhqot'in people. Further, it would appear that there are Tsilhqot'in people who are not members of any of those bands (see *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.* (1999), 37 C.P.C. (4th) 101 at para. 3 (B.C.S.C.)).

[141] On the other hand, the Xeni Gwet'in, as a band under the *Indian Act*, has well-defined membership and a clear political structure. That makes it possible to definitively identify individuals entitled to exercise Aboriginal rights, and allows governments to engage in proper consultation when rights are threatened.

[142] I have considerable sympathy for the position of British Columbia. The courts have established that governments must respect Aboriginal rights. Where governments infringe such rights, they must justify the infringement; one component of the justification analysis is the question of whether or not there has been consultation with the group that holds the Aboriginal right (*R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1119). Even where Aboriginal rights are unproven, governments must engage in consultations with groups asserting rights at a level commensurate with the strength of the claim (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511). Where there is no body with authority to speak for the collective (or worse, where there are competing bodies contending that they have such authority), consultation may be stymied.

[143] Consultation and negotiation are, without doubt, the preferred routes to reconciliation of Aboriginal rights with the needs of British Columbians as a whole. Practical barriers to consultation and negotiation are, therefore, more than mere inconveniences.

[144] British Columbia asserts that these practical considerations demonstrate the necessity for any rights-holding group to have a political structure capable of decision-making. It goes further, however, and says that the requirement is supportable not merely on practical grounds, but also on jurisprudential ones.

[145] Aboriginal rights are communal rights. British Columbia suggests that in order for a collective to be considered a proper rights holder, it must have traditionally exercised decision-making authority with respect to the exploitation and allocation of such rights within the collective. British Columbia contends that the absence of any traditional pan-Tsilhqot'in governance structure is fatal to any claim on behalf of the Tsilhqot'in Nation.

[146] If the law adopted such a position, it might well be devastating to claims by groups such as the Tsilhqot'in. The judge found that Tsilhqot'in decision-making and governance traditionally took place on a localized level, typically within family or encampment groupings, depending on the season. Because of the fluidity of the group structure and the limits of available evidence, however, it would be impossible to trace those localized collectives into modern counterparts. If Aboriginal rights devolve only upon collectives that can show that they are the modern successors of groups that had a clear decision-making structure, no one would be able to claim Aboriginal rights on behalf of the Tsilhqot'in.

[147] Even if it were possible to trace modern counterparts to the traditional family, encampment, and sub-band groupings of the Tsilhqot'in, recognizing those collectives as the holders of Aboriginal rights would not reflect the judge's findings with respect to the traditional allocation of rights. He found that the Tsilhqot'in people recognized that they collectively had rights throughout their traditional territories, regardless of which sub-groups they belonged to.

[148] British Columbia argues that bands under the *Indian Act* will typically be the proper claimants in Aboriginal rights cases. It points to a number of cases in which claims have been brought by or on behalf of such entities. Rights will not, however, always be allocated along band lines. This fact was recently recognized by this Court in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193. While the Court found that the "Aboriginal collectives" identified by the chambers judge were not juridical persons entitled to make a claim in a class proceeding, the majority did not doubt that rights could be held on a collective basis that was not based on band membership:

[77] ... [T]he chambers judge designated the class members as "Aboriginal collectives" because of his recognition of the fact that Band membership does not necessarily establish the requisite ancestral connection to assert an Aboriginal right. I agree with the chambers judge in this regard. This is so because in some cases, an Aboriginal collective may self-identify along traditional lines independent of *Indian Act* designation as a Band. A Band is not necessarily the proper entity to assert an Aboriginal right.

[149] In my view, the position taken by British Columbia does not take adequate account of the Aboriginal perspective with respect to this matter. I agree with the trial judge's conclusion that the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself. In that regard, at para. 471, the judge cited with approval a passage from Professor Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 745:

What role, then, does native custom play in this scheme? The answer lies in the fact that, while the doctrine of aboriginal land rights governs the title of a native group considered as a collective unit, it does not regulate the rights of group members among themselves. Subject, always, to valid legislation, the latter are governed by rules peculiar to the group, as laid down by custom or internal governmental organs.

Thus, the doctrine of aboriginal land rights attributes to native groups a collective title with certain general features. The character of this collective title is not governed by traditional notions or practices, and so does not vary from group to group. However, the rights of individuals and other entities within the group are determined *inter se*, not by the doctrine of aboriginal title, but by internal rules founded on custom. These rules dictate the extent to which any individual, family, lineage, or other sub-group has rights to possess and use lands and resources vested in the entire group. The rules have a customary base, but they are not for that reason necessarily static. Except to the extent they may be otherwise regulated by statute, they are open to both formal and informal change, in accordance with shifting group attitudes, needs, and practices.

[Footnotes omitted; see also Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255.]

[150] In the case before us, the evidence clearly established that the holders of Aboriginal rights within the Claim Area have traditionally defined themselves as being the collective of all Tsilhqot'in people. The Tsilhqot'in Nation, therefore, is the proper rights holder.

[151] It will, undoubtedly, be necessary for First Nations, governments, and the courts to wrestle with the problem of who properly represents rights holders in particular cases, and how those representatives will engage with governments. I do not underestimate the challenges in resolving those issues, and recognize that the law in the area is in its infancy. I do not, however, see that these practical difficulties can be allowed to preclude recognition of Aboriginal rights that are otherwise proven.

[152] Fortunately, the record in this case resolves the question of who speaks for the Tsilhqot'in Nation. Once again, I refer to what the trial judge described as the "modern political structure" of the Tsilhqot'in Nation:

[468] In the modern Tsilhqot'in political structure, Xení Gwet'in people are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xení, including Tachelach'ed. Other bands are considered to be the caretakers of the lands that surround their reserves. Still, the caretakers have no more rights to the land or the resources than any other Tsilhqot'in person.

[153] While the judge did not specifically refer to the Trapline Territory in this paragraph, it was clearly his intention to include it. There was a great deal of evidence establishing that the lands over which the Xení Gwet'in was the "caretaker" included all of the Claim Area.

[154] I read this paragraph as a recognition that the Xení Gwet'in is the custodian of land-based Aboriginal rights within the Claim Area – indeed, several witnesses used the word "custodian" to describe the relationship between the Xení Gwet'in and the Claim Area. Thus, though the rights are held on behalf of the entire Tsilhqot'in Nation, it is the Xení Gwet'in that administers and protects those rights.

[155] In saying this, I do not ignore the fact that the judge also said, in the paragraph immediately following the one I have quoted, that "band level organization ... is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot'in people". As I read the context of that statement, the judge's point was only that the organization of the Tsilhqot'in into bands as a result of the reserve allocation process and the *Indian Act* does not affect the identity of the Nation as the holder of rights. To the extent that the statement goes further than that, and suggests that band councils have no role to play in the administration of rights or in discussions with government, it is, in my view, not a correct assessment of the situation.

[156] In the result, I am not persuaded that the judge made any error in finding that the Tsilhqot'in Nation is the proper rights holder. The Xení Gwet'in, as modern "caretaker" or custodian of the Tsilhqot'in rights in the Claim Area, has a special role

to play in asserting those rights and in engaging with governments in attempts to reconcile them with broader public interests.

[157] Before leaving the issue of the proper rights holder, I think it appropriate to refer to the judge's view that the tests in *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, can be used to determine membership in the Tsilhqot'in Nation. I note that *Powley* dealt with the difficult issue of who qualifies as Métis for the purposes of s. 35 of the *Constitution Act, 1982*. The Métis have a unique history and mix of traditions, and have not, historically, been given the same recognition as a distinct group as have those who are described in s. 35(2) as "the Indian ... peoples of Canada". While it may well be that the *Powley* tests, or some variation of them, serve to identify those individuals who are entitled to the benefit of Aboriginal rights in the cases of all First Nations, I prefer not to express any opinion on that matter in this case.

IX. Aboriginal Title

A. Introduction

[158] Before addressing the substance of the Aboriginal title claim, I wish to comment on the difficulties that First Nations and governments face in attempting to settle cases such as the present one.

[159] In accordance with the common law tradition, the courts have proceeded to develop the law relating to Aboriginal title incrementally on a case-by-case basis. It is a particularly daunting task because the issues involved are unique. In developing rules for the proof of rights and title, the courts have had to develop, as well, an entire philosophical and jurisprudential framework for the recognition of traditional rights that came into being before the reception of the common law.

[160] Even, however, taking into account the difficulties inherent in this area of the law, jurisprudential development has been slow. While several full-scale claims for title to large areas of land have been advanced to the level of the Supreme Court of Canada, none has succeeded, and considerable areas of uncertainty subsist.

[161] To some degree, the apparent reluctance of the courts to go beyond what is needed to resolve the specific cases is understandable. I have already noted that that is the traditional manner in which the common law has developed. Further, the stakes in Aboriginal title claims have been high – cases such as *Calder*, *Delgamuukw*, and *Marshall; Bernard* involved vast areas of land. The resolution of such claims can be critical to the future of both the First Nation involved and the broader Canadian population.

[162] The technical difficulty of this area of law has exacerbated the problem, and has led to considerable frustration. The efforts of the Nisga'a in *Calder*, the Gitksan and Wet'suwet'en in *Delgamuukw*, and the Tsilhqot'in in this case (to this point) all consumed enormous amounts of resources, only to have the cases end inconclusively due to problems with the way they were commenced or pleaded.

[163] The courts have frequently emphasized the need for resolution of Aboriginal rights and title issues through negotiated agreements where possible. The trial judge in this case went beyond the ordinary role of the court in attempting to set the stage for a negotiated resolution. Negotiated resolution of issues, however, is not facilitated by uncertainty in the law.

[164] It is apparent that all sides have attempted to resolve the issues in this case, but without success. That is not surprising, given that the theories of Aboriginal title espoused by the plaintiff, on the one hand, and the defendants, on the other, are as far apart as they are. The trial judge's decision to provide a non-binding opinion as to the title area did not, in the end, assist the parties in finding common ground.

[165] The present case has been an extraordinary one, both in terms of the resources mustered by the parties to present their cases and in terms of the court resources that have been devoted to it. It is in many respects a test case on the issue of Aboriginal title. It presents a suitable vehicle for development of the law.

B. The Basis for Aboriginal Title and Rights

[166] The basic concepts underlying claims of Aboriginal title and Aboriginal rights are straightforward. First Nations occupied the land that became Canada long before the arrival of Europeans. As the trial judge noted at para. 592, “Aboriginal nations were not recognized as nation states by the European nations colonizing North America”. European explorers considered that by virtue of the “principle of discovery” they were at liberty to claim territory in North America on behalf of their sovereigns (see *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 378). While it is difficult to rationalize that view from a modern perspective, the history is clear. As was said in *Sparrow* at 1103:

[W]hile British policy towards the native population was based on respect for their right to occupy their traditional lands, ... there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. [Citations omitted.]

[167] The assertion of Crown sovereignty did not, as a matter of common law, serve to extinguish the pre-existing traditional rights of First Nations, and those rights survived. Aboriginal rights, then, are recognized rather than created by the common law.

[168] The general notion that Aboriginal rights survived the assertion of Crown sovereignty in common law jurisdictions is beyond doubt. The manner in which different common law jurisdictions deal with Aboriginal rights, however, varies. (See the discussion in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 36-42).

[169] This variation is not surprising. While the basic concept of Aboriginal rights is easily understood, the recognition of such rights in a common law system is a complex matter. Three major questions must be answered in order to elaborate a workable framework of Aboriginal rights: What types of rights are recognized? How is their existence to be determined? What protection is to be afforded those rights? Compendiously, the answers to those questions have been described as representing a reconciliation of Aboriginal rights with Crown (or national) sovereignty.

[170] There are extreme positions which attempt to “reconcile” Aboriginal rights with Crown sovereignty by giving one or the other absolute primacy, and these extreme positions have, from time to time, been advanced in the courts. For example, in *Calder*, the Attorney General of British Columbia argued that Aboriginal title (and, by extension, other Aboriginal rights) had been completely extinguished in British Columbia. At the other extreme, the plaintiffs in *Delgamuukw* originally claimed absolute ownership of their traditional territory, as well as a paramount right to govern it (see *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 at 193-4 (B.C.S.C.)). While these positions were not, *per se*, inconsistent with a basic theory of Aboriginal rights, they failed to provide a basis for genuine reconciliation of Aboriginal rights with Crown sovereignty. Such reconciliation demands not only a framework that is jurisprudentially defensible, but also one that presents a practical compromise and encourages consensual settlement of differences. As Lamer C.J.C. put it at the end of his judgment in *Delgamuukw*:

[186] ... Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.

[171] One fundamental aspect of Aboriginal rights that must be kept in mind is that they are intimately connected with traditional Aboriginal culture and practices, adapted, as they may be, to modern conditions. Respect for Aboriginal rights safeguards the unique cultures of Aboriginal groups, and preserves their abilities to continue to live according to their traditions: see *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686 at paras. 26 and 33. Such respect is the proper focus of an Aboriginal rights analysis.

[172] As I will indicate, this fundamental aspect of Aboriginal rights must be kept in mind in defining the extent of Aboriginal title. The law must recognize and protect Aboriginal title where exclusive occupation of the land is critical to the traditional culture and identity of an Aboriginal group. This will usually be the case where the traditional use of a tract of land was intensive and regular.

[173] Where traditional use and occupation of a tract of land was less intensive or regular, however, recognition of Aboriginal rights other than title may be sufficient to fully preserve the ability of members of a First Nation to continue their traditional activities and lifestyles and may fully preserve Aboriginal culture. In such cases, the recognition of those other rights may be more commensurate with the reconciliation of Aboriginal rights with Crown sovereignty than would a broader recognition of Aboriginal title.

C. Canadian Law of Aboriginal Title

[174] The rights of First Nations to lands that they traditionally occupied has been a concern of colonial and Canadian law from the earliest times. The history of protection of those rights, has, however, been embarrassingly weak. As the Supreme Court of Canada remarked in *Sparrow* at 1103:

[T]here can be no doubt that over the years the rights of the Indians were often honoured in the breach.... As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."

[175] In most of Canada, the Crown entered into treaties with First Nations in an attempt to resolve many of the concerns. Even where such treaties exist, however, there continue to be many issues that arise. The Crown did not enter into treaties in respect of most of the territory in what is now British Columbia, and, accordingly, Aboriginal title issues arise in this province in a very stark way.

[176] Despite the lengthy period in which reconciliation of Aboriginal interests with those of the broader population has been required, it is only comparatively recently that the law has begun to develop a robust theory of Aboriginal rights, including Aboriginal title.

[177] While early Canadian law recognized "Indian tenure" in land, the scope and nature of that tenure was uncertain. In *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at 56 (J.C.P.C.), the tenure was described as being "a personal and usufructuary right, dependent on the goodwill of the Sovereign".

[178] The description of Aboriginal title as being “personal and usufructuary” was subject to criticism in later cases. In *Calder* at 328, Judson J. said that he found the description unhelpful, a sentiment that would later be echoed in *Delgamuukw* at para. 112. A discussion of various criticisms of the use of the phrase “personal and usufructuary” can be found in *Guerin* at 380-382. In *Guerin*, Aboriginal title was described, at 382, as being a *sui generis* interest. The majority said:

The nature of the Indians' interest is ... best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

[179] Most of the criticisms of the phrase used in *St. Catherine's Milling* were focused on the question of whether Aboriginal title should be considered to be more akin to a real or a personal interest in land. They were not directed, so much, at the idea that the interest was of a usufructuary character.

[180] Until relatively recently, Aboriginal rights were often considered to be incidents of Aboriginal title. This was in keeping with the idea that Aboriginal title itself was a sort of usufructuary right. Thus, in *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development)*, [1980] 1 F.C. 518, an important case in the development of Canadian Aboriginal law, the judge granted a declaration at 579 that “the lands [in issue] are subject to the aboriginal right and title of the Inuit to hunt and fish thereon”.

[181] Even as Aboriginal rights were recognized to exist separately from Aboriginal title, the relationship between title and rights remained in a state of flux. In her dissenting judgment in *Van der Peet*, for instance, L'Heureux-Dubé J. expressed the view that common law recognition of Aboriginal title depended on proof of a large “bundle” of Aboriginal rights in a particular area:

[119] ... Aboriginal title ... is founded on the common law and strict conditions must be fulfilled for such title to be recognized. In fact, aboriginal title exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest to occupy and use the land. [Citations omitted.]

[182] The decision of the majority in *Van der Peet* marks the beginning of the Supreme Court of Canada's construction of a modern comprehensive framework dealing with Aboriginal rights and Aboriginal title. It defined the basic requirements for recognition of an Aboriginal right. The construction of the framework was further advanced in *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139, which considered whether land-based Aboriginal rights could exist in places where claims to Aboriginal title could not be made out. The Court affirmed that they could. In *Adams*, Lamer C.J.C., speaking for the majority, said:

[26] What [the test for identification of Aboriginal rights set out in *Van der Peet*], along with the conceptual basis which underlies it, indicates, is that while claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out. Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land. *Van der Peet* establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.

[Emphasis in original.]

[183] The majority of the Court, then, seems to have considered that Aboriginal title could only be established by a particular (unstated) level of occupation or use. Further, in order to found a claim to Aboriginal title, it would have to be shown that the land on which the activity took place was of "central significance" to the distinctive culture.

[184] Lamer C.J.C. continued by referring specifically to the situation of nomadic groups:

[27] To understand why aboriginal rights cannot be inexorably linked to aboriginal title it is only necessary to recall that some aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances. That this was the case does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures. The aboriginal rights recognized and affirmed by s. 35(1) should not be understood or defined in a manner which excludes some of those the provision was intended to protect.

[185] He noted that levels of occupation and use of land that were insufficient to found a claim to Aboriginal title might, nonetheless, found a claim to specific Aboriginal rights:

[30] The recognition that aboriginal title is simply one manifestation of the doctrine of aboriginal rights should not, however, create the impression that the fact that some aboriginal rights are linked to land use or occupation is unimportant. Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question.

[Emphasis in original.]

[186] *Adams* stands for the proposition that traditional use of land will not necessarily found a claim to Aboriginal title – it may, instead, found an Aboriginal right to continue to use the land for specific activities or purposes. As the law recognized that usufructuary rights could be divorced from title, the rationale for describing Aboriginal title as being “usufructuary” in nature ceased to exist. I agree with the trial judge’s conclusion, at para. 478, that it is no longer correct to describe Aboriginal title in this way.

[187] The Supreme Court of Canada first attempted a comprehensive discussion of Aboriginal title in *Delgamuukw*. Lamer C.J.C., speaking for the majority, described Aboriginal title as follows:

[111] ... Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit ... flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.

[188] Referring back to *Adams*, he considered the relationship between Aboriginal rights and Aboriginal title:

[137] ... [A]lthough aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land "was of a central significance to their distinctive culture" [citing para. 26 of *Adams*].

[138] The picture which emerges from *Adams* is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" [citing para. 26 of *Adams*; emphasis is from *Adams*]. Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity....

[Emphasis in original.]

[189] He emphasized that traditional use of land will not necessarily found claims to Aboriginal title, even when it establishes an Aboriginal right:

[139] Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities. As I explained in *Adams*, this may occur in the case of nomadic peoples who varied "the location of their settlements with the season and changing circumstances" (at para. 27)....

[190] Lamer C.J.C. set out specific requirements for the establishment of Aboriginal title in para. 143:

[143] In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[191] For the purposes of the present case, the question is what degree of occupation suffices to found a claim for Aboriginal title. There is some discussion of this question in *Delgamuukw* beginning at para. 149:

[149] ... Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, *Common Law Aboriginal Title*, at pp. 201-2. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at p. 758.

[150] In *Van der Peet*, I drew a distinction between those practices, customs and traditions of aboriginal peoples which were "an aspect of, or took place in" the society of the aboriginal group asserting the claim and those which were "a central and significant part of the society's distinctive culture" (at para. 55). The latter stood apart because they "made the culture of the society distinctive . . . it was one of the things that truly made the society what it was" (at para. 55, emphasis in original). The same requirement operates in the determination of the proof of aboriginal title. As I said in *Adams*, a claim to title is made out when a group can demonstrate "that their connection with the piece of land ... was of a central significance to their distinctive culture" (at para. 26).

[151] Although this remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim. The requirement exists for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.

[192] After discussing the requirement that occupancy be exclusive, the majority judgment concluded by noting that non-exclusive occupation can found rights other than Aboriginal title:

[159] I should also reiterate that if aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title. These rights will likely be intimately tied to the land and may permit a number of possible uses. However, unlike title, they are not a right to the land itself. Rather, as I have suggested, they are a right to do certain things in connection with that land. If, for example, it were established that the lands near those subject to a title claim were used for hunting by a number of bands, those shared lands would not be subject to a claim for aboriginal title, as they lack the crucial element of exclusivity. However, they may be subject to site-specific aboriginal rights by all of the bands who used it. This does not entitle anyone to the land itself, but it may entitle all of the bands who hunted on the land to hunting rights.

[193] The Supreme Court further considered the issue of Aboriginal title in its judgment in *Marshall; Bernard*. The judgment arose out of two separate appeals. In *Marshall*, thirty-five Mi'kmaq Indians were charged under Nova Scotia legislation with cutting timber on Crown land without authorization. In *Bernard*, a Mi'kmaq Indian was charged with unlawful possession of logs under New Brunswick legislation. The logs had been cut by another Mi'kmaq Indian on Crown lands. In both cases, the accused argued that the land from which the timber was cut was subject to Mi'kmaq Aboriginal title, and that provincial authorization for logging by the Mi'kmaq was therefore unnecessary. Technically, the title issue in each case only concerned the tract of land from which the logs had been cut. In asserting title, however, the defendants in each case contended that the relevant tract of land was, in fact, part of a large territory over which the Mi'kmaq held title.

[194] The accused were convicted at trial in both *Marshall* and *Bernard*. In both cases, the trial judges found that Mi'kmaq occupation of the cutting sites at the time of Crown sovereignty was insufficient to support a claim to Aboriginal title. They both interpreted the test for title as requiring regular and exclusive occupancy of the area. In both cases, summary conviction appeal judges upheld the convictions.

[195] In *Marshall*, the Nova Scotia Court of Appeal held that the trial judge had applied too stringent a test for occupation, particularly given that the Mi'kmaq were a semi-nomadic group. Instead, the court considered that occupation could be made out by demonstrating entry into an area, combined with an intention to occupy. In a passage quoted at para. 42 of the Supreme Court of Canada's decision, the Court of Appeal held that "cutting trees or grass, fishing in tracts of water, and even perambulation" could be relied upon to show occupation sufficient to found a title claim. The Court of Appeal ordered a new trial.

[196] In *Bernard*, the New Brunswick Court of Appeal held that it was unnecessary to show occupation or regular use of the specific area from which logs were taken. Instead, it held, occupation of a nearby area was sufficient to show "that the cutting site would have been within the range of seasonal use and occupation by the Mi'kmaq" (quoted at para. 43 of the Supreme Court of Canada's decision). The Court of Appeal substituted an acquittal for the conviction that had been entered at trial.

[197] The Supreme Court of Canada heard the two cases together. In both, it reinstated the convictions entered by the trial courts. McLachlin C.J.C., writing for the majority, began her discussion of the issue of common law Aboriginal title by referring to *Delgamuukw*. At para. 40 she noted that while *Delgamuukw* had established general principles governing proof of Aboriginal title, it had left many of the details to be developed in subsequent cases, including what level of occupation was necessary to found a claim to title.

[198] At para. 54, she held that in order to establish Aboriginal title, the claimant must demonstrate "possession similar to that associated with title at common law". She noted that that level of possession depends on all of the circumstances, including "the nature of the land and the manner in which the land is commonly enjoyed" as well as the actual nature of the occupation.

[199] In respect of the nature of occupation, she said:

[56] “Occupation” means “physical occupation”. This “may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources”: *Delgamuukw*, per Lamer C.J., at para. 149.

...

[58] It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet*, *Nikal* [*R. v. Nikal*, [1996] 1 S.C.R. 1013], *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.

...

[62] Aboriginal societies were not strangers to the notions of exclusive physical possession equivalent to common law notions of title: *Delgamuukw*, at para. 156. They often exercised such control over their village sites and larger areas of land which they exploited for agriculture, hunting, fishing or gathering. The question is whether the evidence here establishes this sort of possession.

[200] She also considered the specific question of whether a semi-nomadic group could successfully make a claim of Aboriginal title:

[66] The second sub-issue is whether nomadic and semi-nomadic peoples can ever claim title to aboriginal land, as distinguished from rights to use the land in traditional ways. The answer is that it depends on the evidence. As noted above, possession at common law is a contextual, nuanced concept. Whether a nomadic people enjoyed sufficient “physical possession” to give them title to the land, is a question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used. Not every nomadic passage or use will ground title to land; thus this Court in *Adams* asserts that one of the reasons that aboriginal rights cannot be dependent on aboriginal title is that this would deny any aboriginal rights to nomadic peoples (para. 27). On the other hand, *Delgamuukw* contemplates that “physical occupation” sufficient to ground title to land may be established by “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” (para. 149). In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.

[201] McLachlin C.J.C. summarized her legal conclusions at para. 70:

[70] In summary, exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. Less intensive uses may give rise to different rights. The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law: *Delgamuukw*, at para. 156. These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes. Continuity is required, in the sense of showing the group's descent from the pre-sovereignty group whose practices are relied on for the right. On all these matters, evidence of oral history is admissible, provided it meets the requisite standards of usefulness and reasonable reliability. The ultimate goal is to translate the pre-sovereignty aboriginal right to a modern common law right. This must be approached with sensitivity to the aboriginal perspective as well as fidelity to the common law concepts involved.

[202] She found that, in each case, the trial judge had applied the correct test of Aboriginal title. While the trial decision in *Bernard* had turned in large measure on the question of whether occupation had been exclusive, the decision in *Marshall* had not. In his reasons for judgment in *R. v. Marshall*, 2001 NSPC 2, 191 N.S.R. (2d) 323, Curran P.C.J. specifically indicated that to the extent there was occupation, it was exclusive:

[137] The question of exclusiveness really does not arise in this case. There was no other aboriginal group in Nova Scotia in 1713 or 1763. On the mainland in 1713 there were a few Acadian enclaves and one small British outpost. In Cape Breton between the fall of Louisbourg and 1763 there was one small French community and some scattered French settlers. There is no reason to believe there was any European on any of the cutting sites, or for that matter on most of the mainland or in most of Cape Breton, at the relevant times. That leaves the question of occupancy.

[203] His analysis of the issue of sufficiency of occupation was as follows:

[139] The problem for the defendant is that mere occupancy of land does not necessarily establish aboriginal title: (See *Delgamuukw*, *supra*, at paragraph 138, where Lamer C.J. commented on *R. v. Adams*, [1996] 3 S.C.R. 101). If an aboriginal group has used lands only for certain limited activities and not intensively, the group might have an aboriginal right to carry on those activities, but it doesn't have title.

[140] The Supreme Court considered the question of sufficient occupancy for aboriginal title in *R. v. Côté*, *supra*. In paragraph 60 Lamer C.J. said, for the majority, that the superior court judge who heard the first appeal in the

case had “made a finding of fact which was directed at the proper question before the court.” The question was whether the ancestors of the appellants, the Algonquins, had “exercised sufficient occupancy” to prove aboriginal title. According to the evidence, the Algonquins were “a moderately nomadic people who settled only temporarily and moved frequently within the area of the Ottawa River basin.” Their habits were the result of “the presence and movements of their sources of sustenance,...governed by the changes of the seasons.” Although the judge had found that the Algonquins frequented the territory at the relevant time, he decided that “in light of the itinerant hunting patterns and the thin population of the Algonquins” they had not “exercised real and exclusive possession” of the territory.

[141] In paragraph 149 of *Delgamuukw*, *supra et sequitur*, while quoting with favour from Brian Slattery’s Canadian Bar Review article *Understanding Aboriginal Rights*, the Chief Justice wrote:

In considering whether occupation sufficient to ground title is established, “one must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed”.

The problem is to have a clear way of differentiating between sufficient and insufficient occupancy for title. *Delgamuukw* offers some help. Paragraph 139 begins as follows:

Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities. As I explained in *Adams*, this may occur in the case of nomadic peoples who varied “the location of their settlements with the season and changing circumstances”.

In paragraph 149 the Chief Justice referred to the book Common Law Aboriginal Title by Professor Kent McNeil and said:

Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land ... Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosures of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources...

The line separating sufficient and insufficient occupancy for title seems to be between nomadic and irregular use of undefined lands on the one hand and regular use of defined lands on the other. Settlements constitute regular use of defined lands, but they are only one instance of it. There is no persuasive evidence that the Mi’kmaq used the cutting sites at all, let alone regularly.

[204] At paras. 73 and 75 of her reasons, McLachlin C.J.C. accepted this analysis as being correct in law, and quoted from it with approval.

D. Analysis

[205] The parties come to this Court with very different conceptions of what is needed to make out a claim to Aboriginal title. The plaintiff places great weight on what was said at para. 143 of *Delgamuukw*, which I repeat for convenience:

[143] In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[206] In his argument, the plaintiff often treats the concept of “occupation” as if it is synonymous with “presence in the territory”. He rejects the idea that proof of title depends on showing any intensive or regular use of specific plots of land. Rather, he says that proof that the Tsilhqot’in were present in the region and that there was a degree of exclusivity to that presence suffices to found a title claim. He points to the defendants’ concession that the Tsilhqot’in were present in Tachelach’ed and the Trapline Territory in 1846, and to the judge’s findings of fact to the effect that the Tsilhqot’in did, in fact, enjoy effective exclusive occupancy.

[207] To buttress his contention that the key criterion for a title claim is exclusivity of occupation, the plaintiff points to para. 159 of *Delgamuukw*, quoted above, arguing that only a lack of exclusivity will prevent a claim to land-based Aboriginal rights from being a claim to Aboriginal title.

[208] The plaintiff says that the judge’s findings that the Tsilhqot’in occupied the Opinion Area in 1846 and did so exclusively are findings of fact, which must be treated by this Court as binding.

[209] The plaintiff rejects the defendants’ characterization of his claim as a “territorial” one. He points out that the Claim Area represents only a fraction of the traditional territory of the Tsilhqot’in. He also notes that the Claim Area is significantly smaller than the areas over which title was asserted in *Marshall* and *Bernard*.

[210] As at trial, the plaintiff emphasizes the semi-nomadic traditions of the Tsilhqot'in, and argues that requiring such a group to demonstrate intensive regular use of well-defined areas of land is to take a "postage stamp" approach to title. Such an approach, he contends, fails to give effect to the Aboriginal perspective from which the Tsilhqot'in claim arises.

[211] The defendants say that a claim to Aboriginal title can only be made out where definite boundaries can be established, and where there has been intensive occupation of a particular area. They emphasize Lamer C.J.C.'s comments in *Adams* and *Delgamuukw* doubting the ability of nomadic groups to prove title. They also place considerable weight on the examples of title land given at para. 149 of *Delgamuukw*: dwellings, cultivated areas, enclosed fields, and definite tracts of land used for hunting, fishing, or other resource exploitation.

[212] The defendants also refer to passages from *Marshall; Bernard* that speak of a correspondence between the nature of the occupancy necessary to found an Aboriginal title claim and the common law requirements for title by virtue of possession.

[213] Canada, in particular, argues that this case is materially identical to *Marshall; Bernard*, noting that the claim is one to a large region rather than to a definite tract of land, and arguing that, as in *Marshall; Bernard*, there is no evidence of a regular physical Tsilhqot'in presence except at a few places in the Claim Area.

[214] As I indicated when discussing the question of whether the claim in this case is an "all or nothing claim", I accept the defendants' characterization of the claim as being a "territorial" one. The plaintiff does not suggest that the Tsilhqot'in physically occupied the entire Claim Area, either at all times or seasonally. Rather, he says that they lived in various encampments in the Claim Area at different times, some of which have been identified. They hunted, trapped and fished at various places, some of which are in the Claim Area. On a seasonal basis, groups would transit over trails covering most regions of the Claim Area. He says that this type of presence in

the Claim Area amounts to “occupation” for the purpose of claiming title, and allows a claim to title over the territory.

[215] Except in respect of a few specific sites, the evidence did not establish regular presence on or intensive occupation of particular tracts of land within the Claim Area. There were no permanent village sites, though there was evidence of encampments and wintering sites, including groupings of pit houses. Even among these, the evidence did not strongly point to occupation of particular sites in the period around 1846 except in three or four cases.

[216] The Tsilhqot’in did not cultivate or enclose fields. While they did hunt and fish in many parts of the Claim Area, there are only a few sites (primarily fishing sites) that can be said to be specifically delineated in the evidence. Only a few locations were referred to which may have been used intensively. As the defendants contend, the evidence and findings suggest that hunting, trapping and fishing occurred at many places in the Claim Area, more or less on an opportunistic basis. Gathering activities also appear to have been widespread, although the findings of fact suggest that some localized spots may exist where natural plants were harvested and, to a limited extent, managed.

[217] As I see it, the claim can only be described as being a “territorial” one rather than a site-specific claim to title. The fact that the territory being claimed, large as it is, is a fraction of the total area alleged to be the traditional territory of the Tsilhqot’in does not prevent the claim from being characterized in this way.

[218] Indeed, the plaintiff’s often repeated statement that the Tsilhqot’in did not lead a “postage stamp” existence underlines the territorial nature of the claim – with a few exceptions, there are no definite tracts of land that were habitually occupied by the Tsilhqot’in at and around 1846.

[219] I also agree with the defendants that a territorial claim for Aboriginal title does not meet the tests in *Delgamuukw* and in *Marshall; Bernard*. Further, as I will attempt to explain, I do not see a broad territorial claim as fitting within the purposes behind

s. 35 of the *Constitution Act, 1982* or the rationale for the common law's recognition of Aboriginal title. Finally, I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal.

[220] As I read *Delgamuukw*, Aboriginal title cannot generally be proven on a territorial basis, even if there is some evidence showing that the claimant was the only group in a region or that it attempted to exclude outsiders from what it considered to be its traditional territory. I acknowledge that *Delgamuukw* did not fully address the quality of occupancy that was necessary to support a title claim, apart from indicating that the occupancy must have been exclusive. That said, several passages in *Delgamuukw* strongly suggest that an intensive presence at a particular site was what the Court had in mind.

[221] In particular, I note that the examples of title lands given at para. 149 of *Delgamuukw* are well-defined, intensively used areas. The reference to hunting, fishing and other resource extraction activities is coupled with a specific description of the lands so used as “definite” tracts of land. I agree with British Columbia’s assertion that what was contemplated were specific sites on which hunting, fishing, or resource extraction activities took place on a regular and intensive basis. Examples might include salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps.

[222] The Court’s specific references to the difficulty that nomadic peoples might face in proving title is also telling. While, as the Court pointed out in *Marshall; Bernard*, there is no reason that semi-nomadic or nomadic groups would be disqualified from proving title, their traditional use of land will often have included large regions in which they did not have an adequate regular presence to support a

title claim. That is not to say, of course, that such groups will be unable to prove title to specific sites within their traditional territories.

[223] Finally, with respect to *Delgamuukw*, I note Lamer C.J.C.'s comments at paras. 150 and 151 dealing with the need for a group to demonstrate that a piece of land was of central significance to their distinctive culture. He considered this to be a "crucial" part of the test for Aboriginal title, but found that it was unnecessary to treat it as a specific element of the proof of title, because any land that met the other criteria for Aboriginal title would, of necessity, be of central significance to the culture. That position is a sensible one if the occupation needed to found a claim for title is site-specific; it is not, however, if undifferentiated land within a large territory is to be included in a title claim.

[224] *Marshall; Bernard*, as I read it, is even stronger in showing that Aboriginal title must be demonstrated on a site-specific rather than territorial basis. The majority expressly dealt with the question of whether hunting or fishing or the taking of other resources from land could found a title claim. At para. 58, it agreed that such activities could, where they were sufficiently regular and exclusive, be a basis for title. It also cautioned, however, that more typically, such activities will found only claims to specific Aboriginal rights.

[225] The majority's equation of sufficient occupancy for Aboriginal title with the common law requirements to show title by virtue of possession is also important. It supports the views that title must be claimed on a site-specific basis, and that a certain regularity and intensity of presence is needed before it will count as "occupancy".

[226] I further agree with Canada's contention that this case is, on its facts, materially similar to *Marshall; Bernard*, and particularly to *Marshall*. I acknowledge the plaintiff's arguments that there was more evidence presented in this case, that the trial was longer, and that the size of the claimed area was smaller. None of these facts, however, make this case materially different from *Marshall*. I also acknowledge that the traditions of the Tsilhqot'in were and are very different from

those of the Mi'kmaq, as were the traditional seasonal migration patterns. Again, however, those differences are not material to the legal analysis of the case. In *Marshall*, there was no evidence to support occupation of the specific site from which logs were taken. Similarly, in the case before us, there is no evidence to support occupation of most sites within the Claim Area.

[227] I acknowledge the plaintiff's argument that the question of occupation is ultimately a question of fact, on which the findings of a trial judge must prevail. While the question of whether land was occupied is, in large part, a question of fact, the question of whether a particular presence in a territory meets the standard of occupation necessary to found a claim to title is a question of mixed fact and law.

[228] In the case before us, it is not clear what precise test the judge applied in determining whether Tsilhqot'in occupancy of the Claim Area was sufficient to found title. While he divided the Claim Area into regions where there was sufficient occupation and regions where there was not, he did not describe the threshold for differentiating between the two.

[229] While the judge did not articulate any clear test for sufficiency of occupation, it is evident that he considered that occupation could be determined on a regional or territorial basis. The question of whether it is appropriate to determine title issues on a territorial rather than site-specific basis is an extricable issue of law. The standard of review on that question, is, therefore, one of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 36-37.

[230] As I have discussed, the case law does not support the idea that title can be proven based on a limited presence in a broad territory. Rather, as I read the jurisprudence, Aboriginal title must be proven on a site-specific basis. A title site may be defined by a particular occupancy of the land (e.g., village sites, enclosed or cultivated fields) or on the basis that definite tracts of land were the subject of intensive use (specific hunting, fishing, gathering, or spiritual sites). In all cases, however, Aboriginal title can only be proven over a definite tract of land the boundaries of which are reasonably capable of definition.

[231] The limitation of Aboriginal title to definite tracts of land is fully in keeping with the purpose of s. 35 of the *Constitution Act, 1982* and the rationale for common law recognition of Aboriginal rights and title. In order for an Aboriginal group to preserve its culture and allow members of the group to pursue a traditional lifestyle, it is necessary for the group to have exclusive possession of those places that it traditionally occupied on a regular and intensive basis. The group must be given the opportunity to live where it lived traditionally, and to continue to use the land that it cultivated or intensively took resources from.

[232] I do not doubt that the culture and traditions of a semi-nomadic group, like the Tsilhqot'in, depend on rights to use lands that extend well beyond the definite tracts that may be found to be subject to Aboriginal title. The Tsilhqot'in must be able to continue hunting and fishing throughout their traditional territory, and to have the right to pass and re-pass over the trails that they have used for hundreds of years. There will be other specific rights that must be recognized in order to preserve the rich traditions of the Tsilhqot'in people. It is not at all clear to me, however, that Tsilhqot'in culture and traditions cannot be fully respected without recognizing Aboriginal title over all of the land on which they roamed.

[233] In considering Aboriginal title and Aboriginal rights, the Court must take into account Aboriginal perspective as well as that of the common law. The connection of the Tsilhqot'in Nation to its traditional territory has both spiritual and temporal aspects that are difficult to convey in the dry words of a judgment. This deep connection must, however, remain foremost in the Court's mind in considering issues of Aboriginal title and Aboriginal rights. I am not convinced that the relationship of the Tsilhqot'in people to the land requires recognition of title on a territorial basis; it does, however, require the Court to affirm the existence of Aboriginal rights that respect the Tsilhqot'in perspective on its own culture and values. The recognition of such rights will serve to prevent incompatible uses of the land.

[234] The fallacy in the plaintiff's characterization of the defendants' positions as representing a "postage stamp" view of Aboriginal title is that it ignores the importance of Aboriginal rights other than title in protecting traditional culture and lifestyles. The "postage stamp" characterization was accepted by the judge:

[610] The plaintiff characterizes the ... arguments of the defendants as a postage stamp approach to Aboriginal title. I think that is a fair description. There is no evidence to support a conclusion that Aboriginal people ever lived this kind of postage stamp existence. Tsilhqot'in people were semi-nomadic and moved with the seasons over various tracts of land within their vast territory. It was government policy that caused them to alter their traditional lifestyle and live on reserves.

...

[1376] What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations. A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided "cultural security and continuity" to Tsilhqot'in people for better than two centuries.

[1377] A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people. The recognition of the long-standing presence of Tsilhqot'in people in the Claim Area is a simple, straightforward acknowledgement of an historical fact.

[235] It seems to me that the plaintiff's approach to Aboriginal title does not account for the fact that title is not the only tool available to provide cultural security to the Tsilhqot'in.

[236] Aboriginal rights of various sorts protect cultural security and safeguard the ability of First Nations to continue to engage in traditional lifestyles. Indeed, as British Columbia points out, the phrase "cultural security and continuity" was originally used in *Sappier; Gray* to describe the function of Aboriginal rights in general, not merely Aboriginal title.

[237] Aboriginal title, while forming part of the picture, is not the only – or even necessarily the dominant – part. Canadian law provides a robust framework for recognition of Aboriginal rights. The cultural security and continuity of First Nations

can be preserved by recognizing their title to particular “definite tracts of land”, and by acknowledging that they hold other Aboriginal rights in much more extensive territories.

[238] The result for semi-nomadic First Nations like the Tsilhqot’in is not a patchwork of unconnected “postage stamp” areas of title, but rather a network of specific sites over which title can be proven, connected by broad areas in which various identifiable Aboriginal rights can be exercised. This is entirely consistent with their traditional culture and with the objectives of s. 35.

[239] It seems to me that this view of Aboriginal title and Aboriginal rights is fully consistent with the case law. It is also consistent with broader goals of reconciliation. There is a need to search out a practical compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and with the well-being of all Canadians. As I see it, an overly-broad recognition of Aboriginal title is not conducive to these goals. Lamer C.J.C.’s caution in *Delgamuukw* that “we are all here to stay” was not a mere glib observation to encourage negotiations. Rather, it was a recognition that, in the end, the reconciliation of Aboriginal rights with Crown sovereignty should minimize the damage to either of those principles.

[240] In the result, while I do not agree with the trial judge’s analysis of the Aboriginal title issue, I would uphold his order. The claim to Aboriginal title, as it was advanced, was not sustainable.

[241] I do not doubt that there are specific sites within the Claim Area that may be of particular significance to the Tsilhqot’in and on which they traditionally had a regular presence. As I have already indicated, this litigation was not structured so as to identify such specific sites as candidates for Aboriginal title. The Tsilhqot’in should be entitled to pursue title claims to specific sites notwithstanding that the plaintiff’s territorial claim has been dismissed. Accordingly, I would also uphold the trial judge’s declaration that his dismissal of the title claim does not preclude new claims asserting title to lands within Tachelach’ed and the Trapline Territory.

X. Does the *Forest Act* Apply to Title Lands?

[242] As I have noted, Vickers J. presented a detailed analysis of the proper scope of the phrase “Crown timber” in the *Forest Act* and concluded that it did not apply to forests on Aboriginal title lands. He also considered that the doctrine of interjurisdictional immunity prevented provincial legislation from regulating resource use on Aboriginal title lands.

[243] The judge’s reasons were cogent and comprehensive, and I anticipate that they will engender further debate on these issues. Given my conclusion that the claim to Aboriginal title is not made out, however, it is unnecessary for me to come to any final determination as to whether he was correct in finding that the *Forest Act* was inapplicable to title lands. Accordingly, I will refrain from further comment on the issue.

XI. Aboriginal Rights**A. The Relief in Issue**

[244] The amended statement of claim included the following claim of Aboriginal rights on behalf of the Xeni Gwet’in:

14. Before and at the time of European contact, the Xeni Gwet’in trapped (trapping includes hunting) animals for their own use and for trading in skins and pelts (collectively “Trapping Activities”) in the Brittany and the Trapline Territory. These Trapping Activities included the trapping of [there follows a list of animals, which does not include wild horses] and all other fur bearing animals. These Trapping Activities were practices which were integral to the distinctive culture of the Xeni Gwet’in prior to the time of contact with Europeans and continue to be integral to the distinctive culture of the Xeni Gwet’in.

[245] In the paragraphs that followed, the plaintiff alleged that British Columbia issued licences and permits that allowed private companies to engage in forestry activities in the Brittany (Tachelach’ed) and the Trapline Territories. It said that:

23. [These forestry activities] ... will, or are likely to, adversely affect the ability of the Xeni Gwet’in to exercise their right to carry out Trapping Activities by reducing the number of animals available and the number of species available to the Xeni Gwet’in; by compromising the ecological, cultural and spiritual integrity of the Brittany and the Trapline Territory; and by

reducing the wildlife refuge potential, and available wildlife habitat of the Brittany and the Trapline Territory.

[246] The relief sought by the plaintiff included declarations of Aboriginal rights to carry on trapping activities in Tachelach'ed and the Trapline Territory, and declarations that those rights had been violated by British Columbia in issuing licences and permits for forestry activities.

[247] As I have discussed, the trial judge allowed the plaintiff to modify the claims late in the trial, so that they were made on behalf of the Tsilhqot'in rather than the Xeni Gwet'in. My opinion, stated earlier in these reasons, is that the change in the claims was, in effect, an amendment of the pleadings, and that the judge acted within his discretion in allowing it.

[248] British Columbia admitted that the Xeni Gwet'in hold Aboriginal rights to "hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses" but denied that those rights extended to the capture of horses for transportation and work, or to trade in skins and pelts.

[249] British Columbia also admitted that it had granted forest tenures in areas that included the Claim Area and that it had issued certain authorizations. It accepted that the tenures and authorizations allowed private companies to undertake certain forestry activities and to apply for further authorizations to undertake other activities. It denied that the tenures and authorizations infringed any Aboriginal rights, and contended that if rights were infringed, the infringement was justified.

[250] The trial judge's order included the following declarations with regard to Aboriginal rights:

4. The Tsilhqot'in people have an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial and cultural uses. This right is inclusive of a right to capture and use horses for transportation and work;

5. The Tsilhqot'in people have an Aboriginal right to trade in skins and pelts taken from the Claim Area as a means of securing a moderate livelihood; [and]
6. Forestry activities, which include logging and all other silvicultural practices, have unjustifiably infringed the Aboriginal rights in the Claim Area.

[251] British Columbia says that the judge erred in finding a right to capture and use horses and a right to trade in skins and pelts. It also says that he erred in finding that forestry activities have infringed the Tsilhqot'in Aboriginal rights. In the alternative, it argues that if the judge was correct in finding an infringement, he erred in finding the infringement to have been unjustified.

B. The Right to Capture Horses

[252] British Columbia objects to the declaration as it pertains to horses on both procedural and substantive grounds.

[253] The first procedural objection concerns the breadth of para. 14 of the amended statement of claim. British Columbia says that it does not encompass the right to capture wild horses for transportation and work.

[254] While it might, at first, be questioned whether the capture of wild horses is within the ambit of that paragraph, the procedural history of this matter resolves any doubt. In March 2003, British Columbia sought particulars in respect of para. 14, and the plaintiff responded to the demands. The demands and responses included the following:

Demand: The Plaintiff says that the Xeni Gwet'in trapped animals for their own use. What uses does he say were included within the term "their own use"?

Response: food, clothing, shelter, mats, blankets, crafts, spiritual, ceremonial and cultural uses. In addition, the Plaintiff includes trapping for safety reasons and *the use of horses for transportation and work*.

Demand: The Plaintiff says that the Xeni Gwet'in Trapping Activities included the trapping of certain enumerated and "other fur bearing animals". What species of animals, if any, other than those specifically enumerated, does he include within the term "all other fur bearing animals"?

Response: [A further list of species of fur-bearing animals is provided] ... [I]n addition ... to fur bearing animals ... the Plaintiff includes the following

species of animals that were and are trapped by the Xeni Gwet'in for their own use: ..., *wild horses*

[Emphasis added.]

[255] While it might have been open to British Columbia to argue that the second response included material that was not responsive to the demand, it did not immediately do so. In a document entitled "Identification of Deficiencies in Plaintiff's Reply to Demand for Particulars", British Columbia listed the various demands that had been made, the responses received, and the deficiencies that it alleged in the responses. In respect of each of the responses listed above, it stated that "[t]he British Columbia Defendants do not object to this response".

[256] During the trial, approximately three years after receiving the particulars, British Columbia brought an application to strike the one that added the reference to "wild horses" on the basis that it answered a question that had not been asked. The judge rejected the application in reasons indexed as 2006 BCSC 399. He said:

[16] The opening words of [para. 14] in the statement of claim make reference to "animals" generally. Animals include, but are not limited to, fur bearing animals. The answer to the demand for particulars was not confined to the specific demand but went on to list animals generally, placing the defendants on notice as to the types of animals relied upon for use and trade by the Xeni Gwet'in.

...

[18] For the past three years the defendants have known that the plaintiff included in the definition of "animals", certain non fur bearing animals....

[19] I am unable to find the words complained of in the March 14, 2003 Reply to Demand for Particulars to be frivolous and vexatious within the meaning given to those words in *Lang Michener Lash Johnston v. Fabian* (1987), 59 O.R. (2d) 353 at 358-359 (H.C.). On the contrary, those words have placed the defendants on notice for the past three years and there cannot now be an assertion that they are taken by surprise as to what animals (and birds) the plaintiff says were used and traded by the Xeni Gwet'in. The allegations set forth in this paragraph of the statement of claim as amplified by the particulars does not raise any new allegations, assertions or prayers for relief against either defendant. That portion of both motions is dismissed.

[257] In light of the background facts and the judge's ruling, I would not accede to British Columbia's argument with respect to the pleading.

[258] A second procedural argument brought by British Columbia contends that no declaration ought to have been granted because the judge did not specifically determine that any forestry activity has interfered, or will interfere, with the capture and use of wild horses. In making this argument, it relies on *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539. In that case, this Court upheld a chambers judge's decision to strike a claim for a declaration of Aboriginal rights to fish on the basis that there was no live controversy that would require the issuance of a declaration.

[259] I note that the Supreme Court of Canada has, since the hearing of the appeal in this matter, reached a similar conclusion in *Lax Kw'alaams* in which it upheld the trial judge's refusal of a declaration:

[14] ... [T]he Lax Kw'alaams brought to the forefront a claim to an Aboriginal right to a fishery for food, social and ceremonial purposes. The Lax Kw'alaams presently hold federal fisheries licences for these purposes. Their entitlement seems not to be a contentious issue. It was therefore not an issue of significance in the present litigation. Courts generally do not make declarations in relation to matters not in dispute between the parties to the litigation and it was certainly within the discretion of the trial judge to refuse to do so here.

[260] In my view, neither *Cheslatta* nor *Lax Kw'alaams* assists British Columbia's argument. It is well-established that declaratory relief is discretionary, and that one ground for refusal of such relief (and, indeed, for refusal to consider an application for it) is that the matter is not of immediate or practical importance. That discretion was exercised by the chambers judge in *Cheslatta* and by the trial judge in *Lax Kw'alaams*. In the case before us, however, the trial judge exercised his discretion in favour of granting a declaration. It has not been shown that he erred in principle in doing so.

[261] The issue of the right to capture horses for personal use appears to be a contentious issue between the parties, and does appear to have been the subject of evidence and full argument. In these circumstances, the judge was well within the ambit of his discretion in deciding to issue a declaration.

[262] The more interesting argument brought by British Columbia concerns the requirement that the Aboriginal rights protected by s. 35 of the *Constitution Act, 1982* must be based on traditional practices, customs or traditions that pre-dated European contact (see *Van der Peet* at paras. 60-61). As I have mentioned, the judge fixed 1793 as the date of European contact. No appeal is taken from that finding. In respect of horses, he said:

[1225] The origins of these animals have not been determined. The Court takes judicial notice of the fact that horses are not native to North America. They were introduced by Europeans, very likely by the Spanish in what is now Mexico. Thereafter, there was a gradual movement of horses across the continent. For my purposes, the route of their travels is unimportant. When Tsilhqot'in people met with Simon Fraser in June of 1808, horses had already arrived on the Chilcotin Plateau and were being used by Tsilhqot'in people. I find this evidence is sufficient to raise a fair inference of Tsilhqot'in use of horses in pre-contact times.

...

[1235] The historical record refers to Tsilhqot'in people's use of horses. The absence of the word "wild" cannot be of any consequence. Nor does the absence of oral tradition evidence persuade me that there were no wild horses in pre-contact times. Given their use in 1808, I believe it is logical to infer they were used in pre-contact times. I also infer that Tsilhqot'in people obtained horses from the wild stock of horses that is now said to have roamed the Chilcotin plateau over the past 200 years....

[263] It was open to the trial judge to use evidence that post-dated contact to draw inferences as to pre-contact practices. The issue was commented upon in *Van der Peet*:

[62] ... It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

[264] "Traditional" practices, in order to qualify as Aboriginal rights, must have existed pre-contact. As indicated in *Van der Peet*, practices that arose only as a result of European influence cannot form the basis for Aboriginal rights:

[73] The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.

[265] While I acknowledge that there is room for debate on the issue, it is my view that the Tsilhqot'in practice of capturing and using horses for work and transportation does qualify as an Aboriginal right, notwithstanding that horses were introduced (or, more precisely, reintroduced) to North America by Europeans.

[266] Horses reached North America more than 250 years before the date of contact fixed by the trial judge. If wild horses derived from European stock reached Tachelach'ed well before European explorers, I do not think it can be said that the Tsilhqot'in tradition of capturing and using the animals was a result of "European influences". The mere fact that the ancestors of the horses captured and used by the Tsilhqot'in came from Europe does not constitute European influence. There is also no indication that the Tsilhqot'in learned to capture or use horses either from Europeans or from people who had learned those practices from Europeans. It was open to the trial judge to infer, as he did, that they developed the practice independently when wild horses first appeared in their traditional territory.

[267] As the trial judge made no palpable and overriding error in finding that the Tsilhqot'in tradition of horsemanship pre-dated European contact, and as it is undoubtedly central to Tsilhqot'in culture, I would not interfere with the judge's findings with respect to Aboriginal rights to capture and use horses.

[268] In the result, it is not necessary to address the trial judge's alternative basis for finding an Aboriginal right to capture and use horses, i.e., that those activities constituted contemporary extensions of pre-contact practices.

C. Trading Rights

[269] The trial judge held that the Tsilhqot'in have an Aboriginal right to trade in skins and pelts taken from the Claim Area as a means of securing a moderate livelihood. British Columbia says the trial judge erred by using the "moderate livelihood" standard, and, more generally, in concluding that Tsilhqot'in pre-contact trade was integral to their distinctive culture. Finally, it argues that the judge erred in failing to confine the right to specific species of animals.

[270] In *Lax Kw'alaams*, the Supreme Court of Canada affirmed that in determining whether an Aboriginal right exists, a court must begin by characterizing the right that is claimed. At the characterization stage, "the focus is on ascertaining the true nature of the claim, not assessing the merits of this claim or the evidence offered in its support": *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 at para. 14.

[271] In *Lax Kw'alaams*, the claim began as one to an Aboriginal right to fish for commercial purposes on a "large scale". Late in the day, without seeking an amendment of the pleadings, the plaintiff argued, instead, for an ill-defined lesser right to fish for trading purposes. The trial judge refused to allow the claim to be re-characterized in that way. The Supreme Court of Canada found that the judge made no error in proceeding as she did, and made the following comments about characterizing a claim for Aboriginal rights:

[45] To the extent the *Lax Kw'alaams* are saying that, in Aboriginal and treaty rights litigation, rigidity of form should not triumph over substance, I agree with them. However, the necessary flexibility can be achieved within the ordinary rules of practice. Amendments to pleadings are regularly made in civil actions to conform with the evidence on terms that are fair to all parties. The trial judge adopted the proposition that "he who seeks a declaration must make up his mind and set out in his pleading what that declaration is", but this otherwise sensible rule should not be applied rigidly in long and complex litigation such as we have here. A case may look very different to *all* parties after a month of evidence than it did at the outset. If necessary, amendments to the pleadings (claim or defence) should be sought at trial. There is ample jurisprudence governing both the procedure and outcome of such applications. However, at the end of the day, a defendant must be left in no doubt about precisely what is claimed. No relevant amendments were sought to the prayer for relief at trial in this case.

[46] With these considerations in mind, and acknowledging that the public interest in the resolution of Aboriginal claims calls for a measure of flexibility not always present in ordinary commercial litigation, a court dealing with a s. 35(1) claim would appropriately proceed as follows:

1. First, at the characterization stage, identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties.

...

[Emphasis in original.]

[272] In the case before us, the statement of claim simply alleged an Aboriginal right to trade in skins and pelts. In argument, the plaintiff used the words “moderate livelihood” to characterize the scale of trade that he claimed was traditionally undertaken by the Tsilhqot’in.

[273] The use of the words “moderate livelihood” to describe Aboriginal trading rights has a curious history. In *R. v. Van der Peet*, (1993) 80 B.C.L.R. (2d) 75 (C.A.), Lambert J.A., dissenting, considered that the social significance of salmon in Sto:lo tradition could be translated into a right to trade in fish to the extent needed to provide a “moderate livelihood”. The phrase “moderate livelihood” was adopted from American jurisprudence, particularly from *State of Washington v. Washington State Commercial, Passenger, and Fishing Vessel Association*, 443 U.S. 658 (1979). Wallace J.A., in a judgment concurring with the majority, was critical of that standard, arguing that it was tied into American standards for allocation of fisheries resources, was inherently subjective, and would be impossible to police.

[274] In the Supreme Court of Canada's decision in *Van der Peet*, Lamer C.J.C., for the majority, rejected the basis on which Lambert J.A. had found an Aboriginal right to sell fish:

[79] ... [A] claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question. The definition of aboriginal rights is determined through the process of determining whether a particular practice, custom or tradition is integral to the distinctive culture of the aboriginal group. The significance of the practice, custom or tradition is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. As such, the appellant's claim cannot be characterized as

based on an assertion that the Sto:lo's use of the fishery, and the practices, customs and traditions surrounding that use, had the significance of providing the Sto:lo with a moderate livelihood. It must instead be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.

[Emphasis in original.]

[275] He held that the issue to be determined was not the significance of salmon to the Sto:lo but rather whether the First Nation had a pre-contact tradition of trading in salmon. Based on the trial judge's findings that the exchange of fish for money or other goods was irregular, incidental and not integral to the Sto:lo culture, he found no Aboriginal right to sell salmon.

[276] In *R. v. Marshall*, [1999] 3 S.C.R. 456, the Supreme Court of Canada interpreted a trade clause in a Mi'kmaq treaty to confer a right to trade the products of hunting and fishing activities to secure "necessaries". The majority considered this standard to be equivalent to that of a "moderate livelihood", and referred to Lambert J.A.'s dissenting judgment in *Van der Peet*:

[59] The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, at p. 126, described as a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth ([*R. v. Gladstone*, [1996] 2 S.C.R. 723], at para. 165). It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

[277] British Columbia argues that the judge erred in accepting the "moderate livelihood" standard in this case because it is a standard that applies to treaty rights, not traditional Aboriginal rights. It says the standard was rejected for traditional Aboriginal rights in *Van der Peet*. Further, it says that the right to a "moderate livelihood" standard was not pleaded.

[278] In my view, these objections cannot prevail. While *Marshall* was a case interpreting a treaty, the "moderate livelihood" standard was not described in the treaty itself. Rather, it was the Court's characterization of a standard somewhat

higher than mere subsistence, but not so high as to allow for the accumulation of wealth. There is nothing in *Marshall* to suggest that the standard can only apply within the context of a treaty.

[279] Further, it cannot be said that the Supreme Court of Canada rejected the “moderate livelihood” standard in *Van der Peet*. Rather, it rejected the idea that traditional subsistence through the consumption of salmon could be translated into a modern right to gain a moderate livelihood through the sale of salmon.

[280] It will normally be necessary, in characterizing an Aboriginal right to trade in a commodity, to describe the scale of such trading. That scale must be consistent with the traditional role of trade in the particular Aboriginal culture under consideration. In *Van der Peet*, the claim was for a right to exchange fish for money or other goods. In contrast, in *Gladstone*, the claim was for a right to sell herring spawn on kelp on a “commercial” scale. *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, makes clear, at paras. 17 and 18, that an Aboriginal right to trade a commodity should be described according to the scale of traditional trading.

[281] In this case, the trial judge found that trade in skins and pelts was integral to the Tsilhqot’in culture, and that the trade was at a level consistent with earning a moderate livelihood. I see nothing in *Van der Peet* or other cases that makes this an inappropriate assessment. Indeed, the “moderate livelihood” standard, having been more fully described in *Marshall*, would seem to furnish a proper benchmark for defining a relatively low level of commercial activity. The judicial consideration of the standard in *Marshall* eliminates many of the concerns expressed by Wallace J.A. in this Court in *Van der Peet*.

[282] I am also not convinced that the failure of the plaintiff to include the “moderate livelihood” language in the statement of claim precluded the court from making a declaration using that language. The claim made it clear that the right to trade in skins and pelts was in issue, and there is no suggestion that British Columbia was misled as to the scale of trade that was being argued for by the plaintiff. If British

Columbia needed greater detail as to the type of trading right that was being sought, it should have sought particulars.

[283] In my view, therefore, there was nothing in principle that prevented the judge from making a declaration that the Tsilhqot'in have a right to trade in skins and pelts as a means of securing a moderate livelihood. I turn, then, to his specific findings:

[1247] Tsilhqot'in people traded animal skins and pelts with their Aboriginal neighbours who were willing to trade with them. These trading relationships were important to the Tsilhqot'in people as a means of obtaining salmon resources, particularly during the years when the salmon fishery failed. Trade was not restricted to years of poor salmon runs. Trading with neighbours was an element of the traditional Tsilhqot'in pattern of survival.

[1248] The practice of trade for salmon and accommodations was an integral part of Tsilhqot'in society that cannot be ignored. This type of survival was intermittent but it was regular in the sense that there were always cycles produced by nature which forced changes in the preferred pattern of living off and staying on the land within the Claim Area.

[1249] In *Sappier; Gray*, the issue arose as to whether a survival practice could be considered sufficiently integral to require protection as an Aboriginal right. The Court concluded that a practice undertaken for survival purposes is sufficient to meet the integral to a distinctive culture test. A Court must seek to understand how the particular pre-contact practice relied upon relates to the Aboriginal group's way of life.

...

[1263] Tsilhqot'in people moved about their territory harvesting what the land had to offer, according to their needs and the seasons. Fish, game, root plants, and berries provided the staples for their diets. Salmon were a critical component. When salmon failed, the Tsilhqot'in way of life included a trade of furs, root plants, and berries for salmon. I am satisfied that trade was not just opportunistic or incidental and was not limited to times of need. It was a way of life, accelerated in times of need. Trade was always undertaken for the necessities of life; it was not trade to accumulate wealth. In my view, the trading practice of the Tsilhqot'in people, at the time of first contact and continuing well into the twentieth century, was more than sufficient to meet the tests of cultural integrality set out by the Supreme Court of Canada.

[284] After citing *Marshall*, the judge concluded:

[1265] The right may be properly characterized as a Tsilhqot'in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood. The evidence shows that the Tsilhqot'in ancestors engaged in that right and that it was integral to their distinctive culture.

[285] British Columbia contends that the judge's findings were not consistent with the evidence. In my view, there was evidence on which the judge was entitled to make the findings that he did. It is, of course, not this Court's role to re-weigh the evidence.

[286] British Columbia also contends that the trial judge's reference to *Sappier; Gray* is an error, because *Sappier; Gray* involved subsistence harvesting of resources, not trading. While it is true that *Sappier; Gray* involved harvesting for personal use rather than trading, I do not see that the nature of the case affects the basic proposition for which it was cited by the trial judge.

[287] Finally, British Columbia argues that trading rights must be species-specific, citing *Gladstone*, wherein a right to trade was in "herring spawn on kelp". I do not read *Gladstone* as standing for the proposition that a right to trade must always be species-specific. In my view, the characterization of the right will be dependent on the pleadings and the evidence. For example, in *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237 (remanded by the Supreme Court of Canada for reconsideration, [2011] S.C.C.A. No. 353), this Court upheld a finding of a right to "fish and to sell fish", except insofar as it related to geoducks. Similarly, in *Powley* the trial judge characterized the accused's right as a right to hunt for food. The Supreme Court of Canada agreed, affirming at para. 16 that "[t]he relevant right is not to hunt moose but to hunt for food in the designated territory" (emphasis in original).

[288] In this case, the judge's finding of a general right to trade in skins and pelts taken from the Claim Area was supported by evidence. I would not interfere with his declaration.

D. *Prima facie* Infringement

[289] I now turn to the question of whether the judge erred in finding that the Aboriginal rights of the Tsilhqot'in were infringed by British Columbia's conduct in respect of forestry management in the Claim Area.

[290] The first step in the infringement analysis is that of characterizing the Aboriginal right at issue (see *Van der Peet* and *Lax Kw'alaams*). The trial judge characterized the rights at para. 1041 of his judgment:

- a) a Tsilhqot'in Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses; and
- b) a Tsilhqot'in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.

[291] Once the right has been characterized, the court must determine whether the claimant has demonstrated a *prima facie* infringement of the right. In *Sparrow*, at 1111, the Court equated a *prima facie* infringement with “interference” with an Aboriginal right. At 1112-1113, it elaborated on the concept of *prima facie* infringement in the context of the fishing rights at issue in the case:

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

[292] In *Gladstone* at para. 43, the Court explained a seeming contradiction in the discussion in *Sparrow*:

[43] The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other

hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and “undue” hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

[293] The idea that the onus of showing interference is not an onerous one was confirmed in *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915. In that case, the Court considered the application of the *Sparrow* test in the context of a treaty right to hunt. After quoting para. 43 from *Gladstone*, the majority said:

[53] Essentially, therefore, a *prima facie* infringement requires a “meaningful diminution” of a treaty right. This includes anything but an insignificant interference with that right.

[294] The issues in the case before us are much broader than those that were considered in *Sparrow*, *Gladstone*, and *Morris*. Each of those cases concerned a single regulation or set of regulations, and a specific prosecution for its violation. In contrast, this case concerns a broad Aboriginal right to hunt and trap over a large area, and a complex matrix of primary and secondary forestry legislation, government policies, grants of forest tenure, and issuance of licences and permits. Nonetheless, the basic framework for analysis established in *Sparrow* and *Gladstone* is applicable. The Tsilhqot’in are able to establish a *prima facie* infringement of their rights to hunt and trap simply by showing that government action has interfered with these rights in more than an insignificant or trivial way.

[295] This low threshold is entirely appropriate. If, as I have suggested, Aboriginal rights short of title are the primary means by which the traditional cultures and activities of First Nations (and particularly those that are nomadic or semi-nomadic) are protected, it is essential that those rights be taken seriously. Any interference with those rights (apart from trivial ones) demands legal protection. Such infringements must be justified.

[296] The judge commenced his discussion of infringement with an outline of the plaintiff's position:

[1269] The plaintiff says that forest harvesting activities negatively impact a number of different species, affecting wildlife diversity as well as populations of individual species.

[1270] In addition, the plaintiff says forest harvesting leads to the destruction of habitat. In the plaintiff's submission, habitat must be preserved to ensure a harvestable surplus of all species, sufficient to meet the needs of Tsilhqot'in people over time. He says Crown activities are an infringement of Tsilhqot'in rights if they are likely to reduce the habitat available for any particular species to below the level where the necessary harvestable surplus is available.

[297] He began his application of the *Sparrow* test with the following paragraph outlining his findings:

[1276] On the whole of the evidence, I conclude that forest harvesting activities, which include logging and all other silviculture practices, reduce the number of different wildlife species (diversity) and the number of individuals within each species (abundance) in a landscape. Forest harvesting depletes species diversity and abundance through: 1) direct mortality; 2) the imposition of roads; and, 3) the destruction of habitat.

[298] British Columbia contends that the trial judge, in outlining the plaintiff's position and in his analysis at para. 1276, effectively changed the nature of the Aboriginal rights in issue. In its factum, it says:

Rather than focus on any alleged specific and discrete interference with hunting activities, or unmet hunting needs, Vickers J. instead transformed the claimed activity right into a right to an undiminished diversity and number of each species of wildlife whether actively hunted or not.

[299] I do not agree with that contention. The judge fully understood that the Aboriginal right to hunt at issue in this case was not a property right to a resource. He said:

[1162] In *Sappier; Gray* the [Supreme Court of Canada] emphasized that a claim for an Aboriginal right must be founded upon an actual practice, custom or tradition of the particular group claiming the right. The right cannot be characterized as a right to a particular resource: see *Sappier; Gray*, at para. 21.

[300] Further, he made it clear that he understood the *Sparrow* test, and that that was the test he was applying in determining whether Aboriginal rights had been infringed:

[1274] This case differs from *Sparrow* in that it does not involve a regulatory restriction on a harvesting right. Here, the issue is whether forest harvesting activities and forest silviculture activities are or might be an infringement of Tsilhqot'in Aboriginal hunting and trapping rights in the Claim Area.

[1275] Thus, in this case, the language in *Sparrow* leads to an inquiry as to whether such activities would impose an undue hardship on Tsilhqot'in people and whether the activities would deprive them of their preferred means or way of exercising their rights to hunt, trap and trade.

[301] The judge went on to outline his findings that forestry activities that were proposed for the Claim Area would result in a loss of habitat and reduce the number of species and their abundance. At paras. 1277-1287, the judge discusses the negative impacts of various forest practices on wildlife diversity: road construction; thinning and other silviculture practices; and removal of coarse, woody debris on the forest floor. He also discussed the effects of forestry activities on the land, including soil compaction, changes to hydrology, and the resulting slow regeneration of forests. At para. 1288, he concluded:

[1288] Forest harvesting activities would injuriously affect the Tsilhqot'in right to hunt and trap in the Claim Area. The repercussions with respect to wildlife diversity and destruction of habitat are an unreasonable limitation on that right. For these reasons, I conclude that forest harvesting activities are a *prima facie* infringement on Tsilhqot'in hunting and trapping rights and thus demand justification.

[302] British Columbia says that the trial judge ignored certain evidence showing that forestry activities may actually result in an increase in ungulate populations, and notes that current Tsilhqot'in hunting practices focus on ungulates rather than on fur-bearing animals due to the depressed market for furs.

[303] The weighing of evidence was a matter for the trial judge. His conclusion that the overall effects of forestry on hunting would be negative was, in my view, open to him on the evidence.

[304] I acknowledge British Columbia's contention that the judge failed to focus attention on specific and discrete interference with hunting activities. The judge's approach was to examine proposed forestry activities in the Claim Area at a fairly high level, and to consider whether that activity would have large-scale effects on hunting and trapping rights.

[305] The judge's order stated that "[f]orestry activities, which include logging and all other silvicultural practices" unjustifiably infringed Aboriginal rights. I do not read this declaration as an indication that the judge's concern was specific to logging or to silvicultural practices. Rather, the order was meant to be inclusive – it was the totality of forest management that infringed rights, not specific activities or practices.

[306] The declaration granted by the trial judge is not one that provides detailed guidance as to the particular conduct of British Columbia that was improper, nor does it state the specific manners in which Tsilhqot'in hunting and trapping rights have been infringed.

[307] As I have already indicated in my discussion of *Cheslatta*, declaratory relief is discretionary, and whether or not it should be granted is ordinarily a matter for the trial judge. I doubt that the trial judge's high-level approach to the infringement in this case should be the norm in future. I do think, however, that there was good reason for him to adopt that approach in this case, and I would not interfere with his decision.

[308] As was noted at para. 39 of *Lax Kw'alaams*, the Supreme Court of Canada has developed the law of Aboriginal rights in a series of regulatory prosecutions: *Sparrow*; *Van der Peet*; *Gladstone*; *N.T.C. Smokehouse*; and *Marshall*; *Bernard*. Such cases facilitated the infringement analysis, because they focused on particular regulatory provisions, or on limited sets of provisions comprising a regulatory scheme.

[309] The Supreme Court of Canada has recognized, however, that the procedural limitations of regulatory prosecutions make such prosecutions awkward vehicles for

the determination of Aboriginal rights. Civil actions seeking declarations are to be preferred, because they allow for the assembly of a comprehensive evidentiary record (see *Lax Kw'alaams* at para. 11). While regulatory prosecutions examine Aboriginal rights in the context of a narrow factual inquiry, civil actions for declarations are able to examine the bigger picture. They eliminate the need for a piecemeal analysis of rights that is dictated by regulatory prosecutions.

[310] Nonetheless, actions for declarations present their own challenges. They are expensive and can be unwieldy. They can take years to be resolved.

[311] The granting of injunctive relief early in this litigation, and the vast changes in forestry regulation and practices and in the economics of forestry over the long period during which the case has been before the courts has made concentration on specific details of infringement of little import.

[312] This was very much a test case. In addition to being an effort to resolve particular issues for the Tsilhqot'in and Xeni Gwet'in, it was an attempt to clarify the law of Aboriginal title and Aboriginal rights in British Columbia. The trial judge's declaration is a recognition of this fact. The unique circumstances of this case justified the judge's exercise of discretion in favour of granting a declaration that may not have immediate, specific, and concrete application on the ground.

[313] In terms of the judge's analysis, I am not persuaded that he erred in finding a *prima facie* infringement. As the plaintiff points out, extensive and substantial clear-cut harvesting through the Claim Area was an inevitable result of the various tenures and permits that were granted and the administration of forestry in the area. The judge had ample evidence for his conclusion that extensive habitat damage was the inevitable result of the province's administration of the forest in Tachelach'ed and the Trapline Territory. For example, the plaintiff points to evidence that 90% of the Brittany Triangle Special Resource Development Zone lies within the Claim Area, and that 86% of the productive area of the Zone would have to be cut in order to meet targets. While British Columbia points out that the cutting would occur over the

course of many years, the fact remains that, on the judge's findings, such cutting would have had a serious detrimental effect on wildlife population and diversity.

[314] The judge found that the diminution in wildlife population and diversity would affect the hunting rights of the Tsilhqot'in. British Columbia is critical of his analysis because it failed to quantitatively relate the projected diminution to the actual hunting activities of the Tsilhqot'in. It says that the judge failed to find any specific detrimental impact on hunting.

[315] In view of the judge's findings with respect to habitat destruction and its effects on wildlife, it was open to him to make the general finding that these hunting rights would be detrimentally affected. Indeed, given the fairly high level of planning that had taken place, it would not have been possible to make definitive findings about specific locations or specific species. It was enough, in my view, for the judge to come to a finding that detrimental effects on hunting rights would inevitably result from the forestry activities authorized and planned by British Columbia.

[316] In saying this, I recognize that very little logging actually took place in the Claim Area. As a result of the litigation, most activities were stopped. I do not think this fact precludes a finding that the Aboriginal rights of the Tsilhqot'in were infringed. The plaintiff did not have to wait until the traditional territory of the Tsilhqot'in was negatively impacted before seeking a declaration. The very acts of planning and authorizing logging infringed the Aboriginal rights of the Tsilhqot'in, since the planning and authorization were incompatible with those rights.

[317] I have already noted that this case was, in many respects, a test case, and that the trial judge's high-level approach to the issue of infringement is unlikely to be an appropriate template for analysis in future cases. Outside of the test case scenario, I would think that courts will be reticent to grant declarations of the sort issued here; it is more likely that Aboriginal rights declarations will be granted when there is a practical aspect to them, either in vindicating specific Aboriginal practices, or in invalidating particular exercises of governmental authority.

[318] I note, as well, that the judge's declaration in this case was founded on a comprehensive evidentiary record that allowed him to consider high-level effects of forest practices on the rights of the Tsilhqot'in. The case should not be seen as authority for the proposition that any industrial activity that affects the diversity of species or abundance of wildlife will necessarily be inimical to an Aboriginal right to hunt or trap. Each case must be analyzed in terms of the nature and scope of the Aboriginal right and of the conduct that allegedly infringes it.

[319] One final issue that should be mentioned is British Columbia's contention that the judge wrongly placed upon it the burden of proving that its actions would not infringe Aboriginal rights. British Columbia points to the following statement by the trial judge:

[1103] What is clear from the evidence of Dr. [Hamish] Kimmins [a professional forester and expert in forest ecology called as a witness for British Columbia] is that "sustainability is multifaceted, involving a complex of physical, biological, social, economic, institutional and cultural dimensions: Kimmins report at p. 41. Given the findings of Tsilhqot'in Aboriginal rights resulting from these proceedings, there will be a need for British Columbia to develop a new model of sustainability in the Claim Area. The burden is on British Columbia to prove that any future harvesting of timber will not infringe Tsilhqot'in Aboriginal rights. That burden will require close consultation with Tsilhqot'in people, taking into account all of the factors that bear on their Aboriginal rights, as well as the interests of the broader British Columbia community.

[320] I do not read para. 1103 as reversing the onus. The judge clearly articulated the correct approach to Aboriginal rights earlier in his judgment:

[1058] A person claiming an Aboriginal right bears the onus of establishing that the government's conduct amounts to a *prima facie* infringement or denial of that right. Once this onus is discharged, the burden then shifts to the Crown to demonstrate that its conduct was justified. Proof of infringement of an Aboriginal right protected by s. 35(1) triggers the Crown's burden to justify its conduct.

[321] In my view, the judge, in using the word "infringe" in para. 1103 was referring to an "unjustified infringement" rather than to a "*prima facie* infringement". His concern was with the justification analysis rather than the *prima facie* infringement analysis.

[322] In summary, the judge understood and applied the *Sparrow* test for *prima facie* infringement of Aboriginal rights. The test is satisfied when government action interferes with a proven Aboriginal right in more than a trivial way. Here, government policy and high-level planning, combined with the specific forest tenures, permits and licences granted by British Columbia, led the trial judge to the conclusion that there would be an inevitable detrimental effect on habitat and wildlife populations in the Claim Area. He further found that this detrimental effect would interfere with proven Tsilhqot'in Aboriginal rights to hunt and trap. These findings were open to the trial judge, and this Court cannot interfere with them. Further, the declaration granted by the trial judge, while broad and of limited immediate practical utility, was justifiable given the unique nature of the case before him.

E. Justification

[323] The final issue to be addressed is whether the judge erred in finding that the *prima facie* infringement of Aboriginal rights was not justified by British Columbia.

[324] The test for justification was enunciated in *Sparrow*. A convenient summary of the test was provided in *Gladstone*:

[54] In *Sparrow*, Dickson C.J. and La Forest J. articulated a two-part test for determining whether government actions infringing aboriginal rights can be justified. First, the government must demonstrate that it was acting pursuant to a valid legislative objective

Second, the government must demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples....

[55] Dickson C.J. and La Forest J. also held at p. 1119 that the Crown's fiduciary duty to aboriginal peoples would require the Court to ask, at the justification stage, such further questions as:

... whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented....

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

[325] The trial judge in this case recognized that economic activities, including forestry, could, in appropriate circumstances, constitute valid legislative objectives:

[1085] There is a range of legislative objectives that may justify infringement of Aboriginal title. These objectives arise from the need to reconcile the fact that Aboriginal societies exist within and are part of a broader social, political and economic community: *Delgamuukw* (S.C.C.), at para. 161; *Gladstone*, at para. 73. The development of agriculture, forestry, mining and hydro-electric 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 these aims, are the kinds of objectives that may justify the infringement of Aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives is ultimately a question of fact that must be examined on a case-by-case basis: *Delgamuukw* (S.C.C.), at para. 165.

[326] While the quoted passage was part of the judge's analysis of justification for infringement of Aboriginal title rather than Aboriginal hunting and trapping rights, the same considerations were, on my reading of his judgment, incorporated into his later analysis in relation to those rights.

[327] The judge continued, indicating that the justification analysis should be carried out not on a general basis, but on an examination of the specific infringements under consideration:

[1089] There can be no doubt that forestry falls within the range of government activities that might justify infringement of Aboriginal title. Generally speaking, the development of forest resources, and the protection of the environment and wildlife are all valid government objectives that may justify infringement of Aboriginal title and other Aboriginal rights.

[1090] However, the analysis cannot end there. In this case I am concerned not with the general, but the specific. Can the Province justify its forestry activities in the Claim Area where such activities infringe Tsilhqot'in Aboriginal title? British Columbia must prove that it has a compelling and substantial legislative objective for the forestry practices, not just generally in British Columbia, but in the Claim Area in particular.

[328] British Columbia takes issue with the judge's approach, arguing that "[t]he question is not whether each and every infringing action meets the compelling and substantial test, but whether the objective of the legislative scheme that authorizes the action is compelling and substantial".

[329] I agree with the approach taken by the trial judge, and not that advocated for by British Columbia. The justification analysis must, in my view, depend on the nature of the infringement alleged.

[330] Where it is alleged that a legislative provision infringes Aboriginal rights, the subject of justification must be the legislative provision. In such cases, the first part of the *Sparrow* test for justification is concerned with whether there is a “valid legislative objective”. That was the issue in cases like *Sparrow*, *Van der Peet*, and *Gladstone*. Where the alleged infringement is governmental conduct other than legislation, however, the question becomes one of whether the *governmental* objective underlying the infringement is a justifiable one.

[331] In this case, the judge found that there was no valid governmental objective for logging in the Claim Area. The judge identified the objectives postulated as justifying the authorization of logging as follows:

[1101] British Columbia appears to argue that the compelling and substantial objectives behind the alleged infringements include the economic benefits that can be realized from logging in the Claim Area, and a need to salvage forests affected by mountain pine beetle for sound silviculture reasons.

[332] He found that neither of these objectives was made out in respect of forestry activities in the Claim Area:

[1107] I conclude that British Columbia has failed to establish that it has a compelling and substantial legislative objective for forestry activities in the Claim Area for two reasons. First, as was the case with sports fishing in *Adams*, there is no evidence that logging in the Claim Area is economically viable. The Claim Area has been excluded from the timber harvesting land base for an extended period of time. Even the Chief Forester acknowledged its more recent inclusion was questionable. The impact of forestry activities on the plaintiff's Aboriginal title is disproportionate to the economic benefits that would accrue to British Columbia or Canadian society generally.

[1108] Second, I conclude there is no compelling evidence that it is or was necessary to log the Claim Area to deter the spread of the 1980's mountain pine beetle infestation. Rather, the evidence shows that none of the proposed harvesting is directed at stopping or limiting the mountain pine beetle outbreak.

[333] On this appeal, British Columbia denies that battling the pine beetle or salvaging pine beetle ravaged forests was put forward as a justification in this case. If British Columbia is correct in that regard, then the judge's rejection of that basis of justification was unnecessary, but would not disclose an error in his analysis.

[334] The judge's analysis of the economic viability of forestry in the Claim Area would seem to be dispositive of any justification argument. British Columbia argues that the judge's conclusions with respect to economic viability are unreasonable, because the Crown only authorized private companies to undertake logging. It says that "[i]f logging within the Claim Area is not economically viable then there is no reason to fear that any logging will occur".

[335] I am not sure it is true that logging that is not economically viable will not be undertaken. Some provisions of provincial forest legislation and tenures require specific levels of logging to be undertaken in order for a tenure holder to retain its rights. Quite apart from this, however, it seems to me that the judge's determination did not depend on logging actually being unprofitable. Rather, his conclusion was based on the economic value of logging compared to the detrimental effects that it would have on Tsilhqot'in Aboriginal rights. The judge's comments at paras. 1290 and 1291 of the judgment underline the nature of his assessment:

[1290] I have already noted that a legislative scheme that manages solely for timber with all other values as a constraint on that objective can be expected to raise severe challenges when called upon to strike a balance between Aboriginal rights and the economic interests of the larger society.

[1291] Recognizing Aboriginal rights to hunt and trap over an area means wildlife and habitat must be managed to ensure a continuation of those rights. Section 35(1) of the *Constitution Act, 1982* demands that the protection of those rights is a paramount objective. The declaration of Aboriginal rights is not intended to be hollow or short lived. Tsilhqot'in Aboriginal rights grew out of the pre-contact society of Tsilhqot'in people. This historical right is intended to survive for the benefit of future generations of Tsilhqot'in people.

[336] I am not persuaded that the judge erred in his analysis of the importance of the governmental objective in this case. Accordingly, the judge's finding that the infringement of Tsilhqot'in hunting and trapping rights was not justified must stand.

[337] It is not, in the circumstances, necessary to engage in any detailed analysis of whether the impugned governmental conduct was consistent with fiduciary obligations or with the honour of the Crown. Given the potential for certain statements in the trial judgment to be misconstrued, however, I will address the issue of consultation briefly.

[338] The judge concluded his discussion of justification as follows:

[1294] ... As I mentioned earlier, the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights.

[339] British Columbia argues that the trial judge was in error in suggesting that the Crown must acknowledge unproven Aboriginal rights as a prerequisite to meaningful consultation.

[340] It is clear that the Crown need not accept the validity of asserted, but unproven, claims to Aboriginal rights as a prerequisite to meaningful consultation. Indeed, it is the uncertainty surrounding such rights that forms the basis for the duty to consult that was established in *Haida Nation*. Read in context, however, I do not think that the judge meant that the Crown is required to accept the validity of unproven rights claims as a condition precedent to meaningful consultation. Rather, as the plaintiff argues, all that is required is that the Crown treat the claim seriously by making a preliminary evaluation of its strength, and entering into consultations commensurate with that evaluation.

[341] The judge's criticism in this case was not that the government failed to accept the validity of Tsilhqot'in claims prior to consultation, but rather that it failed to gather important information before choosing its course of conduct.

[342] Given the judge's finding that the governmental objective in this case did not justify the Crown's authorization of forestry development in the Claim Area, it is not necessary to evaluate the judge's conclusion that the government's position in consultations was inconsistent with the honour of the Crown. There is little to be

gained from such an analysis, given that the law and practice surrounding consultation has advanced significantly since the consultations undertaken in this case.

[343] The judge determined that there was no governmental objective that was sufficiently weighty to justify the infringement of Tsilhqot'in Aboriginal rights. I would not interfere with that determination.

XII. Conclusion

[344] In the result, I would come to the following conclusions with respect to the various issues brought forward in these appeals:

1. The plaintiff is correct in his assertion that the claim for Aboriginal title was not an "all or nothing claim" to the Claim Area.
2. The plaintiff's claim was a "territorial" one rather than a claim to a definite tract of land that was actually occupied by the Tsilhqot'in at the time of assertion of sovereignty.
3. The "territorial" basis for the claim did not form a viable foundation for a title claim. Accordingly, the claim for title was not made out.
4. This case was not about Aboriginal title to definite tracts of land within the Claim Area. Given the state of the law and the nature of this test case, the plaintiff cannot be faulted for failing to include site-specific claims in this litigation. Accordingly, the dismissal of the Aboriginal title claim cannot prejudice future claims by the Tsilhqot'in to title to specific areas within the Claim Area on the basis that they constitute definite tracts of land which were actually occupied by the Tsilhqot'in at the time Crown sovereignty was asserted.
5. The judge made no error in allowing the plaintiff to claim Aboriginal rights on behalf of the Tsilhqot'in rather than on behalf of the Xeni Gwet'in.

6. The judge made no error in finding that Aboriginal rights resided with the Tsilhqot'in Nation rather than the Xeni Gwet'in First Nations Government.

7. The judge made no error in finding a Tsilhqot'in right to capture and use wild horses in the Claim Area.

8. The judge made no error in allowing the plaintiff to assert that Tsilhqot'in hunting and trapping rights extended to the earning of a moderate livelihood, nor did he err in finding those rights to have been proven.

9. The judge did not hold that the Tsilhqot'in have a right to a harvestable surplus of all wildlife species in the Claim Area. Rather, he found that they have hunting and trapping rights in the Claim Area, and that the Crown had, in its management of forestry in the Claim Area, infringed those rights.

10. The judge, in considering whether there had been a *prima facie* infringement of the Aboriginal rights of the Tsilhqot'in, properly placed the burden of proof on the plaintiff. He did not, as alleged by British Columbia, "reverse the burden of proof".

11. The judge did not hold that the Crown must accept Aboriginal rights claims as valid in order to properly engage in consultation. Rather, his reasons should be interpreted as requiring such claims to be treated seriously in accordance with the Supreme Court of Canada's ruling in *Haida Nation*.

[345] In the result, while I would analyze certain aspects of this case differently than did the trial judge, I would uphold his order in its entirety, and would dismiss all three appeals.

[346] This has been a very complex appeal, and I would like to express my thanks to all of the counsel who participated in it, including counsel for the various intervenors. They succeeded in presenting a very complex case in a comprehensible and comprehensive fashion.

“The Honourable Mr. Justice Groberman”

I agree:

“The Honourable Madam Justice Levine”

I agree:

“The Honourable Mr. Justice Tysoe”



Canadian Environmental
Assessment Agency

Agence canadienne
d'évaluation environnementale



Technical Guidance

**Determining Whether a Designated Project is
Likely to Cause Significant Adverse
Environmental Effects under the
Canadian Environmental Assessment Act,
2012**

April 2017
DRAFT Version 1

Canada 

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Document Information

Disclaimer

Please be advised that this draft guidance piece is an interim document. The Agency is currently reviewing the Environmental Assessment process and as a result of the review, EA practice, policies and procedures may change. This draft guidance document reflects current practice under the Canadian Environmental Assessment Act, 2012 (CEAA 2012).

This Technical Guidance is for information purposes only. It is not a substitute for the Canadian Environmental Assessment Act, 2012 (CEAA 2012) or its regulations. In the event of an inconsistency between this document and CEAA 2012 or its regulations, CEAA 2012 or its regulations would prevail.

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Updates

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LIST OF ABBREVIATIONS AND ACRONYMS

Agency	The Canadian Environmental Assessment Agency
CEAA 2012	<i>Canadian Environmental Assessment Act, 2012</i>
EA	Environmental Assessment
EIS	Environmental Impact Statement
Minister	Minister of the Environment
OPS	Operational Policy Statement
Project	A designated project under CEAA 2012 for which the Agency is the responsible authority
Project EA	EA of designated projects conducted under CEAA 2012 for which the Agency is the responsible authority
VC	Valued Component

INTRODUCTION

Context

The Canadian Environmental Assessment Act, 2012 (CEAA 2012) aims to protect components of the environment that are within federal legislative authority from significant adverse environmental effects caused by a project, including cumulative environmental effects.

In addition, CEAA 2012 ensures that a project is considered in a careful and precautionary manner to avoid significant adverse environmental effects, when the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament is required for the project to be carried out.

Throughout this guidance, the term “environmental effects” refers to environmental effects in areas of federal jurisdiction as described in section 5 of CEAA 2012, which are:

- effects on fish and fish habitat, shellfish and their habitat, crustaceans and their habitat, marine animals and their habitat, marine plants, and migratory birds;
- effects on federal lands;
- effects that cross provincial or international boundaries;
- effects of any changes to the environment that affect Aboriginal peoples, such as their use of lands and resources for traditional purposes; and
- changes to the environment that might result from federal decisions as well as any associated effects on health, socio-economic conditions, matters of historical, archaeological, paleontological or architectural interest, or other matters of physical or cultural heritage.

Please refer to Basics of Environmental Assessment and the Practitioners Glossary for Environmental Assessment of Designated Projects under the Canadian Environmental Assessment Act, 2012 for additional information on the environmental assessment (EA) process and key terms under CEAA 2012.

Purpose

This technical guidance provides methodological options and considerations to support the implementation of CEAA 2012 and the approach outlined in the Operational Policy Statement on Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under CEAA 2012 (OPS), in a way that achieves high quality EA.

The OPS provides core guidance on CEAA 2012 requirements related to the determination of significance for a designated project to ensure that these requirements are met in all project EAs.

This document informs the preparation of Canadian Environmental Assessment Agency (the Agency) documents such as the Environmental Impact Statement (EIS) Guidelines and the EA report. It is intended to support proponents of designated projects in the preparation of an EIS, in conjunction with other Agency policy and guidance instruments. It also provides guidance to Agency employees throughout the EA of a designated project in their interactions with those

engaged in federal EAs, such as proponents, review panel members, federal authorities, other jurisdictions, Indigenous groups and the public.

This Technical Guidance is based on a collection of examples from past EAs; it is not exhaustive. This document will be reviewed periodically to integrate updated information on the best available approaches to determination of significance.

Application

This technical guidance is intended for use in the EA of a designated project when the Agency is the responsible authority or supports an EA conducted by a review panel. It should be used in conjunction with other Agency policy and guidance instruments. For an EA by a review panel, additional guidance and direction may be provided in the Terms of Reference and/or Joint Review Panel Agreement.

When the National Energy Board is the responsible authority, direction and guidance can be found in their filing manual. Applicants seeking guidance on nuclear projects should refer to the Canadian Nuclear Safety Commission's regulatory framework.

The term "project" refers to designated projects under CEAA 2012 for which the Agency is the responsible authority, and "project EA" refers to the EA of designated projects conducted under CEAA 2012 for which the Agency is the responsible authority. Environmental effects refer to those identified in section 5 of CEAA 2012, including cumulative environmental effects.

This guidance replaces the Agency's 1994 *Reference Guide: Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects* and is for application under CEAA 2012. The 1994 reference guide will continue to apply for project EAs initiated under the former *Canadian Environmental Assessment Act* and are being completed under the transitional provisions of CEAA 2012.

For further guidance on the assessment of cumulative environmental effects, please see the Agency's *Operational Policy Statement Assessing Cumulative Environmental Effects under the Canadian Environmental Assessment Act, 2012* and *Technical Guidance on Assessing Cumulative Environmental Effects under the Canadian Environmental Assessment Act, 2012*.

SUMMARY OF THE CORE GUIDANCE

Determining whether a project is likely to cause significant adverse environmental effects is central to the concept and practice of EA under CEAA 2012. Whatever adverse environmental effects are predicted and whatever methods are used to assess them, the focus of an EA under CEAA 2012 is always whether the project is likely to cause significant adverse environmental effects, after taking into account the implementation of mitigation measures.

The approach for determining significance is nested within the EA framework (see Annex 1 of the OPS).

The OPS provides the following approach for determining whether a project is **likely** to cause **significant adverse** environmental effects:

- Stage 1: Determining whether the environmental effects are adverse
- Stage 2: Determining whether the adverse environmental effects are significant
- Stage 3: Determining whether the significant adverse environmental effects are likely

The OPS provides core guidance on the three stages as well as on information requirements, documentation, and decision-making. Notably, conclusions on the significance and likelihood of environmental effects by the Agency or the review panel are presented in the EA report (or review panel report).

The OPS describes the following key criteria to be used for stage 2: determining if a residual adverse environmental effect is significant:

- Ecological and Social Context,
 - This criterion should be taken into account when considering the key criteria below in relation to a particular valued component (VC), as the context may help better characterize whether adverse effects are significant (see Technical Concepts and Considerations section);
- Magnitude;
- Geographic Extent;
- Timing;
- Frequency;
- Duration; and
- Reversibility.

Example 1: Ecological and Social Context

A proposed project would affect a burial site and a cremation site identified by an Indigenous group. The sites would be buried under mine tailings. The Indigenous group has stated that the site is of great cultural and historical importance to them. The effects are therefore deemed to be of high magnitude and permanent.

TECHNICAL CONCEPTS AND CONSIDERATIONS

The following key concepts inform the determination of significance under CEAA 2012:

- Valued components (VCs) refer to environmental features that may be affected by a project and that have been identified to be of concern by the proponent, government agencies, Indigenous peoples or the public. The value of a component not only relates to its role in the ecosystem, but also to the value people place on it. For example, it may have been identified as having scientific, social, cultural, economic, historical, archaeological or aesthetic importance. For the purposes of CEAA 2012, VCs are selected in relation to section 5 of CEAA 2012 and taking into account direction provided by the responsible authority, or in the case of an EA by review panel, by the Agency or the Minister of the Environment (the Minister).
- Mitigation measures are for the elimination, reduction or control of the adverse environmental effects of a project, and include restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or any other means. Under CEAA 2012, these measures must also be technically and economically feasible.
- A residual environmental effect is an environmental effect of a project that remains, or is predicted to remain, after mitigation measures have been implemented. The determination of whether a project is likely to cause significant adverse environmental effects relates to the residual environmental effects.

Key technical considerations in determining significance include the following:

- Information and documentation;
- Addressing cumulative effects;
- Using benchmarks;
- Addressing likelihood; and
- Addressing uncertainty.

1. Information and Documentation

The Agency issues EIS Guidelines to proponents, which specify the nature, scope and extent of the information required for the preparation of the EIS. Following the review of the EIS, the Agency, the review panel or the Minister may also issue information requests to a proponent seeking additional clarification and information if necessary.

A proponent, the Agency or a review panel may make a determination of significance in the course of a project EA. Such determinations are separate from, but may inform, the decisions made by the Minister under subsection 52(1) of *CEAA 2012*.

Community knowledge and Aboriginal traditional knowledge can contribute to the determination of significance. The public and Indigenous groups can provide new information, offer a different interpretation of the facts or question the conclusions put forward by the proponent or the Agency.

The EIS will identify and define the criteria used to assign significance ratings to any predicted adverse effects and justify the methods selected to determine significance. It will contain clear and sufficient information to enable the Agency, technical and regulatory agencies, Indigenous

groups and the public to review the proponent's analysis of the significance of effects. If any deficiencies are identified by the Agency, the proponent will be directed to address them.

The degree of uncertainty in outcomes of the EA should be described in the documents produced throughout the project EA as appropriate. The sources and nature of uncertainty should be clearly described to provide the basis for the stated level of confidence as well as how any identified uncertainty may affect the steps in the methodologies discussed in this document.

Example 2: Information from Indigenous Groups

Construction of a proposed project would eliminate access to sites used by a nearby Indigenous group to gather medicinal plants for traditional purposes. The plants are present at other sites within the Regional Study Area. During the EA, members of the Indigenous group noted that alternative plant sites would not be suitable because the community elders could not easily access them. The original sites were important for maintaining the practice of plant gathering for medicine and for the cultural transmission of knowledge of these sites and plants to younger members of the Indigenous group. Through the EA process, the consideration of significance was greatly informed by engagement with the affected Indigenous group.

2. Addressing cumulative effects

Determinations of significance must be made for both project-specific effects, and for any cumulative environmental effects. Both determinations of significance, documented in the EA report, will be taken into account in the Minister's decisions under subsection 52(1) of CEEA 2012.

The assessment of both project-specific and cumulative environmental effects includes the consideration of the implementation of mitigation measures. This is done prior to determining the significance of the environmental effects. Any uncertainty regarding the predicted effectiveness of proposed mitigation measures should be considered in the assessment.

The cumulative environmental effects assessment should consider all VCs for which residual environmental effects are predicted, regardless of whether those residual environmental effects are predicted to be significant.

3. Using benchmarks

Benchmarks help define what would be considered a significant adverse environmental effect on a VC. In some cases, it may be possible to identify established or generally accepted benchmarks. These may be in the form of standards, guidelines, targets, or objectives. Benchmarks are used to:

- aid in understanding whether and how much a VC's state (health, status, or condition) is affected by specific or multiple activities and stressors (Stage 1);
- provide information on potential effects levels for a VC (i.e. thresholds for negative consequences of a stressor on a VC), which can assist in the application of the criteria set for significance (Stage 2); and

- provide an indication of which VCs are of regional concern (i.e. if a benchmark for a VC has been established at a regional level), which may assist with all stages.

4. Addressing likelihood

Likelihood is defined as the probability that an event or incident, such as a significant adverse environmental effect, will occur as a result of a project. The likelihood of the predicted significant adverse environmental effects should be supported with sufficient detail, using an appropriate quantitative or qualitative approach, to understand and substantiate how conclusions were reached.

Different methodologies, such as professional judgment, reasoned argumentation, collaboration and risk assessment, (see Methodologies section) may be used to determine the likelihood of a predicted significant adverse environmental effect. The selection of the methodology used for assessing likelihood is linked, among other things, to measurability of the effect, which in turn is influenced by the nature of the VC and the nature of the environmental effect.

Where possible, practitioners should use a quantitative assessment to characterize the likelihood of occurrence. Any assumptions and limitations should be described and be transparent.

Where quantitative assessment is not possible, the probability of occurrence is often determined based on a qualitative approach using terms such as “low”, “moderate” and “high” probability or “unlikely”, “probable” and “very likely”.

It is important that qualitative terms be defined (e.g. using a defined percentage), applied in a transparent manner and supported by explanation and discussion to avoid variability in different interpretation by reviewers.

Uncertainty often influences the prediction of the likelihood of a significant adverse environmental effect.

Example 3: Likelihood and Uncertainty

Stage 3: Determining whether the significant adverse environmental effects are likely

A proposed project could affect a herd of woodland caribou. An Indigenous group has stated that this herd is critically important to them as a source of food and for a variety of products such as snowshoe panels (current use of lands and resources for traditional purposes).

Uncertainties exist in the conclusions related to:

- the critical ecological pathways to the effects on current use;
- the effectiveness of proposed mitigation measures; and
- the interaction of various effects.

Given these scientific uncertainties and the importance placed on the availability of woodland caribou by the affected Indigenous group, a conservative approach is used. It is assumed to be 100% likely that the hunting success rate of caribou by the Indigenous groups will be significantly affected. Therefore a significant adverse effect to the current use of lands and resources for traditional purposes by the Indigenous group is likely.

5. Addressing uncertainty

Scientific uncertainty associated with information and methods may be introduced at many points in the EA process, including, for example, in the evaluation of the accuracy and availability of baseline information, accuracy of environmental effects predictions, and the expected level of effectiveness of mitigation measures.

All project EAs involve some level of uncertainty and observed results can be expected to deviate, to some degree, from predictions made in the EA. The confidence limits, confidence interval or the confidence level provides information about the range in which the true value lies within a stated degree of probability. This information can be assessed with a quantitative or qualitative approach by qualified professionals.

When data are generated, the application of statistical methods may allow for quantitative determination of confidence limits. When statistical methods are used, the nature and quality of the data used, the scientific validity of the hypotheses, and “statistical significance”, have to be taken into account. Statistical significance is characterized by a low probability of error and a high confidence level. (Note that statistical significance is a different concept from that of significance of adverse environmental effects under CEAA 2012.)

As an alternate to statistical methods, professional judgment (see Methodologies section) is often applied to characterize the level of confidence of each prediction of significance and likelihood with qualitative terms such as “low”, “medium” and “high”. The criteria for determination of the level of confidence should be defined and documented to enable consistent interpretations by reviewers.

It may be appropriate to perform an additional risk analysis to characterize potential risks, particularly if:

- there is a high level of uncertainty in the prediction of the environmental effect;

- a significant environmental effect is possible among the range of potential effects; or
- specific adaptive management commitments would not adequately mitigate the uncertainty or potential for significant environmental effects.

The risk assessment would allow for the description of the range of likely, plausible, and possible outcomes with respect to both potential significance and likelihood.

Regardless of the approach taken to consider uncertainty (quantitative or qualitative), the sources and nature of uncertainty should be clearly described to provide the basis for the stated level of confidence as well as how any identified uncertainty may affect any of the steps in the methodologies discussed in the document.

Adaptive management may be used to address uncertainty. Adaptive management provides flexibility to identify and implement new mitigation measures or to modify existing ones during the life of a project. However, a commitment to implementing adaptive management measures does not eliminate the need for sufficient information regarding the environmental effects of the project, the significance of those environmental effects and the appropriate mitigation measures required to eliminate, reduce or control those environmental effects. Adaptive management requires appropriate predictions, monitoring and triggers for when action will be taken. For further information on adaptive management, please see the Agency's Operational Policy Statement: Adaptive Management Measures under the *Canadian Environmental Assessment Act* or any future updates of this document.

METHODOLOGIES

Several methodologies that can be used to determine whether an adverse environmental effect is significant are described in this section. A methodology generally frames the implementation of various methods.

The methodologies described below are often interrelated and can be used in combination, as appropriate, to determine whether a project is likely to cause significant adverse environmental effects. For example, professional judgment and reasoned argumentation may be used to adapt broad standards, guidelines and objectives to establish a definition or limit of significance for a specific environmental effect. Collaboration can support and inform a variety of methods.

1. Collaboration

Collaborative interactions among experts and other stakeholders can inform the consideration of significance and the scaling or defining of the key criteria. Collaboration generally involves identification of stakeholder representatives who can participate in forums that may require multiple sessions and an investment of time. These forums are typically distinct from general public participation opportunities provided by the proponent, the Agency or a review panel.

Considerations for applying this methodology include the following:

- the objectives of interactions with stakeholders (e.g., seek advice, achieve consensus) should be clear to all participants;
- the reasoning for the determination of significance must be clear for all participants to enable clear conclusions in the EIS;
- this methodology is conducive to the integration of scientific, Aboriginal and community knowledge, mutual learning, creative interpretations and problem solving; and
- this methodology is highly dependent on effective participation methods.

Consideration should be given to using multiple forms of participation (e.g., public meetings, site tours, focus groups), considering the needs and characteristics of the collaborating parties, making use of specialists with the appropriate background and experience, as well as specialists with facilitation and mediation skills.

Example 4: Collaboration

Stage 2: Determining whether the adverse environmental effects are significant

A proposed project may affect the current use of lands and resources for traditional purposes by an Indigenous group. Due to the importance of Indigenous perspectives in the understanding and interpretation of effects on this VC, a collaborative method is used to inform the consideration of significance.

Traditional knowledge holders and leaders from the potentially affected Indigenous group, as well as the proponent's technical experts in biology and archaeology, participated in a three-day workshop to discuss the evaluation of significance of adverse environmental effects. The objectives of the workshop were clearly defined:

- share and understand the rationale behind the residual adverse environmental effects identified;
- define and discuss the key criteria (i.e., ecological and social context, magnitude, geographic extent, timing and duration, frequency, and reversibility) that are typically used to determine the significance of residual adverse environmental effects; and
- achieve consensus on the key criteria to be considered for this VC and the process that will be used to apply these key criteria.

Concerns raised at the workshop were used to inform the design of the project and application of mitigation measures. Questionnaires and interviews with members of the Indigenous group resulted in additional baseline information and greater understanding of their ranking of issues related to current use of lands and resources for traditional purposes.

2. Risk Assessment

Significance can be determined on the basis of an “acceptable level” of a specified risk, using quantitative or qualitative ecological or human health risk assessment. This methodology considers a combination of likelihood and the consequences of the adverse environmental effect.

Risk assessment may also be used to describe the range of likely, plausible, and possible outcomes with respect to both potential significance and likelihood. This may be a useful aid for addressing uncertainty.

Considerations for applying this methodology include the following:

- quantitative risk assessment is often used to determine the significance of the risks to human or ecological health from, for example, carcinogenic chemicals. Its use is restricted to agents that have predictable dose-response or exposure-effect relationships. The response, effect, or risk is often measured in terms of increased incidence of a particular health outcome per million people exposed. By using the dose-response relationship, it can be determined whether or not the dose or exposure would result in an unacceptable level of risk;
- ecological risk assessments are used to assess risks to ecosystem processes, habitats and biotic resources;

- information on who has set the risk levels and how acceptable risk levels are determined should be presented. The views of Indigenous groups should be considered regarding acceptable risk levels for environmental effects that may affect them; and
- risk assessments may use generally available and tested models, models that have been adapted to better address the circumstances of the project or models developed specifically for the project.

Example 5: Quantitative Risk Assessment

Stage 1: Determining whether the environmental effects are adverse,

Stage 2: Determining whether the adverse environmental effects are significant, and

Stage 3: Determining whether the significant adverse environmental effects are likely

The health of an Indigenous group could be affected by air emissions from a proposed project.

A quantitative risk assessment method is appropriate due to the availability of a risk assessment framework and guidance endorsed by federal regulatory agencies.

Future concentrations of air contaminants are modelled and compared to available site-specific and/or published background levels, as well as health-based environmental guidelines set by regulatory agencies.

The risks to the health of Indigenous peoples are evaluated using professional judgement and by comparison to risk levels that consider both the probability of occurrence and the consequences of an adverse environmental effect.

3. Aggregation

Qualitative or quantitative aggregation methods involve attributing a scale ranking to each key criterion and applying a decision rule to inform the determination of significance. Examples of this methodology include multi-criteria analysis and decision trees.

The influence of the key criteria on a determination of significance will vary between VCs. In most cases, reliance on a standardized ranking system or standardized decision rules across all VCs will not give adequate consideration to VC-specific circumstances. It is important to explain rankings and give a clear rationale for the determination of significance on a VC-specific basis.

Example 6: Qualitative Aggregation

Stage 2: Determining whether the adverse environmental effects are significant

A proposed project may affect air quality on a nearby national park (federal lands) and also across a provincial boundary. A method based on qualitative aggregation and professional judgement is appropriate in this case, because the most relevant key criteria for measuring air quality are magnitude, geographic extent and frequency.

Thresholds for magnitude of air quality effects, available as established standards, are best understood in relation to the geographic extent and frequency criteria. Established air quality criteria are developed to apply in the environment, which means beyond the geographic extent of the project itself. The geographic extent of the effect can be tied to the predicted magnitude. For an effect on air quality on federal lands or in another jurisdiction (i.e. transboundary) to be significant, the predicted air quality would need to exceed the relevant criteria and would need to exceed the criteria more frequently than under baseline conditions.

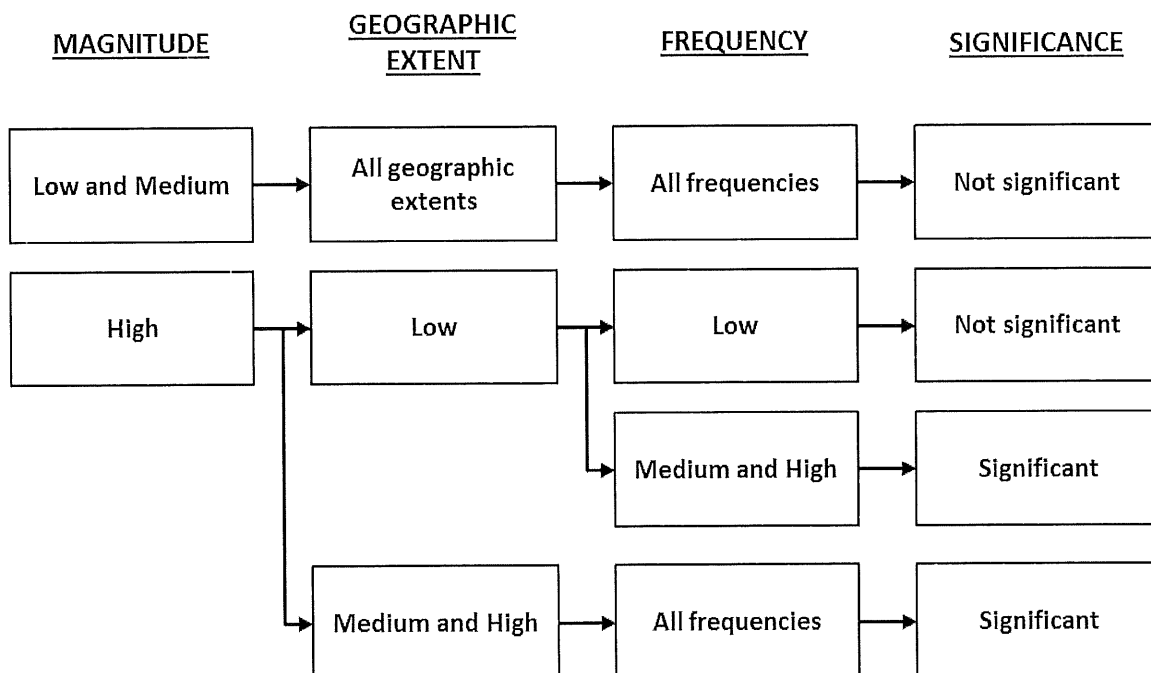
The definitions of the most relevant criteria are as follows:

- **Magnitude:** degree of the change in concentration of indicator compounds (airborne particulate matter, combustion by-products; and airborne metals) relative to applicable standards
- **Geographic extent:** the spatial area over which the effect occurs, categorized by comparison to the established study areas for the VC (e.g., Local Study Area, Regional Study Area, beyond the Regional Study Area); and,
- **Frequency:** how often the residual adverse environmental effect occurs within a given time period.

The decision making process for this example is outlined in Figure 1 below.

Figure 1. Example Decision Tree for Determination of Significance

Note: This diagram provides a decision tree for determination of significance (not significant or significant) based on the sequential interaction between the magnitude, geographic extent, and frequency criteria for effects (defined as low, medium or high).



Example 7: Quantitative Aggregation

Stage 2: Determining whether the adverse environmental effects are significant

A proposed project may affect fish and fish habitat as defined in the *Fisheries Act*. A quantitative aggregation method is appropriate due to the considerable variation in the importance of the key criteria to the determination of significance. Each of the key criteria is assigned effects-level definitions and related scores (see Classification and Score columns in Table 1 below) based on degree of adverse effect, e.g.:

Magnitude and Geographic Extent

- Low (Score 0): Under 20% alteration of important fish habitat in the Local Study Area
- Medium (Score 5): 20% to 40% alteration of important fish habitat in the Local Study Area
- High (Score 10): Greater than 40% alteration of important fish habitat in the Local Study Area

Magnitude and geographic extent, timing and reversibility are given greater weight in the scoring system to reflect their relative importance, i.e. any effects to these criteria could cause fundamental changes to the current state of fish populations.

In Table 1 below, the predicted effects of the project are compared to the significance key criteria using the corresponding scores. The key criteria scores are then aggregated to provide an overall determination of significance as follows:

- Negligible (not significant): 0-5
- Low (not significant): 6-10
- Moderate (not significant): 11-15
- High (significant): 16 or greater

The aggregated score of the effects is 10 corresponding to low, not significant, effects. Therefore, no significant adverse environmental effects on fish and fish habitat are anticipated as a result of the project.

Table 1. Application of Key Criteria

Note: This table illustrates the determination of significance by using quantitative aggregation, based on a comparison among the predicted effect of the project and the corresponding scores for each key criteria.

Key Criteria	Application of Key Criteria	Classification	Score
Ecological and Social Context	Species not identified as commercially or recreationally important or important to Indigenous groups.	Low	0
Magnitude and Geographic Extent	Approximately 25% of important fish habitat is likely to be altered in the Local Study Area.	Medium	5
Timing	The effect extends to sensitive periods (e.g. spawning).	Sensitive	3
Duration	The effect extends from the Construction Phase through the Closure Phase.	Long-term	2
Frequency	Conditions or phenomena causing the effect are anticipated to occur once.	Low	0
Reversibility	The effects are anticipated to be reversible following Project closure.	Reversible	0
Aggregated Score:			10 (Low)

4. Reasoned Argumentation

Reasoned argumentation involves presenting a clear, well-reasoned, substantiated and organized argument in support of a conclusion. A reasoned argument allows a wide audience to reasonably draw the same conclusions as the author. The argument should fully utilize relevant information, be based on a comparison of the predicted effect to a benchmark, where appropriate, and consider the most relevant key criteria.

Example 8: Reasoned Argumentation

Stage 2: Determining whether the adverse environmental effects are significant

A proposed project could affect habitat quality and quantity for a migratory bird species on federal lands, and disrupt breeding and nesting periods. Professional judgment and reasoned argumentation are used to identify benchmarks to determine what would be a significant effect for this VC. Scientific literature, species life history traits, predicted changes in measurement indicators and experience from past EAs, monitoring programs and regional studies informed this work.

A significant adverse environmental effect to this VC could be when one or more of the following population outcomes are reached:

- habitat loss or reduced habitat quality causes permanent adverse changes to survival or reproduction at the population level;
- habitat loss and fragmentation that reduces population connectivity to the point that it disrupts demographic rescue between source and sink habitats (or areas); or
- effects on abundance and distribution would be measurable at the population level and likely to decrease resilience and increase the risk to maintaining self-sustaining and ecologically effective populations.

5. Professional Judgment

Professional judgement involves developing interpretations informed by an understanding of project characteristics, predicted environmental effects, and general EA and sustainability principles, to establish a rational basis for a conclusion. The factors and logic leading to the conclusion must be clearly presented. Professional judgment should be applied by individuals that have the appropriate background and experience to make the judgment. Professional judgement is often used in combination with other methodologies (see Aggregation and Reasoned Argumentation sections above).

Considerations for applying professional judgment as the main or single methodology when determining significance include the following:

- a variety of factors should be taken into account, such as the status, size and range of a population unit, broad-scale habitat conditions, established thresholds or standards for closely related species, area-specific policies for land use and species management;
- information from a variety of sources including scientific analysis, community knowledge and Aboriginal traditional knowledge of environmental effects and their significance; and
- comparison to a benchmark should be used, where possible.

Example 9: Professional Judgement

Stage 1: Determining whether the environmental effects are adverse

After the implementation of mitigation measures, it is predicted that a project will result in the direct loss and fragmentation of migratory bird habitat on federal lands due to clearing and grubbing, watercourse alterations, and development of site access roads. Changes in habitat quality from noise, lights, people and vibrations from the project also have the potential to alter the movement and behaviour of individual birds and decrease occupancy of habitat near the project. Since no further mitigation measures are proposed, these effects are deemed residual adverse environmental effects and are advanced for consideration of significance.

Example 10: Professional Judgement

Stage 3: Determining whether the significant adverse environmental effects are likely

The migratory behaviour of marine mammals could be affected by the cumulative effects on habitat quality from a proposed project in combination with the environmental effects of other physical activities that have been or will be carried out. However, the likelihood is considered low given the distances over which the various physical activities are taking place, as well as the localized nature of potential project effects.



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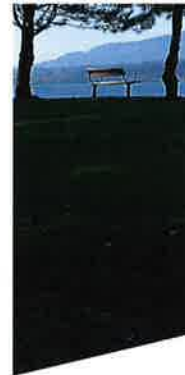
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de l'énergie
Columbia

This is Exhibit WW referred to in the
Affidavit of Tanny Nguyen sworn before me
at Vancouver, BC this 6th day of July, 2019.

A Commissioner for taking affidavits for British
Columbia

Trans Mountain Pipeline ULC

Application for the Trans Mountain Expansion Project



National Energy Board reconsideration
of aspects of its OH-001-2014 Report as
directed by Order in Council P.C. 2018-1177

MH-052-2018

February 2019

Canada

National Energy Board Report

Application for the Trans Mountain Expansion Project

National Energy Board
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Introduction and disposition

This introduction contains the National Energy Board's (Board or NEB) overall conclusions and recommendations with respect to the Trans Mountain Expansion Project (Project). It also sets the context for how the Board approached the Reconsideration it was directed to undertake by the Governor in Council (GIC), and contains remarks on some of the multifaceted considerations that informed the Board's conclusions. This includes details regarding the holistic, systemic and precautionary approach that the Board took to examining and addressing effects likely to be caused by the Project on the Salish Sea and its complex and interconnected ecosystem. This introduction should be read together with – and not in isolation from – the detailed reasons that follow in the subsequent chapters of this report.

Disposition

After completing the Reconsideration hearing and having regard to all relevant considerations, the Board is of the view that the Project is and will be required by the present and future public convenience and necessity, and is in the Canadian public interest. Pursuant to the *National Energy Board Act* (NEB Act), the Board confirms the recommendation, and replaces certain conditions, that it provided to the GIC in its OH-001-2014 Report. The Board recommends that the GIC approve the Project by directing the issuance of a certificate of public convenience and necessity (CPCN) to Trans Mountain Pipeline ULC (Trans Mountain), subject to 156 conditions.

Pursuant to the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) the Board is of the view that the designated Project is likely to cause significant adverse environmental effects. Specifically, Project-related marine shipping is likely to cause significant adverse environmental effects on the Southern resident killer whale, and on Indigenous cultural use associated with the Southern resident killer whale. This is despite the fact that effects from Project-related marine shipping will be a small fraction of the total cumulative effects, and the level of marine traffic is expected to increase regardless of whether the Project is approved. The Board also finds that greenhouse gas (or GHG) emissions from Project-related marine vessels would result in measureable increases and, taking a precautionary approach, are likely to be significant. While a credible worst-case spill from the Project or a Project-related vessel is not likely, if it were to occur, the environmental effects would be significant. While these effects weighed heavily in the Board's reconsideration of Project-related marine shipping, the Board recommends that, in light of the considerable benefits of the Project and measures to mitigate the effects, the GIC find that they can be justified in the circumstances. The Board has identified a recommended follow-up program to be implemented with respect to the designated Project.

Pursuant to the *Species at Risk Act* (SARA), the Board has identified the adverse effects of the Project and its related marine shipping on each SARA-listed wildlife species and its critical habitat, and has imposed (through conditions) and recommended (to the GIC) measures to avoid or lessen those effects and to monitor them.

Reconsideration background and process

If approved, the Project would expand the existing Trans Mountain Pipeline system between Edmonton, Alberta and Burnaby, British Columbia (B.C.), nearly tripling its capacity to ship oil from 300,000 to 890,000 barrels per day. Almost 90 per cent of the Project route parallels existing disturbance, including the right-of-way for the existing pipeline. The Project includes approximately 987 kilometres of new pipeline, new and modified facilities such as pump stations and tanks, and the reactivation of 193 kilometres of existing pipeline. The Westridge Marine Terminal (WMT) would also be expanded. Oil would be loaded onto tankers at the WMT for transit to Washington State, California, and Asia.

In May 2016, after an approximately two-year regulatory review (the OH-001-2014 hearing), the Board issued its OH-001-2014 Report recommending that the GIC approve the Project. Project-related marine shipping was considered as part of that review and report, but only under the NEB Act – not under the CEAA 2012. On 29 November 2016, the GIC approved the Project, issuing Order in Council (OIC) P.C. 2016-1069. Accordingly, on 1 December 2016, the Board issued CPCN OC-064 to Trans Mountain, along with amendments to other existing CPCNs. Additional related instruments in respect of the Project also came into effect at that time. These regulatory instruments authorized the construction and operation of the Project, subject to 157 conditions.

On 30 August 2018, the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*¹ set aside OIC P.C. 2016-1069, in part because, in the Court's view, the Board unjustifiably excluded Project-related marine shipping from the scope of the "designated project" reviewed under the CEAA 2012.

On 20 September 2018, the GIC issued OIC P.C. 2018-1177, directing the Board to conduct a Reconsideration taking into account the environmental effects of Project-related marine shipping in view of the requirements of the CEAA 2012, and the adverse effects of Project-related marine shipping on species at risk in view of any requirements of section 79 of the SARA. The OIC instructed the Board to complete the Reconsideration within 155 days.

In carrying out the Reconsideration, the Board held a public hearing (the MH-052-2018 hearing) and has prepared this MH-052-2018 Report as a result. As directed by the OIC and as reflected in the Board's List of Issues (see Appendix 1), this Reconsideration is focused on Project-related marine shipping – a comparatively narrow scope to the OH-001-2014 hearing. The Board's focus was on any necessary changes or additions to its OH-001-2014 Report in light of the inclusion of Project-related marine shipping in the designated Project being assessed under the CEAA 2012.

At the end of this introduction and disposition, there is a roadmap to this MH-052-2018 Report, which explains how it is laid out to incorporate both new information received through the MH-052-2018 hearing, and information received during the OH-001-2014 hearing. The Board has structured this MH-052-2018 Report in this manner to ensure that all pertinent information about the Project and its related marine shipping is captured in a single, consolidated report to the GIC.

Considering the evidence and submissions

While the Reconsideration was a focused hearing, the evidentiary record was nevertheless substantial, and included additional investigative and scientific studies that have been completed since the close of the OH-001-2014 hearing record. The level of participation was also substantial, with a total of 118 intervenors that included 52 Indigenous intervenors, and 8 federal government department intervenors. Any member of the public was able to file a letter of comment, and many took the opportunity to do so.

Prior to issuing a Hearing Order, the Board sought public comments on the scope of the environmental assessment and List of Issues, and the design of the hearing process. Intervenors provided evidence and argument, and were given an opportunity to question the evidence of other intervenors and Trans Mountain. A total of \$4,981,760 in participant funding was offered to 69 recipients, 82 per cent of which was offered to Indigenous intervenors.

Much of the evidence and submissions presented was relevant, informative, and helpful to the Board. The Board appreciates the efforts and diligence of the Parties in preparing their evidence and submissions, including the Indigenous oral traditional evidence that the Board heard over approximately three weeks in Calgary, Alberta, and in Victoria and Nanaimo, B.C.

However, the Board observes that, regrettably, not all Parties and commenters adhered to the Hearing Order and many filed evidence or offered comments on issues canvassed in the OH-001-2014 hearing or that were not within the scope of this

¹ 2018 FCA 153

Reconsideration, adding unnecessarily to the complexity of the hearing process. The Board did not consider evidence or revisit issues that were outside of the scope of the Reconsideration.

In making their submissions, some Parties implored the Board to not only listen, but to hear what they were saying. Elder George Harris from Stz'uminus First Nation said it this way:

You know, in our culture and traditional ways of our people, when we go into our longhouse, my speaker, when he says, "Listen, listen," that's a big part of our culture. We listen. I'm hoping that you, the Panel, are going to listen. I'm hoping our words are heard beyond this room.

The Board has endeavored to do this – to listen, hear, and share the evidence and views of the Parties with the GIC and Canadians.

The Board has carefully considered all of the relevant evidence and submissions it received. The Board is of the view that the MH-052-2018 hearing offered a fair and meaningful opportunity for Parties to participate and to fully present their case and represent their diverse points of view.

The Board's MH-052-2018 hearing also forms part of the overall consultation process with Indigenous peoples with respect to their constitutionally protected rights. In this regard, the GIC has indicated that it will rely on the NEB's process, to the extent possible, to discharge the duty to consult. The Board's MH-052-2018 Report may also inform the additional "Phase III" consultations being carried out separately by the Government of Canada with respect to the Project. Although the GIC has the responsibility of ultimately ensuring that the duty to consult has been fulfilled before a decision is made on the Project, the Board has considered those aspects of consultation which are relevant to the Reconsideration and for which evidence was filed on the record.

Weighing the public interest

The Board has undertaken this Reconsideration in accordance with the requirements of the NEB Act, the CEAA 2012, and the SARA, and with the Canadian public interest as a guide.

Weighing the public interest, as required by the NEB Act, is not a rigid or mechanical task. It is a complex, flexible, and multifaceted inquiry that requires the Board to conduct a thorough and scientific examination of evidence relating to economic, environmental, and social factors; to consider the impacts of the Project on Indigenous rights; to weigh and balance the overall benefits and burdens of the Project; and to draw conclusions. This consideration of benefits and burdens also informs the Board's recommendation under the CEAA 2012 regarding whether any significant adverse environmental effects can be justified in the circumstances. The various factors that the Board considers in this inquiry cannot be understood in isolation from one another, or divorced from the specific context and circumstances surrounding this Project.

In the Board's view, the benefits of the Project are considerable, including increased access to diverse markets for Canadian oil; jobs created across Canada; the development of capacity of local and Indigenous individuals, communities, and businesses; direct spending on pipeline materials in Canada; and considerable revenues to various levels of government.

However, the Board is also of the view that the Project and its related marine shipping carries risks. Its burdens include the significant adverse effects that are likely to be caused by Project-related marine shipping on the Southern resident killer whale and Indigenous cultural use associated with the Southern resident killer whale.

Further, the benefits and burdens of the Project and its related marine shipping are not distributed evenly across the country.

In light of these circumstances, reasonable people can and will disagree on what the best balance and outcome is for Canadians. Sometimes, Parties disagree on the evidence and facts, while other times, Parties agree on the facts but differ in their opinions, perspectives, or values. In carrying out the Reconsideration, the Board has listened carefully and taken into account diverse views. The Board has remained cognizant that the public interest is not regionally based, but is inclusive of all Canadians. It must also be responsive to Canadians' interests and values as they change over time.

It is through this holistic and contextual lens that the Board has carried out its environmental assessment, including the justification analysis; considered and weighed the Project's benefits and burdens; and determined that the Project is in the Canadian public interest.

Taking a precautionary approach

Many Parties in the MH-052-2018 hearing emphasized the application of the precautionary principle, despite the fact that there were different interpretations expressed as to exactly what the principle requires.

The Board recognizes the important role of the precautionary principle under the CEAA 2012. The precautionary principle requires that environmental measures must anticipate and prevent environmental harm. A lack of full scientific certainty should not be used as a reason for not implementing measures to prevent environmental harm. Adaptive management can, in certain circumstances, be an important part of a follow-up program for a project to allow for uncertainties in the environmental assessment process. The Board is of the view that certain activities may be permitted despite a lack of full scientific certainty regarding their effects, provided the activity and its effects can be effectively monitored and adaptively managed. This involves an exercise in balancing interests and weighing risks.

The Board has applied the precautionary principle to its environmental assessment in this case. As examples, the Board has applied the precautionary principle to its significance determinations, and to its consideration of measures to mitigate impacts through design, planning, follow-up, and monitoring. The Board has required that effects or consequences be minimized, even if they are only anticipated or possible and not certain.

The importance of taking a precautionary approach is evident when faced with the Salish Sea and its complex and not necessarily well-understood ecosystem. An approximately 18,000-square-kilometre body of water that includes the Straits of Juan de Fuca and Georgia as well as Puget Sound, the Salish Sea is home to diverse marine life. This includes a number of endangered and threatened species, some of which are of particular importance to Indigenous peoples and intrinsic to Indigenous cultural and spiritual practices.

Over 6.5 million people live on or in close proximity to the Salish Sea, and it is home to a population of over 35 types of mammals, 170 species of bird, 240 kinds of fish, and 3,000 species of invertebrates. Not surprisingly, the health of the Salish Sea is of significant importance to all who live in the area.

The evidence in the MH-052-2018 hearing is clear that the Salish Sea is not the healthy environment it once was. It is subject to a number of stressors, including vessel traffic and resulting noise, environmental contaminants, and a decline in salmon. The causes for the current state of the Salish Sea are numerous and diverse, and these effects have accumulated over time. There appears to be no serious controversy among the Parties with regard to these points, nor does there appear to be any serious controversy that Project-related marine shipping is likely to cause significant adverse environmental effects. This is despite the fact that Project-related marine shipping would comprise a relatively small increase in the total vessel traffic in the Salish Sea, and that increased pressure on the Salish Sea and its marine life can be anticipated regardless of whether the Project proceeds.

Taking an holistic approach

Given the cultural, environmental, and commercial importance of the Salish Sea, the Board has adopted an holistic approach to its consideration of the designated Project and how it fits into the wider context of the many current stressors on that body of water, the marine animals and fishes within it, and the people who derive cultural use, livelihood, or pleasure from it. The Board concludes that, while Project-related marine shipping's incremental addition to cumulative effects on the Salish Sea will not be large, it will add to already significant effects.

Addressing effects, and cumulative effects in particular, on the Salish Sea requires a broad, systemic, and multi-faceted approach. To understand the effects of Project-related marine shipping and how best to mitigate those effects, one needs to understand the complex and interconnected system that it would operate within. In order to be most effective in mitigating environmental harm to the Salish Sea and its ecosystem that is likely to be caused by the Project, a broader approach is required; one which extends beyond the NEB's regulatory authorities and one which will benefit the broader system. The Board has conducted its environmental assessment, set Project conditions, and made its broader recommendations to the GIC with this in mind. This includes making recommendations that use an offset-based approach. It is the Board's view that, should the GIC make changes to the operation of all marine traffic, including Project-related traffic, and take action to relieve other stressors within the broader system, it will offset the incremental effects of the designated Project and make material improvements to the health of the Salish Sea.

The Board is also supportive of the role of the Indigenous Advisory and Monitoring Committee (IAMC) for the Project. In the Board's view, the IAMC is well placed to help facilitate effective and ongoing Indigenous consultation and participation in Project-related Salish Sea monitoring and follow-up measures.

While the Board recognizes that scientific work to better understand the Salish Sea is continuing, it has heard a great deal of evidence, including from a variety of experts. The Board is satisfied that the evidence before it is sufficient for it to make the conclusions and recommendations it has reached in this MH-052-2018 Report.

Project conditions and recommendations to the GIC

The Board will impose 156 conditions on the Project if it is approved. It has also made 16 recommendations to the GIC. The conditions and recommendations are made in a manner consistent with the NEB Act, the CEAA 2012, the SARA, and they apply the precautionary principle.

The conditions cover a wide range of matters, including emergency preparedness and response, protection of the environment, consultation with affected Indigenous communities, socio-economic matters, pipeline safety and integrity, commercial support for the Project prior to construction, and financial responsibility on the part of Trans Mountain.

The Board's recommendations to the GIC relate to Project-related marine shipping, including cumulative effects management for the Salish Sea, measures to offset increased underwater noise and increased strike risk posed to SARA-listed marine mammal and fish species, marine oil spill response, marine shipping and small vessel safety, reduction of greenhouse gas emissions from marine vessels, and the IAMC.

In making its recommendations to the GIC, the Board drew guidance from the Federal Court of Appeal's decision in *Tsleil-Waututh Nation*. The Court indicated that the Board should identify mitigation measures within the authority of the federal government, despite the fact that the Board does not regulate marine shipping. The Board is also not limited to identifying measures that are within Trans Mountain's control to implement. With the addition of recommendations about matters beyond the Board's authority but within that of the GIC, the GIC will possess the requisite breadth of information to make the informed decisions required of it with respect to the Project.

Both the conditions and recommendations made by the Board are intended to mitigate, avoid, or lessen potential effects associated with the Project and its related marine shipping. The conditions are regulatory requirements imposed on Trans Mountain, which the Board would oversee and enforce as part of its regulatory mandate. In comparison, the recommendations to the GIC fall outside of the Board's regulatory mandate and are generally beyond the control of Trans Mountain. While the recommendations are sufficiently specific and are evidence-based, they are comparatively less prescriptive than the conditions. This provides a measure of flexibility for the GIC to determine the details of how best to implement them, and the resources required, should it decide to do so. This is appropriate given that the optimization of these mitigation measures may need to be based on a multitude of factors, including the GIC's overall approach for managing cumulative effects in the Salish Sea, multi- and cross-jurisdictional considerations, and the need to employ ongoing adaptive management in light of the complexities and uncertainties of the Salish Sea.

Although the Board's recommendations to the GIC are directly related to its environmental assessment of Project-related marine shipping, the Board is of the view that, if implemented, they may assist in mitigating effects of all marine traffic in the area. This would be a positive outcome that would extend beyond mitigating or offsetting the impacts of the Project and its related marine shipping. The Board encourages the Government of Canada in the direction it has already taken to both deepen the scientific understanding of the Salish Sea and its resident marine life, and to continue to put in place procedures, programs, equipment, and funding to safeguard this important Canadian marine resource.

Roadmap to the MH-052-2018 Report

Given that the Reconsideration focused on Project-related marine shipping, much of the OH-001-2014 Report is outside the scope of the MH-052-2018 hearing. However, the GIC must be informed about all aspects of the Project to make the decisions required of it. It is also important to be clear about what changed from the OH-001-2014 Report as a result of the MH-052-2018 hearing.

For this reason, this MH-052-2018 Report contains the sections that were reconsidered by the Board, as well as sections from the OH-001-2014 Report that were beyond the scope of the Reconsideration. This ensures that all pertinent information is captured in a single consolidated report to the GIC.

This MH-052-2018 Report contains the same chapter numbers and titles of the OH-001-2014 Report. Although sections of the OH-001-2014 Report are included in this MH-052-2018 Report, this does not mean that they were within the scope of the Reconsideration or reconsidered by the Board. The beginning of each chapter contains an explanation of what, if anything, was changed from the OH-001-2014 Report.

Most chapters in this MH-052-2018 Report were reproduced from the OH-001-2014 Report and include the views of the original Panel that undertook the OH-001-2014 hearing. These views remain valid and unchanged, and are labelled as **"Views of the Board."** Some chapters have undergone substantive changes as a result of the MH-052-2018 hearing and include the views of the Panel that carried out the Reconsideration. These are labelled as **"Views of the Reconsideration Panel."**

For issues that fall within the scope of the MH-052-2018 hearing, the Reconsideration Panel included views of the Parties from the OH-001-2014 hearing where they were still applicable. These are then followed by new or updated evidence raised by the Parties in the MH-052-2018 hearing. The views of the Reconsideration Panel contain Board views from the OH-001-2014 Report that were found to remain applicable after considering relevant evidence from both the OH-001-2014 and MH-052-2018 hearings. The views of the Reconsideration Panel include additional views to address the new or updated evidence and to explain if it confirms or modifies the Board's previous findings from the OH-001-2014 hearing.

The majority of the issues relevant to the MH-052-2018 hearing are covered in Chapters 5 and 14. An overview of what was considered by the Reconsideration Panel and changed from the OH-001-2014 Report is outlined below. The appendices from the OH-001-2014 Report have been reproduced, with updates to reflect the circumstances and factual underpinnings of the Reconsideration. Appendices 14 and 15 are new to this MH-052-2018 Report.

Chapter	Update
Introduction and disposition	New
Chapter 1 – The Board's review	Updated to reflect both hearing processes
Chapter 2 – Benefits, burdens, and recommendations	Updated to reflect the conclusions arising from the Reconsideration
Chapter 3 – Regulating through the Project lifecycle	Unchanged
Chapter 4 – Public consultation	Unchanged
Chapter 5 – Indigenous matters	Section 5.2 includes new or updated evidence and views with respect to Indigenous matters
Chapter 6 – Pipeline and facility integrity	Unchanged
Chapter 7 – Construction and operations	Unchanged
Chapter 8 – Environmental behavior of spilled oil	Section 8.2 includes new or updated evidence and views with respect to the environmental behavior of spilled oil
Chapter 9 – Emergency prevention, preparedness, and response	Unchanged
Chapter 10 – Environmental assessment	Mostly unchanged except for references about the scope of the environmental assessment completed under the CEAA 2012, and Project-related marine shipping
Chapter 11 – People, communities, and lands	Unchanged
Chapter 12 – Need for the Project and economic feasibility	Unchanged
Chapter 13 – Financial matters	Unchanged
Chapter 14 – Project-related increase in shipping activities	Revised significantly; covers the majority of the issues relevant to the Reconsideration

Conclusion

The Reconsideration has comprised a comprehensive, evidence-based, fair, and meaningful review of Project-related marine shipping. The Reconsideration process and this resulting report discharge the relevant requirements of the Board under the NEB Act, the CEAA 2012, and the SARA. The Board finds, in conclusion, that the Trans Mountain Expansion Project is in the Canadian public interest and recommends to the GIC that it be approved.

The Board thanks the Parties in the MH-052-2018 hearing for their thoughtful and thorough participation, which has resulted in better information, well-informed conclusions, and more effective conditions and recommendations that serve all Canadians.

Should the Project be approved, the NEB will regulate it throughout its full lifecycle. The NEB will oversee Project construction and operation, and will hold Trans Mountain accountable for meeting its commitments and applicable regulatory requirements, keeping its pipelines and facilities safe and secure, and protecting people, property, and the environment.



L. Mercier
Presiding Member



A. Scott
Member



M. Lytle
Member

Calgary, Alberta
February, 2019



The Board's review of the Trans Mountain Expansion Project

The content of this chapter has been updated since the Board's May 2016 OH-001-2014 Report to reflect the Reconsideration. The Reconsideration Panel has added information regarding the MH-052-2018 hearing process and its views on various issues raised in argument.

Section 1.6 contains the views of the Board from the OH-001-2014 Report (formerly Chapter 1.3), but has been included as it provides helpful background information.

Section 1.7 contains the views of the Board from the OH-001-2014 Report (formerly Chapter 1.4). The Reconsideration Panel adopts this approach to assessing risks from spills and has revised the conclusions related to spills from Project-related marine shipping.

In May 2016, after an approximately two-year regulatory review (the OH-001-2014 hearing), the Board issued its OH-001-2014 Report recommending that the GIC approve the Project. Project-related marine shipping was considered as part of that review and report, but only under the NEB Act – not under the CEAA 2012. On 29 November 2016, the GIC approved the Project, issuing Order in Council (OIC) P.C. 2016-1069. Accordingly, on 1 December 2016, the Board issued CPCN OC-064 to Trans Mountain, along with amendments to other existing CPCNs. Additional related instruments in respect of the Project also came into effect at that time. These regulatory instruments authorized the construction and operation of the Project, subject to 157 conditions.

On 30 August 2018, the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*² set aside OIC P.C. 2016-1069, in part because, in the Court's view, the Board unjustifiably excluded Project-related marine shipping from the scope of the "designated project" reviewed under the CEAA 2012.

On 20 September 2018, the GIC issued OIC P.C. 2018-1177, directing the Board to conduct a Reconsideration taking into account the environmental effects of Project-related marine shipping in view of the requirements of the CEAA 2012, and the adverse effects of Project-related marine shipping on species at risk in view of any requirements of section 79 of the SARA. The OIC instructed the Board to complete the Reconsideration within 155 days.

² 2018 FCA 153

In carrying out the Reconsideration, the Board held a public hearing (the MH-052-2018 hearing) and has prepared this MH-052-2018 Report as a result. As directed by the OIC and, as reflected in the Board's List of Issues (see Appendix 1), this Reconsideration is focused on Project-related marine shipping – a comparatively narrow scope to the OH-001-2014 hearing. The Board's focus was on any necessary changes or additions to its OH-001-2014 Report in light of the inclusion of Project-related marine shipping in the designated Project being assessed under the CEAA 2012.

1.1 The Project

On 16 December 2013, Trans Mountain Pipeline ULC (Trans Mountain) submitted an application (Application) to the National Energy Board (NEB or Board) for a Certificate of Public Convenience and Necessity (CPCN) and other requested relief to construct and operate the Trans Mountain Expansion Project (Project).

In its Application, Trans Mountain said that it had received many requests from its shippers over the past few years to increase the capacity of the existing Trans Mountain Pipeline (TMPL) system. This pipeline is currently the only major pipeline route for Western Canadian producers who want to ship oil to the west coast of Canada. The pipeline ships oil from Edmonton, Alberta to Burnaby, B.C. At that point, oil is loaded onto tankers at the Westridge Marine Terminal (WMT) for Pacific Rim destinations, such as Washington State, California, and Asia.

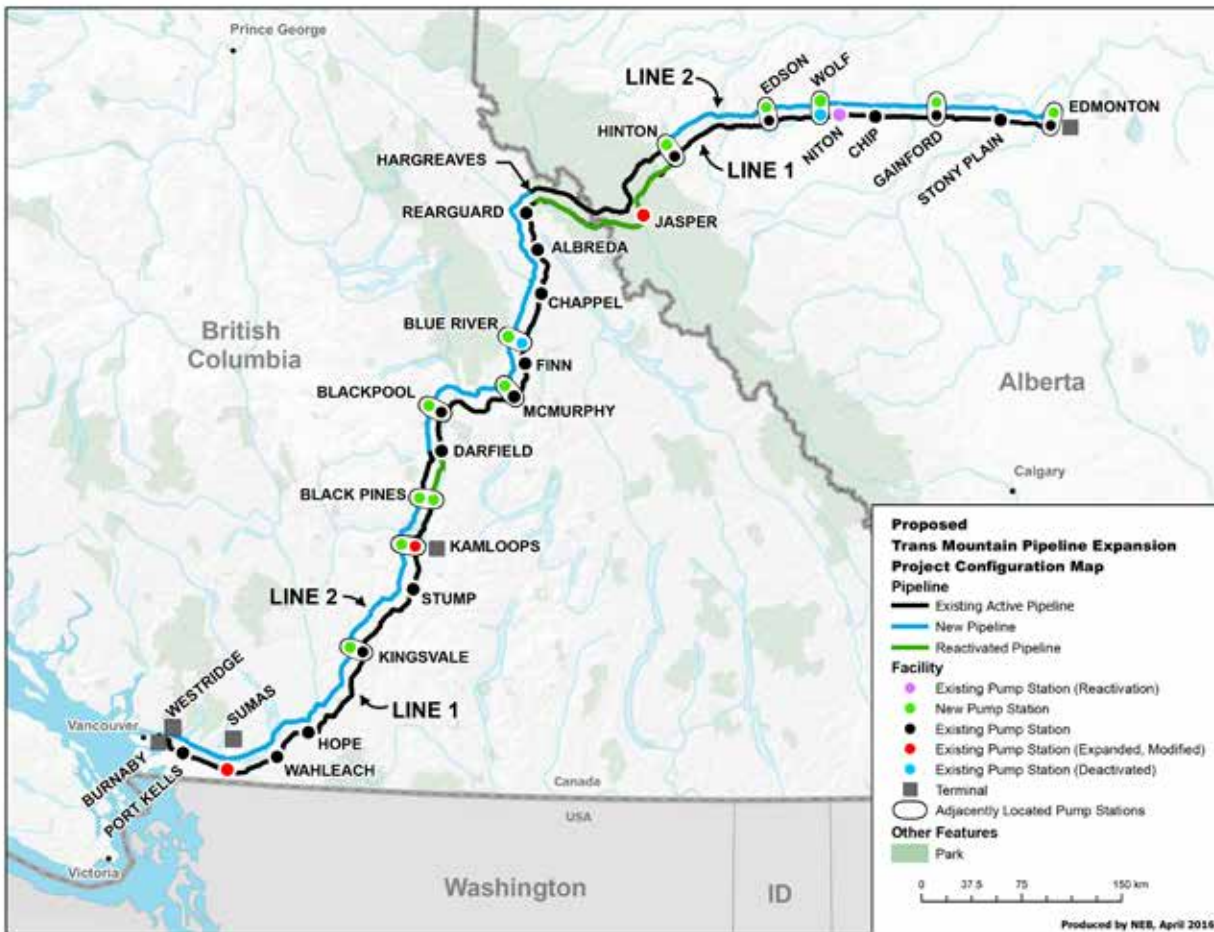
The Project would result in the looping (or twinning) of the existing 1 147 km TMPL system between Edmonton and Burnaby with about 987 km of new buried pipeline. Most of the existing pipeline, along with two reactivated pipeline segments, would become Line 1. The proposed new pipeline segments, along with active pipeline segments, would become Line 2, as shown below in Figure 1.

The Project would increase the capacity of the existing TMPL system from 47 690 m³/d (300,000 bbl/d) to 141 500 m³/d (890,000 bbl/d) of crude petroleum and refined products.

Currently, Panamax tankers (less than 75,000 metric tonnes deadweight tonnage (DWT)) and Aframax tankers (75,000 to 120,000 metric tonnes DWT) call at the WMT. The existing WMT typically loads five tankers per month. The proposed expanded system associated with the Project would increase the WMT's loads to approximately 34 Aframax class vessels per month, with actual demand driven by market conditions.

Additional technical details about the Project can be found in Appendix 4.

Figure 1: Project map



1.2 Definitions of the Project, Project-related marine shipping, and the designated Project

The Project, as defined by Trans Mountain, includes only the facilities described above, which are between Edmonton and the WMT. Following the direction from the GIC in OIC P.C. 2018-1177, the Board concluded that Project-related marine shipping between the WMT and 12-nautical-mile territorial sea limit is “incidental” to the Project and therefore part of the “designated project,” as those terms are defined in the CEAA 2012.

In this MH-052-2018 Report, the Board uses the term “Project” to describe those facilities between Edmonton and the WMT. Project-related marine shipping is identified separately. This terminology enables the Board to clearly distinguish what applies to the pipeline component and WMT and what applies to Project-related marine shipping. Defining “Project” in this way also maintains consistency with the sections from the OH-001-2014 Report that were included as part of this MH-052-2018 Report.

The term “designated Project” is used to describe the entirety of the Project and the Project-related marine shipping.

1.3 OH-001-2014 hearing

1.3.1 The hearing process

Public hearing processes are designed individually and independently by the Board based on the specific circumstances of the application. Each process is designed to provide for a fair hearing. Through the *National Energy Board Rules of Practice and*

Procedure, 1995 and the Filing Manual, the Board provides specific details about what information is required to be filed in regard to any application to build and operate a new pipeline.³ The List of Issues (Appendix 1) provides an outline of the issues that would be considered by the Board during the hearing.

For the Board's review of the Application, the hearing had significant written processes as well as oral components. With the exception of oral traditional evidence described below, evidence was presented in writing, and testing of that evidence was carried out through written questions, known as information requests (IRs). Intervenors submitted over 15,000 questions to Trans Mountain over two major rounds of IRs. Hundreds of other questions were asked in six additional rounds of IRs on specific evidence. If an intervenor believed that Trans Mountain provided inadequate responses to its questions, it could ask the Board to compel Trans Mountain to provide a more complete response. Trans Mountain could do the same in respect of IRs it posed to intervenors on their evidence. There was also written questioning on various additional evidence, including supplemental, replacement, late and Trans Mountain's reply evidence.

The Board decided, in its discretion in determining its hearing procedure, to allow testing of evidence by IRs and determined that there would not be cross-examination in this hearing. The Board decided that, in the circumstances of this hearing where there were 400 intervenors and a legislated time limit, and taking into consideration the technical nature of the information to be examined, it was appropriate to test the evidence through written processes. In the final analysis, the written evidence submitted was subjected to extensive written questioning by up to 400 participants and the Board.⁴ The Board is satisfied that the evidence was appropriately tested in its written process and that its hearing was fair for all parties and met natural justice requirements. Comments about process provided in this hearing will be passed on for the consideration of future Board panels.

With the participation of approximately 400 intervenors and 1,250 commenters, the Board received evidence from those with first-hand knowledge and understanding about the specific circumstances along the corridor. This is why holding the public hearing was so valuable to the Board.

Over 1,600 participants in the hearing, including Indigenous people, businesses, communities, landowners, individuals and non-government and government organizations, had the opportunity to provide evidence about specific considerations that the Board took into account when coming to its recommendation. While not all those who were granted participation status participated in the hearing, many did participate in some or all hearing steps.

The Board's recommendation is founded upon the entire evidentiary record built through the oral and written parts of the hearing that formed the basis for the Board's deliberations.

1.3.2 Public participation

Participation by those members of the public who are either directly affected or have relevant information or expertise is one means of identifying potential and real impacts of a project. The Board required Trans Mountain to contact anyone who lives, works or uses land and resources along the proposed pipeline route. The Board also took a number of steps, beginning before the Application was received, to ensure that those who could be potentially affected by the Project were aware of it and knew how they could get involved in the review (see Appendix 5). Full details of the application to participate notification are contained in the Board's letter to Trans Mountain, dated 31 December 2013.

It is not unusual for hearing participants to be unfamiliar with how the NEB carries out its reviews. For a major project such as this one, the Board assigns a Process Advisory Team to help participants understand the hearing process and decide how best to participate.

The *National Energy Board Act* (NEB Act), section 55.2 states:

On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise.

The Board decides for each hearing whether to grant participation rights to any person and, if granted, the appropriate method of participation. In addition, if it is the Board's opinion that a person has relevant information or expertise about the environmental assessment required under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), the Board must provide that person with an opportunity to participate. Full details of the Board's ruling on participation are found in the Board's ruling of 2 April 2014.

³ The term "pipeline" is defined in section 2 of the NEB Act.

⁴ Ruling No. 14 dealt with a notice of motion to include oral cross-examination of witnesses. (Appendix 7 provides an overview of the notices of motions that were filed.)

The Board recognizes that good decisions and recommendations consider the thoughts, views and opinions of directly affected people and those with a broad range of relevant information or expertise. Participants for this Project's hearing could apply to:

- write a letter of comment (commenter); or
- become an intervenor.

A letter of comment gives the writer an opportunity to express his/her knowledge, views or concerns about a project. These letters are considered evidence in the proceeding. People who wrote letters of comment in this hearing could not ask questions about other participants' evidence or make final argument, nor were they asked questions about their letters.

Intervenors could file evidence, submit notices of motion, and ask questions of Trans Mountain and other intervenors. They also had the opportunity to provide final written and oral argument. The Board, Trans Mountain and other intervenors could also ask them questions about their evidence.

Full details about participation in the hearing are set out in the Board's OH-001-2014 Hearing Order, dated 2 April 2014. Additional rules regarding hearing participation are contained in *National Energy Board Rules of Practice and Procedure, 1995*.

More details about the process and participation are provided in the hearing timeline in Appendix 5.

1.3.3 Participant funding

Public participation is an important element of an open and balanced regulatory process. To facilitate public involvement, the NEB is responsible for a Participant Funding Program (PFP), a transfer payment program independent from the regulatory review process. The objective of the PFP is to provide funding to facilitate the participation of Indigenous groups, landowners, individuals and groups, associations and not-for-profit organizations.

On 22 July 2013, the NEB announced it would make \$1.5 million available to eligible intervenors to participate in the Trans Mountain Expansion Project hearing. Some intervenors raised concerns that the PFP process took too long and, given the large number of intervenors requesting funding, the level of funding was not sufficient. While the decisions on who received participant funding, how much, and the timing of those decisions were entirely separate from the regulatory hearing process, the Board notes the funding envelope was increased to \$3 million on 16 July 2014. There was also special participant funding offered in September 2015 for up to \$10,000 per applicant to cover eligible replacement evidence. In total, the PFP offered funding valued at \$3,085,370 to 72 eligible intervenors; 79 per cent of this funding was offered to Indigenous groups.

Awards are announced in the Participant Funding Report on the NEB website. For more information about the PFP or to see the Participant Funding Report, go to <http://www.neb-one.gc.ca/pfp>.

1.3.4 Gathering oral Indigenous traditional evidence

Indigenous people in the Project area have a long relationship and connection with the land, water and resources. The Board recognizes that Indigenous traditional knowledge can help provide relevant information, including historical information, which may otherwise be unavailable. This information can also help identify potential environmental effects, strengthen mitigation measures, and lead to better-informed decision-making.

The Board wants to provide opportunities for Indigenous people to share their traditional knowledge in a way that is both meaningful to them and valuable for the Board's deliberations. The Board recognizes that Indigenous people have an oral tradition for sharing stories, lessons and knowledge from generation to generation. This information cannot always be shared adequately in writing.

In this hearing, the Board asked participating Indigenous groups to let the Board know if they wanted to present oral traditional evidence. The Board received notices of intent from 49 groups and individuals. Originally, the Board intended to hear this oral evidence in August and September 2014. The Board later amended its hearing schedule in response to the input received from a number of Indigenous groups who expressed concerns that the proposed schedule would interfere with the sockeye salmon harvest. As a result, the Board held sessions in Edmonton, Alberta, in September; Chilliwack, B.C., in October; Kamloops and Victoria, B.C., in November 2014; and Calgary, Alberta, in January 2015.

Indigenous intervenors were able to file written evidence in addition to their oral traditional evidence. Other intervenors, Trans Mountain or the Board could ask questions about the oral traditional evidence. Each Indigenous group could then decide whether they would respond to any questions orally, in writing, or both.

1.3.5 Board rulings

As part of the hearing process, the Board provided participants with guidance on how they could ask the Board to do something, such as change or modify a particular deadline. This is known as filing a notice of motion. Depending on the nature of the request and the circumstances surrounding it, the Board had the option of providing an opportunity for Trans Mountain and intervenors to comment on a notice of motion. The Board issued rulings on approximately 291 motions and review applications. The motions focused on, among other things:

- requests to extend deadlines and/or the statutory time limits;
- the release of emergency response plans;
- allegations of apprehension of bias of Panel Members;
- requests to file late evidence;
- calls to include oral cross-examination in the hearing process;
- constitutional questions; and
- challenges to the limitations on public access during the oral hearing.

In the case of each of these notices of motion, the Board provided rulings, including reasons. Appendix 7 provides an overview of the notices of motions throughout the hearing.

As part of closing argument, a number of intervenors made requests for relief other than requests that specifically addressed the intervenors' positions on the recommendation that the Board ought to make to the Governor in Council (GIC).

In some cases, these requests were presented as alternative requests to the intervenor's primary request that the Board recommend denial of the Project application. In other cases, the relief was advanced as the intervenor's primary position. Trans Mountain also made a request for other relief in its reply evidence and in its closing argument.

The Board has addressed other relief requested in Appendix 7.

1.3.6 Modifying the hearing schedule

The NEB Act, subsection 52(4) sets a 15-month time limit starting when the Board decides an application is complete to when the Board submits its report to the GIC. This may be extended under particular circumstances specified in the Act. On 2 April 2014, the Board found the Trans Mountain Expansion Project application complete and issued the OH-001-2014 Hearing Order.

In June 2014, Trans Mountain advised that its preferred corridor for the delivery lines to the WMT would run through Burnaby Mountain instead of around it as described in the original Application.

The new proposed pipeline corridor included two possible construction options through Burnaby Mountain; a horizontal directional drill and a tunnel. Trans Mountain retained the original route around the mountain as an alternative corridor.

In order for the Board and hearing participants to assess the new preferred pipeline corridor, the Board needed more information from the company, and this required more time. The Board, with the approval of the NEB Chair, announced an excluded period that ran from 11 July 2014 until 3 February 2015. The excluded period was not counted in the 15-month time limit that the Board had to make its recommendation to the GIC.

This excluded period provided time for hearing participants and the Board to review the new evidence, once filed, and test it through IRs. The time limit for the Board to issue its Report to the GIC was revised to 25 January 2016, more than six months later than the original date of 2 July 2015.

As Trans Mountain's preferred pipeline corridor through Burnaby had now changed, the Board opened a second "application to participate" process for those who might have been directly affected by, or might have had relevant information or expertise on, the new preferred corridor. This process ran from 8 to 24 September 2014 (as illustrated in the hearing timeline at Appendix 5).

On 21 August 2015, the Board announced, on its own volition, that it was striking Trans Mountain's filed evidence that was prepared by or under the direction of Mr. Steven J. Kelly. This action was taken to ensure the integrity of the hearing. The stricken evidence addressed, among other things, the issue of oil market supply and demand.

On 18 September 2015, the Board, with the approval of the NEB Chair, announced a second excluded period so that it could acquire information from Trans Mountain and intervenors in relation to the issues previously addressed by the stricken

evidence. As a result of this second excluded period, the legislated time limit for the Board to issue its Report to the GIC was extended to 20 May 2016.

The updated hearing timeline is provided in Appendix 5.

1.4 MH-052-2018 hearing

1.4.1 Tsleil-Waututh Nation and OIC P.C. 2018-1177

On May 2016, after an approximately two-year regulatory review (the OH-001-2014 hearing), the Board issued its OH-001-2014 Report recommending that the GIC approve the Project. Project-related marine shipping was considered as part of that review and report, but only under the NEB Act – not under the CEAA 2012. On 29 November 2016, the GIC approved the Project, issuing Order in Council (OIC) P.C. 2016-1069. Accordingly, on 1 December 2016, the Board issued CPCN OC-064 to Trans Mountain, along with amendments to other existing CPCNs. Additional related instruments in respect of the Project also came into effect at that time. These regulatory instruments authorized the construction and operation of the Project, subject to 157 conditions.

On 30 August 2018, the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*⁵ set aside OIC P.C. 2016-1069, in part because, in the Court's view, the Board unjustifiably excluded Project-related marine shipping from the scope of the "designated project" reviewed under the CEAA 2012. The Court noted that this exclusion permitted the Board to conclude that section 79 of the *Species at Risk Act* (SARA) did not apply to its consideration of the effects of Project-related marine shipping.⁶ However, the Court noted that the Board had considered Project-related marine shipping under the NEB Act, and that the report was adequate for the purpose of informing the GIC about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups.⁷

The Court stated that the issue of Project approval should be remitted to the GIC for redetermination, and the GIC must refer the Board's recommendations and its terms and conditions back to the Board for reconsideration.⁸ At paragraph 770 of its judgment, the Court stated:

Specifically, the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the [SARA] to Project-related shipping, the Board's environmental assessment of the Project in the light of the Project's definition, the Board's recommendation under subsection 29(1) of the [CEAA 2012] and any other matter the [GIC] should consider appropriate.

In OIC P.C. 2018-1177 dated 20 September 2018, the GIC, on the recommendation of the Minister of Natural Resources, pursuant to section 53 of the NEB Act and section 30 of the CEAA 2012:

- a) refers back to the National Energy Board for reconsideration the recommendations and all terms or conditions set out in its May 19, 2016 report entitled *Trans Mountain Expansion Project OH-001-2014* that are relevant to addressing the issues specified by the Federal Court of Appeal in paragraph 770 of *Tsleil-Waututh Nation v. Canada (Attorney General)* (2018 FCA 153), including Conditions 91, 131 to 134, 144 and 151;
- b) directs that the Board conduct the reconsideration taking into account the following factors:
 - i. the environmental effects of Project-related marine shipping in view of the requirements of the *Canadian Environmental Assessment Act, 2012*, and
 - ii. the adverse effects of Project-related maritime shipping on species at risk, including the Northeast Pacific southern resident killer whale population, and their critical habitat, in view of any requirements of section 79 of the *Species at Risk Act* that may apply to the Project; and
- c) directs that the Board complete its reconsideration within 155 calendar days after the day on which this Order is made.

⁵ 2018 FCA 153

⁶ *Ibid* at para 469 & 765.

⁷ *Ibid* at para 439.

⁸ *Ibid* at para 768-769.

The Chair of the Board assigned a panel of three Board members (Lyne Mercier – presiding, Alison Scott, and Murray Lytle) to conduct the Reconsideration (the Reconsideration Panel). In carrying out the Reconsideration, the Board held a public hearing (the MH-052-2018 hearing) and has prepared this MH-052-2018 Report as a result.

1.4.2 The hearing process

Prior to issuing a Hearing Order and deciding on the scope of the Board's Reconsideration, on 26 September 2018, the Board sought public comments on:

- 1) whether, "on a principled basis,"⁹ Project-related marine shipping should be included in the "designated project" to be assessed under the CEAA 2012;
- 2) the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 (Amended Factors Document), and a draft List of Issues to be considered in the MH-052-2018 hearing;
- 3) the design of the hearing process to be used for the Reconsideration; and
- 4) which government departments or bodies the Board should require information from during the hearing.

On 5 October 2018, the Board sought additional, focused comments from the Parties on the following limited issue:

Assuming Project-related marine shipping is included in the "designated project" to be assessed under the CEAA 2012, should the designated project be defined as including:

- a) Project-related marine shipping between the WMT and the territorial sea limit; or
- b) Project-related marine shipping between the WMT and the outer boundary of Canada's exclusive economic zone?

The comments received are found on the Board's online public registry. These comments were considered by the Board in reaching the various decisions it communicated in a series of documents on 12 October 2018, which included:

- Hearing Order MH-052-2018, to which the List of Issues and the Amended Factors Document were attached;
- a letter requesting specialist or expert information or knowledge in the possession of each of Fisheries and Oceans Canada, Environment and Climate Change Canada, Transport Canada, Vancouver Fraser Port Authority, Pacific Pilotage Authority, Health Canada, Parks Canada, and Natural Resources Canada (collectively, the Federal Authorities),¹⁰ pursuant to paragraph 20(a) of the CEAA 2012; and
- filing requirements for Trans Mountain.

The Board released reasons for these decisions on 29 October 2018.

The Board's Hearing Order set out the steps and deadlines to guide all participants in the MH-052-2018 hearing. Via subsequent procedural updates and rulings, the Board revised or introduced certain steps and deadlines.

As described in the Hearing Order, the List of Issues, the Amended Factors Document, and the Reasons issued on 29 October 2018, the scope of the Reconsideration was limited. The Reconsideration Panel carried out an environmental assessment of Project-related marine shipping pursuant to the CEAA 2012. In carrying out this assessment, it considered relevant evidence filed in the OH-001-2014 hearing and the new or updated evidence submitted through the MH-052-2018 hearing. The Reconsideration Panel made its recommendations pursuant to the CEAA 2012, as detailed in this Report, then considered whether the submissions made in the Reconsideration process led to a confirmation or modification of the overall recommendation made in the OH-001-2014 Report.

The time limit set out in OIC P.C. 2018-1177 required the Board to complete the Reconsideration process and issue its Reconsideration Report no later than 22 February 2019. Despite the expedited hearing process, the MH-052-2018 hearing had many steps that were similar to the OH-001-2014 hearing. With the exception of oral traditional evidence described below, evidence was presented in writing and testing of that evidence was carried out through written IRs. Parties had the

⁹ *Supra* note 6 at para 770.

¹⁰ The Board gave all of the Federal Authorities intervenor status, regardless of whether a particular Federal Authority registered for that role or not, meaning that they were required to answer any information requests asked of them by the Board or other Parties regarding the information or knowledge they filed in response to the Board's letter, or any other evidence they filed.

opportunity to ask the Board to compel other Parties to provide more complete responses to IRs and also to file final argument.

1.4.3 Public participation

Between 26 September and 3 October 2018, the Board held a process through which individuals and groups could apply or register to participate in the MH-052-2018 hearing. Information about the Board's application to participate process was contained in the Board's letter to all Parties to the OH-001-2014 hearing and all Indigenous groups on the Crown list, which was also posted on the Board's website and circulated to the media.

Intervenors in the OH-001-2014 hearing at the time that the Board issued its OH-001-2014 Report were guaranteed intervenor status in the MH-052-2018 hearing, if they chose to participate and register. Any other member of the public was able to apply to participate as an intervenor. For those that were not intervenors in the OH-001-2014 hearing, the Board indicated the following:

Intervenor status will be granted to those who, in the Board's opinion, are directly affected or have relevant information or expertise. Applicants must demonstrate how they meet this criteria as they relate to the draft List of Issues for the MH-052-2018 hearing.

Anyone not granted intervenor status, as well as any other member of the public, was able to file a letter of comment on the hearing record by 20 November 2018. The Board received various letters after this deadline that did not include justification for lateness. These were not considered as part of the record.

In the Board's 5 October 2018 Ruling No. 1, it announced the List of Parties,¹¹ based on the applications to participate received by the deadline. The Board's reasons for its participation decisions were issued separately on 11 October 2018.

Throughout the hearing, the Board received and ruled on additional late applications to participate as intervenors. Some intervenors also withdrew from the hearing. At the time that the Board finalized its MH-052-2018 Report, there were 118 intervenors, the majority of which were intervenors during the OH-001-2014 hearing. The list of intervenors is found in Appendix 6.

1.4.4 Participant funding

On 26 September 2018, the Participant Funding Program announced a simplified funding process for this hearing to reduce administrative burden. Eligible groups could request up to \$80,000, and individuals up to \$12,000, to participate in the MH-052-2018 hearing. The Participant Funding Program offered a total of \$4,981,760 to 69 recipients; of which 82 per cent was offered to Indigenous intervenors. The Participant Funding Program is a reimbursement-based program, therefore actual payments to groups and individuals depended on eligible costs claimed by recipients and approved for payment by the NEB.

1.4.5 Gathering oral Indigenous traditional evidence

The Board heard comments that Indigenous intervenors wanted the opportunity to provide traditional evidence orally for the MH-052-2018 hearing. The Board was honoured that Elders, Chiefs and community members chose to share their ceremonies, songs, prayers and stories. Throughout this MH-052-2018 Report the Board includes evidence heard through oral traditional evidence. This evidence was valuable to the Board as it undertook its deliberations.

Between 20 November and 6 December 2018, the Board heard oral traditional evidence from 25 Indigenous intervenors. Oral traditional evidence sessions were held in:

- Calgary, Alberta from 20-22 November;
- Victoria, B.C. from 26-29 November; and
- Nanaimo, B.C. from 3-6 December.

The Board described the process it would use to hear oral traditional evidence in Procedural Direction No. 1 and Procedural Direction No. 2.

The Board offered to hear oral traditional evidence in person at any of the announced locations, or remotely while it sat in Calgary. Two Indigenous intervenors that could not appear before the Panel provided their oral traditional evidence

¹¹ The Parties included Trans Mountain and all intervenors.

remotely by teleconference, one of which took place while the Board was in Nanaimo. Indigenous intervenors could also supplement their oral traditional evidence presentation – for example, if they felt they required more time – with an audio or video recording. Some indigenous intervenors provided the Board with a video recording of oral traditional evidence presentations.

Parties had an opportunity to respectfully ask questions about oral traditional evidence. The Board also asked questions of clarification. Indigenous groups could decide to answer questions orally, in writing, or both.

The Board broadcasted live audio of each day's oral traditional evidence presentations, made media files available for download, and produced written daily transcripts that can be found on the online public registry. The exception to this involved a portion of Tsleil-Waututh Nation's presentation, which, through Ruling No. 17, the Board decided to hear confidentially.

1.4.6 Board rulings

The Board received several process-related requests and notices of motion throughout the MH-052-2018 hearing. In response to these, the Board issued 30 rulings, some of which resulted in process changes, including to deadlines.

Following the issuance of the Hearing Order and Appendices, the Board issued its Reasons for the rulings contained in those documents, by letter dated 29 October 2018. The letter attached two appendices: Appendix 1 provided the reasons for including Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit in the "designated project;" Appendix 2 provided the reasons for the remainder of the decisions made in relation to the Hearing Order and its attachments. Those reasons are referred to in this MH-052-2018 Report as the 29 October 2018 Reasons (Appendix 1 or 2).

The Board was also asked to review various decisions it made, including the spatial limit for its assessment of Project-related marine shipping under the CEAA 2012. Ruling 22 provided the Board's reasons related to these review requests.

A summary of the requests and notices of motions received, and the decisions the Board made with respect to them, is found in Appendix 7.

1.5 Issues raised in argument

During written argument-in-chief for the MH-052-2018 hearing, participants raised a numerous issues related to the hearing process, scope of the hearing, and other legal arguments. The Board's views on many of these issues are discussed in this section. However, the Board views regarding other legal issues related to mitigation under the CEAA 2012, and the SARA requirements are covered in Chapter 14.

1.5.1 Procedural fairness

Some parties argued that the Board's Reconsideration process breached requirements for procedural fairness. Their arguments included the following points:

- That significant procedural fairness was owed and the timelines in the Reconsideration were unreasonable. An extension under subsection 52(7) of the NEB Act should have been sought by the Board.
- More time was required because intervenors had to review approximately 8,000 pages of direct evidence from Government departments and Trans Mountain.
- Large quantities of evidence were provided in response to written information requests that were filed on 31 December 2018 and motions to compel better responses that were granted were only filed shortly before final argument was due.
- Participant funding was limited.
- Oral cross-examination was not offered and unsatisfactory responses were received to questions asked in the form of written information requests.
- Only written final argument and not oral final argument was provided.
- The locations for oral traditional evidence were too far away from the Lower Mainland.

Trans Mountain countered that in its view procedural fairness was satisfied. Its arguments included the following points:

- Procedural fairness varies with the context and interests at stake and here the Reconsideration was narrow in scope, which should inform procedural fairness.

- Having a fair but expedited hearing was consistent with the NEB Act and the direction from both the Federal Court of Appeal and the OIC for a prompt redetermination.
- All parties had an opportunity to fully and fairly present their case.
- In response to a notice of motion from Squamish Nation and supported by other intervenors the Board granted the request for an additional 15 days for filing intervenor evidence. In contrast Trans Mountain had a very limited time to file its reply evidence

Views of the Reconsideration Panel

Summary

The Board has determined that parties raising concerns about the fairness of the hearing process have not demonstrated that the Board breached any duty of procedural fairness. In considering individual issues raised as well as considering procedural fairness in the context of the entire hearing process, all parties had a meaningful opportunity to present their case fully and fairly. This included an opportunity to comment on the MH-052-2018 hearing process, file evidence, present Indigenous oral traditional evidence, ask written questions and receive responses and present final written argument. Parties had an opportunity to challenge evidence they did not agree with. The Board considers that hearing deadlines, as amended, were fair.

The Law: Was the Board's Reconsideration Process Procedurally Fair?

The Board as a public authority that makes decisions and recommendations that affects the rights, privileges or interests of individuals and groups, including Indigenous people, owes a duty of procedural fairness to the parties before it.¹²

In describing the variable nature of procedural fairness which depends on the context and circumstances in each case, the Court in *Tsleil-Waututh Nation* went on to list and apply the non-exhaustive factors from *Baker v. Canada (Minister of Citizenship & Immigration)* which are used in determining what procedural fairness requires in a particular circumstance.¹³

In discussing whether procedural fairness has been satisfied in a particular case it is useful to keep in mind that a variety of procedural options are available to meet the duty to be fair. While it is important to keep in mind individual claims specific to procedural fairness, it is also important to assess them in the context of the process for the Reconsideration as a whole. There is generally no right to the most advantageous procedure¹⁴ but parties can expect a decision or recommendation pursuant to statutory authority will be made fairly.

Taking into consideration a number of factors, the Court in *Tsleil-Waututh Nation* determined that the procedural fairness owed in the OH-001-2014 hearing was "significant" and that parties were entitled "to a meaningful opportunity to present their cases fully and fairly." The Court stated that this "included in the right to present a case fully is the right to effectively challenge evidence that contradicts the case."¹⁵

Taking into consideration the importance of the Board's recommendations and the ultimate GIC decision on the rights of parties, and other factors discussed in *Tsleil-Waututh Nation*, the Board accepts that procedural fairness owed in the Reconsideration is significant. The main difference between the Reconsideration and OH-001-2014 is that the Reconsideration was more narrowly focused and the Reconsideration also had shorter time limit for completion. These differences were considered as part of the overall context of the Reconsideration.

Hearing timelines

At issue is whether when taking into account the new evidence filed by Trans Mountain and Federal Departments and Agencies, that the overall timelines for the Reconsideration were so tight that intervenors did not have an opportunity

¹² *Tsleil-Waututh Nation*, para. 230

¹³ [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.). The factors being the nature of the decision being made and the process followed in making it; the nature of the statutory scheme, including the existence of an appeal procedure; the importance of the decision to the lives of those affected; the legitimate expectations of the person challenging the decision; and, the choice of procedures made by the decision-maker.

¹⁴ *Ironside v. Alberta (Securities Commission)*, [2009] A.J. 376 at para 107 (Alta C.A.).

¹⁵ *Tsleil-Waututh Nation* at para 235.

to fully and fairly make their case. Related to this point was whether there was a breach of procedural fairness that the Board did not make a request of the Minister under subsection 52(7) of the NEB Act to extend the time limit by an additional period.

The Board is of the view that its previous findings regarding the timeline still apply to assertions made about timing during final argument:

The Board received comments stating that the timeline for the hearing, including the time allotted for the initial comment process, is too short. Others commented that the Board should extend the timeline or seek an extension from the GIC.

The Board acknowledges that the timeline is not lengthy. This requires an expedited process and the need for Parties to stay focused on the hearing steps and to work diligently. Section 53 of the NEB Act authorizes the GIC to direct the Board to undertake a reconsideration based on any factor specified, and to specify a time limit for the Board to complete its reconsideration. In this focused Reconsideration, it is not necessary that the Board have the same timelines as a new application. There is already significant evidence on the record on numerous topics being examined. Many of the Parties will also be familiar with the record from the OH-001-2014 hearing. Consistent with subsection 11(4) of the NEB Act, there is a need for proceedings to be conducted expeditiously and fairly and, in any case, within the time limit set by the GIC.¹⁶

Consistent with both the Court's direction for a prompt redetermination¹⁷ and the OIC, while the Reconsideration time line was expedited, the Board is satisfied that parties had a fulsome opportunity in the Reconsideration to make their case and challenge evidence from Trans Mountain and Federal Departments and Agencies. If there were particular circumstances requiring additional time, the Board explicitly stated that it was open to considering such requests.¹⁸ Both Squamish Nation and Tsleil-Waututh Nation did file a request on 5 November 2018 requesting that intervenor evidence be moved from 20 November to 5 December 2018 (Trans Mountain and Federal Departments and Agencies had filed direct evidence on 31 October 2018).

Squamish, for example, said it had been diligently working since the Board's letter of 26 September 2018 to retain experts. A number of intervenors wrote in support of the extension request. The Board fully granted the 15 day extension request. In doing so the Board recognized the fundamental importance of parties being able to full present their case with evidence. The Board also took into account the volume of evidence that Federal Departments and Agencies, in particular, had filed. This all factored into the extension request being granted in full. The Board stated that, in order to accommodate the 15-day extension, it had to shorten some other deadlines and compress the Board's own time for writing the MH-052-2018 Report.

On the revised deadline for intervenor evidence to be filed, the Board received dozens of reports and studies. This included those prepared by asserted experts from intervenors. There were a very limited number of parties that made requests to file late evidence, and those requests were considered on a case by case basis. In the Board's view, taking into consideration the limited scope of the Reconsideration, that parties had notice of the need to start preparing evidence since 26 September 2016 and that as requested a 15 day extension to the deadline of filing intervenor evidence was granted, the Board considers that parties had an adequate opportunity to fully and fairly present their case and procedural fairness was not breached.

With respect to the time lines to complete the balance on the Reconsideration process, while at times comment processes occurred on an expedited basis, parties appeared to have provided detailed comments within established time lines. Particularly for intervenors, in the Board's view there was a reasonable amount of time to ask written questions regarding other parties' evidence.¹⁹ While responses to questions resulted in additional evidence being filed on 31 December 2018, intervenors had over 3 weeks from this time to file written argument-in-chief. Where motions to compel were granted, the responses were filed closer to written argument, although these additional responses added limited new materials.

¹⁶ 29 October 2018 NEB Appendix 2 – Trans Mountain Expansion – Reconsideration – reasons to the List of Issues and Hearing Process, pages 18 and 19.

¹⁷ *Tsleil-Waututh Nation* at paras 768 and 774.

¹⁸ *Supra* note 16 at pg 19. Hearing Order MH-52-2018 at pg 13.

¹⁹ Information requests were due on 17 December 2018, which was more than 6 weeks after Trans Mountain and Federal Departments filed their direct evidence.

Taking all these facts and circumstances into consideration, the Board is of the view that hearing process deadlines, as amended, allowed parties to fully and fairly present their case and challenge evidence, and resulted in a procedurally fair hearing.

With regard to subsection 52(7) of the NEB Act, this extension provision arises in the context of the time limit that applies in a section 52 certificate hearing; its application to the time limit of a Reconsideration is questionable. Even if this subsection has application to a Reconsideration, the Board is not persuaded that a convincing case was made for the Board to make such a request of the Minister. Consistent with subsection 53(2) of the NEB Act which authorizes the Minister to impose a time limit for the Board to complete its Reconsideration, a 22 February 2019 time limit was imposed in the OIC, which is binding on the Board. The Board is not persuaded that such a time limit breached the requirement for a fair hearing. When a large number of parties made a specific request for more time, the request was granted. No party made a compelling case during the hearing process as to why the Board was required to request more time from the Minister in the context of a focused Reconsideration.

Participant funding

Limited comments were received that participant funding was insufficient to allow meaningful participation.

The Board provided information, forms and contact information regarding participant funding early in the hearing process. The Board's letter of 26 September 2018 stated:

Participant funding is available to facilitate eligible intervenors' participation in this hearing. A simplified funding process will be used for this hearing to reduce administrative burden. Eligible groups may request up to \$80,000, and individuals up to \$12,000.

For information about participant funding and eligible costs, visit www.neb-one.gc.ca/pfp or contact a Participant Funding Program Coordinator at 1-800-899-1265.

The Participant Funding Request Form is found at the link above, and also attached to this letter as Appendix 3.

In the few instances that parties raised participant funding as an issue, there were no detailed comments filed explaining why the funding amounts were insufficient or could not be accessed on a timely basis. It is worth noting that parties were advised that intervenors from the OH-001-2014 hearing were guaranteed intervenor status in the Reconsideration. As a result, there should not have been a concern about whether intervenor standing would be granted. Also parties had the opportunity to work with other parties and divide up issues or jointly tackle issues. For example, **Tsleil-Waututh Nation, Squamish Nation, Stz'uminus First Nation, Snuneymuxw First Nation, and the City of Vancouver** filed joint evidence from Dr. Gunton and Dr. Joseph.

For all these reasons, in the circumstances of the Reconsideration the Board is not persuaded that concerns raised about participant funding established there was a breach of procedural merit.

Lack of cross-examination and oral final argument

The issue raised about having only written questioning, and not oral cross-examination, was covered in detail in Ruling No. 14 in OH-001-2014 and in *Tsleil-Waututh Nation* and the Board adopts those reasons. In the context of this multi-party public hearing that is a reconsideration of a past hearing resulting in recommendations to GIC, the Board is of the view that the duty of fairness does not necessarily require cross-examination. Parties had an opportunity to challenge evidence both by filing their own evidence in response and by asking written questions and receiving responses. Parties unsatisfied with answers received had an opportunity to file motions to compel a better answer. For parties now claiming that responses received were inadequate, such a concern should have been appropriately detailed and raised ahead of final argument.

With respect to a concern raised about not having final oral argument the issue is whether, in looking at the hearing process as a whole, the lack of oral final argument was unfair. Largely the main process difference from the OH-001-2014 hearing to the MH-052-2018 hearing is that the Reconsideration added a step of providing parties the option of filing an opening statement with their evidence but the Reconsideration did not have oral summary argument. Parties were advised early in the Reconsideration to include all pertinent argument in their written argument-in-chief. The Hearing Order clearly stated that oral summary argument or oral summary argument on specific issues only "may be

held if needed and time permits.”²⁰ Later in Procedural Direction No. 4 the Board advised parties that it decided that oral argument was not necessary. The Board stated:²¹

The Board is not persuaded that such argument is necessary. This takes into consideration that the Board provided additional time for intervenors to prepare their evidence and an opportunity for Indigenous groups to provide oral traditional evidence at two locations on Vancouver Island. There is not sufficient time to also have oral summary argument, nor is oral argument considered necessary given the specific focus in the MH-052-2018 hearing and the List of Issues.

It is up to the Board's discretion whether it considers written versus oral argument to be the most helpful in making its decision or recommendation. As stated in the Hearing Order, “[t]he Parties should include all pertinent argument in their written argument-in-chief, as [oral summary argument] may not be held.” The Board looks forward to considering written final argument from the Parties.

Consistent with the case law cited above, the Board is of the view that there is no one process that is necessary to satisfy procedural fairness in the circumstances of this Reconsideration. While some hearings at the Board have an oral final argument or summary argument component, in some instances the Board has had only written final argument so there is no legitimate expectation²² of oral final argument.²³ Such an approach is consistent with section 22 of the *National Energy Board Rules of Practice and Procedure*, 1995.

In the case of this Reconsideration, the Board invited submissions on the process the Board should follow and considered those comments in designing a process. Necessarily, process steps may involve some compromise. Here the Board determined it was important to provide an opportunity for Indigenous oral traditional evidence, and many Indigenous intervenors participated by providing oral evidence. Additionally, part way through the hearing process, the Board was persuaded by a number of requests to provide additional time for the foundational step of preparing intervenor evidence. This limited the time available to hear a large group of parties provide oral final argument. In any event, parties had an opportunity to provide full final argument in written form and the Board determined in its discretion that it did not also require oral final argument. The Board does not dispute that there can be utility in the Board having oral final argument; however, it was not required in the circumstances of the Reconsideration. For all these reasons, in considering the Reconsideration process as a whole, the Board is not persuaded oral final argument was required for the hearing to be fair.

Concern that locations for Indigenous oral traditional evidence on Vancouver Island required too much travel

The Board previously ruled on this issue in Ruling No. 7 and found that the overall design of the hearing process was procedurally fair for Indigenous intervenors including those from the Lower Mainland. Those reasons continue to be relied upon by the Board and no basis has been provided to overturn this ruling.

Procedural fairness as a whole

The Board has responded to specific concerns raised which allege the Reconsideration process was procedurally unfair. However, as reflected in the views above, the whole of the Board's process must be considered in order to determine whether the Board's overall process for the Reconsideration was procedurally fair. Such a determination must take into consideration the circumstances that this was a focused Reconsideration with a specific time limit applying. Many of the parties would have been familiar with at least elements of the subject matter of the Reconsideration as they participated in the OH-001-2014 hearing. While the process was expedited, there were a number of steps, which when considered as a whole, allowed for meaningful participation. These process steps included opportunities to:

1. Comment on several aspects of the Reconsideration including the design of the hearing process.
2. File and respond to notices of motion and review applications as considered appropriate.

²⁰ Hearing Order MH-52-2018 page 8.

²¹ 10 January 2019, Procedural Direction No. 4, pages 1 to 2.

²² Legitimate expectations as contemplated by *Baker*, *supra* note 12.

²³ As stated above, parties were advised early on that oral summary argument, or oral summary argument on specific issues would only be held if needed and time permits. Comparable although not identical participation opportunities were offered in the GH-002-2015 hearing regarding the 2017 Nova Gas Transmission Ltd. System Expansion Project (where the GIC decision and NEB recommendation were considered and affirmed in *Bigstone Cree Nation v. NGTL*, 2018 FCA 89). Hearing steps in GH-002-2015 included an opportunity to provide oral traditional evidence, written evidence, written information requests and written final argument.

3. File written evidence in response to the evidence of Trans Mountain and Federal Departments and Agencies, and to address the List of Issues for the Reconsideration. This included being granted a 15 day extension as many of the intervenors requested.
4. Present oral Indigenous evidence, either in person or remotely, on Vancouver Island or in Calgary, or through an audio or video recording.
5. Ask information requests of other Parties' written evidence, and to file motions to compel full and adequate answers if the responses are not considered adequate; and
6. Filing written-argument-in chief, including replying to the argument of Trans Mountain, the Federal Departments and Agencies and the advice provided by Marine technical advisor John A. Clarkson²⁴. Parties could also comment on draft conditions and recommendations.

Participant funding was also available for hearing steps undertaken and travel costs. For all the above reasons, the Board is not persuaded that there was a breach in procedural fairness in the Reconsideration process.

1.5.2 Reliance on the OH-001-2014 hearing

In final argument, parties submitted diverging views regarding the extent to which the Reconsideration panel should rely on the assessment of Project-related marine shipping from the OH-001-2014 hearing. Some intervenors supported less reliance on the assessment from the OH-001-2014 hearing. For example, TWN argued that the extent to which the OH-001-2014 Report failed to meet the statutory requirements of the CEAA 2012 was not narrow in scope nor minor or technical in nature. TWN said that the FCA did not hold that the Board was permitted to simply re-use the findings it made on matters that were erroneously considered under the NEB Act. The Province of B.C. also said that the Board is not precluded from reconsidering evidence from the OH-001-2014 hearing and reaching different conclusions, so long as it limits its review to the scope of matters the GIC identified for reconsideration. Tsartlip First Nation argued that the Board's environmental assessment in this reconsideration under the CEAA 2012 is not functionally or legally the same as its environmental assessment conducted in the OH-001-2014 hearing. The Board is not bound to its past assessments in the OH-001-2014 hearing.

In contrast, Trans Mountain argued that the scope of the reconsideration was limited and nothing in the FCA's decision requires the Board to re-assess effects of Project-related marine shipping that were already assessed in OH-001-2014. Similarly, the Government of Alberta said that the scope of this reconsideration is targeted and narrow. The Board's original public interest inquiry was thorough and substantially complied with the requirements of the CEAA 2012. The "successive deficiencies" the Court identified in *Tsleil-Waututh Nation* flow not from the Board's approach to its public interest review of the environmental effects of Project-related marine shipping, but from its failure to "justify" its decision to exclude Project-related marine shipping from the "designated project." The underlying review itself was *not* deficient. In light of this, the primary focus of the Reconsideration is building upon the Board's original assessment of Project-related marine shipping by considering and evaluating mitigation or alternative measures.

Views of the Reconsideration Panel

As directed by the OIC and, as reflected in the Board's List of Issues, this Reconsideration is focused on Project-related marine shipping – a comparatively narrow scope to the OH-001-2014 hearing. The Board did not consider evidence or revisit issues that were outside of the scope of the Reconsideration. To understand the scope of the Reconsideration with respect to matters that fall within the List of Issues for the Reconsideration, it is important to look at what was assessed in the OH-001-2014 hearing. Although the Board did not include Project-related marine shipping under its CEAA 2012 environmental assessment during the OH-001-2014 hearing, the Board did consider Project-related marine shipping under the NEB Act. Issue #5 from the OH-001-2014 hearing List of Issues was "the potential environmental and socio-economic effects of marine shipping activities that would result from the proposed Project, including the potential effects of accidents or malfunctions that may occur." The Board also issued filing requirements specific to the issue of the potential effects of Project-related marine shipping activities.

The Board's reasons for its decision related to the List of Issues, Factors for the environmental assessment, and hearing process design outlines what was examined in the OH-001-2014 hearing:

²⁴ Mr. Clarkson was appointed by the federal government pursuant to section 10 of the NEB Act. Mr. Clarkson provided advice to the Board in the form of written argument-in-chief about evidence and draft conditions and recommendations filed on the record. At least one party raised a concern in final argument that Mr. Clarkson's participation was unfair. However, the Board is of the view that since all parties had an opportunity to comment on Mr. Clarkson's advice, there was no breach of procedural fairness. Rules of evidence concerning experts that may apply in a Court process, do not strictly apply in the Board's hearing process.

When carrying out its analysis under the NEB Act, the Board followed an approach similar to the [environmental assessment] conducted for the pipeline component under the CEAA 2012. As a result of this approach, the Board collected extensive evidence relevant to Project-related marine shipping. For example, Chapter 14 of the Board's OH-001-2014 Report extensively considered the effects of Project-related marine shipping, and the significance of those effects. Chapter 8 considered the environmental behaviour of spilled oil, and related environmental effects. This is reflected in the Federal Court of Appeal's decision in *Tsleil-Waututh*, when it stated that the Board, among other things, considered the effects of Project-related marine shipping on Southern resident killer whales (SRKW) and the significance of those effects,²⁵ and that the OH-001-2014 Report was adequate for the purposes of informing the GIC about the effects of Project-related marine shipping on SRKW and their use by Indigenous groups, and of the significance of these effects.²⁶

The Board has indicated that the entirety of the evidence filed in the OH-001-2014 hearing will be included as part of its record for this MH-052-2018 hearing, and will be considered by the Board to the extent it is relevant to the List of Issues for the MH-052-2018 hearing.

Accordingly, the Reconsideration List of Issues stated:

Parties are expected to limit their evidence filings to **new or updated** evidence (including comments from the public, community knowledge, and Indigenous traditional knowledge) relevant to the above issues. Parties are not required to re-file or re-test evidence on the record of the OH-001-2014 hearing. It is recommended that Parties focus their evidence on aspects of the above issues that were not fully canvassed in the OH-001-2014 hearing.

The Board recognized that a couple of issues in the Reconsideration List of Issues had not been thoroughly canvassed in the OH-001-2014 hearing and ensured that these were addressed in the MH-052-2018 Report. For example, mitigation of significant adverse environmental effects of Project-related marine shipping (Issue #2) and measures to avoid or lessen the adverse effects of Project-related marine shipping on SARA-listed wildlife species and their critical habitat (Issue 5).

The Board also accounted for the fact that many aspects of Project-related marine shipping were thoroughly canvassed in the OH-001-2014 hearing, particularly the environmental effects of Project-related marine shipping. However, this did not mean that the Reconsideration Panel blindly adopted the Board's findings on these aspects of Project-related marine shipping from the OH-001-2014 hearing. For matters that fall within the List of Issues for the Reconsideration, the Reconsideration Panel was open to the possibility of altering the Board's previous findings based on new or updated evidence. In the Reconsideration, the onus remained on Trans Mountain to make the case for its Project.

The Board carried out a full environmental assessment of Project-related marine shipping in accordance with the requirements of the CEAA 2012, SARA, OIC and paragraph 770 of *Tsleil-Waututh Nation* in this MH-052-2018 hearing. This included a comprehensive assessment of the factors and environmental effects set out in sections 19 and 5 of the CEAA 2012, respectively. As a result of its EA, the Board made its recommendations under subsection 30(4) of the CEAA 2012. The Board also considered whether its recommendation under the CEAA 2012 resulted in changes or additions to the recommendations (including recommended terms or conditions) from the OH-001-2014 hearing.

The interplay between Project-related marine shipping matters canvassed in the OH-001-2014 hearing and Reconsideration is reflected in the layout of the MH-052-2018 Report. For issues that fell within the scope of the MH-052-2018 hearing, the Reconsideration Panel included views of the parties from the OH-001-2014 hearing where they were still applicable. These were then followed by new or updated evidence raised by the parties in the MH-052-2018 hearing. The views of the Reconsideration Panel contain Board views from the OH-001-2014 Report that they found to remain applicable after considering relevant evidence from both the OH-001-2014 and MH-052-2018 hearings. The views of the Reconsideration Panel also include additional views to address the new or updated evidence and explain if it confirms or modifies the Board's previous findings from the OH-001-2014 hearing.

²⁵ *Tsleil-Waututh Nation* at para 438.

²⁶ *Ibid* at para 439.

1.5.3 Changed circumstances regarding need, economic feasibility, and financial matters

A number of parties filed evidence regarding the changed circumstances related to the need for and the economic feasibility of the Project since the OH-001-2014 hearing, including evidence on changes to supply and markets. Parties also argued that the Board should reconsider financial matters arising from Canada's purchase of the Project and associated changes to Trans Mountain's corporate structure.

Tsleil-Waututh Nation, Squamish Nation, Stz'uminus First Nation, and Snuneymuxw First Nation submitted a report by Mr. David Hughes entitled "Report on the Need For, and Economics Of, the Trans Mountain Expansion Project." In this report, Mr. Hughes evaluated if any significant developments have occurred since the OH-001-2014 Report that materially affect the conclusions regarding the need for and the benefits of the Project. Based on the developments, Mr. Hughes evaluated the need for the Project and if the Project will increase the price per barrel of oil that Canadian producers obtain.

Some intervenors, including Stz'uminus First Nation, Snuneymuxw First Nation and City of Burnaby, argued that the Board must consider new information, including economics of the Project, when reweighing the Project's benefits and burdens.

In its Argument-in-Chief, Trans Mountain asked the Board to take judicial notice of recent events that support the need for increasing Canadian pipeline export capacity to tidewater and, therefore, support the conclusion in the OH-001-2014 Report that the economic benefit of the Project is significant.

Views of the Reconsideration Panel

In the MH-052-2018 hearing, the Board did not consider any new evidence filed on need for the project, economic feasibility, or financial matters.

The scope of the MH-052-2018 hearing was defined by the List of Issues, released by the Board on 12 October 2018, and did not include need for the project, economic feasibility, or financial matters. The Board developed the List of Issues following comments from parties. The Board addressed this matter in the 29 October 2018 Reasons (Appendix 2)²⁷ and Ruling No.22²⁸.

Therefore, Chapter 12: Need for the Project and economic feasibility and Chapter 13: Financial Matters in this MH-052-2018 Report are the same as they were in the OH-001-2014 Report, as they fall beyond the scope of the MH-052-2018 hearing. These chapters contain the views of the original panel from the OH-001-2014 hearing, including the requirement for Trans Mountain to comply with Conditions 57 and 121, which remain unchanged.

As economic feasibility and the need for the Project fall outside of the List of Issues, the Board did not consider or give any weight to Mr. Hughes' report or any other evidence filed by parties with respect to these issues. The Board also rejects Trans Mountain's request for the Board to take judicial notice of recent events that support the need for increasing Canadian pipeline export capacity to tidewater. Furthermore, the Board is not persuaded that it should consider new information on the economics of the Project when reweighing the Project's benefits and burdens for its public interest recommendation. This would essentially circumvent the List of Issues and open the MH-052-2018 hearing up to other issues indirectly, rendering the purpose of section 53 of the NEB Act and narrow scope of the OIC meaningless.

Consistent with section 53 of the NEB Act, both the Federal Court of Appeal and the OIC prescribed a limited scope for the Reconsideration. The Board went out for comment early on regarding the scope of the Reconsideration and after considering the comments made determinations about hearing scope. It is not appropriate for the parties to then file whatever evidence they wish on out-of-scope issues or, in the case of Trans Mountain, to ask the Board to take judicial notice of something that is out of scope. To include any evidence filed during the MH-052-2018 hearing on need for the project, economic feasibility, or financial matters would be inappropriate in light of the scoping decision made with respect to the List of Issues.

²⁷ 29 October 2018 NEB Appendix 2 – Trans Mountain Expansion – Reconsideration – reasons to the List of Issues and Hearing Process at pg 11-12.

²⁸ NEB, Ruling No. 22 Applications for Review from Living Oceans, Raincoast and TWN (27 December 2018) at pg 22-23.

1.5.4 Issues dealt with in prior Board rulings

In final argument, some parties raised arguments related to issues which the Board had decided in earlier rulings. In particular:

- Some parties disagreed with the decision to include Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit in the designated Project under the CEAA 2012 (the Spatial Limit Decision). They argued that the Board ought to also include shipping in the Exclusive Economic Zone. The Board first sought comments on this issue in its 5 October 2018 letter. In the 29 October 2018 Reasons (Appendix 1) the Board thoroughly explained the Spatial Limit Decision. On 16 November 2018, the Board received applications to review the Spatial Limit Decision. The Board established a comment process, considered all submissions on the merits, and denied the review of the Spatial Limit Decision on its merits, with reasons in Ruling No. 22 issued 27 December 2018.
- Some parties argued that a *de novo* hearing was required because the Reconsideration Panel did not hear the evidence and submissions of the parties in the OH-001-2014 hearing. The Board explained why it did not agree with this argument in the 29 October 2018 Reasons (Appendix 2), Section 4.3. On 16 November 2018, the Board received an application to review this decision. The Board established a comment process, considered all submissions, and denied the review of the decision not to conduct a *de novo* hearing, with reasons in Ruling 22 issued 27 December 2018.
- Some parties argued that Trans Mountain should have been required to conduct species-specific risk assessments. The Board established a comment process, considered all submissions and denied the motion to require Trans Mountain to conduct a new risk assessment of Project-related marine shipping, with reasons in Ruling no. 24 issued 4 January 2019. Additional Board views regarding the adequacy of Trans Mountain's risk assessment of Project-related marine shipping are contained in Chapter 14.
- Some parties argued that Canada's purchase of the Project created a conflict of interest for the federal agencies providing expert information and for the Board's assessment of the Project. The Board found that there is no conflict of interest in its 29 October 2018 Reasons (Appendix 2), Section 4.2. The Board addresses the alleged conflict of interest between the Crown's fiduciary role in respect of Indigenous peoples and its role as the owner of the Project in Chapter 5, finding that the Crown's fiduciary obligations toward Indigenous peoples can be balanced with its broader obligations with respect to the public interest.
- Some parties argued that the Board ought to have assessed the environmental effects of upstream and downstream activities, including greenhouse gas emissions. The Board decided not to include these effects in the List of Issues, and explained this in the 29 October 2018 Reasons (Appendix 2), Section 2.8. On 21 January 2019, the Board received an application to review this decision along with Ruling No. 25 from the OH-001-2014 hearing. The Board established a comment process, considered all submissions, and denied the review of the decision to exclude the effects of upstream and downstream greenhouse gas emissions from the List of Issues for the Reconsideration, with reasons in Ruling 30 issued 19 February 2019.

1.5.5 Request to strike Trans Mountain's reply evidence

Some parties, including Tsleil-Waututh Nation, BC Nature and Nature Canada argued that Trans Mountain's reply evidence ought to be inadmissible or given no weight, because it was not prepared by properly qualified experts and Trans Mountain has not demonstrated that it is fair, objective and non-partisan evidence.

In reply, Trans Mountain said that it has significant expertise within its organization, including internal subject matter experts and a long history of corporate experience with the issues raised by intervenors. Trans Mountain also said that parties could have asked more information about the experts through information requests, but that they did not do so.

Views of the Reconsideration Panel

Under the *National Energy Board Rules of Practice and Procedure, 1995*, the Board requires that filed written evidence be prepared by the party filing it, or under their direction and control, and that the party be able to answer questions about it. In this case, the evidence being challenged was prepared by Trans Mountain, or under their direction and control. No party demonstrated that Trans Mountain was unable to answer their questions related to that evidence.

As an administrative tribunal, the Board is not bound by strict rules of evidence including those regarding the admissibility of expert opinion and qualification of experts. The Board is an expert tribunal and has the ability to evaluate the evidence submitted in each hearing. The Board decides what weight, if any, to give evidence once the

record is closed and all submissions are made. The Board is of the view that Trans Mountain's reply evidence is admissible. With respect to weight, the views of the Reconsideration Panel are described throughout this Report.

1.5.6 Precautionary principle and adaptive management

Many parties in the MH-052-2018 hearing emphasized the application of the precautionary principle. Intervenor relied on the precautionary principle in relation to the mitigation measures that should be put in place. For example, PIPE UP said that consistent with the precautionary principle, the Board should require Trans Mountain to use a trenchless construction method for salmon watercourses, despite residual areas of uncertainty regarding SRKW diet.

A number of intervenors also interpreted the precautionary principle to mean that the Project should not be approved until there is a better understanding of the Project's effects and effectiveness of mitigation measures. Tsleil-Waututh argued that the precautionary principle leads to the conclusion that justification of significant adverse environmental effects cannot occur in these circumstances, given the environmental degradation marine shipping will visit upon Burrard Inlet and the Salish Sea, and the lack of any salutary benefits associated with the Project-related marine shipping.

Other parties interpreted the precautionary principle differently. Trans Mountain said that the precautionary principle should not be used or interpreted to the point of effectively paralyzing development, and that decision-makers should rely on the principle of adaptive management to address uncertainties in environmental assessment. The Government of Alberta argued that while the precautionary principle must inform the Board's review, its implications should not be overemphasized - particularly when the Project proponent and responsible agencies have demonstrated a willingness to develop and implement additional harm reduction and management strategies.

Views of the Reconsideration Panel

The Board recognizes the important role of the precautionary principle under the CEAA 2012. The mandate of the CEAA 2012 explicitly references the precautionary principle in subsection 4(2): The Government of Canada, the Minister, the Agency, federal authorities and responsible authorities, in the administration of this Act, must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle. The purposes of the CEAA 2012 also include ensuring that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid significant adverse environmental effects (subsection 4(1)).

The Supreme Court of Canada used the definition of precautionary approach from the Bergen Ministerial Declaration on Sustainable Development (1990) in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*:

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.²⁹

This definition of precautionary principle was subsequently cited and expanded upon by the Supreme Court of Canada in *Castonguay Blasting Ltd. v. Ontario (Environment)*:

This emerging international law principle recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation.³⁰

Trans Mountain relies on *Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries) et al* to support its views on the precautionary principle:

[T]he precautionary principle does not require governments to halt all activity which may pose some risk to the environment until that can be proven otherwise. The decisions on what activity to allow and how to control it often require a balancing of interests and concerns and a weighing of risks.³¹

²⁹ 2001 SCC 40 at para 31 [*Spraytech*].

³⁰ 2013 SCC 52 at para. 20 [*Castonguay*]. Both *Spraytech* and *Castonguay* were also followed by the Federal Court of Canada in *Morton v. Canada (Fisheries and Oceans)* 2015 FC 575.

³¹ 2005 BCSC 283 at para 45 [*Blaney*].

The Board notes Tsleil-Waututh Nation's argument that aspects of *Blaney* can be distinguished from these circumstances. However, the Board finds it informative for supporting the notion that recommendations and decisions regarding project approval do require a balancing of interests and concerns and a weighing of risks.

The Board applies the precautionary principle in conducting its environmental assessments. The precautionary principle is applied in the Board's consideration of measures to mitigate impacts through design, planning, follow-up and monitoring, particularly where scientific uncertainty exists on the prediction of effects or effectiveness of mitigation. The Board requires proponents to minimize the effects or consequences that are *anticipated or possible* even if not certain. The Board also requires proponents to make considerable efforts to prevent or avoid environmental impact and, if impacts are unavoidable, to minimize and reduce them.

The Board also applies the precautionary principle in its significance determinations. The Canadian Environmental Assessment Agency guidance on "Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under CEAA 2012" notes that all project environmental assessments involve some level of uncertainty, and observed results will often deviate, to some degree, from predictions made in an environmental assessment.³² Uncertainty could be related to a number of factors such as: project design and components, baseline environmental conditions, overall scope of effects, accuracy of environmental effects prediction, risk assessment methodologies, assumptions around the effectiveness of mitigation, significance determination, follow-up programs, and adaptive management. Uncertainty also triggers the need for additional monitoring, additional consultation, validation of the predictions of models, etc. The Reconsideration Panel confirms the views regarding adaptive management from the OH-001-2014 hearing as discussed in Section 10.1.6:

[In] appropriate circumstances adaptive management can be an important part of the follow-up program for a project to allow for uncertainties. The Board's conditions also incorporate adaptive management, requiring the implementation of new or modified mitigation measures over the life of the Project in response to mitigation measures that do not achieve full success and to address unanticipated environmental effects.

The Board adds that the appropriate circumstances for relying on adaptive management include consideration of whether there is sufficient confidence that: (i) monitoring would detect an ineffective mitigation or unforeseen environmental impact, and (ii) responses would be available and have a reasonable chance of success.

The Board, consistent with the case law and statutory scheme of the CEAA 2012, does not interpret the precautionary principle to mean that approval of a project cannot be recommended if uncertainties remain about its effects or mitigation measures. The Board notes that environmental assessment is a planning and decision-making tool. The environmental assessment identifies potential adverse environmental effects, and proposes measures to reduce those effects, which the Board imposes through conditions or recommendations to the GIC. The precautionary principle cannot be applied in isolation; it must be applied in a manner consistent with the entire statutory scheme.

1.5.7 Justification pursuant to the CEAA 2012 and the SARA

Living Oceans and Raincoast argue that the effects of Project-related marine shipping cannot be justified under the CEAA 2012 because approving the Project would harm the SRKW and destroy critical habitat in contravention of section 32 and subsection 58(1) of the SARA, respectively. Living Oceans and Raincoast rely on *Alberta Wilderness Assn v. Cardinal River Coals Ltd.*³³ for the proposition that it is not lawful to issue an authorization under one federal law that will violate the provisions of another. Similarly, Tsleil-Waututh Nation said that justifying significant adverse environmental effects on SRKWs would defeat the purpose of the SARA and the protections it provides to endangered species.

In reply, Trans Mountain submits that the obligations under the SARA must be interpreted in the context of the entire statutory scheme, including CEAA 2012, which expressly contemplates that projects may proceed in the face of significant adverse environmental effects if those effects are justified in the circumstances.

Views of the Reconsideration Panel

The Board is of the view that these circumstances are distinguishable from *Cardinal River*, where the Federal Court in obiter found that the granting of a *Fisheries Act* authorization would permit the deposition of millions of tonnes of waste rock and materials in areas frequented by migratory birds. This was contrary to law because the *Migratory Birds*

³² Canadian Environmental Assessment Agency, *Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under CEAA 2012* (November 2015).

³³ [1999] 3 FC 425 at paras 104-105 [*Cardinal River*].

Convention Act prohibited a person from depositing or permitting the deposit of any substance harmful to migratory birds in any waters or areas frequented by migratory birds. The facts are not so clear in this case.

Pursuant to CEAA 2012, the Board has found that Project-related marine shipping is likely to cause significant adverse environmental effects on SRKW, a SARA-listed wildlife species. However, the Board is not persuaded that these effects necessarily result in harm to the SRKW or destruction of critical habitat that would contravene section 32 and subsection 58(1) of the SARA.³⁴ The Board found that while the effects from Project-related marine shipping will be a small fraction of the total cumulative effects, and the level of traffic is expected to increase with or without the Project, the increase in marine vessels associated with the Project would further contribute to cumulative effects that are already jeopardizing the recovery of SRKW. Furthermore, environmental effects on SRKW from underwater noise, as well as potential vessel strikes and spills from Project-related marine shipping, will be reduced by measures and monitoring under the CEAA 2012 and subsection 79(2) of the SARA; in some cases via Board conditions and in other cases if GIC implements the Board's recommendations.

The Board finds that the guidance on *Addressing Species at Risk Act Considerations Under the Canadian Environmental Assessment Act for Species Under the Responsibility of the Minister responsible for Environment Canada and Parks Canada* provides additional clarification:

There is no direct link between the SARA subsection 79(2) requirement to identify adverse effects on listed wildlife species and their critical habitat, and the prohibitions set out in the Act. In other words, determining that an activity will lead to an adverse effect does not necessarily mean that the activity itself is prohibited. Prohibitions are set out in sections 32 to 36 and 58 to 61 of the SARA and their applicability depends on a variety of circumstances.

...

In addition, the potential significance of an adverse environmental effect under CEAA is not necessarily an indication of whether an activity is prohibited under the SARA...³⁵

Furthermore, such an expansive interpretation of the prohibitions in SARA would mean that existing vessels calling at Westridge Marine Terminal and a great proportion of marine shipping currently occurring (i.e., ferries, whale watching boats, commercial vessels) are all in violation of the SARA since they also increase underwater noise, and the risk of vessel strikes and spills (from fuel if not cargo). It is unclear if the SARA prohibitions were intended to be used to manage these types of cumulative effects.

The Board agrees that CEAA 2012 and SARA are related legislation, and the principles of statutory interpretation require each to be read in the context of the other in a coherent manner.³⁶ The prohibitions in section 32 and subsection 58(1) cannot be read in isolation from subsection 79 of the SARA or the overall statutory scheme of the CEAA 2012. In the context of a "designated project" as defined by CEAA 2012, SARA requires that adverse effects on listed species be identified, and that measures are taken to avoid or lessen those effects and to monitor them. There is no explicit requirement in section 79 for there to be no residual effects on SARA-listed species, only that measures are taken in a way that is consistent with applicable recovery strategies and action plans. CEAA 2012 also expressly contemplates the possibility that a finding of likely significant adverse environmental effects can be justified. The potential significance of an adverse environmental effect under the CEAA 2012 or adverse effect under section 79 of the SARA, does not necessarily mean an activity is prohibited under the SARA; the facts need to be carefully examined. If a project is likely to hinder the recovery of endangered or threatened wildlife species, contrary to the purpose of the SARA, this will weigh heavily in the justification analysis. However, the analysis of whether significant adverse environmental effects can be justified will ultimately involve the balancing of many factors.

³⁴ Subsection 32(1) of the SARA states: No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.

Subsection 58(1) of the SARA states: ... no person shall destroy any part of the critical habitat of any listed endangered species or of any listed threatened species...

³⁵ Environment Canada and Parks Canada, *Addressing Species at Risk Act Considerations under the Canadian Environmental Assessment Act for Species under the Responsibility of the Minister responsible for Environment Canada and Parks Canada* (2010) at 51-52.

³⁶ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis Canada, 2014) at para 13.26.

1.6 The Project application stage – codes, commitments, and conditions

This section contains the views of the Board from the OH-001-2014 Report (formerly Chapter 1.3). Some of the general concepts are relevant to the Reconsideration, but much of the content relates to conditions that are outside the scope of the Reconsideration. However, the Reconsideration Panel has included this section of the MH-052-2018 Report as it provides helpful background information. A more detailed discussion about the conditions relevant to Project-related marine shipping examined in the MH-052-2018 hearing is in Chapter 2, Section 2.4.

Trans Mountain's Application was filed while the Project was at an initial phase of the regulatory lifecycle, as is typical of applications under section 52 of the NEB Act. As set out in the Board's Filing Manual, the Board requires a broad range of information when a section 52 application is filed. At the end of the hearing, the level of information available to the Board must be sufficient to allow it to make a recommendation to the GIC that the Project is or is not in the public interest. There also must be sufficient information to allow the Board to draft conditions that would attach to any new and amended CPCNs, and other associated regulatory instruments (Instruments), should the Project be approved by the GIC.

The Board does not require final information about every technical detail during the application stage of the regulatory process. For example, much of the information filed with respect to the engineering design would be at the conceptual or preliminary level.³⁷ Site-specific engineering information would not be filed with the Board until after the detailed routing is confirmed, which would be one of the next steps in the regulatory process should the Project be approved. Completion of the detailed design of the project, as well as subsequent construction and operations, would have to comply with:

- the NEB Act, regulations, including the *National Energy Board Onshore Pipeline Regulations* (OPR), referenced standards and applicable codes;
- the company's conceptual design presented, and commitments made in the Application and hearing proceedings; and
- conditions which the Board considers necessary.

The Board may impose conditions requiring a company to submit detailed information for review (and in some cases, for approval) by the Board before the company is permitted to begin construction. Further information, such as pressure testing results, could be required in future leave to open applications before a company would be permitted to begin pipeline operations. In compliance with the OPR, a company is also required to fully develop an emergency response plan prior to beginning operations. In some cases, the Board has imposed conditions with specific requirements for the development, content and filing of the emergency response plan (see Table 1). This would be filed and fully assessed at a condition compliance stage once detailed routing is known. Because the detailed routing information is necessary to perform this assessment, it would be premature to require a fully detailed emergency response plan to be filed at the time of the project application.

While the project application stage is important, as set out in Chapter 3, there are further detailed plans, studies and specifications that are required before the project can proceed. Some of these are subject to future Board approval, and others are filed with the Board for information, disclosure, and/or future compliance enforcement purposes. The Board's recommendation on the project application is not a final determination of all issues. While some hearing participants requested the final detailed engineering or emergency response plans, the Board does not require further detailed information and final plans at this stage of the regulatory lifecycle.

To set the context for its reasons for recommendation, the Board finds it helpful to identify the fundamental consideration used in reaching any section 52 determination. The overarching consideration for the Board's public interest determination at the application stage is: can this pipeline be constructed, operated and maintained in a safe manner. The Board found this to be the case. While this initial consideration is fundamental, a finding that a pipeline could be constructed, operated and maintained in a safe manner does not mean a pipeline is necessarily in the public interest as there are other considerations that the Board must weigh, as discussed below. However, the analysis would go no further if the answer to this fundamental question were answered in the negative, as an unsafe pipeline can never be in the public interest.

³⁷ Pipeline projects generally follow a three phase design process consisting of a conceptual phase, a preliminary engineering phase, and a detailed engineering phase leading to final design.

1.6.1 Safety

The Board's regulations focus on results and there are NEB requirements that companies must follow in order to design, construct and operate their pipelines safely. These requirements cover everything from the selection of materials used to build a pipeline to the processes, controls, manuals and programs designed to manage risk and mitigate potential consequences during construction and operation. The Board requires NEB-regulated pipeline companies to consider thoroughly all of the hazards and potential hazards that are associated with their pipeline systems, and demonstrate to the Board that the appropriate safety and risk management plans and measures are in place. The Board provides considerable regulatory oversight throughout the pipeline lifecycle to verify that companies comply with regulatory requirement, and adequately and effectively anticipate, prevent, manage and mitigate risks to people and the environment.

1.6.2 Project-specific commitments and conditions

The Board considered the Project and associated risks in the context of the Board's stringent regulatory requirements, Trans Mountain's Application and the commitments Trans Mountain made during the hearing. The Board also considered the information from participants in the proceeding, including information about community-specific and environment-specific circumstances along the corridor.

The Board found that in addition to existing regulations, codes and standards, and Trans Mountain's commitments, Project-specific conditions would be required to mitigate residual effects posed by the Project and to make sure the Project is designed, constructed and operated safely, and in a manner that protects the environment (see conditions in Appendix 3). For example, evidence provided by the Grasslands Conservation Council of British Columbia led to the inclusion of conditions about grassland protection and management, and evidence submitted by municipalities of the lower mainland of B.C. led to the inclusion of conditions for the creation and operation of technical working groups.

The Board issued draft conditions throughout the hearing and gave participants the chance to consider and provide comments on them, and to propose other potential conditions. The Board used these suggestions and its own analysis of the evidence to create a final, comprehensive list of conditions that address a wide range of issues identified through this hearing process.

The Board concluded that the Project could be constructed and operated safely if designed, constructed, and operated in compliance with this list of conditions, which would mitigate risks posed by the Project.

1.6.3 Conditions

Should the GIC approve the Project, the Board would issue the CPCNs and Instruments, and impose 156 conditions to address the identified, outstanding issues.

In addition to conditions addressing specific technical issues, the Board would impose overarching Conditions 1, 2, 3, 4 and 5. The effect would be to make all commitments, plans or programs included, referenced or agreed to on the hearing record, regulatory requirements of the Board. Furthermore, to assist the Board and all stakeholders in tracking construction progress and compliance, and to assist the Board in planning appropriate compliance verification activities, the Board would impose conditions requiring Trans Mountain to file commitments tracking tables, phased filing information, a list of temporary infrastructure sites, construction schedules, construction progress reports, and a signed confirmation of Project completion and compliance (Conditions 6, 10, 61, 62, 106, 139).

The 156 conditions listed in Appendix 3 are arranged in approximate chronological order of the required filings. While the Board encourages those with an interest to review all of the conditions, we are aware it is a long list. In order to assist readers with specific areas of concern, Table 1 is provided, as a guide only.

It will be clear that there is overlap between conditions and categories, and a condition may apply to more than one category. For example, air emissions conditions may fall within the *Air quality and greenhouse gases* category, as well as within the Terminal categories. Conditions of interest to Indigenous people may appear under the Specific effects on Indigenous interests category, as well as various Environment and People categories.

Table 1 also illustrates that conditions would require fulfillment at the appropriate stage of the regulatory lifecycle.

Table 1: Conditions by subject matter and regulatory lifecycle stage

		Pipeline Lifecycle Stage			
		Over-arching	Prior to construction	Prior to operation	During operation
Regulatory Oversight		1, 2, 5	6, 10, 61, 62	6, 10, 62, 106	6, 139
Economics and Financial Responsibility			57	121	121
Emergency Preparedness and Response			89, 90	117, 118, 119, 120, 123, 124, 125, 126, 127, 136, 138	120, 145, 153
Environment	General	3	7, 60, 72, 78, 81		145, 151
	Air quality and greenhouse gases		52, 53, 54, 55, 79, 85	137	140, 142
	Water quality		35, 39, 47, 71, 87	113, 130	151, 154
	Soil, vegetation and wetlands		40, 41, 42, 45, 46, 47, 71, 76, 92		151, 154, 155, 156, 157
	Wildlife and wildlife habitat		36, 37, 38, 44, 47, 56, 71, 92	128	37, 128, 149, 150, 151, 154
	Fish and fish habitat		43, 47, 71, 75, 92	75, 108, 109, 110	108, 109, 110, 151, 154
	Marine mammals		92	132	151
People, communities and lands	Effects on communities (including Indigenous)		7, 13, 14, 48, 49, 59, 60, 72, 73, 74, 78, 80, 81, 82, 86, 93, 94, 95, 99, 100, 102, 103	49, 94, 99, 131	94, 99, 141, 145
	Specific effects on Indigenous interests		7, 39, 77, 96, 97, 98	96	146
	Training, skills and employment		11, 12, 58	58, 107	
	Lands and routing		7, 60		
Engineering and Safety	Project	4	9, 50, 51, 63, 64, 66, 69, 88	63, 66, 105, 111, 112, 114, 116	147, 148
	Line 1 (existing pipeline and reactivated segments)		18, 19	115, 135	152
	Line 2 (new pipeline & segments transferred from Line 1)		15, 16, 17, 65, 67, 68, 70	104, 115, 122, 135	143
	Pump Stations		8, 30, 31, 101	30	
Multidisciplinary	Westridge Delivery Pipelines and Burnaby Mountain Tunnel		15, 16, 20, 21, 26, 27, 28, 29, 72, 85, 86, 87	104, 125	143
	Westridge Marine Terminal		8, 21, 30, 33, 34, 35, 52, 53, 80, 81, 82, 83, 84, 97, 101	30, 109, 118, 119, 123, 126, 127, 129, 130, 136, 138	109, 141
	Edmonton, Sumas and Burnaby Terminals		8, 22, 23, 24, 25, 30, 32, 54, 78, 79, 80, 101	30, 118, 123, 125, 127, 129, 130, 136, 137, 138	141, 153
	Watercourses (freshwater)		43, 47, 48, 65, 67, 71, 72, 74, 75, 87, 92, 94	75, 94, 108, 110, 113	94, 108, 110, 151, 154
	Project-related marine shipping		91	131, 132, 133, 134	134, 144

1.7 Risk overview

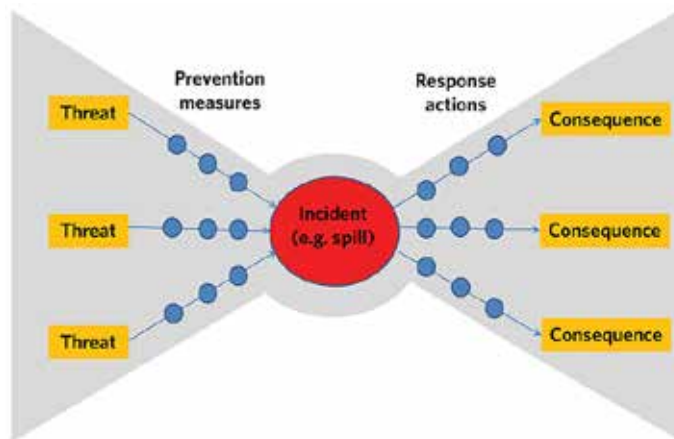
This section contains the views of the Board from the OH-001-2014 Report (formerly Section 1.4). The Reconsideration Panel adopts this approach to assessing risks from spills. The only change it has made is to revise the conclusions related to spills from Project-related marine shipping to reflect the Reconsideration.

It is important to carefully analyze the risks created by the Project and Project-related marine shipping. This includes considering the probability of incidents occurring and the severity of the consequences that could result from such incidents, even if such incidents are unlikely to occur. It also includes considering the acceptability of such risks in the context of the benefits and burdens of the proposed Project and Project-related marine shipping as part of the Board's public interest determination.

A bowtie diagram (Figure 2), as exemplified below, is a useful and common aid in illustrating:

- the various threats that could lead to an incident (such as a spill);
- prevention measures that reduce the probability of such threats leading to an incident;
- the various consequences that could result from an incident; and
- response actions that reduce the severity of such consequences.

Figure 2: Bowtie diagram for assessing risk



In addition, risk tables, such as that shown in Figure 3, can be useful to illustrate the combination of the probability (P) of an incident occurring and the anticipated consequences (C) if such an incident does occur, and the magnitude of the resulting risk (R). The Board notes, however, that the labels used for probability, consequences and risk (e.g., Very low to Very high) and the placement of risk labels in such tables can vary widely according to use and author, and can contain considerable subjectivity. Nevertheless, such tables are conceptually useful to illustrate the relationship that $R = P \times C$, that both probability and consequences need to be considered in fully understanding the risk of a spill, and to assist in prioritizing risk mitigation efforts.

Figure 3: Risk as combination of probability and consequence

Probability (P)	Very high P	Medium R	High R	High R	Very high R	Very high R
	High P	Medium R	Medium R	High R	High R	Very high R
	Medium P	Low R	Medium R	Medium R	High R	High R
	Low P	Very low R	Low R	Medium R	Medium R	High R
	Very low P	Very low R	Very low R	Low R	Medium R	Medium R
		Very low C	Low C	Medium C	High C	Very high C
Consequences (C)						

1.7.1 Consideration of spill risks

Throughout this Report, the Board has considered the risks associated with spills. For example, Chapter 6 discusses pipeline and facility integrity, which includes the assessment of risk-based design methods proposed by the company to identify, prevent or reduce the frequency of potential releases from the pipelines and terminals, as well as consequence reduction measures, such as leak detection, containment and valve placement. Chapter 8 discusses the environmental behaviour of spilled oil, which is relevant when considering spill response and the consequences of a spill. Chapter 9 discusses prevention, preparedness and response, and considers the likelihood of accidents and malfunctions. Chapter 10 includes a discussion of the potential environmental effects of a spill that might result from such an incident, while Chapter 11 discusses potential socio-economic effects. Chapter 14 discusses spills from Project-related marine shipping.

The Board acknowledges that achieving zero risk is impossible for most developments. The Board finds that there is very low probability of a Project spill (i.e., from the pipelines, tank terminals, pump stations or the WMT) that may result in a significant effect (high consequence). In regard to spills from the Project-related marine shipping, the Board finds that there is a very low probability of a marine spill from a Project-related tanker that may result in a significant effect (high consequence).

Having considered all of the evidence and in light of the spill prevention, preparedness and response measures discussed in Chapter 9, and the regulatory framework for marine oil spill preparedness and response discussed in Chapter 14, the Board finds that the risks associated with potential spills from the Project and Project-related marine vessels are acceptable.

Views of the Reconsideration Panel

The Board considered the risks associated with potential spills from Project-related marine shipping in the MH-052-2018 hearing. For example, Sections 14.9 and 14.10 of Chapter 14 includes a discussion of potential environmental and socio-economic effects of malfunctions and accidents. Chapter 8 discusses the environmental behaviour of spilled oil, which is relevant when considering spill response and the consequences of a spill. Section 14.11 of Chapter 14 discusses spill prevention, risk analysis, preparedness and response, and considers the likelihood of accidents and malfunctions.

Having considered all of the evidence and in light of the spill prevention, preparedness and response measures, the Board finds that there is a very low probability of a large marine spill from a Project-related tanker that may result in a significant effect (high consequence).



Benefits, burdens, and the National Energy Board recommendation

The content of this chapter has been updated since the Board's May 2016 OH-001-2014 Report to reflect the Reconsideration.

This chapter provides the Board's reconsideration of the overall benefits and burdens of the Trans Mountain Expansion Project (Project) in relation to its mandate under section 53, Part III of the *National Energy Board Act* (NEB Act). This chapter also summarizes the Board's reconsidered findings and recommendations in relation to the Project under section 30 of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and the *Species at Risk Act* (SARA).

2.1 The Board's mandate

With respect to the Project application, the Board's original role was to determine if the Project is in the public interest, pursuant to section 52 of the NEB Act (as further described below). In the OH-001-2014 Report, the Board concluded that the Project is in the present and future convenience and necessity, and in the Canadian public interest. The Board recommended that a CPCN be issued under section 52 of the NEB Act along with 157 conditions.

The Board also has a mandate to conduct an environmental assessment under the CEAA 2012. In the OH-001-2014 hearing, Project-related marine shipping was not included within the scope of the Board's environmental assessment under the CEAA 2012. Rather, Project-related marine shipping was assessed under the NEB Act. Accordingly, in the OH-001-2014 Report, the Board recommended that the GIC decide that the Project is not likely to cause significant adverse environmental effects under the CEAA 2012.

As a result of the *Tsleil-Waututh Nation* decision by the Federal Court of Appeal, the Board was directed by the Governor in Council (GIC) in OIC P.C. 2018-1177 to conduct a reconsideration of aspects of its recommendations and terms or conditions for the Project relevant to Project-related marine shipping, pursuant to section 53 of the NEB Act and section 30 of the CEAA 2012 (Section 1.4 of this report contains complete details regarding the OIC).

The Reconsideration Panel conducted the Reconsideration in accordance with OIC P.C. 2018-1177. The Reconsideration Panel decided to include Project-related marine shipping between the Westridge Marine Terminal (WMT) and the 12-nautical-mile territorial sea limit in the "designated project" to be assessed under the *Canadian Environmental Assessment Act, 2012*. As a result, the Reconsideration Panel carried out an environmental assessment of Project-related marine shipping under the CEAA 2012. The entirety of the evidence filed in the OH-001-2014 hearing was included as part of the record for the MH-052-2018 hearing. In making its findings, the Reconsideration Panel considered new or updated evidence submitted during the MH-052-2018 hearing, as well as relevant evidence from the OH-001-2014 hearing.

The Board's environmental assessment of the Project can be found in Chapter 10, with the socio-economic components assessed in Chapter 11. The Reconsideration Panel's assessment of Project-related marine shipping is in Chapter 14. The Reconsideration Panel necessarily relies on Chapter 10 and 11 views and findings of the Board from the OH-001-2014 hearing in order to make the required recommendation to GIC under subsection 30(4) of the CEAA 2012 for the designated Project.

Under paragraph 30(4)(a) of the CEAA 2012, in its Reconsideration Report, the Board must:

- (i) confirm the recommendation or set out a different one with respect to the decision that may be made under paragraph 31(1)(a) in relation to the designated project, and
- (ii) confirm, modify or replace the mitigation measures set out in the report with respect to the environmental assessment.

Specifically, the Board must confirm or set out a different recommendation regarding whether the designated Project is likely, or is not likely, to cause significant adverse environmental effects after taking into account the implementation of mitigation measures, including the Board's recommended conditions.

Under paragraph 30(4)(b) of the CEAA 2012, in its Reconsideration Report, the Board must also confirm the recommendation or set out a different one with respect to the follow-up program that is to be implemented in respect of the designated project.

The Board then considered whether its recommendation under the CEAA 2012 resulted in changes or additions to the recommendations (including recommended terms or conditions) under the NEB Act from its OH-001-2014 Report.

Under subsection 53(6) of the NEB Act, in its Reconsideration Report, the Board must:

- (a) if its recommendation was referred back, either confirm the recommendation or set out a different recommendation; and
- (b) if a term or condition was referred back, confirm the term or condition, state that it no longer supports it or replace it with another one.

Specifically, the Board must confirm or set out a different recommendation as to whether or not the certificate should be issued for the Project, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity.

2.1.1 Public interest test

The NEB Act provides the Board with flexibility and broad powers, but the Board must interpret and implement the Act in ways that serve the Canadian public interest.

Part III of the NEB Act provides a test for the Board to apply when making its assessment of a project and providing its recommendation to the GIC. When applying the "present and future public convenience and necessity" test under Part III of the NEB Act, the Board makes a recommendation in the overall Canadian "public interest." In its consideration of an application, the Board is required to weigh all relevant evidence on the record and come to a recommendation whether, overall, the project is in the public interest. This is referred to in the NEB Act as the present and future public convenience and necessity.

The Board has described the public interest in the following terms:

The public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social interests that change as society's values and preferences evolve over time. As a regulator, the Board must estimate the overall public good a project may create and its potential negative aspects, weigh its various impacts, and make a decision.³⁸

In section 52 of the NEB Act, under which the Board's original recommendation was made, Parliament has given direction about the factors relevant to the Board's consideration in reaching a public interest determination.

52(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

- a) the availability of oil, gas or any other commodity to the pipeline;

³⁸ NEB Reasons for Decision, Emera Brunswick Pipeline Company Ltd., GH-1-2006.

- b) the existence of markets, actual or potential;
- c) the economic feasibility of the pipeline;
- d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and
- e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

52(3) If the application relates to a designated project within the meaning of section 2 of the CEEA 2012, the report must also set out the Board's environmental assessment prepared under that Act in respect of that project.

52(4) The report must be submitted to the Minister within the time limit specified by the Chairperson. The specified time limit must be no longer than 15 months after the day on which the applicant has provided, in the Board's opinion, a complete application. The Board shall make the time limit public.

With respect to the Project application, the Board's role is to determine if the Project is in the public interest, pursuant to section 52 of the NEB Act.

The Board also has a mandate to conduct an environmental assessment of the Project under the CEEA 2012. As a responsible authority under the CEEA 2012, the Board must, in its report to the GIC, set out its recommendation regarding the environmental effects of the Project. Specifically, the Board must provide a recommendation that the Project is likely, or is not likely, to cause significant adverse environmental effects after taking into account the implementation of mitigation measures, including the Board's recommended conditions. The Board's environmental assessment of the Project can be found in Chapters 10, 11 and 14.

2.2 Benefits and burdens of the Project

As directed by the OIC, and as reflected in the Reconsideration List of Issues, this was a reconsideration focused on Project-related marine shipping - a comparatively narrow scope to the OH-001-2014 hearing. However, under subsection 30(4) of the CEEA 2012, the Reconsideration Panel is required to confirm or set out a different recommendation regarding whether the designated Project is likely, or is not likely, to cause significant adverse environmental effects after taking into account the implementation of mitigation measures. Similarly, under subsection 53(6) of the NEB Act, the Reconsideration Panel is required to confirm or set out a different recommendation as to whether or not the certificate should be issued for the Project, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity. In order to make these recommendations regarding the overall designated Project, it was necessary for the Reconsideration Panel to rely on the previous findings and views of the Board regarding benefits and burdens from the OH-001-2014 Report that were outside the scope of the List of Issues for the Reconsideration.

Some intervenors argued that the Board must consider new information when reweighing the Project's benefits and burdens. As discussed earlier in Chapter 1.5.3, the Board is not persuaded that it should consider new information unrelated to the Reconsideration List of Issues (i.e., economics) when reweighing the Project's benefits and burdens. This would essentially circumvent the List of Issues and open the MH-052-2018 hearing up to other issues indirectly, rendering the purpose of section 53 of the NEB Act and narrow scope of the OIC meaningless. Therefore, the benefits and burdens summarized in Tables 2 and 3 contain a mixture of findings from the Board in the OH-001-2014 hearing and the Reconsideration Panel.

Table 2 and Table 3 summarize the key benefits and key residual burdens, respectively, of the designated Project as outlined in the various chapters of this MH-052-2018 Report. Both tables indicate whether the benefits or burdens would apply locally (e.g., within the immediate vicinity of the Project, such as the specific municipalities along the route), regionally (i.e., Alberta and B.C.) or nationally.

These tables are not intended to be a comprehensive list of all benefits and burdens mentioned by participants during the OH-001-2014 and MH-052-2018 hearings. Rather, it is a summary of the key benefits and key residual burdens that the Board identified during its analysis of the evidence. A description of how the Board considered the balance of benefits versus residual burdens is found in Section 2.5 and a more in-depth assessment of the evidence is provided in the various chapters of the MH-052-2018 Report that follow.

2.2.1 Benefits

In the OH-001-2014 hearing, the Board found that the benefits associated with the Trans Mountain Expansion Project, taken as a whole, are considerable.³⁹ This includes market diversification, jobs, competition among pipelines, spending on pipeline materials, Community Benefit Program, capacity development and Government revenues. The Reconsideration Panel relies upon these findings of the Board from the OH-001-2014 Report, for matters that are outside the scope of the Reconsideration List of Issues.

As a result of the MH-052-2018 hearing, the Reconsideration Panel confirms that there is a modest benefit associated with enhanced marine spill response, and capacity development connected to Project-related marine shipping and spill response. The Reconsideration Panel also finds that, if GIC implements its recommendations to make changes to the operation of all marine traffic, including Project-related traffic, and takes action to relieve other stressors within the broader system, there will be the added benefit of material improvements to the health of the Salish Sea.

Table 2: Summary of key benefits

Benefit associated with:	Brief description	Type of impact	Report chapter(s)
Market diversification	The Board finds there would be a considerable benefit gained by providing Canadian shippers with more flexible and diverse markets, the ability to manage risk associated with competing in multiple markets, the ability to manage development and operational risk, and a likely reduction of discounts to Canadian crude.	Regional National	12
Jobs	The Board finds a considerable benefit in the form of jobs created across Canada: • Pipeline construction - 400-600 workers per spread • Tank construction - between 60 and 370 workers • Westridge Marine Terminal construction - 95 workers • Over the first 20 years of operation – 443 jobs/year (313 in B.C., with remainder in Alberta)	Local Regional National	11
Competition among pipelines	The Board finds a considerable benefit would be gained from the increase in flexibility and optionality for those producers looking to get their product to markets, and that all western Canadian producers are likely to benefit from the Project in the longer term, through greater customer choice and efficiencies gained through competition among pipelines.	Regional National	12
Spending on pipeline materials	The Board finds there would be a considerable benefit to local and regional economies from the direct spending on pipeline materials in Canada and spending within the regions where the Project is located.	Local Regional	11
Community Benefit Program	The Board finds a modest benefit to local communities and the environment along the Project from the establishment of a Community Benefit Program, including: • local emergency management capacity enhancements; • improvements to community parks and infrastructure; • support for events and educational programs; and • Environment Stewardship Program.	Local Regional	10 11
Enhanced marine spill response	The Board finds there would be a modest benefit from the enhanced marine spill response planning for and capacity to respond to spills from vessels not associated with the Project (e.g., fuel spills from container ships and cruise ships).	Local Regional	14
Capacity development	The Board finds that a modest benefit from local economic and educational opportunities, and the development of capacity of local and Indigenous individuals, communities and businesses.	Local Regional	5 11
Government revenues	The Board finds that direct Project expenditures will likely result in considerable revenues to various levels of government.	Local Regional National	11

³⁹ Definitions for the terms “considerable” and “modest” are not provided. Rather, the terms are meant to illustrate the weight the Board attributed to the benefits and burdens relative to each other.

3.6 Regulating emergency response

One of the key goals of the Board's compliance and enforcement program is to prevent pipeline incidents from happening in the first place. However, should an incident occur, the Board is ready to respond, as and when required.

In addition to reporting all incidents through the Board's Online Event Reporting System, companies are responsible for reporting significant incidents, including ruptures or larger spills which leave company property or the RoW, to the Transportation Safety Board which then notifies the Board. Each company is expected to implement its emergency response plan immediately, which must be on file with the Board prior to beginning operation and which must be kept up to date. An emergency response plan outlines the emergency management procedures that the company will follow during an incident. The procedures must address emergency management, environmental protection, and worker and public safety. The Board also requires a regulated company to develop a training program and conduct emergency exercises. The Board often independently observes these exercises to verify the company's capabilities in responding to incidents.

When the Board is notified of an incident, its top priorities are the safety and security of people, and the protection of property and the environment. The Board holds the company fully responsible and accountable for clean-up and site remediation, regardless of the size of the release.

When an incident is reported, the Board initiates its emergency response procedures and, if appropriate, activates its Emergency Operations Centre (EOC) or deploys field personnel. The Board coordinates, from the EOC, field staff at the incident site and provides situation reports to the Government of Canada's EOC. The Board also has working agreements with other government departments and agencies to coordinate responses and communicate effectively during emergencies.

In the case of a spill, once Board staff arrives at the incident site, they make sure that the company is properly cleaning up the spill and remediating any environmental effects caused by the incident. The Board's long-term goal with any incident is the full restoration of the site, including mitigating any potential sub-surface effects on groundwater. Companies are required to meet the most stringent applicable remediation criteria for all contaminants of concern.

3.7 Developing a safety culture

The Board believes that one of the best ways to prevent an accident from happening in the first place is to promote a workplace culture where safety is a way of life. This means that safety, not production or deadlines, must be a company's very first priority.

In some of the worst tragedies in the energy industry,⁴² there was often an observable disconnect between the company's vision and policies, and the planning, implementation, monitoring and review of these policies. While the direct causes of these incidents varied, investigators found the lack of a strong safety culture was a factor in all of the incidents.

To achieve a strong safety culture, companies set the tone, beginning at the very top of the organizational chart. It is the senior executives who shape and reinforce a robust safety culture in which the company demonstrates a continual respect for threats to its defenses. The required investment of time, energy and resources means it cannot simply be an intellectual exercise to meet a prescribed minimum standard. It has to be a personal mission for the person at the top. It is their duty to drive the culture and values down and across the organization.

When committed safety leadership exists, safety performance and oversight are considered part of the organization's governance model in the same way as financial performance. This means that leaders stand up for safety even when production may be impacted.

The OPR requires senior company leadership to be accountable for building a safety culture and supporting management systems. Companies must appoint a senior officer who is accountable to ensure that the company's management system and programs are in compliance with the OPR.

⁴² Det Norske Veritas. (2011). Major Hazard Incidents. Prepared for the National Energy Board's Arctic Offshore Drilling Review. Report No.: NEB 2010-04 / DNV Reg. No.: ANECA 851



Public consultation

With the exception of administrative adjustments (e.g., section /chapter cross-references, footnote numbering, etc.) and to replace “Aboriginal” with “Indigenous,” the content of this chapter remains as it was in the Board’s May 2016 OH-001-2014 Report.

The Board’s expectations of an applicant regarding public consultation are set out in the Board’s Filing Manual. Applicants are expected to undertake a level of public consultation commensurate with the setting, nature, and magnitude of their project. The Board uses the information gained through the company’s consultation process, and filed on the hearing record, to contribute to its understanding of the concerns and interests of those who are potentially affected by the project, and to help inform its public interest determination. The Board requires companies to involve the public during each phase in the lifecycle of a project (that is, project design, construction, operation and maintenance, and decommissioning or abandonment) in order to address potential impacts of that project.

This chapter addresses Trans Mountain’s public consultation program. Trans Mountain’s engagement and consultation with potentially affected Indigenous groups are discussed in Chapter 5.

4.1 Trans Mountain’s Stakeholder Engagement Program

4.1.1 Principles and goals of Trans Mountain’s Stakeholder Engagement Program

Trans Mountain said that its Stakeholder Engagement Program is designed to foster participation from the public who have an interest in the scope, activities and routing of the Project. The program seeks input from stakeholders regarding the proposed pipeline corridor, environmental effects, and socio-economic effects and benefits. The program also shares information with stakeholders to keep them informed throughout the process.

Prior to launching its Stakeholder Engagement Program in 2011, Trans Mountain said that it consulted with local governments and community leaders to seek input on the program. These early conversations with local governments and community leaders provided Trans Mountain with direction on areas of greatest interest to local communities, appropriate means of engagement for different communities and local stakeholders who should be engaged in the process.

Trans Mountain identified a number of stakeholder groups that could have an interest in the Project, including: private and public landowners and occupants, government authorities, industry and business development agencies, environmental non-governmental organizations, special interest groups and the general public. Trans Mountain said that its Stakeholder Engagement Program allows for the identification of new information and additional stakeholders as Trans Mountain proceeds through the life of the Project.

In consideration of the potential impacts to the marine environment from an increase in Project-related marine vessel traffic, Trans Mountain said that it extended stakeholder engagement to include coastal communities beyond the pipeline terminus

at the Westridge Marine Terminal (WMT) in Burnaby, B.C. In recognition of this and the high level of stakeholder interest in marine shipments of petroleum products, Trans Mountain engaged communities on Vancouver Island and the Gulf Islands along established marine shipping corridors transited by oil tanker traffic, as well as communities in and around Port Metro Vancouver.

Trans Mountain described the principles it used to guide the development and execution of the Stakeholder Engagement Program. These included principles regarding accountability, communication, local focus, mutual benefit, relationship building, respect, responsiveness, shared process, sustainability, timeliness and transparency.

Trans Mountain said it is committed to ongoing engagement throughout the life of the Project, including the continuation of engagement opportunities through hosting facility open houses, providing newsletters and Project updates, making safety and public awareness presentations; and participating in community events, regulatory processes and ongoing informal meetings with stakeholders.

4.1.2 Public consultation activities

Trans Mountain said that its engagement activities were designed to reflect the diverse and varied interests of the various communities and areas along the proposed pipeline route, and provided various engagement opportunities, including public open houses, community workshops, and online discussion activities. Trans Mountain said that since 2012, there were tens of thousands of exchanges with stakeholders through face-to-face meetings, presentations, public forums, technical meetings, community meetings, social media sites, community investment events, emails, telephone calls, letters, advertisements and website postings. It noted that some of these exchanges included:

- providing 159 open houses or workshops along the pipeline and marine corridors, including topics focused on routing, emergency management, economic benefits, regional environmental and socio-economic assessment (ESA), and terminal information;
- organizing more than 1,700 meetings between Project team members and stakeholder groups;
- responding to approximately 550 phone inquiries and 1,500 emails received from the public; and
- providing responses to approximately 950 media inquiries and giving 430 media interviews.

Trans Mountain translated various documents, such as news releases, newspaper advertisements and information material, into French, Chinese, Punjabi and Korean with the goal to provide Project information in other languages that would help inform and serve public audiences and media in communities along the proposed pipeline and marine corridor. Trans Mountain said that community and technical workshops, and public open houses were advertised in numerous newspaper and online advertisements and direct mail postcard drops.

Trans Mountain said that feedback received from the stakeholder engagement initiatives helped shape various aspects of the Project, including topics and issues related to construction, routing, economic benefits and impacts, employment and training, environment, liability and safety. Examples of how Trans Mountain said that it incorporated stakeholder feedback into the design of the Project included:

- exploring alternative methods of construction in order to avoid the use of temporary workspace in Colony Farm Regional Park;
- establishing access plans, construction schedules, pipeline alignments and compensation plans to minimize impacts to Ledgeview Golf Course;
- having horizontal directional drilling entry and exit points more than 30 metres away from the watercourse in order to avoid routing the proposed pipeline through riparian zones; and
- assigning community construction liaison roles as part of its construction team as a key point of contact, in response to concerns raised by the Wembley Estates Strata Council.

4.1.3 Landowner Relations Program

Trans Mountain said that the primary objectives of its Landowner Relations Program were to:

- introduce the Project to landowners and occupants;
- obtain approval for land access on a timely basis to support engineering and environmental surveys;
- obtain landowner understanding, acceptance, and land rights for survey, construction, restoration, and transition to operations; and

- preserve good relationships that currently exist and reinforce positive relations into operations.

Trans Mountain identified a study corridor of, generally, 150 metres width along the entire length of the Project. Since the commencement of the Landowner Relations Program, Trans Mountain's Project representatives identified and contacted more than 4,400 owners and occupants of properties located in part or in whole within the proposed pipeline corridor and alternative corridors in Alberta and B.C. A standard information package was provided that included information regarding the Project, NEB publications and a copy of the original easement. As route refinements were made, some landowners and occupants were no longer within the 150-metre-wide pipeline corridors. Those who no longer fell within the consultation areas were notified and no longer engaged. Those landowners or occupants that were identified as being within these areas were contacted.

Trans Mountain said that it continued to engage with landowners into 2014 to obtain permission for environmental and engineering surveys, discuss changes in potentially affected lands resulting from routing modifications, and provide Project notification and details to any new landowners or occupants potentially affected by these changes. In addition to commencing discussions on land rights acquisition, land agents continued efforts to obtain survey consent for those lands where landowners had not yet provided their consent, to collect issues and concerns, and to provide information to landowners in response to any questions and concerns. Trans Mountain said that the questions, issues or concerns raised by landowners commonly included topics such as land access, compensation, environmental and land impact, land value, legacy concerns, opposition to the Project, and construction and routing.

Some of the evidence filed and concerns raised by intervenors related to issues that occurred respecting the existing Trans Mountain Pipeline (TMPL) system. Trans Mountain said that although these specific issues related to the existing TMPL system and are therefore not within the scope of this hearing, Trans Mountain representatives attempted to meet with landowners and address the concerns identified.

Trans Mountain said that its Landowner Relations Program continues to be an ongoing process, and questions or concerns will continue to be addressed throughout the life of the Project.

4.2 Trans Mountain's consultation with governments

Trans Mountain said that it incorporated consultation with municipal, provincial and federal governments into its consultation activities for the Project, as it anticipated that they would have an interest in shaping project planning. The company said that local government officials from relevant jurisdictions in Alberta and B.C. were invited to and participated in, stakeholder and issues identification, public information and input gathering, community conversations and continuing engagement. In June and July 2012, a Project information package was mailed to municipal governments, members of the legislative assemblies, and members of parliament along the proposed pipeline corridor and in marine communities.

Trans Mountain said that it held more than 250 government meetings to provide information on the Project and respond to questions on a wide range of topics, including routing, Indigenous and stakeholder engagement, the marine ESA, Transport Canada's Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL) marine risk studies, and economic benefits.

Several government authorities requested further information from Trans Mountain on aspects of its consultation with various stakeholders, landowners and other government authorities. They also requested further information from Trans Mountain on aspects of its ongoing engagement program with regard to concerns about the impact of the Project on emergency services, transportation rights-of-way, infrastructure, permits and further route refinements.

In the joint final argument of the City of Abbotsford, Township of Langley, Fraser Valley Regional District, Fraser-Fort George Regional District and Village of Valemount, the intervenors expressed concerns regarding Trans Mountain's overall consultation methods and its failure to communicate with them or incorporate their feedback on important matters that would impact them, specifically during the design and construction phase of the Project. These intervenors said that Trans Mountain had not fully recorded all of the commitments it made to them, and it had failed to identify and adequately mitigate the risk and impacts to the local governments.

The City of Burnaby said that it had not made formal or informal arrangements with Trans Mountain for many of the necessary services, resources, and planning initiatives that Trans Mountain contemplates will be available. It said that Trans Mountain made many assumptions concerning emergency services, emergency planning, evacuation, availability of external resources, fire services, police services, traffic management, planning and development, land use, access to water, noise and compensation that were either incorrect or unsupported by commitments from the City of Burnaby.

Trans Mountain said that the City of Burnaby declined several attempts by Trans Mountain to engage with the city about its concerns.

Trans Mountain said that it maintained regular engagement with the governments of Alberta and B.C., facilitating effective participation in the assessment process by provincial authorities. Trans Mountain said that it will continue ongoing municipal and regional government engagement, including undertaking a number of specific engagement commitments it has made during the hearing process that extend from approval through the entire lifecycle of the Project. It also committed to work jointly with municipalities to identify and address specific municipal issues and concerns through joint technical working groups. Trans Mountain said that it would review intervenor submissions and incorporate all applicable commitments into the commitments tracking table to ensure no commitments are missed.

Views of the Board

The Board regards engaging the public as an essential and ongoing activity throughout the Project's entire lifespan. Thorough and effective consultation requires a process that must provide timely, appropriate and effective opportunities for all potentially affected parties to learn about the Project, provide their comments and concerns, and to discuss how Trans Mountain could address them.

The Board is of the view that Trans Mountain has developed and implemented a broadly based public consultation program, offering numerous venues and opportunities for the public, landowners, governments and other stakeholders to learn about the Project, and to provide their views and concerns to the company.

Since a company's relationship with directly affected stakeholders will continue for several decades throughout the lifecycle of a project, it is critical for all parties to recognize and understand their respective roles and responsibilities for achieving effective dialogue during consultation, including those offered outside of the NEB hearing process. The Board expects affected parties, including municipalities, to engage with Trans Mountain by communicating their concerns to the company and making themselves available to discuss potential solutions. The Board observes with regret that not all municipalities accepted the opportunity to engage with the Trans Mountain effectively. In particular, the City of Burnaby declined a number of opportunities to engage with Trans Mountain. The Board is of the view that when municipalities decline opportunities to engage, this diminishes the quality of information available to both the company and the Board, and creates the potential that less than satisfactory solutions to municipal concerns may be the result.

The Board acknowledges the concerns raised by municipalities regarding ongoing consultation, particularly during the design and construction phase of the Project. Trans Mountain has committed to offer continued engagement opportunities to affected municipalities through the formation of technical working groups, with the stated goal to build trust and good relationships where the company operates. The Board views such working groups as useful opportunities to explore collaborative approaches through the design and construction phases of the Project, and to pursue ongoing dialogue. To facilitate the establishment and development of the technical working groups, the Board would impose Condition 14 requiring Trans Mountain to file with the Board, prior to commencing construction, the terms of reference for the technical working groups, to be developed in collaboration with participating affected municipalities, and facility owners and operators.

Although consultation with government authorities was initiated early in the process, the Board expects Trans Mountain to continue to offer opportunities for effective and timely consultation with government stakeholders, as appropriate, through the lifecycle of the Project in order to further identify and adequately address concerns regarding the Project's potential effects on governments, including municipalities. To facilitate Trans Mountain's ongoing consultation with government stakeholders, and to apprise the Board and all parties of the outcomes of this ongoing consultation, the Board would impose Condition 49 requiring Trans Mountain to file with the Board reports of the meetings of the technical working groups. In the Board's view, this reporting would allow the Board and all parties to understand the outcomes achieved by the technical working groups, and provide for the transparent reporting to the Board of any potential issues regarding the design and construction of the Project. The reporting would also allow the Board and all parties understand how these issues have been addressed, to the extent possible, by Trans Mountain and the members of the technical working groups.

As discussed in Chapter 7, the Board would impose a condition requiring Trans Mountain to file with the Board an updated commitments tracking table prior to the start of construction (Condition 6). This update should include all commitments made to landowners and government stakeholders. The Board reminds Trans Mountain that even where commitments may not be specifically included in Trans Mountain's filings submitted pursuant to Condition 6, Trans Mountain would still be required to implement all commitments made in its Project application, or as otherwise agreed to in the evidence it filed during the hearing, or in its related submissions (Condition 2).

Trans Mountain has committed to continue consulting with and addressing issues raised by affected landowners, both before and after pipeline construction. The Board is of the view that an effective and responsive process for responding to issues that may be raised by affected landowners is an important part of the company's ongoing engagement with landowners. To that end, the Board would impose Condition 102 requiring Trans Mountain to

confirm that it has created, and will maintain, a process/system that tracks Project-related landowner and tenant complaints or concerns and how Trans Mountain has addressed them, up until the Project is abandoned or decommissioned pursuant to the NEB Act. The Board would also impose Condition 99. Some groups were critical of the approach requiring Trans Mountain to maintain and file with the Board records of its landowner and tenant consultations, and provide confirmation that it will make available to a landowner or tenant, upon request, a copy of the consultation records related to that landowner or tenant. The Board is of the view that these requirements would facilitate an effective and responsive process for responding to issues raised by landowners and tenants in order that potential concerns can be appropriately addressed, to the extent possible.

The Board is of the view that with Trans Mountain's commitments and the Board's recommended conditions, Trans Mountain can continue to effectively engage the public, landowners and other stakeholders, and address issues raised throughout the Project's operational life.



Indigenous matters

The potential impacts of Project-related marine shipping on Indigenous interests was relevant to the List of Issues for the Reconsideration. The content of this chapter has been updated since the Board's May 2016 OH-001-2014 Report to reflect the Reconsideration.

Section 5.1 is unchanged from the OH-001-2014 Report (with the exception of administrative adjustments and to replace "Aboriginal" with "Indigenous"), as the Reconsideration Panel found that the views of the Parties and of the Board from the OH-001-2014 Report were still valid.

Section 5.2 sets out the submissions of the Parties from the MH-052-2018 hearing, followed by the Views of the Reconsideration Panel. In order for the Reconsideration Panel to reach its views, it reviewed all relevant evidence from both the OH-001-2014 hearing and the MH-052-2018 hearing.

5.1 Indigenous matters – OH-001-2014 hearing

5.1.1 Overview

The Board's process was designed to obtain as much relevant evidence as possible on Indigenous concerns about the Project, the potential impacts on Indigenous interests, and possible mitigation measures to minimize adverse impacts on Indigenous interests. The Board was provided with and considered extensive information about concerns related to the Project, and the measures that would be required to address those concerns, as brought forward through consultation undertaken by the applicant and through the participation of potentially affected Indigenous groups and others in the hearing process. In assessing the potential impacts on Indigenous interests, the Board considered all of the evidence provided.

This chapter includes summaries of evidence provided directly by Indigenous groups through their participation in the hearing, as well as summaries of Indigenous concerns and interests as recorded by Trans Mountain in its evidence. Appendix 8 refers to information and evidence sources provided by Indigenous groups who participated in the hearing. The Board notes that identifying and referring to specific passages within the record can lead to other direct and indirect references being overlooked. Therefore, anyone wishing to fully understand the context of the information and evidence

provided by Indigenous groups should familiarize themselves with the entire record of the hearing.⁴³ In addition, evidence provided by Indigenous groups and evidence of Indigenous concerns and interests recorded by Trans Mountain in its evidence is summarized in chapters throughout this Report, including matters relating to the use of lands, waters and resources for traditional purposes by Indigenous groups as described in Chapter 11 and Chapter 14.

5.1.2 Trans Mountain's consultation with Indigenous groups

Trans Mountain said it views working with Indigenous communities along the Project route as part of its commitment to promote open and transparent consultation and communication with Indigenous communities, and to build lasting and mutually beneficial relationships with these communities and Indigenous businesses.

Trans Mountain said it embarked on an extensive consultation program commencing in 2012 to engage with Indigenous communities about the Project. To ensure meaningful engagement continues to occur, the company committed to continue its engagement with Indigenous communities, groups, associations, councils and tribes throughout the life of the Project.

5.1.2.1 Trans Mountain's Indigenous Engagement Program design

Trans Mountain said it worked in collaboration with the Government of Canada and provincial ministries to identify Indigenous groups in Alberta and B.C. that might have an interest in the Project, or have Indigenous interests potentially affected by the Project.

Trans Mountain said that its final engagement list for Indigenous communities and groups with traditional territories in the Project area was developed in collaboration with federal departments, provincial ministries, the Major Projects Management Office (MPMO), the NEB, and the B.C. Oil and Gas Commission. The company said it followed the recommendation of Indigenous and Northern Affairs Canada (INAC) and used a 10-kilometre buffer area around the proposed pipeline corridor in B.C. to identify Indigenous groups with traditional territory in the Project area. Trans Mountain said, given the lower degree of certainty regarding traditional territories in Alberta, a 100-kilometre buffer was used. In Alberta, the pipeline would cross Treaty 6 territory, Treaty 8 territory, and the Métis Nation of Alberta Region 4, but would not cross any Indian Reserves. In B.C., the Project would cross both Crown lands and privately held lands, and is proposed to cross seven Indian Reserves utilized by five Indigenous communities:

- Zoht #4 - Lower Nicola Indian Band
- Zoht # 5 - Lower Nicola Indian Band
- Joeyaska # 2 - Lower Nicola Indian Band
- Ohamil # 1 - Shxw'ōwhámél First Nation
- Popkum # 1 - Popkum First Nation
- Tzeachten #13 - Tzeachten First Nation
- Matsqui Main # 2 - Matsqui First Nation

Trans Mountain said that it extended its Indigenous engagement program to include coastal communities, beyond the pipeline terminus at the Westridge Marine Terminal (WMT). Trans Mountain said it engaged with communities on Vancouver Island and the Gulf Islands along established marine shipping corridors transited by tanker traffic, as well as communities in and around Port Metro Vancouver. At the recommendation of Transport Canada, for the Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL) review process, Trans Mountain also engaged with Indigenous groups located in the Burrard Inlet Region and Marine Corridor.

Trans Mountain said it added Indigenous groups to its engagement when groups expressed an interest in the Project. Trans Mountain's final list included 120 Indigenous groups, two non-land-based B.C. Métis groups, and 11 Indigenous associations, councils and tribes. The list of Indigenous groups engaged by Trans Mountain can be found in Appendix 9.

Trans Mountain said its Indigenous Engagement Program for the Project was guided by the Kinder Morgan Canada Indigenous Relations Policy and focused on:

⁴³ Indigenous groups provided evidence and made argument addressing all the chapters contained in this Report. Their evidence and views were fully considered as is reflected throughout the Report. As noted above, this chapter of the Report cannot be considered in isolation from the Report as a whole.

- enhancing trusting and respectful relationships;
- sharing Project information such as the Project scope, routing options, safety and emergency response, scheduling and environmental field study components;
- negotiating group and community-specific protocols, capacity agreements, Letters of Understanding (LOUs) and Mutual Benefit Agreements (MBAs);
- facilitating traditional land use (TLU) and traditional marine resource use (TMRU) studies, including traditional ecological knowledge (TEK) and socio-economic research;
- identifying potential impacts and addressing concerns;
- discussing the adequacy of planned impact mitigation and opportunities; and
- identifying education, training, employment, and procurement opportunities.

Trans Mountain said it considered Indigenous Traditional Knowledge according to subsection 19(3) of the *Canadian Environmental Assessment Act, 2012*, the filing requirements and guidance provided in the Board's Filing Manual, as well as pertinent issues and concerns identified through Indigenous engagement for the Project. Trans Mountain said that Indigenous Traditional Knowledge was typically collected from Indigenous communities through the participation of their members in biophysical field studies for the Project, and that their knowledge about the land formed part of the documented studies.

5.1.2.2 Trans Mountain's consultation activities with Indigenous groups

Trans Mountain said it made substantial efforts to provide Indigenous groups with opportunities to participate in planning the Project. It said that it used a number of methods to inform Indigenous communities, obtain feedback and identify issues about the Project. Activities began in 2012, including sending out Project letters, holding open houses during 2012 and 2013, maintaining a project website, providing Project update letters, and holding a number of Project meetings. Trans Mountain said more than 24,000 engagement activities were completed with Indigenous groups based on the following framework of activities:

- project announcement;
- initial contact with Indigenous community or Indigenous group;
- negotiation and execution of confidential LOUs or capacity agreements;
- host community information session(s);
- conduct TLU, TMRU and TEK studies;
- identify interests and concerns;
- review key mitigation options;
- provide additional capacity funding, if required; and
- negotiate and execute confidential MBA.

Trans Mountain said the communications materials that it sent to communities included:

- advanced notice of field study work and a field study process brochure;
- Project update letters and newsletters including updates to the Project website content, regulatory filings and participation funding; and
- invitations to meet to discuss routing options for those communities where the existing Trans Mountain Pipeline system encounters Indian Reserve lands.

Trans Mountain said its process for engagement allowed each community and group to engage in meaningful dialogue in the manner they chose, and in a way that met its objectives and values. Trans Mountain said many communities worked cooperatively with Trans Mountain in relation to the Project, some openly and others on a strictly confidential basis at their request.

Trans Mountain said that in March 2013, it provided a copy of the environment and socio-economic assessment (ESA) approach summary to Indigenous groups. Trans Mountain requested feedback on the methodology for field studies that would be undertaken starting in May 2013.

Trans Mountain said that potential environmental elements interacting with the Project were identified through consultation with Indigenous groups. These elements included air and water quality, fish and fish habitat, wetland loss or alteration, vegetation, wildlife and wildlife habitat, and species at risk. Effects from potential accidents and malfunctions were also identified. Issues raised through consultation were included in the assessment of potential Project effects. Trans Mountain said the feedback it received informed its Project planning in a number of areas including routing, the scope of ESA, the identification of mitigation measures to reduce environmental and socio-economic impacts, emergency management, construction planning, Project-related benefits and routing alternatives.

Trans Mountain said that engagement with participating Indigenous communities about socio-economic issues occurred in parallel with its Indigenous Engagement Program. Activities included one-on-one meetings with leaders and staff members, and meetings, interviews and discussions with people living in the area. Trans Mountain said that information related to socio-economic elements (e.g., cabin locations, resource use and employment and economy concerns) is often provided during meetings and discussion associated with TLU and TEK. As a result, information made available from the non-confidential TLU study reports and TEK discussions as it relates to the socio-economic elements was incorporated into the socio-economic assessment.

Trans Mountain said traditional land and resource use (TLRU) and TMRU studies were initiated for the Project in 2012 and were consultant-facilitated or independently directed by the group. Trans Mountain said the aim of the TLRU and TMRU studies was to identify and mitigate effects of the Project on current use of traditional land and marine resources. At the time of the submission of its evidence, Trans Mountain said a total of 52 communities participated in TLRU studies, 15 communities participated in TMRU studies and 57 communities provided TEK.

Trans Mountain said that the remainder of the Indigenous groups consulted on the Project either did not request to participate in a TLRU study or, in other cases, funding for a TLRU study had been discussed but the parties were unable to reach agreement.

Trans Mountain said it executed 94 agreements, including LOUs (which include components for TEK, TLRU and TMRU studies), capacity funding, and integrated cultural assessments with an aggregate value of \$36 million.

Trans Mountain said it received 30 letters of support from Indigenous groups.

Trans Mountain said it is committed to working with Indigenous groups to address Project-related interests and concerns. The company said this is an ongoing and iterative process that is part of the ongoing dialogue with Indigenous groups. Trans Mountain said its ongoing consultation process is designed to refine and optimize the work based on knowledge of the mitigation measures to be implemented in the field. Trans Mountain said this would include regional workshops with Indigenous groups to discuss Environmental Protection Plans (EPPs) and emergency management, including mitigation measures to minimize Project-related effects.

Trans Mountain said that through its Environmental Education Program, all personnel working on the construction of the Project would be informed of the location of known TLRU sites.

Trans Mountain said that it is committed to the continuation of an effective Indigenous Engagement Program that satisfies all parties, and that it will continue engagement into Project development and through operations.

5.1.2.3 Concerns raised about Trans Mountain's consultation with Indigenous groups

A number of Indigenous groups raised concerns in their written evidence and submissions filed with the Board about Trans Mountain's consultations, including Adams Lake Indian Band, Asini Wachi Nehiyawak Traditional Band, Cheam First Nation, Chawathil First Nation, Coldwater Indian Band, Cowichan Tribes, Katzie First Nation, Lyackson First Nation, Métis Nation of Alberta Gunn Métis Local 55, Métis Nation of British Columbia, Matsqui First Nation, Michel First Nation, Musqueam Indian Band, Nooaitch Indian Band, Pacheedaht First Nation, Stk'emlupsemc Te Secwépemc, Stó:lō Collective, Snuneymuxw First Nation, Squamish Nation, Tsartlip First Nation, Tsawout First Nation, Tsawwassen First Nation, Tsleil-Waututh Nation, and Upper Nicola Band. The concerns raised in relation to Trans Mountain's consultation for the Project included:

- the engagement process and/or timing;
- Project benefits;
- emergency response management and planning;
- capacity funding;

- the opportunity to provide input; and
- the potential Project-related effects on the assertion of Indigenous rights and title governing traditional and cultural use of the land and/or marine environment.

Cheam First Nation and Chawathil First Nation said that Trans Mountain has not engaged in any consultation with respect to emergency response, and did not give consideration to their Indigenous rights and title.

Adams Lake Indian Band said that Trans Mountain's engagement has been impersonal, inaccurate, and lacking sincerity. It also said that Trans Mountain offered to engage on its Aquatics Offset Plans. However, when Adams Lake Indian Band expressed interest and proposed engagement, Trans Mountain retreated from its offer of engagement.

Cowichan Tribes said that Trans Mountain's approach to consultation limited the measures available to mitigate impacts, and that to properly account for the Project's potential impacts on the Cowichan Tribes' Indigenous rights and title, Trans Mountain must have understood Cowichan Tribes' strength of claim at a stage where Trans Mountain could have fundamentally altered the Project design and been open to all options for mitigation measures. Cowichan Tribes said that did not occur.

Coldwater Indian Band said targeted and specific consultation with Coldwater is required to develop appropriate avoidance, mitigation and accommodation of impacts, and this has not occurred. Coldwater Indian Band also said that meaningful consultation on the Project, including routing, has not occurred.

Katzie First Nation said it had difficulties in reaching agreement with Trans Mountain on capacity funding or Mutual Benefit Agreements, and therefore could not provide all of the information Trans Mountain needed to understand the potential impacts to traditional sites and uses.

Kwantlen First Nation expressed concerns with Trans Mountain's lack of consultation and consideration of Indigenous rights and title for emergency response in Trans Mountain's identification of "High Consequence Areas" for emergency response.

Lyackson First Nation said that Trans Mountain did not discuss mitigation measures and without further consultation, issues remain unresolved.

Métis Nation of Alberta Gunn Métis Local 55 said that it wishes for meaningful consultation beyond the hearing and construction phase. It said this should include operation of the pipeline, since a spill could impact water bodies downstream of the Project, as well as lands holding burial, archaeological and heritage sites, and lands used for harvesting. It also said it has been excluded from discussions on developing a fish and fish habitat offset program.

Michel First Nation said Trans Mountain only initiated consultation with Michel First Nation on the proposed Project once Michel First Nation made Trans Mountain aware of the need to consult with them, and that the late start to the consultation process and collection of TLU information has resulted in a failure to include Michel First Nation in the overall development of the assessment, failure to assess effects on Michel First Nation rights and interests, and failure to include Michel First Nation in discussions of mitigation and accommodation.

The Stó:lō Collective raised a number of concerns regarding its consultation with Trans Mountain. The Stó:lō Collective expressed concern about Trans Mountain's reluctance to formalize commitments to the Stó:lō Collective outside of a Mutual Benefit Agreement, to directly involve Stó:lō technical and cultural experts in Project mitigation and Environmental Protection Planning (EPP development), emergency response planning, or environmental survey work in order to mitigate concerns pertaining to traditional fisheries, spiritual and cultural sites, wetlands, old growth forests, communication protocols, capacity development, economic development or emergency response procedures. The Stó:lō Collective also raised concerns with the engagement process, in that communication has been on a proponent to Band level, when Trans Mountain was asked to have communication sent through the Stó:lō Collective as the process for engagement established by the Collective, leading to negative impacts on the engagement process.

Stk'emlupsemc Te Secwépemc said that there had been no discussion with Trans Mountain on the proposed routing of the pipeline.

Tsawwassen First Nation said in their written evidence that Trans Mountain mischaracterized its engagement with Tsawwassen First Nation through the Indigenous Engagement Logs filed by Trans Mountain. Trans Mountain acknowledged errors and omissions, and accepted the updated information on consultation filed by Tsawwassen First Nation.

Simpcw First Nation, First Nations of Maa-nulth Treaty Society, and Adam Olson said they were not meaningfully consulted by Trans Mountain about the Project and its potential impacts to their Indigenous rights, title and interests.

In response to the concerns expressed, Trans Mountain said it made every effort to provide Indigenous groups with opportunities to engage in meaningful dialogue in the manner they chose, and in a way that met their objectives and values. Trans Mountain said it tailored its engagement approach to accommodate the myriad of diverse objectives and values it

encountered. The sharing of information was integral to this process. As a result of the information it received, Trans Mountain said it made modifications to the Project in order to reduce impacts on the land and marine environment, address concerns regarding routing and construction, address socio-economic considerations, and enhance Indigenous involvement and engagement.

Trans Mountain said during engagement activities, Indigenous groups expressed an interest in participation in emergency response planning and programs (ERPs). Trans Mountain said the integration of Indigenous groups into ERPs provides opportunities for reduced response time in some locations and additional workforce to respond to a spill and participation of Indigenous communities in emergency planning and response also aligns with the principles outlined in the B.C. land-based spill initiative. Trans Mountain said ERPs will be developed with the participating Indigenous group(s) and Indigenous groups will be invited to participate in regional workshops regarding emergency response planning. Finally, Trans Mountain committed to file a consultation plan related to their Emergency Management Program (EMP), including its ERPs.

Trans Mountain said the company and the Stó:lō Collective have had multiple engagements throughout the hearing process. Trans Mountain said it has proactively engaged with the communities represented by the Stó:lō Collective, with the Stó:lō Collective, and with Ts'elxweyeqw Tribe Management Limited (TTML) to ensure Stó:lō interests are heard, and potential issues and concerns can be avoided or mitigated. Trans Mountain's evidence of the engagement activities, completion of land use studies, and the provision of funding to support engagement is outlined in its evidence filed throughout the hearing process.

Trans Mountain also said it has continued to share information with Stó:lō, in response to the information received through the Integrated Cultural Assessment Report.

Trans Mountain said it has made multiple efforts to share information regarding procurement, employment, and training for the Project, including with Tsartlip First Nation, and has requested that Tsartlip share information regarding the abilities of the Nation and its membership to participate in the business and employment-related opportunities that would arise as a result of the Project.

In response to Tsawwassen First Nation, Trans Mountain said that starting in 2012, Trans Mountain has been engaging Tsawwassen First Nation on the Project to provide comprehensive information to them, to seek feedback from them, and to identify anticipated impacts of the Project on the assertion of Indigenous rights and title governing traditional and cultural use of the environment. Trans Mountain stated it is aware of the Tsawwassen First Nation Final Agreement, and the resulting rights and obligations. Trans Mountain said its understanding of the Final Agreement is based on both reviewing the agreement and on discussions with Tsawwassen First Nation. Trans Mountain confirmed that, in engaging with Tsawwassen First Nation regarding the Trans Mountain Expansion Project, it took the Final Agreement into consideration.

Trans Mountain said it is committed to continued engagement to discuss the Project, mitigation measures, Project-related issues and the potential Project-related effects on Indigenous groups.

5.1.3 The Government of Canada's consultation process with Indigenous groups

The Government of Canada said it would rely on the Board's review process, to the extent possible, to identify, consider and address any adverse impacts on potential or established Indigenous and treaty rights resulting from the Project. The Government of Canada said federal authorities work together to ensure the legal duty to consult Indigenous groups is fulfilled and performed in a coordinated manner that is integrated with the environmental assessment and regulatory review process for the Project. In the Government's correspondence to Indigenous groups, Indigenous groups were informed of the Crown's reliance on the Board's process, to the extent possible, to meet the Crown's duty to consult and encouraged to participate in the Board's process to express Project-related concerns.

The Government of Canada outlined its approach to consultation with Indigenous groups for the Project, which occurs in four phases:

- Phase I: Initial engagement, from submission of project description to the start of NEB review process;
- Phase II: NEB hearings, from the start of the NEB review process to the close of the hearing record;
- Phase III: Post-NEB hearings, from the close of the hearing record to the Governor in Council (GIC) decision on the project; and
- Phase IV: Regulatory permitting, from the GIC decision on the project to issuance of departmental regulatory approvals (if required).

The Government of Canada said that commencing at the close of the NEB hearing record and ending with a GIC decision on the Project, the MPMO will coordinate consultation meetings between the Government and Indigenous groups for which the depth of consultation has been determined to be moderate or high. The purpose of these consultations is to conduct a

meaningful two-way dialogue to determine if there are any concerns related to the Project that have not been fully addressed by the NEB's draft conditions or the proponent's commitments to that point in the process, and to consider proposals from Indigenous groups for accommodation measures to further address outstanding issues or concerns that could be considered by the Crown.

A number of Indigenous groups expressed concerns about the limitations of the Government of Canada's approach to discharging its duty to consult with Indigenous groups, including its reliance on the NEB process. Some said that direct government-to-government consultation with the federal government is required to address their concerns, or as part of their decision-making about whether the Project may proceed in their territory.

5.1.4 Participation of Indigenous groups in the Board's hearing process

The Board's Enhanced Indigenous Engagement (EAE) initiative aims to provide proactive contact with Indigenous groups that may be affected by a proposed project, and to help Indigenous groups understand the Board's regulatory process and how to participate in that process. The Board reviews the completeness of the list of potentially affected Indigenous groups identified in the proponent's Project Description filed with the MPMO and the Board. The Board may suggest to the applicant any necessary revisions. The Board then sends letters to each potentially impacted Indigenous group on the revised list, informing them of the project as well as the Board's regulatory role in respect of the project, and offers to provide further information on the hearing process. Following issuance of these letters, Board staff follow up, respond to questions or conduct information meetings, where requested.

As committed to in the Project Agreement with the MPMO for the Project, the Board carried out its EAE activities for the Project from the time the Project Description was received on 23 May 2013 until February 2014. In August 2013, the Board sent a letter to 131 potentially affected Indigenous groups and organizations. The letter discussed the Board's hearing process and its Participant Funding Program. It also included a summary of the Project, information on how to obtain further information and an offer for NEB staff to attend a community meeting. Between November 2013 and February 2014, NEB staff presented information in person at nine community meetings attended by 22 different Indigenous groups and organizations.

Seventy-three Indigenous groups participated as intervenors in the OH-001-2014 hearing and provided their comments, views and evidence through written submissions and oral evidence to the Panel. Appendix 8 refers to information sources provided by Indigenous groups who participated in the review process and where this information can be located on the public record.

A total of 35 Indigenous groups and individuals provided oral traditional evidence (OTE) to the Board during the hearing. The Board received OTE at five locations (Edmonton, Chilliwack, Kamloops, Victoria, and Calgary). The Board received traditional evidence from the Horse Lake First Nation by telephone. The Board also made the audio recordings of OTE sessions available free of charge from the audio recording service provider.

5.1.5 Potential impacts on Indigenous groups

5.1.5.1 Trans Mountain's assessment of impacts on Indigenous groups

Trans Mountain said that through its Indigenous Engagement Program, it worked with Indigenous groups to identify anticipated impacts of the Project on the assertion of Indigenous rights and title governing traditional and cultural use of the land and marine environment. Trans Mountain said it endeavored to gather Indigenous perspectives on rights and asserted rights, identify issues and concerns relating to those rights and the Project, and reach understandings or agreements that address potential infringement of Indigenous rights affected by the Project.

Trans Mountain said its understanding that existing Indigenous and treaty rights of the Indigenous peoples of Canada are recognized and affirmed through section 35 of the *Constitution Act, 1982*.

Trans Mountain said it acknowledges the importance of the environment and the resources within it to Indigenous communities, and understands that the ability to participate in traditional land use activities is an important component of the exercise of their rights. Trans Mountain said its assessment of potential adverse effects of the Project considered the following value components that support Indigenous rights and interests:

- economy;
- employment;
- community services and infrastructure;
- individual, family and community well-being;

- human health;
- traditional culture;
- section 35 rights to fish, hunt and gather;
- Governance;
- visual and aesthetic resources; and
- species and habitats required to maintain a traditional lifestyle.

Trans Mountain said the methodology used to assess potential adverse effects of the Project on valued components supporting the exercise of Indigenous rights and interests considers: the potential environmental and socio-economic effects of the Project; ways in which these effects can be minimized or avoided altogether; and key mitigation strategies in place that would further reduce these effects. Trans Mountain said that it included Indigenous participation in its environmental field program to incorporate Indigenous views and additional traditional knowledge of the land into the consideration of potential Project-related environmental effects, and to provide Indigenous community members with the opportunity to provide TEK information to the ESA. Trans Mountain said its approach for collecting TEK tried to ensure a free, informed and ongoing process that meets Canadian ethical research standards. Translators were made available in the field upon the request of a given community, as warranted. Trans Mountain said that during field surveys, over 200 participants reviewed, collected and discussed TEK and potential Project-related effects and mitigation strategies.

Trans Mountain said it considered the potential effects of spills on elements of the environment that support Indigenous rights and interests. It said it acknowledges that salmon are vital to First Nations people in B.C.

Trans Mountain said TLU studies were completed on Crown land to obtain information regarding the TLU activities that participating Indigenous communities engage in on the land. The aim of the TLU studies was to assess and mitigate effects of the Project on current use of Crown lands for traditional activities and on identified TLU sites. Trans Mountain said this is achieved by meeting the following objectives:

- determine the extent and general nature of each community's current use of lands for traditional activities relative to the Project;
- identify existing concerns and potential effects of the Project on traditional land and resource use for baseline scoping and selection of social or environmental indicators for the effects assessment;
- provide traditional knowledge information, where appropriate, for the assessment of potential Project-related effects on traditional land and resource use; and
- establish appropriate site-specific mitigation measures to address traditional land and resource use concerns raised relative to the Project.

As discussed in detail in Chapters 11 and 14 of this report, Trans Mountain said it based the assessment of TLRU and TMRU on biophysical and human environments.

For the pipeline and associated facilities, Trans Mountain said that subsistence activities may be temporarily disrupted by construction or operations of the Project and the disruptions could mean that the traditional resource users miss the opportunity to harvest wild foods (e.g., wildlife, fish, plants) or that their participation is curtailed. Trans Mountain said that, despite these disruptions, the construction and routine operations would not result in significant adverse effects on the ability of Indigenous communities to continue to use land, waters or resources for traditional purposes, and thus the Project's contribution to potential broader cultural impacts related to access and use of natural resources is also considered not significant.

For the WMT, Trans Mountain said the expanded dock complex would become a permanent feature of the inlet and long-term traditional resource use patterns will likely adapt over time. Trans Mountain concluded there are no situations for TLRU that would result in a significant residual socio-economic effect, and that residual socio-economic effects of construction and operations activities of the WMT on TLRU indicators would be not significant.

With respect to the effects of Project-related marine vessel traffic, Trans Mountain said that a disruption of subsistence activities may occur due to increased transit of Project-related marine vessel traffic by restricting access to traditional use areas particularly if the resource users' travel occurs at the same time and in the same location as the Project vessel's transit. The company said that this could result in limiting the ability to harvest in certain areas, missed harvesting opportunities, or an increase in travel time to reach a destination. Trans Mountain said the Project-related disruption would only be temporary and activities are likely to be resumed in most cases once the vessel has passed. Trans Mountain said the effects associated with Project-related marine vessel traffic on TMRU are considered not significant, with the exception of

the expected residual effects on the traditional use associated with Southern resident killer whale population, which are considered to be significant.

Trans Mountain also said that its assessment of total cumulative effects for the Project concluded that there would be no significant Project contribution to adverse cumulative effects to the biophysical resources in the environment used for TLRU or TMRU by Indigenous groups. Trans Mountain concluded that overall there would be no significant adverse effects on the biophysical resources or the ecosystems that support TLU activities, with the exception of the Project's effects on the Southern resident killer whale.

With respect to human environment considerations, Trans Mountain concluded that there are no situations where social and cultural well-being, infrastructure and services, and community health indicators would result in a significant residual socio-economic effect with respect to Indigenous groups, including with respect to increased stress and anxiety related to perceived contamination that Indigenous groups may feel could result from the Project. Trans Mountain said that the assessment of effects on TLU patterns is based on alterations to the biophysical resources that TLU practices are based on and on consideration of the human environment, and concluded that the effects of the Project on TLU are not significant. Therefore, according to Trans Mountain, the residual socio-economic effects of Project construction and operations would be not significant.

5.1.5.2 Impacts raised by Indigenous groups

Indigenous groups have raised concerns throughout their written and oral evidence in this proceeding, and information about their concerns and interests has also been provided directly to Trans Mountain, which has filed evidence summarizing the concerns presented to them. Indigenous groups have characterized their concerns and interests in ways specific to each of them and, while information regarding key concerns and interests are summarized here, anyone wanting to understand the full context of the concerns and interests expressed by Indigenous groups should familiarize themselves with all of the relevant evidence on the record.

Indigenous groups provided information on impacts through their consultation activities with Trans Mountain as well as through their participation in the NEB hearing process. This evidence included completed TLRU and TMRU studies, OTE, responses to information requests, written evidence and final argument.

A number of Indigenous groups raised overarching concerns about impacts on their Indigenous and treaty rights. Within both written and oral evidence, Indigenous groups provided information on how, where, and when they exercise their asserted and established Indigenous and treaty rights, and they expressed their concerns as to how these rights might be impacted.

Groups described their established rights in the Project area, including those established through Treaty No. 6, Treaty No. 8, the Douglas Treaties, the Tsawwassen First Nation Final Agreement and court cases, including *R. v. Sparrow* and *R. v. Van der Peet*. Groups also described their rights in areas that would be traversed by Project-related marine vessel traffic. Indigenous groups referred to, and provided evidence on, their rights to hunt, trap, fish and gather and noted their rights related to the establishment of reserves.

In addition, a number of Indigenous groups provided information about their asserted rights. Details were provided as to claims to Indigenous title in areas potentially impacted. Descriptions were provided of stewardship and governance rights. Indigenous groups described their rights to fish for food, social, ceremonial and commercial purposes, and specific reference was made to fishing and harvesting sites, including those for salmon, crabs, prawns, shellfish and waterfowl. A number of Indigenous groups noted the importance of the Fraser River for the exercise of rights. Indigenous groups also noted the importance of marine areas for exercising their rights, including Burrard Inlet, Howe Sound, Swiftsure Bank and the Strait of Georgia. Details were provided regarding rights to gather plants for food and medicine as well as rights to engage in hunting and trapping activities, including harvesting of ungulates, waterfowl, fish, and shellfish. Travel and access was often referred to in the descriptions of their Indigenous rights. Many Indigenous groups noted rights related to ceremonial and spiritual practices and places. Rights related to archaeological and cultural heritage sites were also described. Much emphasis was placed on the importance of the exercise of their Indigenous rights to their culture.

Indigenous groups expressed significant concern as to how the exercise of these rights would be impacted. A number of Indigenous groups noted the importance of protecting the land and water for future generations, and indicated that the Project would introduce too much risk and additional impacts to their territories, rights, and identities. Indigenous groups also said that they must be part of all part decisions regarding access to their lands, waters and resources.

INAC said First Nations involved in the review of the proposed Project are at various stages of the British Columbia treaty process. INAC described in its evidence the ongoing status of negotiations within the British Columbia treaty process.

In addition to these overarching concerns related to their asserted and established Indigenous rights and title, key concerns raised by Indigenous groups about the Project relate to its potential impacts on:

- traditional land and marine resource uses, practices and activities;
- cultural heritage resources;
- community health;
- cultural practices;
- effects of cumulative development; and
- employment.

Many of the topics of concern raised by Indigenous groups are addressed in the chapters throughout this Report. The potential impacts on biophysical components, including fish and fish habitat, wildlife, vegetation, soils, and water quality and quantity, are discussed in Chapters 10 and 14. The potential effects on TLRU and TMRU are addressed in Chapters 11 and 14 respectively. Navigation, navigation safety and potential effects on recreational and commercial fishing are discussed in Chapter 11. Potential effects on human health, including the health of Indigenous people, are discussed in Chapters 11 and 14. Emergency management and spill response is discussed in Chapters 9 and 14. The concerns raised by Indigenous groups that relate specifically to these elements are discussed in detail in each of these respective chapters.

5.1.2.1.1 Impacts on traditional land and marine resource uses, practices, and activities

Indigenous groups said that their people have lived, hunted, gathered and fished within their traditional territories since time immemorial, and their uses of the lands, waters and resources within their territories are the backbone of their cultures. Many groups said they felt that the construction and operation of the Project would adversely impact their uses and activities within their traditional territories.

Indigenous groups raised concerns about how the Project could negatively impact their ability to continue their traditional uses, practices and activities such as hunting, fishing, trapping, the gathering of plants for subsistence and medicinal purposes, as well as their ability to access the land and specific sites for these purposes. Groups expressed concerns about their ability to harvest traditional food resources, including fish, shellfish, birds, and wild game as well as the impacts any reductions in their ability to harvest these resources would have on cultural and ceremonial activities as well as cultural transmission. Groups said that the harvesting and preparing of food is the primary context for many aspects of cultural transmission.

Many groups were concerned about their ability to continue to harvest plants for traditional uses, including medicinal plants. Some Indigenous groups said that they had concerns with the clearing of vegetation and with contamination of plants and loss or alteration of traditional use subsistence sites for plant gathering.

With respect to the WMT and marine shipping, a number of groups expressed concern these would negatively impact fish and fish habitat and would impact the reliance on fish for food and sustenance, and for economic purposes and spiritual practices and ceremonies, including harvesting at and around the WMT.

Concerns about specific marine resource harvesting locations, such as Swiftsure Bank, were also raised.

Several Indigenous groups expressed concern that accessing marine harvesting sites will be further restricted as a result of increased Project-related marine traffic.

Indigenous groups contend that a spill would have a catastrophic effect on the resources that they traditionally harvest and that the fact that the probability of a spill is small is not sufficient reason to determine the effects of a spill are not significant. They fear that a substantial spill or series of smaller spills could push resources past the tipping point and dramatically pollute and reduce stocks and habitat for many years.

5.1.2.1.2 Impacts on cultural heritage resources

A number of Indigenous groups raised concerns about the potential effects on their cultural heritage resources, including potential impacts to specific sites as well as effects on their continued ability to access sites in areas of cultural significance such as spiritual sites and gathering places. Groups said the Project would have impacts on their lands, resources and cultural practices including potential contamination of ancient village sites and cemeteries. Groups said their cultural rights and interests include sacred sites like villages, cemeteries, burning and ritual bathing sites, pit houses, and travel routes. Some groups expressed concern about their most sacred sites, including house pits and burial grounds.

Some groups expressed concern that specific information relating to their particular cultural heritage and spiritual sites were not fully accounted for in Trans Mountain's assessment of the project or its mitigation measures. The Stó:lō Collective raised specific concerns about potential impacts of the Project on the Lightning Rock site.

5.1.2.1.3 Impacts on community health

Several Indigenous groups expressed concerns about potential direct or indirect effects on community health, particularly in the event of a spill, through impacts on cultural activities, traditional food resources, or through increased anxiety and perception of contamination. Groups raised concerns about how the ability to continue traditional land use activities has resulting effects on the physical and psychological health of community members.

Some Indigenous group expressed concern about predicted impacts on physical and community health including stress, and reduced pre-natal health and youth development.

5.1.2.1.4 Impacts on cultural practices

Many Indigenous groups expressed concerns that the Project would impact opportunities to transmit knowledge from one generation to the next. Indigenous groups said that being on the land connects the present to the past, and traditional and cultural activities, such as harvesting, fishing and ceremonies bind families together. A number of groups were concerned that the Project would accelerate the process of loss of the spiritual connection to the land being experienced by youth and successive generations.

Indigenous groups said that their sense of place, privacy and quiet enjoyment are all-essential to their cultural and sacred practices, and that they will suffer sensory disturbance to these from tanker noise, light and vibration. Groups noted specific cultural practices they undertake, such as bathing in the waters of Burrard Inlet and associated creeks. Groups said continuing to engage in their ceremonial practices is a very important part of their culture.

Many Indigenous groups described how a disruption or reduction to traditional travelways would represent a loss of cultural expression and identity, as well as a loss of teaching opportunities for youth.

5.1.2.1.5 Effects of cumulative development

Many Indigenous groups discussed cumulative effects in their written and oral evidence. Indigenous groups said that their traditional territories have already been subject to change and continued encroachment. Groups said that the cumulative effects of development activities, including large-scale residential, industrial and commercial development, highways, railways and other infrastructure, and agricultural development have severely impacted their ability to exercise their Indigenous and treaty rights. Indigenous groups are concerned about the effects of existing development on the health of the ecosystems and resources harvested, and on their cultural and spiritual well-being, and the potential effects of the Project in addition to these existing effects.

Groups said that hunting activities continue to be impacted by development, and expressed concerns about the fragmentation of lands, loss of access to hunting and trapping areas, encroachment of developments, and loss of natural habitat.

A number of Indigenous groups had concerns with increased access to traditional areas. They were concerned that this would threaten wildlife, increase fishing pressure, and increase competition for resources used for traditional purposes.

A number of groups expressed concerns about Tran Mountain's cumulative effects assessment. Some groups said it did not accurately characterize or reflect the implications of incremental impacts on their use and occupancy of their territory, their interests, or their Indigenous rights and title.

5.1.2.1.6 Employment

In addition to the concerns noted above, numerous Indigenous groups also expressed an interest in employment and procurement opportunities as well as assistance with training to provide required skills. Many Indigenous groups said they wanted to participate in monitoring activities, and that community members or Elders should be present during construction and involved in reclamation work to ensure mitigation measures are completed. Samson Cree First Nation expressed concerns with monitoring by third parties and said ongoing traditional land use and environmental monitoring should be part of prevention and protection mechanisms.

5.1.2.1.7 Mitigation for potential impacts on Indigenous groups

Trans Mountain said it developed mitigation measures in accordance with Trans Mountain standards, industry and provincial regulatory guidelines, current industry-accepted best practices, engagement with Indigenous communities, experience gained from other pipeline projects with similar environmental and socio-economic conditions, and professional judgment. Mitigation measures, Management Plans and Contingency Plans are included in the Pipeline, Facilities and Westridge Marine Terminal EPPs. Trans Mountain said the EPPs and Environmental Alignment Sheets would be used to

guide inspection and monitoring of the Project during construction. Details of the mitigation measures Trans Mountain committed to for specific impacts are outlined throughout this Report.

Trans Mountain said that, in response to concerns and requests from Indigenous groups, it made a number of changes to the Project, including:

- reconfiguring the pipeline design in the Upper Fraser River and Upper North Thompson River Valley as a result of concerns raised during Indigenous engagement activities;
- revising a proposed route as a result of engagement with Peters First Nation on routing options across the Peters Indian Reserve No. 1A;
- implementing mitigation to ensure Project personnel are prohibited from fishing on Jacko Lake during construction activities, and working to provide continuous access to Jacko Lake for Stk'emlupsemc te Secwepemc members; and
- in response to concerns from the Katzie First Nation about Surrey Bend Regional Park, confirming that no land would be taken or removed from Surrey Bend Regional Park, and acquiring an easement for the pipeline that ensures ownership of the land will remain with the Park authority.

To mitigate the effects and concerns regarding traditional marine harvesting and cultural activities, Trans Mountain committed to, among other measures, provide regular updated information on Project-related marine vessel traffic to Indigenous communities. It also committed to initiate a public outreach program prior to the Project operations phase to communicate information on Project-related timing and scheduling with Transport Canada, the Canadian Coast Guard, the Chamber of Shipping for British Columbia, commercial and tourism associations, and potentially affected Indigenous groups.

Trans Mountain said that Project-related marine vessels would be fully compliant with all applicable navigational, communications and safety regulations, including those of Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority (PPA) and Port Metro Vancouver.

Trans Mountain said that, during engagement activities, Indigenous groups expressed an interest in participation in ERPs. Trans Mountain said that ERPs will be developed with the participating Indigenous group(s) and Indigenous groups will be invited to participate in regional workshops regarding emergency response planning. Trans Mountain committed to file a consultation plan related to its EMP, including its ERPs.

In response to the high level of interest in monitoring activities, Trans Mountain said Indigenous Monitors would be part of the onsite Environmental Inspection Teams to provide traditional knowledge to the construction program to ensure protection of the environment, and to ensure the successful protection, mitigation and monitoring requirements set out in the EPPs. Trans Mountain also committed to manage access along portions of its right-of-way by implementing mitigation measures during the pre-construction, construction and post-construction phases.

Trans Mountain said it is committed to continued engagement with Indigenous groups when reclamation management plans are being finalized.

Trans Mountain said that site-specific mitigation and enhancement measures will be implemented to ensure that the potential adverse social effects are eliminated or reduced and potential positive effects are enhanced during Project activities.

Trans Mountain said it will support employment and economic opportunities for Indigenous groups for the Project and that it has developed a Training Policy for Indigenous peoples to create initiatives that increase the long-term capability for Indigenous people to participate in the economy and to share in the success of the Project. Trans Mountain also said it will work with Indigenous communities to promote economic development through the identification of opportunities that offer Indigenous communities and businesses the ability to participate in the procurement of goods and services in support of the Project.

5.1.6 Submissions related to section 35, *Constitution Act*, 1982

Indigenous groups noted that the Board is required to act in a manner that is consistent with the *Constitution Act*, 1982. They said that federal action cannot unjustifiably infringe treaty and Indigenous rights and that the Crown is always subject to the limits imposed by the honour of the Crown, including the obligation to engage in proper consultation.

Indigenous groups argued that, in accordance with the Supreme Court of Canada's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 ("*Carrier Sekani*"), the Board must assess the adequacy of Crown consultation as it has the power to decide questions of law, and Parliament has not excluded the ability to decide constitutional questions from the Board's jurisdiction under either the *National Energy Board Act* (NEB Act) or the CEEA 2012. They argued that if the Board is to exercise its jurisdiction under section 52, it must first address and decide all necessary questions of fact and law,

including whether the Crown has discharged the duty to consult and accommodate. They said that the Board cannot make a recommendation in the public interest until it is satisfied that the duty to consult has been discharged. Groups argued that, because the Crown participated in the process, this case was different from the facts considered in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222. It was argued that the Board's recommendation was not simply one of many decisions in relation to the Project but rather was the key regulatory decision to be made in relation to the Project. Indigenous groups characterized the Board's recommendation as a strategic higher-level decision or recommendation.

Indigenous groups said that the controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Indigenous peoples with respect to the interests at stake. Reference was made to what was described as the two primary purposes of the duty to consult and accommodate: balancing interests and preserving the honour of the Crown. Indigenous groups noted that the duty to consult is intended to advance reconciliation between Indigenous people and the Crown by ensuring Indigenous concerns are heard and considered and that Indigenous rights are accounted for in decision-making, protected and accommodated. Consultation must involve a dialogue with a genuine intention of understanding the rights and concerns of Indigenous groups, and with an openness towards changing course if required. They noted that there must be an intention to substantially address Indigenous concerns.

Indigenous groups argued that the Crown has not discharged its duty to consult and accommodate and therefore the Board must recommend that the Project not be approved. Some Indigenous groups argued that there had been no Crown consultation to date and that a decision-maker who proceeds on the basis of inadequate consultation errs in law. Indigenous groups argued that while the Board does not have an independent duty to consult and accommodate, it does have an obligation to exercise its decision-making function in accordance with section 35 but that because of procedural flaws in the hearing process, the Board did not have sufficient evidence to recommend the Project. Several groups argued that the Board's process was inadequate and that their participation in that process was hampered by a variety of issues, including funding. Some argued that they were not provided with complete information, that their rights were not appropriately scoped and that the Project impacts on their rights were not appropriately assessed, as there was too much reliance on biophysical indicators as proxies for Indigenous rights rather than on evidence dealing directly with impacts to Indigenous rights. A number of Indigenous groups noted that consultation must occur early in the process and cannot be put off to later stages; they argued that such early consultation had not occurred in this case. Several groups argued that the Board's process was ill-suited for the intended purpose of consultation.

Indigenous groups argued that the Government of Canada's commitment to consultation after the Board has issued its decision cannot have any bearing on the Board's determination of whether the duty to consult and accommodate has been discharged as it is impossible to know whether it would be meaningful or effective. They argued that consultation that occurs after the Board issues its Report cannot be meaningful as the conditions of approval will have already been set. Indigenous groups pointed to Natural Resources Canada's list of potentially outstanding issues as evidence that the Crown is of the view that Crown consultation has not been adequate. Indigenous groups suggested that the Crown does not rely on Trans Mountain to discharge its duty to consult and, therefore, Trans Mountain's regulatory filings regarding engagement with Indigenous groups are not relevant. Some Indigenous groups argued that the Crown has not put any evidence before the NEB that would allow the Board to find that consultation has been fulfilled.

While most Indigenous groups were of the view that the Board had to make a finding on Crown consultation, the Stó:lō Collective said during oral argument that the Board did not have a role as far as commenting on the Crown's consultation because Crown consultation was not complete. The Stó:lō Collective said the Board should make a finding on whether Trans Mountain has done an adequate job of consultation such that the Crown could rely on it in some way. Additionally, the Stó:lō Collective submitted that since the Crown has made filings with the Board, the Board could comment on them. However, in the Stó:lō Collective's view, the final determination about adequacy of Crown consultation rests with the GIC.

Several groups argued that the Board's constitutional role includes determining whether they had proven their Indigenous rights for the purposes of the application and whether issuing the Certificate would infringe those rights. Groups also argued that a justification analysis must be performed to determine whether, absent consent of the Indigenous groups, infringements of proven rights are justified such that the government action is consistent with subsection 35(1). A number of Indigenous groups argued that the infringements to its rights could not be justified, with one group noting that a "public interest" justification was too vague to be a valid legislative objective. Indigenous groups argued that the Crown must fully discharge its constitutional obligation to justify the infringement prior to permitting the Project to proceed and that the NEB regulatory process was not designed to justify the infringement. They argued that the Board should recommend dismissal of the application on the grounds that the Crown has to date failed to justify the infringement of proven Indigenous rights.

Trans Mountain said that the Board must exercise its decision-making function in accordance with both the NEB Act and subsection 35(1) of the *Constitution Act, 1982*. It said the Board does this through broad consultation requirements it imposed on the proponent and by providing Indigenous groups with an opportunity to participate in a robust and accessible regulatory process in a meaningful way.

Trans Mountain said the Federal Court of Appeal was clear in *Standing Buffalo First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308 that the Board is not the Crown nor its agent when considering a section 52 application. This case was said to be directly analogous to the current Project because here the NEB process also ensures that the proponent has due regard for Indigenous rights. Trans Mountain argued that the Board's process also provides a practical and efficient framework within which the Indigenous group can request assurances regarding project impacts.

Trans Mountain said that the Crown has indicated that the feedback it receives in the NEB's Report will refine the Crown's understanding of potential Project impacts on Indigenous interests. While acknowledging that the NEB Act gives the Board full jurisdiction to hear and determine all matters, whether of law or of fact, Trans Mountain submitted that in *Carrier Sekani*, the Court rejected the argument that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has occurred and if not to fulfill that requirement itself. In Trans Mountain's view, given the evidence on the Board's record that the Crown consultation process with Indigenous groups is not over, an adequacy determination by the Board at the NEB recommendation stage would effectively usurp the Crown's role in the consultation process that will follow the NEB's regulatory process. Phase III and Phase IV of the Crown's consultation will occur after the close of the public record. Therefore, according to Trans Mountain, it would be premature for the NEB to assess the adequacy of Crown consultation prior to issuing this report. In any event, the Crown is the final decision-maker of whether a Project certificate will be issued.

Regarding requested justification for infringement by Indigenous intervenors, Trans Mountain was of the view that there is no legal basis for a justification test to be applied by the Board at this stage of the process when the GIC will be considering the process and its own consultation with Indigenous groups in entirety.

5.1.7 Views of the Board

The Board interprets its responsibilities in a manner consistent with the *Constitution Act, 1982*, including subsection 35(1), which recognizes and affirms the existing Indigenous and treaty rights of Indigenous peoples. In order to ensure that its recommendations and decisions with respect to this application are consistent with both subsection 35(1) and procedural fairness requirements, the Board has adopted the following assessment process. The Board is of the view that this process is appropriate, recognizing the complexity of this application, the importance of the constitutionally protected rights of Indigenous peoples, and the many and varied societal interests that must be considered in its assessment.

The Government of Canada and the NEB hearing process

The Board notes that the Government of Canada indicated in letters to potentially affected Indigenous groups that it is relying on the NEB process to the extent possible to meet the Crown's duty to consult Indigenous groups. While the Board itself does not owe the duty to consult, the Board is of the view that this reliance is appropriate given the Board's robust and inclusive process, its technical expertise, and broad remedial powers with respect to Project-related matters. The Board notes that a number of judicial decisions, including *Taku River Tl'itnit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74, have acknowledged the Crown's ability to rely on opportunities for Indigenous consultation that are available within existing processes for regulatory or environmental review. This is a means by which the Crown may be satisfied that Indigenous concerns have been heard and, where appropriate, accommodated. The evidence of the Government of Canada also indicates that following the issuance of this Report, the Government of Canada will continue consulting with certain Indigenous groups.

Requirements of Trans Mountain

The Board's process was designed to obtain as much relevant evidence as possible on Indigenous concerns about the Project, potential impacts on Indigenous interests and possible mitigation measures to minimize adverse impacts on Indigenous interests. In addition to providing technical information addressing Project-related impacts on, among other things, fisheries, wildlife, vegetation, and heritage resources, Trans Mountain was required to make all reasonable efforts to consult with potentially affected Indigenous groups and to provide information about those consultations to the Board. This included evidence on the nature of the interests potentially affected, the concerns that were raised and the manner and degree to which those concerns have been addressed. Trans Mountain was expected to report to the Board on all Indigenous concerns that were expressed to it, even if it was unable or unwilling to address those concerns. Therefore, even if an Indigenous group chose not to participate in the subsequent hearing process, any concerns could be brought to the attention of the Board through the applicant's evidence.

This early consultation was guided by the Board's Filing Manual Requirements, direction given by the Board during the Project Description phase, as well as information the applicant received from other government departments and agencies that it consulted in relation to the Project. The requirements reflect the fact that an applicant is often in the best position to respond to Indigenous concerns about a project before an application is filed and while a project is still in the early stages of development.

The Board expects an applicant to design and implement its consultation activities with regard to the nature and magnitude of a project's potential impacts. Where there is a greater risk of more serious impacts on Indigenous interests (which would, in part, depend on the nature of that interest), the Board has greater expectations in terms of the applicant's consultation with the potentially impacted Indigenous group. In contrast, where there is a remote possibility of an impact on Indigenous interests, or the impacts are minor in nature, the applicant's consultation will generally not be expected to be as extensive. An evaluation of Trans Mountain's consultation is outlined below.

Indigenous groups and the NEB hearing process

In addition to the mandated one-on-one consultation that is to occur between an applicant and potentially impacted Indigenous groups, it should also be understood that the Board's hearing process itself, including this report, is part of the overall consultative process. While much of the early consultation was performed by Trans Mountain, the Board process acted as a necessary and important check on that consultation and gave Indigenous groups an additional avenue to explain their concerns about the Project and have those concerns carefully considered by the Board.

Indigenous groups who are concerned with potential Project-related impacts on their interests had opportunities to present their views directly to the Board. While the Board required the applicant to implement a consultation program and perform an impact assessment, the Board also took steps to facilitate the direct participation of Indigenous groups in its proceedings. The Board entered into a Project Agreement with the MPMO for the Project, which described the Board's commitments related to its Enhanced Indigenous Engagement activities. The Board sent letters to each potentially impacted Indigenous group informing them of the Project, as well as the Board's role in respect of the Project. The letters provided information regarding the Board's participant funding program and offered to provide further information on the hearing process. Board staff followed up on these letters, responded to questions regarding the Board's process and conducted information meetings where requested.

Independent of the Panel and regulatory process, the Board administered a participant funding program, which allotted funding to assist intervenors with their participation. A total of approximately \$3 million was made available for participant funding for this hearing. This amount was offered to 72 eligible intervenors, with 79 per cent of the funding offered to Indigenous groups.

In addition, potentially affected Indigenous groups were provided with a choice of a number of methods of participating in the hearing. Indigenous intervenors had the option of participating in the Board's proceeding in writing or orally, remotely or in person. The Board understands that Indigenous peoples have an oral tradition for sharing information and knowledge from generation to generation. Since this information cannot always be shared adequately in writing, the Board provided Indigenous groups with the opportunity to present oral traditional evidence (OTE). The Board finds OTE provided by Indigenous groups valuable for the Board's consideration of a project. The opportunity to provide OTE was unique to Indigenous participants. A total of 35 Indigenous groups and individuals provided OTE to the Board during the hearing.

Given the sensitivity of some of the information that was provided by Indigenous groups in their evidence, the Board also ordered that certain information be treated confidentially.

To further facilitate Indigenous groups' participation, the Board generally held oral portions of its hearing in locations near those interested in the Project, and accommodated requests to incorporate traditional ceremonies into its proceeding. When advised of a potential conflict with certain traditional activities, the Board revised, to the extent practical, its schedule to accommodate those timing concerns. The Board also provided both audio and video online broadcasts, as well as transcripts of its proceedings and audio recordings of OTE sessions, so that interested parties who were not in attendance could be aware of what was occurring during the hearing.

Many Indigenous groups took the opportunity to participate in the Board's hearing process and make submissions directly to the Board. Many of those submissions are reflected throughout this Report. Such submissions by Indigenous groups included, among other things, descriptions of the nature and extent of their interests in the Project area, views on the potential Project-related impacts, and discussion of appropriate mitigation measures, including their views on the draft conditions the NEB released for comment. The Board thanks each community for providing their traditional and cultural knowledge at the oral traditional evidence hearings.

Government departments and the NEB hearing process

Given the comprehensiveness of the Board's process, the Board's technical expertise and its broad remedial powers that are generally not within the purview of other government departments, it was important that concerns related to the Project be brought to the Board's attention through consultation with the applicant and participation in the hearing process. To the extent that other government departments had information to provide to the Board, they had the opportunity to participate in the Board's process and file relevant information on the Board's record. Several government departments participated in the Board's proceeding, including Natural Resources Canada, Transport Canada, Environment and Climate Change Canada, Port Metro Vancouver, and Fisheries and Oceans Canada and Canadian Coast Guard. These government participants filed expert information on the Board's hearing record and were available (and required) to answer questions asked by both the Board and intervenors, including Indigenous groups. These authorities also had the opportunity to comment and provide information on appropriate mitigation measures.

There were concerns identified by Indigenous groups during the Board proceeding that are generally unrelated to the application under consideration. The Board recognizes that Indigenous people have a broad range of matters and concerns that they wish to raise, discuss and resolve with the Government of Canada. While the Board recognizes the importance of these issues, the Board does not have the ability within its proceedings, to properly address issues that are unrelated to the application. Nevertheless, the Board carefully considered all of the submissions of Indigenous groups so that it could have a greater understanding of the context for Indigenous concerns with the Project.

Consideration of potential impacts and mitigation

Before making its decisions and recommendation on the Project, the Board considered all of the relevant information before it, including information regarding the consultation undertaken with Indigenous groups, the views of Indigenous groups, the potential impacts on Indigenous interests, and proposed mitigation measures. While the Board considered the nature of the interests potentially impacted, its consideration of claimed interests is not tantamount to the process undertaken to determine the definitive scope of a right through a claims process or a court proceeding aimed at confirming the existence and parameters of an asserted Indigenous right. In the Board's view, the Board is not required to make a declaration that a claimed right has or has not been proven.

The Board looked at the claimed or established interest in the context of how it may be impacted, what measures can be employed to mitigate that impact and how any impact should be considered in light of other interests related to the Project. The Board then considered all of the benefits and burdens associated with the Project, balancing Indigenous concerns with other interests and factors (such as the need for the Project), before determining whether, in its opinion, the Project is in the public interest.

In carrying out this part of its mandate, the Board's objective was to reconcile Indigenous interests and concerns with other public interest considerations. The Board's process is designed to be thorough and accessible to Indigenous groups so that they may make their concerns known to the Board and have those concerns considered and addressed as appropriate. Further, the open nature of the Board's process allowed all participants interested in the application to be fully aware of the evidence that the Board considered in making its recommendations and decisions on the Project, which is consistent with principles of procedural fairness.

Consultation through the Project lifecycle

It is important to understand that there is a need for consultation to occur early in the planning stages of a project. However, information about a project is necessarily refined as project planning progresses, including in response to information provided by Indigenous groups through consultation, and therefore, it is important that consultation is ongoing. The Board has set out broad expectations for all regulated companies that consultation will continue throughout the life of a project and the Board routinely imposes binding obligations on the applicant to ensure that such consultation is occurring in an appropriate manner throughout the lifecycle of a pipeline. As the regulator of a project throughout its lifecycle, the Board also has a number of processes and tools at its disposal to execute its oversight of a project, including ensuring compliance with any conditions imposed by the Board.

If a certificate is issued for this Project, consultation will be ongoing throughout the life of the Project as conditions are met and additional permits are obtained. Notwithstanding this additional consultation, the Board is satisfied that the initial certificate process described above serves an important role in reconciling the various interests involved in such applications and ensuring that *Constitution Act, 1982*, subsection 35(1) obligations associated with the Project are met.

Trans Mountain's consultation

In assessing the consultation undertaken by Trans Mountain with Indigenous groups, the Board evaluated the design and implementation of Trans Mountain's consultation activities. The Board considered the company's activities to engage Indigenous groups and to learn about their concerns and interests. It also considered how Indigenous groups responded to opportunities for consultation and how Trans Mountain sought to understand, consider and address the concerns of potentially affected groups. The Board considered how this input influenced the Project's proposed design and operation. The Board also considered the concerns and views expressed by Indigenous groups.

A company's early consultation with Indigenous groups is a critical part of the development of proposed project, and a key matter for consideration within the regulatory review process. Timely, accessible and inclusive consultation facilitates the effective exchange of information, and provides opportunities for the company to learn about the concerns of potentially affected Indigenous groups, to discuss how those concerns can be addressed through project design and operational considerations, and to develop and discuss measures to reduce and mitigate the effects a project may have on the interests of Indigenous groups. Timely and effective consultation can help establish productive relationships that can carry on throughout the life of the project. It also informs the Board of the concerns Indigenous groups may have about a project's impacts.

With respect to Trans Mountain's consultation with Indigenous groups, the Board finds that Trans Mountain met the expectations of the National Energy Board, including those set out in the Board's Filing Manual. Since 2012, as part of the initial phases of the consultation process, the company provided Project information to Indigenous groups. This included information about the Project's design, operations, as well as its potential environmental, social and economic effects, including potential economic benefits through employment and training opportunities. The Board notes that Trans Mountain continued to provide opportunities to raise and discuss concerns with the company to those Indigenous groups that were identified as being potentially affected, and those that identified themselves to Trans Mountain as wishing to be engaged in consultation, throughout the early Project design phase and the regulatory review process.

The Board finds that the criteria used by Trans Mountain to identify potentially affected Indigenous groups were appropriate. The Board notes that Trans Mountain's consultation with Indigenous groups took into consideration the Project's proximity to areas of traditional use along the proposed right-of-way, and in proximity to the WMT. Trans Mountain also considered input from relevant federal and provincial departments and ministries. Once groups identified to Trans Mountain their interest in engaging in consultation, Trans Mountain was responsive to these requests, including Michel First Nation. The Board also notes that Trans Mountain included Indigenous groups along the shipping route that would be used by tankers associated with marine transportation activities. This included Indigenous groups on Vancouver Island and the Gulf Islands along established marine shipping corridors transited by tanker traffic, as well as communities in and around Port Metro Vancouver. The Board finds these aspects of Trans Mountain's consultation program design and implementation to be inclusive and appropriate for the Project's location and scope.

The Board finds that Trans Mountain offered all potentially affected Indigenous groups adequate opportunities to raise any concerns they had with the company, and to provide information about their concerns and interests in the Project area and within their traditional territories. The Board notes that this included the opportunity for each potentially affected Indigenous group: to complete or participate in traditional land and resource use (TLRU) studies and traditional marine use (TMRU) studies; to provide traditional ecological knowledge (TEK); and to identify potential effects on the current use of lands and waters and resources for traditional purposes. The Board also finds Trans Mountain provided appropriate opportunities to identify and discuss measures to reduce or avoid potential adverse effects. The Board notes the variety of information provided by Trans Mountain to Indigenous groups, as well as the numerous opportunities and offers to engage in consultation. These included providing Indigenous groups with notices of field study work, Project updates, and invitations to meet with the company to discuss concerns. The Board also notes Trans Mountain's offers to provide capacity funding to Indigenous groups, which Trans Mountain said were facilitated through the signing of 94 agreements for capacity funding and assessment studies with an aggregate value of \$36 million.

The Board notes that some Indigenous groups were critical of Trans Mountain's approach to consultation. A number of Indigenous groups raised concerns about the adequacy of Trans Mountain's consultation activities and efforts. Some groups said they were not provided adequate opportunities to raise their concerns with the company, or to discuss or participate in the development of mitigation measures for the Project. Other groups felt that the time allowed to review Project information was inadequate. The Stó:lō Collective felt some of its information was not fully considered by Trans Mountain.

The Board finds that Trans Mountain provided numerous opportunities and venues for Indigenous groups to provide information about their interests to the company, and that Trans Mountain considered the information that it received

from those Indigenous groups that chose to provide it. The Board notes that many Indigenous groups chose not to participate in TLRU and TMRU studies for the Project.

The Board is of the view that Trans Mountain considered the information that was provided by Indigenous groups about their use of the lands, waters, and resources, and made a number of changes to the design and planned operation of the Project as a result of this information. These changes include reconfiguring the pipeline design in the Upper Fraser River and Upper North Thompson River Valley, and revising a proposed route across the Peters Indian Reserve No. 1A. As the Board discusses in Chapter 11, the majority of the pipeline route for the Project parallels existing disturbance, including the right-of-way for Trans Mountain's existing pipeline. The Board finds this appropriate, as this reduces the requirements for new right-of-way disturbance, minimizes the potential impacts of construction, and reduces effects on nearby residents and communities. The Board is of the view that Trans Mountain appropriately responded in its design and routing to the concerns and recommendations made by Indigenous groups, to the extent that was possible while maintaining minimal disturbance by paralleling existing disturbance.

Trans Mountain committed to ongoing consultation with affected Indigenous groups throughout the life of the Project. The Board views consultation as an iterative and ongoing process of discussion and dialogue. The Board expects companies to continue to learn about the concerns that groups may have about a project, and to discuss ways to address those concerns to the extent possible. Trans Mountain's approach to its ongoing consultation with potentially affected Indigenous groups meets the Board's expectations. Trans Mountain has committed to implement its ongoing consultation efforts in order to further develop and finalize those measures that will be used to mitigate and reduce the potential effects on the Indigenous groups in the Project area. The Board finds this approach acceptable, and encourages Indigenous groups to continue to engage with Trans Mountain in order to provide input into the final plans and mitigation measures for the Project. In order to apprise the Board and all potentially affected Indigenous groups about Trans Mountain's ongoing consultation efforts, including how it has addressed any concerns raised by Indigenous groups, the Board would impose Condition 96 requiring Trans Mountain to file with the Board reports on its ongoing consultation with potentially affected Indigenous groups during construction, and through the first five years of operations (Condition 146).

Some groups were critical of this approach to ongoing consultation, and felt that Trans Mountain had not yet adequately completed or fulfilled its consultation with Indigenous groups. For example, Kwantlen First Nation, Cheam First Nation and Chawathil First Nation felt that Trans Mountain did not adequately provide opportunities to discuss or finalize emergency response plans for the Project. The Board finds that, for this phase of the Project, Trans Mountain provided appropriate and adequate opportunities to discuss elements of the Project such as emergency response plans. Trans Mountain has committed to engaging directly with potentially affected groups on the development of emergency response plans. The Board finds this appropriate. In order to apprise the Board and potentially affected Indigenous groups about its consultations, and to ensure that Indigenous groups are provided with opportunities to provide input into the final plans and measures, the Board would require Trans Mountain to file with the Board its plan for consultation on the development of its Emergency Management Program (Condition 90). Trans Mountain would also be required to incorporate the results of consultation into its Emergency Management Program, including tactical plans for high consequence areas (Condition 124). The Board finds that Trans Mountain provided Indigenous groups appropriate and adequate opportunities to discuss the measures and plans that would protect communities and the environment, and that these opportunities will continue as part of ongoing planning for the Project.

The Board acknowledges that Trans Mountain and a number of Indigenous groups entered into agreements and letters of understanding for the Project. The Board also notes the letters from certain Indigenous groups expressing their support for the Project, some of which note they do not object to the Project, or are satisfied by the mitigation measures and consultation provided with respect to the Project. Several of the letters from Indigenous groups also expressed their opinion that the Project would result in positive economic effects. The Board is supportive of the aims of such agreements, which clarify the nature of the relationship between the parties, outline any support necessary to aid in discussion about the Project, and facilitate cooperation. The Board views the expressions of support offered by Indigenous groups to reflect the outcomes of effective consultations and discussions between the company and those Indigenous groups that have chosen to enter into arrangements with Trans Mountain. The Board also notes the concerns expressed by Indigenous groups regarding opportunities to participate in the Project through employment, training, and contracting or procurement. As discussed in Chapter 11, in order to facilitate the economic participation of Indigenous groups in the Project, the Board would impose Condition 12 requiring Trans Mountain to file with the Board a plan for monitoring the implementation of training and education opportunities, and to file a local, regional and Indigenous skills and business inventory (Condition 11).

The Board finds that Trans Mountain has designed and implemented an appropriate and effective consultation program, that meets the requirements and expectations set out in the Board's Filing Manual. The Board also finds that, with Trans Mountain's commitments and the Board's recommended conditions, Trans Mountain can effectively continue to consult with Indigenous groups, to learn more about their interests and concerns, and address issues raised by Indigenous groups throughout the Project's operational life.

Project-related impacts

In assessing potential impacts on Indigenous interests, the Board considered all of the evidence provided. The Board assessed how Trans Mountain identified and evaluated the potential impacts, the concerns raised by Indigenous groups, and the measures Trans Mountain has proposed to minimize or eliminate the Project's potential impacts on the interests of Indigenous groups.

Through the review process, Indigenous groups had the opportunity to make their views and concerns about the Project, including what effects it might have on their potential or established interests, known to both Trans Mountain and the Board. Indigenous groups expressed their views and concerns about how the Project might affect their Indigenous and treaty rights relating to hunting, fishing, trapping, the gathering of plant resources for subsistence and medicinal purposes, and the continued cultural and ceremonial practices and activities that are intimately interwoven with and dependent on their access to lands, waters, and resources within their traditional territories. The Board acknowledges the importance that Indigenous groups place on being able to exercise their Indigenous and treaty rights, and continue their traditional activities, uses and practices within the entire area of their traditional territories, including access to resources and areas and sites of cultural importance and significance.

Trans Mountain outlined its approach for assessing the potential impacts on the rights and interests of Indigenous groups. Its approach relied on an assessment of the effects on biophysical and human environments. This incorporated information provided by Indigenous groups through consultation, traditional land and marine use studies, and their participation in biophysical field studies.

The Board considered the evidence provided by Trans Mountain, Indigenous groups, and other participants about the nature and extent of the activities, uses, and practices that are carried out by Indigenous groups in the Project area, and the concerns expressed regarding the impacts of spills on traditional use and activities. The Board considered the potential impacts on those activities, uses, and practices. The Board also considered all the measures committed to by Trans Mountain to minimize or avoid such impacts.

As described in detail in Chapters 10, 11, and 14, Trans Mountain has described its specific and broad mitigation measures that would be implemented to address potential effects on biophysical elements, including fish and fish habitat, wildlife, vegetation, and water quality and quantity, as well as measures to address specifically the potential effects on TLRU, TMRU and socio-economic components, including cultural heritage resources. Trans Mountain concluded that with the application of its mitigation measures, adverse effects on TLRU, TMRU and the biophysical elements that support such use, as well as on socio-economic components, including cultural heritage resources, are not likely to be significant, with the exception of effects on the Southern resident killer whale, including traditional uses associated with the Southern resident killer whale.

Some Indigenous groups did not agree with the approach taken by Trans Mountain. Some groups expressed concern that Trans Mountain did not undertake group-specific assessments of the potential effects, or did not assess the potential impacts to established or asserted rights. The Board finds Trans Mountain's approach to assessing the potential effects on Indigenous interests is acceptable. Trans Mountain has assessed the effects related to construction, operations, and potential accidents and malfunctions including spills that may impact biophysical resources and socio-economic components within the Project area, and the Indigenous uses, practices and activities associated with those resources.

The Board recognizes that there would be impacts associated with this Project, and that these would be experienced by some Indigenous groups. Reduced or interrupted access to lands, waters, or resources used by Indigenous groups, including for traditional land and marine uses, and for cultural and ceremonial purposes, may result in disruptions in the ability of Indigenous groups to practice their traditional activities. The Board has fully considered all the evidence in relation to these matters, which are described in detail in Chapters 11 and 14, and the Board finds that, during construction and routine operations, these impacts would be temporary and are not likely to be significant. With respect to TMRU activities directly affected by the WMT, the Board finds that these effects would persist for the operational life of the Project, as TMRU activities would not occur within the expanded water lease boundaries for the WMT. The Board finds that while the effects would be long-term in duration, these would be reversible in the long term, and that adverse effects are not likely to be significant.

With respect to the potential effects of Project-related vessel traffic on Indigenous marine vessels and users, the Board finds, as described in Chapter 14, that these effects would be limited to the time during which the Project-related vessels are in transit and therefore, these effects would be temporary and Indigenous marine vessels will be able to continue their movements and to access areas outside of those brief periods of interruption. As outlined in Chapter 14 of this Report, the Board finds that with the exception of effects on the traditional uses associated with the Southern resident killer whale, adverse effects of Project-related marine vessel traffic on traditional marine resource uses, activities and sites are not likely to be significant.

With respect to the potential impacts of a worst-case spill from the pipeline or from Project-related vessels on the ability of Indigenous groups to continue their traditional uses, practices and activities, the Board finds, as described in Chapters 11 and 14, that depending on the size, location and conditions of a spill and the effectiveness of response measures, there could be significant adverse effects on these traditional uses, practices and activities. As noted in its views on these matters in the respective chapters, the Board finds that the probability of such events is very low. The Board has incorporated the potential consequences of a spill outlined above into its discussion on spill risks in Chapter 1 and considered them in its overall weighing of the benefits and burdens of the Project in Chapter 2.

The review and final design of a proposed project is, in the Board's view, an iterative process. Should the Project proceed, Trans Mountain would be required to continue its consultation with potentially affected Indigenous groups, and to finalize the development of its plans and measures to reduce and mitigate the potential effects and to protect the environment and the resources that are of importance to and utilized by Indigenous groups. The Board would impose a number of conditions requiring Trans Mountain to report to the Board on its consultation with Indigenous groups during construction, through the first five years of operations, and to report to the Board on its consultations regarding the development of a number of its plans related to, among other things, environmental protection and emergency response programs.

Viewing all of these factors together, and as the Board has concluded within Chapters 10, 11, and 14, the Board is satisfied that with Trans Mountain's commitments, its proposed mitigation measures, and with the Board's proposed conditions, that the effects on the interests of potentially affected Indigenous groups can be effectively minimized, and that there would not be significant adverse effects on the ability of Indigenous people to continue to use lands, waters and resources for traditional purposes, with the noted exception of traditional uses associated with the Southern resident killer whale.

Summary of views on subsection 35(1), Constitution Act, 1982

The Board heard a number of arguments regarding requirements related to subsection 35(1) of the *Constitution Act, 1982*, including the need for the Board to assess the adequacy of Crown consultation. The Board recognizes that the law with respect to such matters is regularly being clarified. Nevertheless, the Board understands that the duty to consult with Indigenous groups, triggered when government decisions have the potential to adversely affect Indigenous and treaty rights, is a constitutional duty invoking the honour of the Crown and it must be met. While the Board does not itself owe the duty, its process is relied upon, to the extent possible, to discharge the duty to consult.

Having considered all the evidence submitted in this proceeding, the consultation undertaken with Indigenous groups, the impacts on Indigenous interests, the proposed mitigation measures, including conditions, to minimize adverse impacts on Indigenous interests and the commitments to and Board imposed requirements for ongoing consultation, the Board is satisfied that the Board's recommendation and decisions with respect to the Project are consistent with subsection 35(1) of the *Constitution Act, 1982*. The Board is of the view that this assessment is consistent with what is required for the purposes of the Board's Report.

The Government of Canada has stated that there will be additional consultation following the issuance of this Report, and the GIC will be making a determination as to whether it will direct the Board to issue a certificate for the Project pursuant to section 54 of the NEB Act.

5.2 Indigenous matters – MH-052-2018 hearing

5.2.1 Overview

The Board has considered all of the evidence provided in the MH-052-2018 hearing by Indigenous communities and others, including Trans Mountain and the Federal Authorities about the potential impacts of Project-related marine shipping on Indigenous interests, including rights; Trans Mountain and the Federal Authorities' proposed mitigation of the potential effects of marine shipping; requirements in the regulatory framework; and the Conditions listed in Appendix 3 and the recommendations in Chapter 2.

The Board interprets its responsibilities in a manner consistent with the *Constitution Act, 1982*, including subsection 35(1), which recognizes and affirms the existing Indigenous and Treaty Rights of Indigenous peoples. Further discussion of the Board's role in upholding section 35 of the *Constitution Act, 1982* is available in Section 5.2.6 of this chapter. The Board is of the view that there has been adequate consultation and accommodation for the purpose of the Board's reconsideration and recommendations in respect of Project-related marine shipping. The Board is of the view that any potential impacts from marine shipping on the interests, including rights, of affected Indigenous peoples are not likely to be significant and can be effectively addressed, with the exception of the impacts on the traditional use of Southern resident killer whales by Indigenous peoples.

In addition to the summaries of evidence in this section, Appendix 14 provides a summary of the general and specific concerns and issues about the potential impacts of Project-related marine shipping, raised by Indigenous communities through the MH-052-2018 hearing, as well as summaries of the responses to these concerns provided by Trans Mountain, the Federal Authorities, the Board (including conditions and recommendations), and applicable requirements provided through regulation and/or legislation. As noted in Section 5.1, this chapter of the Report should not be considered in isolation from the recommendation as a whole and anyone wishing to fully understand the context of the information and evidence provided by Indigenous communities should familiarize themselves with the entire record of the MH-052-2018 hearing.

The sections below are organized as follows. Section 5.2.2 summarizes the submissions regarding Trans Mountain's engagement program and the Government of Canada's consultation to date. Section 5.2.3 describes the participation of Indigenous communities in the Board's process for this Reconsideration, Section 5.2.4 summarizes the submissions on asserted rights, and Section 5.2.5 summarizes the submissions on potential impacts to the interests, including rights of Indigenous communities. The views of the Board are provided in Section 5.2.6, detailing the Board's findings on Trans Mountain's engagement, the Government's consultation, and the potential impacts, including the Crown's consultation obligations.

5.2.2 Consultation with Indigenous peoples

5.2.2.1 Trans Mountain's engagement with Indigenous peoples

The Board considered evidence related to Trans Mountain's Indigenous Engagement Program in its OH-001-2014 hearing, as described in Section 5.1.2.

In its updated evidence filing for the Reconsideration, Trans Mountain confirmed that it continues to engage Indigenous communities affected by the Project and will continue to update the Board through compliance with Condition 96.

With regards to marine shipping specifically, Trans Mountain stated that since 2012, Trans Mountain has engaged with 27 marine and inlet Indigenous communities, 21 of which have indicated an interest in the Project or interests potentially affected by Project-related marine vessel traffic.

Throughout 2015 to the present, Trans Mountain said that it had facilitated introductions and meetings of marine Indigenous communities with the Western Canada Marine Response Corporation (WCMRC). The purpose of these meetings was to inform Indigenous communities of WCMRC's state of preparedness and current plans in place should a marine spill occur and to mitigate the impacts thereof. This includes protection of wildlife, economic and environmental sensitivities.

Trans Mountain also said that, in accordance with its Consultation Plan for its Emergency Management Plan (Condition 90 of the original Certificate), it has engaged with Indigenous communities regarding the development of several aspects of its Emergency Management Program. Trans Mountain said that the consultation is an extensive, multi-step, ongoing process in which local and traditional knowledge from affected Indigenous communities is sought out through various engagement opportunities, including face to face meetings, workshops and field visits.

Trans Mountain also said that it is advancing the concept of a Salish Sea Initiative as part of an existing commitment with marine Indigenous communities to enhance their stewardship over the Salish Sea. While conceptual at this time, the Salish Sea Initiative has been introduced to marine Indigenous communities with a focus on where there is an already existing commitment, and the intention is for the Initiative to be Indigenous-led and developed in partnership with Trans Mountain. Due to Project-uncertainty the long-term initiative was suspended, but pending the resumption of the Project, Trans Mountain said that it would re-engage with interested Indigenous marine communities in the design and scope of the initiative, together with, as appropriate, other marine organizations and authorities.

Trans Mountain said that it continues to foster and develop working relationships with Indigenous communities to receive Indigenous knowledge. Trans Mountain said that where appropriate, it has established formal relationships with Indigenous communities that includes opportunities to incorporate Indigenous knowledge into Project plans. Trans Mountain said that it continues to review and identify opportunities to facilitate and support Indigenous participation in activities related to Trans Mountain's areas of responsibility.

Finally, Trans Mountain said that it is committed to ongoing and meaningful consultation with Indigenous communities throughout the lifecycle of the Project. Trans Mountain said that it intends to engage directly with Indigenous communities to understand issues, and where appropriate implement avoidance, mitigation and accommodation measures, and agreements.

5.2.2.2 Concerns raised by Indigenous peoples about Trans Mountain's consultation

Some Indigenous communities raised concerns in their evidence about Trans Mountain's consultation related to marine shipping impacts. The concerns raised in relation to Trans Mountain's ongoing consultation regarding marine shipping included the lack of capacity funding and limited opportunity to provide input into condition filings and other management plans.

Lyackson First Nation (Lyackson) stated that none of the concerns it has brought to the attention of Trans Mountain during ongoing engagement have been addressed. Lyackson further noted that Trans Mountain has provided insufficient funding for review of compliance filings or to ensure that it can be meaningfully engaged in the development of programs or mitigation measures to address Lyackson's concerns.

Musqueam Indian Band (Musqueam) characterized Trans Mountain's ongoing engagement activities with Indigenous communities, in particular as they related to condition compliance, as an empty record keeping process with no substance. Neskonalith Indian Band (Neskonalith) stated that Trans Mountain's consultation regarding the Project continues to be poor and does not meet the standard of meaningful consultation. Neskonalith also raised concerns about how Trans Mountain's future engagement would take place given the change in ownership.

During its oral traditional evidence, Stó:lō Tribal Council noted that Trans Mountain had limited its engagement regarding marine issues, and that it would only discuss the pipeline corridor and the Westridge Terminal.

The Indigenous Caucus for the IAMC (IAMC Caucus) raised concerns with the limited detail of engagement information provided by Trans Mountain in its condition compliance filings with the Board. It noted that Trans Mountain did not provide sufficient details regarding the recommendations or results of consultation with various Indigenous communities, including any outcomes or follow up activities to address Indigenous concerns.

BC Métis Federation submitted that meaningful, timely, transparent, and cultural sensitive consultation was not carried out for the Project, and that Trans Mountain has not engaged in discussion with members about how they may be impacted by the Project, nor about the role that they and their community might play in addressing those impacts.

Blood Tribe, Driftpile Cree Nation, Louis Bull Tribe, Papaschase First Nation #136, Tsuut'ina Nation and Whitefish Lake First Nation #459 all indicated that they had not been engaged by Trans Mountain as part of the Project and said that Trans Mountain should be engaging with each of them to discuss accommodation and mitigation measures to be implemented for the lifecycle of the Project.

5.2.2.3 Trans Mountain's reply to consultation concerns

Trans Mountain noted that it continues to dialogue with Lyackson regarding marine transportation activities and Lyackson's concerns over potential Project and regional marine transportation effects on the Southern resident killer whale (SRKW) population. It noted that it is working with provincial and federal maritime agencies with the goal of identifying effective, actionable mitigation measures that balance environmental and marine shipping industry needs. Trans Mountain committed to continue to provide Lyackson with updates and further details on research results and recommendations for possible mitigation measures to reduce potential effects of marine transportation effects on SRKW. More information regarding these measures are found in Chapter 14.

In reply to concerns raised by the BC Métis Federation, Trans Mountain said that it has been engaging with the BC Métis Federation on all facets of the Project since 2012 and that it has entered into a contractual arrangement in relation to the Project with BC Métis Federation and, based on that agreement, Trans Mountain is committed to continued engagement with BC Métis Federation in a meaningful way to address the questions and concerns of its members, including the recommendations brought forth in their direct evidence.

In response to Stó:lō Tribal Council's statement that Trans Mountain had placed restrictions on topics for engagement, Trans Mountain noted that it has engaged Stó:lō governance organizations on all aspects of the Project. While Trans Mountain has clearly stated that its operational control ends at the Westridge Marine Terminal (WMT), this was never intended to and has not precluded engagement on marine issues that extended beyond the WMT, including marine shipping. For example, it noted that Stó:lō Tribal Council was invited to the last two full-scale emergency response exercises at WMT in 2015 and 2018.

In response to questions about how Trans Mountain's engagement activities may change as a result of the change in ownership, Trans Mountain stated that it continues to be the proponent of the Project and as such, it will continue to engage with Indigenous communities and comply with any and all NEB conditions in respect of the Project. Trans Mountain noted that from a constitutional perspective, the ultimate responsibility for ensuring that the duty is adequately fulfilled remains with the Crown under the leadership of the Minister of Natural Resources. Trans Mountain said that it has started collaboration activities with the Federal Government in relation to the resumption of Phase III consultation, and will

participate as appropriate in subsequent consultations with Indigenous groups, to provide proponent and project specific information. Trans Mountain said that it is committed to participating in meaningful dialogue and consultation with Indigenous communities across the Project.

Finally, in response to overarching concerns raised about its engagement program, including the consultation it is doing with communities as part of condition compliance, Trans Mountain said that consultation and engagement with all Indigenous communities is ongoing, and there are no Project-related topics that are considered closed for discussion. Trans Mountain confirmed that it is open to hearing and discussing all issues with Indigenous communities and incorporating feedback into Project plans and development at every opportunity. Further, Trans Mountain said that it welcomes the involvement of Indigenous communities in the development and implementation of key marine conditions. Trans Mountain said that engagement on these conditions will occur through workshops, ongoing one-on-one meetings and Indigenous Engagement Roundtables planned for 2019.

5.2.2.4 The Government of Canada's consultation process with Indigenous peoples

The Board considered evidence related to the Government of Canada's consultation process with Indigenous communities in its OH-001-2014 hearing, as described in Section 5.1.3.

As part of the MH-052-2018 hearing, Natural Resources Canada (NRCan) filed information related to Crown consultation and engagement with Indigenous communities potentially impacted by the Project, outlining the initiatives that Canada has undertaken to identify Indigenous communities' substantive issues and to develop and implement mitigation or accommodation measures where appropriate.

NRCan filed the Joint Federal/Provincial Consultation and Accommodation Report (2016 CAR) for the Trans Mountain Expansion Project which summarizes the procedural and substantive aspect of consultation with Indigenous communities of the Project as part of the Original Phase III consultations on the OH-001-2014 Report. The 2016 CAR describes:

- Indigenous consultation undertaken in respect of the Project;
- View of Indigenous communities on how the Project may impact Indigenous interests;
- Measures proposed to address potential impacts of the Project on Indigenous interests raised by Indigenous communities;
- The Crown's conclusions regarding the potential impacts of the Project on Indigenous interests; and
- Conclusions regarding the adequacy of consultation.

The 2016 CAR also included appendices specific to consultation with the 40 Indigenous communities on the Crown list who had raised issues related to marine transportation during the Original Phase III consultations. NRCan said that the 2016 CAR's appendices summarize the Crown's understanding of concerns raised by Indigenous communities, governments, or nations, including the Crown's conclusion of the impacts of the Project to rights and title, and the depth of consultation owed to each Indigenous community, government or nation. NRCan noted that the key concerns raised by Indigenous communities related to marine shipping activities outlined in the 2016 CAR included impacts on marine fishing and harvesting, impacts on other traditional and cultural practices, and impacts of a spill.

NRCan noted that much of the collaboration and conversation with Indigenous groups on the Project after the Original Phase III consultation process occurred through the co-development and implementation of the Indigenous Advisory and Monitoring Committee (IAMC or Committee) on the Trans Mountain Expansion Project and existing pipeline. This measure was to supplement the proponent's commitments to Indigenous communities, the NEB conditions on the project, and the commitments made by the Government of Canada in the Oceans Protection Plan (OPP). NRCan highlighted Section 23 of the Terms of Reference for the IAMC, which refers to marine issues, noting that Indigenous communities indicated that they had not been meaningfully involved in the oversight of these activities in the past and that there was no clear alternative process for them to participate in the monitoring of those activities.

NRCan also described its West Coast Energy Infrastructure Initiative (WCEI), which was launched in 2014 to facilitate a coordinated federal presence in B.C. and ensure that federal engagement with Indigenous communities was translated into concrete actions and investments. With respect to Indigenous communities potentially impacted by the Project, it said that the WCEI work was undertaken outside of the formal Crown consultation and accommodation process, both prior to the release of the NEB report, as well as after, spanning a period from June 2014 to present. NRCan noted that WCEI work informed the federal response to Indigenous concerns through project funding, or other initiatives with respect to marine shipping, marine safety, marine pollution response, and marine stewardship.

The Federal Authorities said that the engagement outcomes outlined in the 2016 CAR, IAMC, and WCEI were carefully considered in developing the OPP. It said that the OPP aims to build strong relationships and partnerships with Indigenous

coastal communities and organizations. The third pillar of the OPP prioritizes launching co-management practices with Indigenous coastal communities, by building local emergency response capacity, marine training, and governance strategies for northern shipping. The Federal Authorities noted that formal regional partnerships with Indigenous communities will establish long-term relationships and partnerships that will provide opportunities for Indigenous communities to play a meaningful role in marine safety, including decision-making, and environmental protection. It noted that partnerships and agreements will be jointly developed, reflect the priorities and interests of Indigenous communities and Canada, advance common issues and achieve tangible outcomes that meaningfully contribute to reconciliation. More information regarding the Federal Authorities' consultation with Indigenous communities, including Indigenous participation in OPP initiatives is found in Section 5.2.5 of this chapter.

Finally, NRCan said that the Crown has decided to follow the guidance from the Federal Court of Appeal to engage in a specific and focused dialogue with Indigenous communities on the Project. As a result, NRCan stated that the government will re-engage consultations with all 117 Indigenous communities potentially impacted by the Project. On 5 October 2018, the Minister of Natural Resources sent a letter to Indigenous communities outlining the Government's intentions to engage in a specific and focused dialogue with Indigenous groups on the Trans Mountain Expansion Project. It stated that the next round of consultations will lead to an updated CAR that will outline the potential impacts to rights and interests of Indigenous communities in relation to the Project, and how these impacts have been mitigated and, where appropriate, accommodated. NRCan stated that consultation will be guided by four core objectives:

1. Consult with all Indigenous communities that are potentially impacted by the Project;
2. Tailor consultations to reflect the potential impacts, preferences and capacities of each group and outstanding concerns with the Project from the existing Phase III consultations;
3. Consult meaningfully through a substantive two-way dialogue and reasonable accommodations; and
4. Consult in a way that is fully consistent with meeting Canada's obligations under the s. 35 of the *Constitution Act, 1982*, and the Government's commitments to advance reconciliation with Indigenous peoples, including its pledge to implement the United Nations Declaration on the Rights of Indigenous peoples.

NRCan stated that it is committed to respecting the duty to consult and recognizes that consultation is an ongoing process. NRCan also indicated that the Government will rely on the NEB public hearing process to the extent possible to fulfill the legal duty to consult related to the Reconsideration of Project-related marine shipping. It noted that the re-engagement of Phase III consultation on the Project will see Canada engage in meaningful, two-way dialogue with First Nations and Métis communities impacted by the Project to validate and discuss marine shipping (and other) concerns and accommodation measures to address those concerns. As such, it noted that existing measures to address marine shipping concerns may continue to develop and new initiatives will be introduced in response to issues raised.

5.2.2.5 Concerns raised by Indigenous peoples about the Government of Canada's consultation

Indigenous intervenors raised concerns with Canada's consultation efforts at various stages of the Project, including consultation regarding the MH-052-2018 hearing, the ability of the Crown to rely on the NEB's Reconsideration process as part of its consultation obligations, the information filed by Canada as a result of the Original Phase III consultation process, and plans going forward for the re-engagement on Phase III Consultation. Indigenous communities also raised concerns with Canada's consultation around the OPP and its various initiatives, which is discussed further in Section 5.2.5.2 of this chapter.

2016 CAR

Multiple Indigenous intervenors raised concerns regarding the accuracy of the information in the 2016 CAR filed by NRCan, noting where errors and generalities were made, as well as questioning how the Crown came to its determination of impacts on individual First Nation's rights and interests and the depth of consultation owed to their respective communities.

Squamish Nation (Squamish) stated that the 2016 CAR does not accurately represent Squamish's rights, impacts to those rights from the Project and Squamish's outstanding concerns with the Project. Tsawout First Nation (Tsawout) noted that there was incorrect information in the CAR that the Crown relied on in their assessment of Tsawout's rights and interests, leading to an incomplete determination of impacts of the marine shipping component of the Project on Tsawout's rights and interests, as well as the depth of consultation owed.

Musqueam noted that the CAR has numerous errors and omissions regarding the information it provided both to the NEB in the OH-001-2014 hearing and the Crown during its Original Phase III consultations. Musqueam said that the Board should not rely upon it as information regarding Musqueam's concerns with the Project and the potential impacts of the Project on Musqueam's rights. Tsleil-Waututh Nation (TWN) also raised concerns with the CAR, stating that it was unilaterally developed without TWN's involvement, does not capture issues of concern that have been raised in the MH-052-2018

hearing, and that there are many outstanding issues of concern that were not resolved in the previous Phase III consultation process.

Consultation on the scope and process for the MH-052-2018 hearing

Numerous Indigenous intervenors raised concerns with the MH-052-2018 hearing process, including the scope of the Order in Council (OIC) referring aspects of the OH-001-2014 Report back to the NEB for reconsideration, the length of time given for the hearing, as well the scope of the hearing itself.

Squamish, Stz'uminus First Nation (Stz'uminus), Snuneymuxw First Nation (Snuneymuxw) and TWN all submitted that Canada should have consulted with them on the scope of the OIC, as well as procedural aspects related to the MH-052-2018 hearing.

Multiple Indigenous intervenors also noted that the Governor in Council (GIC) time line of 155 days for the Reconsideration was set without consulting impacted First Nations. Indigenous communities noted that the overall timeline was too short and that deadlines for hearing steps were too short to participate meaningfully or provide in-depth studies, or allow for an appropriate level of meaningful consultation. Indigenous intervenors noted that the short timeline for the Board to complete its assessment is especially problematic given the Government of Canada's position that it will be relying on the MH-052-2018 hearing to the extent possible to fulfill its constitutional duty to consult with Indigenous peoples. Indigenous intervenors noted that, since the Reconsideration is considered to be part of the consultation process, it must be conducted in a manner that upholds the honour of the Crown and the process must provide Indigenous communities with a meaningful opportunity to put forward their concerns and have them addressed.

For example, Squamish maintained that the overall time period for the Reconsideration was inadequate and unfair. It noted that since the Reconsideration is considered to be part of the consultation process, it must be conducted in a manner that upholds the honour of the Crown and should not be unduly rushed at the expense of First Nations' ability to lead the evidence they consider necessary for the process.

TWN said that for Canada to be able to rely on the MH-052-2018 hearing to discharge its duty to consult, the process must provide TWN, and other Indigenous intervenors, with a meaningful opportunity, and sufficient time, to put forward its concerns and have them addressed by the Board, so that in turn, the GIC can properly assess the environmental effects and the impacts to, and infringements of, TWN's Indigenous title and rights as a result of the Project.

Stó:lō Collective raised concerns with the length of the MH-052-2018 hearing, noting that the time limits did not allow for procedural fairness or the ability to fully canvas and consider the potentially significant adverse impacts of Project-related marine shipping on, inter alia, Indigenous rights and title, the environment, and species at risk. It also noted that the 155 day timeline imposed by GIC limited its ability to participate substantively in the MH-052-2018 hearing, including the inability to engage with specialists, adequately review and respond to additional evidence filed by Canada and Trans Mountain, or prepare additional assessments on the potential impacts of Project-related marine shipping.

Nooaitch Indian Band stated that it considered the Reconsideration process to be inadequate, stating that there has not been sufficient time for it to review the significant volume of new evidence filed by the Federal Authorities and Trans Mountain, nor to gather its own evidence. Tsartlip First Nation stated that the time limit is woefully inadequate to consider and respond to the serious issues in question, many of which are of a scientific or technical nature. Tsawout stated that the evidence it was able to submit was limited in scope and content due to the timelines imposed upon the hearing.

Stz'uminus said that it did not feel that a meaningful two-way dialogue can be achieved within the compressed timeline of the reconsideration process, and further was of the view that findings of fact generated through the process will be very unlikely to form a sufficient foundation for meaningful consultation between First Nations and the Crown.

Stk'emlúpsemc te Secwépemc of the Secwépemc Nation (SSN) noted that consultation must take place early in the decision-making process for it to be meaningful. SSN said that it was concerned with the late start to the Phase III consultation process and the inadequacy of consultation in the Reconsideration process. It noted that the timelines for the Reconsideration process have not been sufficient to allow for fulsome participation by SSN and other intervenors and so SSN does not accept this process as an appropriate method for Canada to use to discharge its duty to consult and accommodate SSN's Indigenous rights and interests.

Driftpile Cree Nation said that the format, process and timelines for the Reconsideration will prevent the Crown from relying upon the Reconsideration process to fulfill the duty to consult, whether it be in whole or in part. Adam Olsen said that it was disrespectful to Indigenous cultures and societies to put a limit of 22 weeks on consultation with Indigenous peoples.

Shxw'ówhámél First Nation said that the MH-052-2018 hearing process as structured could not consider the potentially significant adverse impacts of Project-related marine shipping on, inter alia, Indigenous rights and title, the environment and species at risk, as it does not, in substance, provide for an appropriate level of meaningful consultation, and particularly

given that Project-related marine shipping could have significant adverse impacts on Shxw'ōwhámel First Nation's Indigenous rights.

Malahat First Nation raised concerns about fairness and adequacy of the Reconsideration process itself, taking issue both with the scope of the Reconsideration and with the abbreviated timeline imposed on the Board by the GIC. Other Indigenous intervenors also noted that scope of the MH-052-2018 hearing should be broader than just Project-related marine shipping. Stz'uminus for example, submitted that it is not reasonable to consider the environmental impacts of marine shipping without also reconsidering whether the Project is necessary. Squamish noted that it is deeply connected to and dependent on its lands, waters and resources that stand to be impacted by the Project, and it is artificial and not in keeping with how Squamish uses its Territory to consider certain Project effects on Squamish's Indigenous rights and title in isolation from the broader Project impacts.

Indigenous intervenors who are located along the pipeline route also raised concerns with the scope of the Reconsideration, suggesting that Project-related marine shipping should not be considered in isolation. Louis Bull Tribe, for example, said that the Board should give serious consideration to evidence of environmental, socio-economic and socio-cultural impacts of this Project both upstream and downstream before making its recommendation. Little Shuswap Lake Indian Band (LSLIB) submitted that it is an error to consider only the interests of the immediate and adjacent nations and not to consider the interests of those whose lands may not be bisected by the Project or whose lands or waters do not directly flank the Project. LSLIB said that as part of the MH-052-2018 hearing, the Board should consider the Indigenous interests of every Indigenous nation that may be affected by the Project and specifically by the increased marine shipping that will result of the Project, as pollution, spills and marine life are not fixed to the land, but are mobile.

Phase III consultation

Multiple Indigenous intervenors raised concerns with the Government of Canada's Phase III consultation activities, both what has occurred to date, as well as plans going forward. Neskonalith stated that Canada's consultation with Neskonalith regarding the Project continues to be poor and does not meet the standard of meaningful consultation.

Squamish stated that Canada has yet to engage substantively in a reinitiated Phase III consultation process and that Squamish is still waiting to hear about how Canada proposes to discharge its constitutional obligations. Squamish further stated that Canada's duty to consult and accommodate Squamish must be discharged prior to Project approval.

Lyackson stated that, to date, the Crown has not engaged meaningfully to ensure that the issues and concerns raised by the First Nation will be adequately addressed. It said that the Crown has not committed to providing sufficient funding to Lyackson to ensure that it can be meaningfully engaged in the development of initiatives and measures to mitigate Lyackson's vast outstanding concerns.

Blood Tribe, Driftpile Cree Nation, Louis Bull Tribe, Papaschase First Nation #136, and Tsuut'ina Nation, Whitefish Lake First Nation #459, and Stoney Nakoda Nations all indicated that they had not been meaningfully engaged by Canada as part of the original Project or the Reconsideration. The Alberta-based communities said that Canada should be consulting with each of them, including providing capacity funding for this consultation to take place, so that their views regarding mitigation and accommodation measures can be considered.

5.2.2.6 NRCan reply to concerns regarding Government of Canada consultation

2016 CAR

In response to concerns raised about the accuracy of the information in the appendices for individual First Nations that are part of the 2016 CAR that was filed on the NEB's record, NRCan said that the Crown's depth of consultation assessment is iterative and is expected to evolve as the NEB MH-052-2018 hearing unfolds and as Indigenous communities, governments and nations engage in re-initiated consultations with the Crown.

NRCan noted that when it sent letters to Indigenous communities in November 2018 as part of its re-engagement in Phase III consultations, it attached that community's Appendix from the 2016 CAR, as a starting point, and invited communities to identify where information needs to be changed or updated. NRCan said that the Crown will re-engage in Phase III consultations, outside of the MH-052-2018 hearing, with all impacted Indigenous communities, governments and nations, to meaningfully fulfill its duty to consult through understanding, and identifying measures to avoid, mitigate or accommodate, where appropriate, impacts of the Project to Indigenous and Treaty rights. Through this process, the Crown's interpretation of the depth of consultation owed and potential impacts on rights of the Project will continue to be updated in collaboration with each Indigenous community, government or nation, to ensure a thorough understanding of potential or established rights, and any potential impacts of the Project on those rights.

NRCan further stated that the next round of consultations will lead to an updated CAR that outlines the potential impacts to rights and interests of Indigenous communities in relation to the Project, and how these impacts have been mitigated, and

where appropriate, accommodated. The updated CAR resulting from the new process will inform the final decision with respect to the Project.

Consultation on the scope and process for the MH-052-2018 hearing

In response to concerns regarding Canada's consultation with Indigenous communities on the scope of the OIC to the Board for the MH-052-2018 hearing, NRCan noted that the Crown was following the guidance from the Federal Court of Appeal and that the Crown recognizes that the MH-052-2018 hearing is operating within the broader context of the re-initiated Phase III consultation process.

NRCan said that the NEB MH-052-2018 hearing provides a mechanism for Indigenous communities, government and nations to express their concerns regarding how Project-related marine shipping might adversely impacts potential or established Indigenous and Treaty rights, and related avoidance, mitigation and other accommodation measures.

NRCan said that the Crown will rely on the NEB Reconsideration Process, to the extent possible, to consider all forms of mitigation to Project-related marine shipping and assess the residual effects. The Crown will then assess the potential seriousness of any residual effects of the Project on Indigenous and Treaty rights, taking into account proposed mitigation and/or accommodation measures.

Phase III consultation

NRCan said that the Crown will re-engage in Phase III consultations, outside of the MH-052-2018 hearing, with all impacted Indigenous communities, governments and nations to meaningfully fulfill its duty to consult through understanding, and identifying measures to avoid, mitigate or accommodate, where appropriate, impacts of the project to Indigenous and Treaty rights. NRCan said that the NEB recommendations will inform the Crown's Phase III consultation. NRCan also stated that a recommendation on whether to approve the Project will only be considered by the GIC once it is satisfied that the Crown's obligation to consult and accommodate has been fulfilled.

NRCan also said that timely and accessible support for participant funding is part of the approach to Crown consultation activities. NRCan said that it offered participant funding to impacted Indigenous communities, governments and nations in November 2018, to support participation in consultation activities with the Crown. It said that this funding is available to cover: preparing input and reports to inform the Crown's record on the Project; building community capacity to engage in and benefit from major project reviews; and other activities, upon approval, considered necessary to ensure meaningful participation in Crown consultations. NRCan further stated that the Consultation Team has been mandated to engage in meaningful two-way dialogue and discuss the concerns of Indigenous communities, government and nations, including agreeing to accommodation measures, where appropriate (following Cabinet approval where required) to address those concerns. This will be an ongoing back and forth conversation between representatives of the Indigenous community, government or nation, and the Crown.

NRCan said that the re-initiated Phase III consultation process will build on existing relationships, the information submitted by Indigenous communities, governments, and nations to date, and the existing consultation record, while making improvements to ensure the duty to consult is appropriately fulfilled. This new process will result in an updated CAR that will be presented to the GIC prior to a decision being made in accordance with section 54 of the *National Energy Board Act*, which includes provisions allowing the Crown to seek an extension beyond the mandated three month review period. Prior to completion, Indigenous communities, governments and nations' views and comments on this document will further inform the Crown's assessment, which will then be reflected in the report.

NRCan also confirmed that Canada has not delegated the procedural aspects of its duty to consult to Trans Mountain. However, it noted that representatives of Trans Mountain will be part of the consultation and accommodation process and participate in meetings with representatives of Indigenous communities, government and nations, where appropriate, although the ultimate responsibility for ensuring that the duty is adequately fulfilled remains with the Crown under the leadership of the Minister of Natural Resources.

In addition, NRCan noted that the NEB process requires the proponent to work with, and potentially accommodate, Indigenous communities, governments and nations impacted by the Project. NRCan noted that while the NEB Filing Manual provides information to the proponent on the requirement to engage with potentially affected Indigenous communities, governments and nations, this does not constitute delegation of the duty to consult.

5.2.3 Participation of Indigenous communities in the Board's MH-052-2018 hearing

A description of the participation of Indigenous communities in the OH-001-2014 hearing process can be found in Section 5.1.4.

The Board's MH-052-2018 hearing process was designed to obtain as much relevant evidence as possible on concerns related to the issues to be considered as part of the Reconsideration, including the potential impacts of Project-related marine shipping on Indigenous interests (as noted in the Board's List of Issues), and possible mitigation measures to minimize those impacts, including on traditional Indigenous use associated with the Southern resident killer whale (SRKW).

The Board received and considered information about concerns related to Project-related marine shipping and the measures that would be required to address those concerns, as brought forward through engagement undertaken by Trans Mountain and the Government of Canada, and through the participation of potentially affected Indigenous communities and other participants in the hearing process.

As described in Section 1.3.4 of this Report, the Participant Funding Program offered a total of \$4,981,760 to 69 recipients, of which 82 per cent was offered to Indigenous intervenors.

The Order in Council P.C. 2018-1177, which referred aspects of the Board's recommendation for the Project back to the Board for Reconsideration, was issued on 20 September 2018. As described further in Section 1.3.2 of this Report, the Board sought comments on the scope and design of the Reconsideration process:

- On 26 September 2018, a letter providing an overview of the Reconsideration and seeking comments was sent to all Indigenous intervenors in the OH-001-2014 hearing for the Trans Mountain Expansion, as well as all Indigenous peoples and groups on the Crown Consultation List in the OH-001-2014 hearing.
- On 5 October 2018, additional, focused comments on the definition of the "designated project" were sought from the Parties.

On 12 October 2018, the Board issued Hearing Order MH-02-2018, which outlined the process to be followed in the Board's adjudication of the Reconsideration. 52 Indigenous intervenors participated as intervenors in the MH-052-2018 hearing and provided their comments, views and evidence through written submissions and oral evidence to the Panel.

During the proceeding, Indigenous intervenors had opportunities to obtain further information about issues and mitigation measures related to Project-related marine shipping and present their views to the Board through the following steps:

- Written evidence submissions
- Oral Traditional Evidence (OTE)
- Written questions (information requests) of Trans Mountain, the Federal Authorities and other intervenors
- Responses to any written questions
- Comments on draft conditions and recommendations
- Written final argument

The Board carefully considered comments from Indigenous intervenors on the Board's draft conditions and recommendations and included a requirement for consultation with Indigenous peoples in the recommendations to the GIC.

The Board understands that Indigenous peoples have an oral tradition for sharing information and knowledge from generation to generation and that this information cannot always be shared adequately in writing. The Board considers it valuable to hear OTE which assists the Board in understanding how the Project may impact Indigenous interests, including rights. A total of 28 Indigenous intervenors provided OTE during the MH-052-2018 hearing. The Board received OTE at three locations (Calgary, Victoria and Nanaimo) and also received traditional evidence by two Indigenous communities via teleconference/video.

Appendix 8 lists and provides references to submissions made by Indigenous communities that participated in the review process. Appendix 14 provides a summary of the general and specific concerns, relevant to the List of Issues, raised by Indigenous communities through the proceeding, as well as summaries of the responses to these concerns provided by Trans Mountain, Canada, the Board (including conditions) and applicable requirements provided through regulation and/or legislation.

5.2.4 Submissions on asserted or established rights

In the MH-052-2018 hearing, Indigenous communities asserted a number of rights potentially impacted by Project-related marine shipping. These rights are summarized below, and the potential impacts of Project-related marine shipping to the interests, including rights, of Indigenous communities are considered in Section 5.2.5. The Board has, for the purposes of this Reconsideration, accepted asserted rights without assessing whether each of these rights has been proven. The descriptions below are summaries and anyone wishing to fully understand the information and evidence provided by Indigenous communities should review the entire record of the hearing.

- Tsleil-Waututh Nation (TWN) provided a table entitled “Summary of Tsleil-Waututh Title, Rights and Interests and of Proposal Effects and Consequences,” which included rights such as harvesting and stewardship rights, which includes the right to determine how its lands, waters, and resources are used, and to manage them, based on its values and aspirations. TWN also shared its defining cultural relationship with the SRKW and the importance of maintaining, and enhancing that relationship as part of TWN’s cultural obligations and revitalization.
- Lyackson First Nation (Lyackson) described how its members rely on the waters and resources within the marine area to continue their traditional way of life and noted their strong cultural connection with the SRKW. It also asserted a strong *prima facie* claim to Indigenous rights and title to *Le’eyqsun* Island, along with other traditional sites at Tl’qutinus on the south bank of the Fraser River south of Vancouver and in and around the waters of the Salish Sea.
- Squamish Nation (Squamish) described how its members rely heavily on the marine and freshwater resources throughout its territory, including within Burrard Inlet, the Fraser River, Howe Sound and the Salish Sea, to practice their rights to harvest resources for food, social and ceremonial purposes. Squamish also asserted title and self-governance within its traditional territory and noted its cultural connection with the SRKW.
- Stz’uminus First Nation (Stz’uminus) noted that the tanker route passes through its marine territory where its members exercise their fishing and harvesting rights. Stz’uminus also described the importance the SRKW play in its cultural and spiritual identity.
- Cowichan Tribes noted that it holds licenses for both commercial and food, social and ceremonial fishing, and explained that its members also practice other forms of marine harvest in accordance with their rights throughout their traditional territories.
- Ditidaht and Pacheedaht described their right to harvest a diverse array of marine resources in their traditional marine areas, in particular within Swiftsure Bank, which is both an area of transit for Project-related vessels and has also been designated as critical habitat for the SRKW.
- Esquimalt Nation, Pauquachin First Nation, and Scia’new First Nation noted that they have constitutionally protected Douglas treaty rights and Indigenous rights, including title, within the marine area.
- Malahat First Nation described its Indigenous and Douglas Treaty rights to fish within the Salish Sea and the lower Fraser River.
- Snuneymuxw First Nation described its Indigenous and Douglas Treaty rights to fish, which it said also includes the right to travel to and from its fishing grounds and the continued existence of an ecological system suitable to sustain those fish. Snuneymuxw also noted that it conducts fisheries for sockeye and halibut under food, social, and ceremonial licences. Snuneymuxw also described how the SRKW that inhabit the Salish Sea have a special place in Snuneymuxw culture.
- Tsartlip First Nation described how its members continue to access cultural and spiritual sites of significance within their traditional territory, and how they actively practice their Indigenous and Douglas Treaty rights to hunt and fish adjacent to or near the Project shipping lanes. Tsartlip also described their cultural use of the SRKW.
- Tsawout First Nation described its established Douglas Treaty right to fish, which includes incidental rights such as being able to travel to and from the preferred fishing areas, as well as an established Treaty right to hunt. Tsawout also claimed Indigenous rights, including title, in the areas of their territory impacted by Project-related marine shipping, and noted that the Tsawout and W̱S̱ANEC̱ Indigenous title includes the ability to decide how the land will be used and the right to proactively manage the land.
- T’Sou-ke First Nation provided information about its Indigenous and Douglas Treaty rights to fish, its coastal reserve lands, its traditional marine-based activities as well as its role as stewards for its territory. T’Sou-ke also described how the SRKW is integral to T’Sou-ke’s spirituality and connection with its marine waters.
- Adams Lake Indian Band noted that the salmon is a keystone species and described their cultural use of the salmon and their right to fish within their traditional territory in the vicinity of the Adams and Fraser Rivers.
- Coldwater Indian Band described their right to fish, particularly the salmon and the Steelhead that migrate from the Salish Sea to the Coldwater River and are integral to their way of life.
- Little Shuswap Lake Indian Band (LSLIB) described its right to fish and harvest within its ancestral lands and waters, noting that the Secwepemc – which includes the LSLIB – are known as the “salmon people” because of their close cultural ties with the salmon. LSLIB also said that its people have a claim of Indigenous title to lands beyond its reserves.

- Neskonlith Indian Band (Neskonlith) described how salmon are a keystone species in its culture and traditional way of life and that, as a core food source, Neskonlith fishing rights are maintained under Secwepemc law, which guarantees the right to resources on Secwepemc territory.
- Simpcw First Nation also described its rights and practices related to salmon.
- Nooaitch Indian Band (Nooaitch) described its right to fish, especially the Chinook and Thompson River Steelhead, which it said that it relies on for sustenance, as well as for ceremonial and socio-economic reasons.
- Stk'emlupsemc te Secwepemc (SSN) also described these fish as keystone species, noting that its members exercise their rights to fish, hunt, gather, and trap and exercise cultural and spiritual practices on the lands and waters within SSN territory.
- Chawathil First Nation, Cheam First Nation, Kwantlen First Nation, Seabird Island Band, and Stó:lō Tribal Council described their fishing and harvesting rights within the Fraser River and explained how the salmon fishery is vital to the cultural identity of the Stó:lō people, who are also known as "People of the River."
- The Stó:lō Collective described how its members have inhabited, controlled and relied on S'ólh Téméxw, their traditional territory in the lower Fraser River watershed and that they exercise rights throughout the territory, including hunting, gathering, trapping and their established (non-treaty) right to fish.
- Shxw'ōwhámél First Nation asserted title to the land and waters of S'ólh Téméxw and also described its fishing, hunting and gathering rights within its traditional territory and waterways.
- Heiltsuk Nation (Heiltsuk) asserted Indigenous rights and title to their lands and waters, including the right to steward marine resources. Heiltsuk also noted that it has a proven Indigenous right to harvest herring spawn-on-kelp for commercial, as well as food, social and ceremonial purposes.
- Musqueam Indian Band (Musqueam) noted that it has an established right to fish for food, social and ceremonial purposes. Musqueam also described its reliance on other marine, aquatic, foreshore and estuarine resources and the integral role they play in Musqueam's culture.
- Shishalh Nation described their right to fish and harvest within their marine territories and noted that this requires access to a healthy marine environment and asserted their collective right to live as a distinct people. Shishalh also described their close cultural ties with the SRKW which it said is found in the legends, myths, teachings, dances, songs, carvings and regalia of the shisall.
- Driftpile Cree Nation, Louis Bull Tribe, Tsuut'ina Nation, and Whitefish Lake First Nation #459 described their Indigenous and Treaty rights to hunt, trap, harvest and fish throughout their traditional territories and these activities remain central to the distinctive cultures of each of the First Nations and their members' traditional way of life.
- Papaschase First Nation described how it was seeking recognition of its Indigenous rights as First Nation under Treaty 6 and the settlement of its claims and wrongful surrender of Indian Reserve #136, which is along the pipeline route.
- Blood Tribe explained that its members exercise their Indigenous and Treaty rights to hunt, fish, trap and gather across the Blackfoot Confederacy Traditional Territory (and beyond) and have a duty as stewards to protect the environment and cultural heritage of these lands.
- Ermineskin Cree Nation and Whitefish (Goodfish) Lake First Nation #128 explained that their members have historically used and occupied, and continue to use and occupy their traditional territory to exercise their Treaty rights, including trapping, hunting, fishing and gathering, as well as practices that are incidental to these rights.
- The three distinct Nations of Stoney Nakoda Nations, Chiniki, Wesley and Bearspaw First Nation, said they hold Indigenous rights and title recognized by Treaty No. 7.
- Métis Nation British Columbia (MNBC) noted that its citizens depend on the marine environment and its resources for food, social, and ceremonial purposes.
- The BC Métis Federation noted Métis people have been closely connected to the diverse social, cultural and economic fabric of the area known today as British Columbia since the early 19th century and have a diverse range of traditional and non-traditional lifeways within this territory.
- Both Indigenous intervenors from the United States noted that their use of the marine areas is not limited by the international boundary between Canada and the United States. The U.S. Tribes (Swinomish, Tulalip, Suquamish and Lummi Indian Nations) noted that they are sovereign nations recognized by the United States government. As

sovereign nations, and as Indigenous peoples who have lived on the Salish Sea since time immemorial, the U.S. Tribes said they have rights reserved by Treaties to fish in their “usual and accustomed grounds,” and have inherent rights to culture. The Makah Tribal Council also noted that it is a sovereign tribal government with Treaty rights assured in the 1855 Treaty of Neah Bay, which includes the role of resource trustee with legal ownership of natural resources within the Treaty area.

Two of the intervenors have modern treaties, which recognize their rights:

- The First Nations of the Maa-nulth Treaty Society described how Project-related tankers will pass through its Southern Domestic Fishing Area, an area in which it has constitutionally protected treaty harvesting rights, as part of the Maa-nulth First Nations Final Agreement.
- Tsawwassen First Nation (Tsawwassen) described its relationship with the Salish Sea and the manner in which its members practice their Indigenous and Treaty fishing rights, as set out in the Tsawwassen First Nation Final Agreement, including Tsawwassen’s ability to harvest traditional foods and carry out traditional cultural practices on the lands and waters within its traditional territory. Tsawwassen also noted its strong cultural ties to the SRKW.

In addition to the above, Alexander First Nation, Kwikwetlem First Nation, Saddle Lake Cree Nation, Samson Cree Nation, and Shackan Indian Band, indicated that there may be impacts on their rights, but these intervenors did not provide a description of asserted rights. The potential impacts raised are, however, included in the next section.

5.2.5 Potential impacts on Indigenous communities

The Order in Council P.C. 2018-1177 directed the Board to consider the environmental effects of Project-related marine shipping, noting the requirements of the CEAA 2012 and the SARA. As described in the List of Issues (issue no. 6), the Board also considered the potential impacts of Project-related marine shipping on Indigenous interests, including rights. The consideration of issue no.6 is not limited to the environmental effects of Project-related marine shipping, but also includes consideration of the potential impact on the interest or right itself. Potential impacts were raised by Trans Mountain, the Federal Authorities, and Indigenous intervenors, as described below.

5.2.5.1 Trans Mountain’s assessment of potential impacts on Indigenous communities

The Board considered evidence related to Trans Mountain’s assessment of impacts on Indigenous communities in its OH-001-2014 hearing, as described in Section 5.1.5.1.

In the MH-052-2018 hearing, Trans Mountain pointed to its previous environmental and socio-economic assessment and risk assessment of Project-related marine transportation in its original Project application and subsequent submissions during the OH-001-2014 hearing. It noted that the effects of Project-related shipping on the environment and Indigenous interests were fully considered by the Board in the OH-001-2014 hearing.

In its updated filing for the MH-052-2018 hearing, Trans Mountain indicated that it is aware that Indigenous communities continue to have concerns related to the impacts of Project-related marine shipping on their traditional Indigenous marine use, the traditional use associated with the Southern resident killer whale (SRKW), as well as concerns related to a marine spill and the involvement of Indigenous peoples in emergency planning and response. More information regarding Trans Mountain’s assessment of these impacts is found in Chapter 14.

Trans Mountain noted that it continues to engage potentially affected Indigenous communities and welcomes their input into project design and the development and implementation of key marine conditions. Trans Mountain said that ongoing engagement will take place through workshops, one-on-one meetings, and Indigenous Engagement Roundtables planned for 2019.

5.2.5.2 Government of Canada’s assessment of potential impacts on Indigenous communities and proposed mitigations

As previously noted, the 2016 CAR filed by the Federal Authorities included appendices specific to consultation with the 40 Indigenous communities on the Crown list who had raised issues with marine transportation during the Original Phase III consultations. NRCan noted that the key concerns raised by Indigenous communities related to marine shipping outlined in the 2016 CAR included:

- Impacts on marine fishing and harvesting
- Impacts on other traditional and cultural practices

- Impacts of a spill

NRCan also noted that, since the completion of the 2016 CAR and federal decision on the Project in November 2016, it received correspondence from Indigenous communities who raised the following concerns related to marine shipping:

- Concerns about increased acoustic disturbance arising from increased vessel traffic, and the need to fill a gap in knowledge;
- Questions about how the federal government will protect Indigenous fishing rights in relation to the impacts of marine shipping;
- The view that the IAMC does not accommodate concerns related to tanker vessel traffic;
- A desire to conduct community-based monitoring on the effects of vessel traffic in the Salish Sea, including on the impact of the vessel traffic on Indigenous communities' ability to hunt, gather, and "fish as formerly," safeguard the Salish Sea's sacred locations and burial places, and protect salmon and orca;
- A desire to move shipping lanes to avoid a key harvesting area at Swiftsure Bank;
- A desire to establish emergency response centres in or near Indigenous communities;
- A desire to discuss or participate in the Oceans Protection Plan; and
- A desire to have community members participate in pollution response, including through the Canadian Coast Guard, and Coast Guard Auxiliary.

The Federal Authorities outlined various programs and initiatives, such as the Oceans Protection Plan (OPP), the Whales Initiative, the IAMC, the West Coast Energy Infrastructure (WCEI) Initiative and others, all of which include federal responses to mitigate impacts to Indigenous interests and rights. The Federal Authorities noted that Pillar 3 of the OPP is to strengthen partnerships and launch co-management practices with Indigenous communities, by building local emergency response capacity, marine training and governance strategies for northern shipping.

The Federal Authorities said that they understood that Indigenous coastal communities are seeking to play an active and meaningful role in marine safety. Canada noted that the majority of the feedback from Indigenous coastal communities that it is working with to build partnerships have identified the lack of capacity – both funding and resources and time – to effectively participate in the Oceans Protection Plan initiatives. Transport Canada said that it is developing a long-term Grant and Contribution program designed to build Indigenous capacity and facilitate their participation in the marine safety system. The program is expected to be launched by December 2018, with funding to flow in April 2019.

The Federal Authorities also said that they understand that the Southern resident killer whale (SRKW) holds cultural significance for Indigenous peoples in B.C. They said that they are committed to protecting the SRKW and that the OPP includes funding for research and engagement to inform the development of a strategy on how to address underwater noise from vessels affecting SRKW.

In its evidence, the Federal Authorities described a variety of measures and initiatives that include consultation and partnerships with Indigenous communities, including the incorporation of Indigenous traditional knowledge where applicable. These measures and initiatives are aimed at providing opportunities for Indigenous communities to play a meaningful role in marine safety, including decision-making, environmental protection, and strategies to address the recovery of the SRKW. The Federal Authorities said that partnerships and agreements will be jointly developed; reflect the priorities and interests of Indigenous communities and Canada; advance common issues; and achieve tangible outcomes that meaningfully contribute to reconciliation. Some of the initiatives that were highlighted by the Federal Authorities include the following:

- *Cumulative Effects of Marine Shipping*: Transport Canada explained that this initiative is aimed at understanding the cumulative effects from marine shipping at six pilot sites across Canada, including on the south coast of B.C.
- *Coastal Environmental Baseline Program*: Fisheries and Oceans Canada and Transport Canada are working with Indigenous partners, coastal communities and local stakeholders to determine key concerns and help collect coastal environmental baseline information that can be used to inform ecosystem assessments, including the cumulative effects of marine shipping.
- *Enhanced Maritime Awareness Information System*: Led by Transport Canada and the Canadian Coast Guard, this pilot initiative aims to inform better decision-making and increased awareness with regards to culturally important areas and resources.

- *Collaborative Situational Awareness Portal*: Developed by the Canadian Coast Guard (CCG), the Portal will provide web-based platform for Indigenous and Coastal communities to access information on local marine traffic.
- *Indigenous Community Response Training*: Led by CCG, this initiative is aimed at enhancing Canada's community-based marine emergency preparedness and response capacity by providing training to individuals who are frequently the first responders to a marine emergency in B.C., including formal training for search and rescue, environmental response, and incident management.
- *SRKW Symposium*: Led by Fisheries and Oceans Canada, Indigenous communities that participated provided a review of the linkages between threats, and expressed that the complexity and importance of killer whales and their relationship to First Nations is fundamental to cultural traditions and teachings.
- *SRKW Indigenous and Multi-Stakeholder Advisory Group*: This groups brings together Indigenous communities, non-Governmental organizations, the shipping and marine transportation, fishing, and whale watching sectors, the Government of British Columbia, and Metro Vancouver Regional District to facilitate communication and coordination of activities to recover SRKW.

5.2.5.3 Issues and concerns raised by Indigenous peoples

The Board considered evidence provided by Indigenous peoples related to potential impacts of the Project in its OH-001-2014 hearing, as described in Section 5.1.5.2.

Indigenous communities filed information in this MH-052-2018 hearing regarding their concerns and interests in ways specific to each of them and while information regarding key concerns and interests is summarized here, anyone wanting to understand the full context of the concerns and interests expressed by Indigenous peoples should familiarize themselves with all of the relevant evidence on the record. Appendix 14 provides an additional summary of concerns raised by Indigenous communities throughout the MH-052-2018 hearing regarding Project-related marine shipping. Indigenous communities also raised concerns regarding the Project beyond marine-shipping related impacts. As these were beyond the scope of the issues being considered in this MH-052-2018 hearing, they are not captured in this chapter or elsewhere in the Report. Instead they have been tracked in a separate document which will be shared publicly with the Government of Canada, on the Major Projects Management Office website, who will use the information to inform its Phase III Consultation process.

As in the OH-001-2014 Hearing, Indigenous intervenors continued to raise concerns regarding the impacts of Project-related marine shipping on their Indigenous and Treaty rights. Some Indigenous communities filed new information, while others indicated that they were relying on the information filed in as part of the OH-001-2014 hearing. As part of both their oral and written evidence, Indigenous communities provided information on how, where, and when they exercise their asserted and established Indigenous and Treaty rights, and they expressed their concerns as to how these rights may be impacted and how the potential impacts would be mitigated and accommodated by both Trans Mountain and Canada.

In addition to the overarching concerns related to their asserted and established Indigenous and Treaty rights, Indigenous communities raised the following concerns about Project-related marine shipping.

Environmental effects of Project-related marine shipping

A number of Indigenous communities raised concerns about the environmental effects of Project-related marine shipping, including concerns about air quality, marine mammals, marine birds, marine fish and fish habitat. A full discussion of these matters, including the views of the Board, is provided in Sections 14.7 and 14.9.

Socio-economic effects of Project-related marine shipping

A number of Indigenous communities raised concerns about the socio-economic effects of Project-related marine shipping, including concerns about heritage resources, human health, traditional marine resource uses, cultural practices and activities. A full discussion of these matters, including the views of the Board, is provided in Sections 14.8 and 14.10

Spill prevention, emergency preparedness, and response

A number of Indigenous communities raised concerns about spill prevention, emergency preparedness and response. A full discussion of these matters, including the views of the Board, is provided in Section 14.11.

Indigenous governance and stewardship

Indigenous intervenors described their established rights in marine areas along the shipping route, including those established through the Douglas Treaties, the Tsawwassen First Nation Final Agreement, the Maa-nulth Final Agreement, and court cases including *R. v. Sparrow* and *R. v. Van der Peet*.

Indigenous intervenors described their rights to harvest marine resources, including to fish for food, social and ceremonial and commercial purposes. Indigenous intervenors described how they rely on the marine resources of the Salish Sea to maintain their way of life, exercising their Indigenous rights throughout the marine shipping area. Indigenous communities noted the importance of the marine areas for exercising their rights, including Burrard Inlet, Howe Sound, Swiftsure Bank and the Strait of Georgia. Indigenous intervenors described their spiritual connection with SRKW, including concerns that increased Project-related marine traffic could adversely impact the SRKW population, as well as their traditional use associated with the SRKW.

Indigenous intervenors also noted that inherent in these rights is the legal responsibility to care for the marine environment and everything within it. Indigenous intervenors spoke about their roles as stewards and protectors for the marine resources and animals. Tsawout referred to the WSÁNEĆ laws and governance, which it said includes the legal responsibility to care for relatives such as the marine waters and lands. Tsawout spoke to the inter-connectedness between WSÁNEĆ identity, the lands and waters in its territory, its ancestors, all of which are part of WSÁNEĆ laws. Therefore, Tsawout said, impacts to its lands, waters and various plants, animals, birds and fish species are also impacts to the exercise of its laws and governance. TWN explained that it has laws, protocols and sacred responsibilities that require it to rehabilitate and restore the ecosystem of Burrard Inlet.

LSLIB spoke of its Indigenous laws respecting salmon, including that every member of LSLIB is responsible for the preservation and protection of their traditional territories, their waters and the creatures contained within. LSLIB also said that its Indigenous laws should be considered and applied when governmental actors are consulting LSLIB and seeking to accommodate LSLIB's Indigenous rights and interests. Neskonlith noted that the Secwepmc People of the Lakes are working together as stewards and caretakers. It said that any impact on the health of the resources in its territory will significantly impact Neskonlith's way of life, Secwepmc laws, customs and traditions.

SSN noted that one of the flaws of the Reconsideration process is that it does not respect SSN's own Project assessment based on its laws and customs. Shxw'ówhámél explained the importance of the law which dictated that Shxw'ówhámél members have to take care of things once they start using those places. It was explained by Mr. Albert McHalsie of Shxw'ówhámél that when chiefs would meet, they would start off with the statement:

"S'olh Temexw Ikw'elo. Xolhmet Te Mekw'stam It Kwelat," meaning, "This is our land, we have to take care of everything that belongs to us."

Anchorage

Indigenous communities as part of the MH-052-2018 hearing raised concerns related to the impacts of anchorages in the Southern Gulf Islands. Cowichan Tribes, Lyackson, Snuneymuxw and Stz'uminus brought forward concerns about whether Project-related tankers would result in an increased use of existing anchorages in marine areas of importance to them or if increased Project-related tankers would result in additional anchorage sites being established. Snuneymuxw and Stz'uminus noted that Trans Mountain had not provided any information about the use of anchorages for Project vessels outside of the First Narrows. Indigenous intervenors also raised concerns about a lack of consultation when it came to the establishment of the existing anchorages in their marine territories, as well as consultation for any new anchorages being established. They also said that the increased use of these anchorages will have a serious impact on their ability to exercise their Treaty and Indigenous fishing rights, on their ability to use the marine resources in their territory, and that the presence of these vessels is accompanied by environmental risks and inherent social-cultural impacts, including noise and light pollution.

Trans Mountain reply regarding: Anchorages

Trans Mountain said it expected that tankers will anchor at the three anchorages east of Second Narrows, and pressure on anchorages will be reduced by holding tankers at the dock whenever a berth is available. Trans Mountain said that vessels destined to the Westridge Marine Terminal (WMT) do not currently anchor and will not anchor in the future, in the areas of concern raised by Indigenous intervenors. It also stated that it intends to manage arriving vessels to minimize the use of anchorages.

PPA reply regarding: Anchorages

The Pacific Pilotage Authority confirmed that there were no WMT bound or departing vessels that anchored in the Southern Gulf islands in the last five years.

Federal Authorities reply regarding: Anchorages

Transport Canada noted that through the National Anchorages Initiative it is conducting research studies to inform the creation of a National Anchorages Framework, which are expected to be completed in 2019. Transport Canada said that it is consulting with the marine industry, Indigenous communities, community organizations, and stakeholders as it works to develop an approach to identify anchorage sites, and traditional knowledge from First Nations will be collected during this process. Finally, Transport Canada said that it will also be undertaking a review and evaluation of the need for possible regulatory changes for oversight and management of anchorage sites. It said that these activities will allow for the development of a national anchorage framework and best practice guide for ships at anchor.

Government of Canada programs and initiatives as mitigation measures

Indigenous intervenors raised concerns about some of the Federal Authorities programs and initiatives as described in Section 5.2.5.2 of this chapter, that have been established since the OH-001-2014 hearing to address the potential impacts of Project-related marine shipping. Multiple communities indicated that engagement on the OPP and Whales Initiative have not been meaningful and that the IAMC is not an appropriate mechanism to address their concerns regarding Project-related marine shipping. Indigenous intervenors also raised concerns with the adequacy of the Federal Authorities plans and programs, including Indigenous involvement in emergency response efforts. Finally, they raised concerns regarding the implications of the initiatives to address impacts to SRKW, which may impact certain communities' Indigenous fishing rights.

Squamish and Lyackson noted that the IAMC does not address their concerns with the lack of proper risk assessment for the Project, and the potentially catastrophic consequences of accidents and malfunctions associated with the Project. Lyackson noted that based on its participation with the IAMC to date, it has received no assurance of any emergency response measures that would effectively mitigate catastrophic effects to the marine ecosystem and First Nations' rights and interests in the case of a spill.]

Squamish also said that the government's overarching initiatives such as the OPP and the IAMC do not address its specific concerns with the Project. Squamish further noted that any participation in the government's general initiatives is outside the consultation and accommodation process for the Project, and should not be considered as engagement on the Project.

Musqueam said that the Terms of Reference for the IAMC are clear that Indigenous Nations do not consider the IAMC nor funding provided through it to be an accommodation for the Trans Mountain Project.

The IAMC Caucus noted that while NRCan has characterized the IAMC as a "governance body," the IAMC neither governs any Indigenous nations' section 35 rights, nor has the Committee been provided decision-making authority with which to govern any aspect of the Project or of Project-related marine shipping. The IAMC Caucus said that it is constrained to monitoring and providing advice. The IAMC Caucus further noted that it is not a forum for consultation with Indigenous nations. It said the IAMC does not replace nor does it reduce the Crown's duty to consult Indigenous nations and that is not a window by which the government can come and consult all of the nations affected by the Project.

Lyackson, Heiltsuk Nation, and the IAMC Caucus also raised concerns regarding the Federal Authorities' engagement with regards to the OPP. Indigenous communities stated that to date, engagement sessions as part of the OPP have been limited in scope to information gathering or overview presentations, the format of which has not been conducive to dialogue, engagement or meaningful input in the planning and implementation of OPP programs. These intervenors noted that this type of engagement does not represent the "partnership" that is used to describe the goal of the OPP initiatives when it comes to Indigenous participation.

Adams Lake Indian Band (Adams Lake) said that it has not been engaged with Canada regarding any of the initiatives that are part of the OPP. It noted that while it is not a marine-side First Nation, the lifecycle of the salmon species upon which Adams Lake relies is dependent upon survival of the marine environment. Adams Lake said that it considers it to be a failure of the OPP to not engage with Indigenous communities who are so interconnected with species from the marine environment.

Indigenous communities also raised concerns with the content of the OPP programs regarding marine protection and emergency response. Heiltsuk stated that it did not agree with Canada's assertion that the Oceans Protections Plan initiatives represent "world-class" marine protections. Heiltsuk said that the initiatives under the Oceans Protection Plan, which was announced over two years ago, have failed to live up to their objectives.

Musqueam said that the OPP initiatives identified by the Federal Authorities in their evidence do not currently amount to substantial commitments and actions that could mitigate impacts from the Project to Musqueam. Cowichan Tribes said that while many of the OPP initiatives are a positive step towards enhanced coastal protection and management from major shipping, which is long overdue, it also said that the initiatives will have marginal benefit – if any – to actually prevent or mitigate an oil spill from a Project tanker.

Ditidaht First Nation (Ditidaht) said while the OPP contains a number of broad commitments, it is not clear what the specific action plan is to address its oil-spill response concerns within Ditidaht territory. Ditidaht noted that Canada must consider Indigenous knowledge, and include a specific commitment to create local spill response and emergency preparedness plans and the infrastructure and training required to implement it.

Pacheedaht First Nation (Pacheedaht) noted that recognition needs to be given to the jurisdiction of Pacheedaht and other Indigenous communities along the Project tanker route. It said that initiatives must be jointly developed and implemented with Indigenous Nations to meet the specific needs in the areas in question, based on the recognition of Indigenous rights and jurisdiction. Pacheedaht said that it needs to be fully involved in marine safety, spill preparedness and emergency response initiatives in its marine waters, and noted the OPP may be a vehicle for this approach to be taken, but while various ideas and proposals have been discussed, to date, few changes have been implemented and few timelines for implementing changes have been set.

The IAMC Caucus said that Coastal Indigenous nations are uniquely well positioned to contribute to effective emergency response by virtue of their locations along the coast line, their marine experience, their knowledge of critical marine areas and shorelines that require priority protection, and their special motivation to protect the lands and waters on which their people demand. The IAMC Caucus said that far more must be done to include Indigenous nations in emergency preparedness and response on the south coast.

The First Nations of the Maa-nulth Treaty Society, Ditidaht and Pacheedaht also raised concerns that the initiatives that form part of the OPP and the Whales initiative may have negative impacts on their fishing rights. In particular they noted that recovery measures for the SRKW including new critical habitat, may impact their ability to fish within their traditional territory.

Pacheedaht First Nation said that any potential conditions relating to fisheries closures intended to help address impacts to SRKW, must be considered in the context of Indigenous fishing rights. It noted that the critical habitat area for SRKW being proposed at Swiftsure Bank means that the entire marine area of Pacheedaht's Territory will be critical habitat. Pacheedaht said that it would like to collaboratively manage any conservation or protected areas in its Territory through a shared decision-making structure.

Ditidaht said that Fisheries and Oceans Canada has not meaningfully consulted Ditidaht on these issues and has not considered the potential adverse impacts of its proposed SRKW strategies on Ditidaht's fishing rights.

The First Nations of the Maa-Nulth Treaty Society also said that the proposed critical habitat at Swiftsure Bank would designate a significant portion of their domestic fishing area as critical habitat, which would have the potential to significantly impact their Treaty rights. It also noted that Canada is moving ahead with these measures without adequate consultation and without providing science to back the measures.

Federal Authorities reply regarding: mitigation measures

Transport Canada stated that Canada has a dedicated OPP engagement team that continues to support ongoing dialogue with South Coast First Nations. Transport Canada noted that while these discussions are still at an early stage, it is ready to work with interested Nations to explore shared goals and interests in more depth. In the course of these discussions, the parties would determine the purpose of potential agreements and the appropriate forums for carrying out this work, establish terms of reference and begin the work planning process. Transport Canada pointed to the recently launched Indigenous and Local Communities Engagement and Partnerships Program (ILCEPP) as a measure to support any future agreements on the South Coast. Transport Canada said that the objective of the ILCEPP is to support relationship building and encourage participation in longer-term engagement work on one or more OPP initiatives. This includes implementing federal-Indigenous or multilateral (e.g., federal, provincial, Indigenous) plans and agreements to facilitate collaborative management and/or partnerships in marine safety and environmental protection.

To assist Indigenous communities in participating in the OPP, the Federal Authorities noted that over \$13 million is being made available to eligible Indigenous and local communities to be engaged and participate in the OPP. It said that this funding gives recipients the opportunity to take part in developing and improving Canada's marine transportation system and contribute their knowledge towards tailoring marine transportation systems to local conditions and the environment.

The Federal Authorities said that it understood that Indigenous peoples are interested in being informed about the OPP as a whole and understanding how it will strengthen marine safety in Canada and the benefits to their communities, including capacity building and the protection of Indigenous coastal communities' way of life, culture, environment, food sources, and commerce. It also noted that Indigenous coastal communities are asking how the OPP will advance reconciliation and rights recognition, and want to move quickly to advance OPP initiatives and see tangible results.

Transport Canada said that because the OPP is not project-specific, engagement is being led through a broader process than the MH-052-2018 hearing and Phase III consultation of the Project. Transport Canada further noted that if Canada contemplates further actions related to OPP initiatives, and these actions have the potential to impact Indigenous rights,

Canada will consult with potentially affected Indigenous communities. Transport Canada noted that while the OPP was not designed to address Project-specific impacts, OPP initiatives directly respond to the marine safety concerns which have been raised through previous consultation, including those done as part of the Trans Mountain Project.

Transport Canada noted that it continued to engage Indigenous communities to establish partnerships and to advance a co-development approach, to identify shared interests and develop solutions. These activities are ongoing and the results will vary based on the specifics of each OPP initiative and the outcomes of the co-development process.

In response to concerns related to the involvement of Indigenous communities in OPP initiatives related to marine safety, Transport Canada noted that Indigenous communities will continue to be engaged on various OPP initiatives to: inform, enhance transparency, establish partnerships, and work towards inclusion in the marine safety system. Transport Canada said that through co-development, the OPP aims to identify shared issues and develop solutions for relevant initiatives. It further noted that these activities are ongoing and the outcomes will vary based on each initiative and the results of the co-development process.]

The Canadian Coast Guard said that through the Indigenous Community Response Training initiative under the OPP, the Coast Guard has provided training to First Nations in the following courses: Coastal Nation Search and Rescue, Marine Advanced First Aid, Small Vessel Operators' Proficiency, and Incident Command System. It said that this training is then applied in joint operational exercises that incorporate all on-water first response partners, such as the Coast Guard Auxiliary, First Nations communities, Parks Canada, other federal, provincial and municipal partners and any other implicated organizations. The Canadian Coast Guard said that it coordinates over 20 such exercises each year along the B.C. coast and that the exercises integrate search and rescue, environmental response, and first aid to ensure an integrated and comprehensive response.

The Canadian Coast Guard also said that regional training workshops are available to all coastal Indigenous communities. Invitations to participate in training depend on the nature of the training that is being offered. For example, Incident Command System courses are offered on a regional basis, the Coastal Nations Search and Rescue program is offered on a rotational basis between northern and southern communities, and environmental response training is location specific. It also said that Indigenous communities may also request in-community training for specific training programs, such as environmental response and incident management.

In response to concerns regarding the new critical habitat for SRKW off southwest Vancouver Island, DFO it explained that the identification of these areas is based on scientific advice stemming from research carried out over the last 40 years. It also noted that there is no immediate plan to add new closures or change the fisheries closures that protect the key SRKW foraging areas. DFO also said that it will be reviewing its fishery closure approach with Indigenous communities going forward and through these discussions, DFO can address questions such as understanding the information used to inform management measures, considering how other threats interact with the threat of lack of available prey for SRKW, and understanding how best to include and incorporate Indigenous and local knowledge to adaptively manage the mitigation of these threats.

Trans Mountain reply to concerns regarding: mitigation measures

Trans Mountain said that as a pipeline operator with no direct control over Project-related marine shipping, it believes that multi-party solutions with active collaboration between industry and government are required to ensure continued maintenance and advancement of the marine safety regime, and Trans Mountain supports the approach proposed under the OPP, whether or not the Project proceeds.

Involvement of Indigenous peoples in monitoring Project-related marine shipping

Many Indigenous communities expressed an interest in having a more active role in monitoring and oversight of Project-related marine shipping. Some Indigenous intervenors argued that the draft conditions released by the Board do not provide for sufficient involvement in Project monitoring and oversight. Shackan Indian Band said that the conditions and recommendations proposed by the Board must ensure that an ongoing role in monitoring and stewardship is provided to First Nations. Malahat First Nation said that it is participating in a number of initiatives relating to environmental stewardship activities in its territory and that it is prepared to play a much larger role in Project-related environmental monitoring and oversight. Tsawout said that an ongoing monitoring program of the Salish Sea must be carried out and include Tsawout in the crafting of the monitoring program.

The IAMC Caucus explained that the IAMC was established in 2017 to provide a collaborative forum supported by the technical resources of Indigenous nations, the Government of Canada and regulators. It said that the committee's purpose is to enhance environmental protections and the safety of the existing pipeline and the proposed expansion and to support Indigenous communities' meaningful participation in monitoring the pipelines and marine shipping. The IAMC Caucus said that the IAMC is comprised of: five members representing various federal departments (Natural Resources Canada, Transport Canada, Fisheries and Oceans Canada, Canadian Coast Guard, and Environment and Climate Change Canada);

one member representing the NEB; and the Indigenous Caucus, which is comprised of up to 13 members who strive to represent the interests of the potentially impacted Indigenous communities along the pipeline and marine shipping routes.

The Terms of Reference (TOR) for the IAMC set out the purposes and guiding principles of the IAMC, stating that the Committee is intended to form the basis of a new relationship between Indigenous communities, the Government of Canada and the NEB in respect of the Trans Mountain project activities. The IAMC Caucus noted that central to the Committee's work is the integration of Indigenous knowledge, values and perspectives into the monitoring, regulation and performance of the Trans Mountain project activities. It was noted that Section 9 of the TOR states that, in working towards that objective, the Committee is guided by s.35 of the *Constitution Act, 1982*, the principles of UNDRIP, and the Committee works to support reconciliation. Section 44 of the TOR states that in their participation on the Committee, government and NEB committee members seek to understand Indigenous perspectives, exchange information and build understanding regarding the work of the relevant regulators and collaborate on solutions to matters of concerns.

The IAMC noted that much of the work of the Committee takes place through subcommittees, including the Indigenous Monitoring and Marine Shipping Subcommittees. It noted that the Monitoring Subcommittee's goal is to work towards meaningful Indigenous inclusion in project monitoring. Section 19(c) of the TOR describes the monitoring activities that may be undertaken, including:

- Identifying monitors to accompany and advise NEB Inspection Officers and other staff from the NEB;
- Engaging with NEB Inspection Officers as described on corrective actions to be taken when non-compliance is identified; and or
- Providing or arranging for training and educational materials to Indigenous communities to improve their knowledge and capacity surrounding the Trans Mountain Project activities, including their ability to detect and respond to any spills or other hazards or emergencies.

The IAMC Caucus noted that the Monitoring Subcommittee has to date participated in twelve inspections, four emergency management exercises and one marine exercise.

The IAMC Caucus indicated that it hopes for an expanded role for the IAMC. It said that Indigenous peoples and interests need to be fully integrated into the oversight of the Project, if it proceeds, and into broader planning and stewardship process in respect of the use of marine areas off the south coast. It said that the IAMC is well positioned to play an expanded role in monitoring and oversight with the aim of increasing the safety of the Project-related marine shipping and reducing its impacts on Indigenous use of the lands and waters. During oral traditional evidence, members of the IAMC Caucus explained that the involvement of the IAMC in inspections along the pipeline route and at WMT has shown to add value to the process and it would be something positive to see other regulators starting to adopt this process, to have greater collaboration and participation by Indigenous communities in marine exercises, in inspections, and working with other regulators.

Chawathil First Nation, Cheam First Nation, Kwantlen First Nation, Seabird Island Band, and Stó:lō Collective all indicated that they wished to see the IAMC take on an expanded role in spill response, monitoring, oversight and compliance activities. Ditidaht also said that it supported the expansion of the IAMC's role, but noted that the IAMC activities should be in addition to the specific consultation and accommodation work that must be carried out with each First Nation that has the potential to be adversely affected by the Project.

Lyackson noted while it does have a seat on the IAMC marine shipping sub-committee, to date no concrete plans exist that effectively include First Nations in Indigenous-led monitoring that adequately address their concerns about Project-related marine shipping. The First Nations of the Maa-Nulth Treaty Society and the Métis Nation of BC noted that they had concerns regarding the membership of the IAMC, indicating that they had not been invited to participate as members of the IAMC.

Federal Authorities reply regarding: monitoring

NRCan said that the IAMC participation in the monitoring and oversight of Project-related marine shipping and its potential impacts to the marine environment is pursued primarily by the Marine Shipping subcommittee (the Subcommittee). Between October 2018 and March 2019, it said that the Subcommittee will be engaging with Indigenous communities with interests related to the marine corridor to validate and advance the following objectives:

- Explore and develop an Indigenous marine stewardship program: explore the idea of an Indigenous Pilotage Partnership through information gathering and engagement with communities, marine regulators and other relevant organizations. This priority work would include development of cultural training for pilots and support for building Indigenous capacity, coordinating efforts, and integrating Traditional Knowledge in marine monitoring.

- Provide advice on Indigenous inclusion in spill response: engage with relevant agencies; review the proponent and government's spill notification system, response and crisis communications plans; and provide advice to improve those plans.
- Provide advice on marine-related conditions: examine the marine-shipping related project conditions. The Indigenous members may assess the proponents' fulfillment of those Project conditions and provide advice on improvements to the conditions or proponents' plans.
- Enhance Indigenous capacity: support community member training with the Canadian Coast Guard (in coordination with OPP Marine Training), and review programs targeted at Indigenous marine training and related capacity needs such as equipment, in order to recommend areas for potential IAMC support.

Canada noted that it has committed \$64.7 million to support the IAMC for the Project. It noted that so far, the Committee is reviewing or supporting 13 community projects related to the effects of Project-related marine shipping, including projects that analyze vessel traffic associated with the Project, the enhancement of emergency planning, the development of environmental management, and the hiring of emergency response personnel in individual First Nations, among others.

Trans Mountain reply regarding: monitoring

Trans Mountain noted that it is not a member of the IAMC nor does it provide funding to the IAMC. Trans Mountain stated that it understands that the IAMC is an Indigenous-led committee, established with a goal to form the basis of a new relationship between Indigenous communities, the government and the NEB in respect of Trans Mountain's activities. Trans Mountain's understanding is that the IAMC is already advancing Indigenous interests with respect to guardianship and stewardship over land and water operations during the lifecycle of the Project. Trans Mountain noted that the IAMC provides for collaborative, inclusive and meaningful Indigenous involvement in the review and monitoring of environmental, safety and socio-economic issues, and Trans Mountain is supportive of the IAMC's role as it pertains to the Project.

Crown's duty to consult and accommodate

As described in more detail in Section 5.2.2.4 of this chapter, Indigenous communities raised concerns regarding the Government of Canada's consultation to date. Intervenor argued that the 2016 CAR was inaccurate, that the Crown did not consult on the scope and process for the Board's MH-052-2018 hearing, and that no meaningful dialogue has occurred, neither through Phase III consultation nor otherwise.

Indigenous intervenors and commentators argued that the Crown continues to fall short on its consultation obligations. They pointed to a lack of meaningful two-way dialogue with the Government of Canada with respect to both the Project and the Reconsideration process. They argued that Canada should engage in consent based and collaborative Nation-to-Nation decision-making as required by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

With respect to the MH-052-2018 hearing, Indigenous communities noted that the Board is required to act consistently with the *Constitution Act, 1982*, but argued that the Board's process is not properly set up to meet the requirements of the honour of the Crown. They said that the Board cannot find that the Project is in the public interest if their rights are infringed and if the Crown has not meaningfully consulted. Indigenous communities argued that the Government of Canada's commitment to the re-engagement of Phase III consultations cannot have any bearing on the Board's determination of whether the duty to consult and accommodate has been discharged as it is impossible to know whether the consultation will be meaningful and effective. They note the "inadequacies of [Canada's] consultation process" found by the FCA in *Tsleil-Waututh Nation*⁴⁴.

Indigenous intervenors said that Indigenous and Treaty rights will be seriously harmed by marine traffic associated with the Project and the Crown has corresponding obligations to justify this infringement. Indigenous intervenors noted that marine resources, including salmon and Southern resident killer whales are integral to their way of life and that the Crown has an obligation to consult and accommodate to ensure their rights are not unjustifiably infringed.

Stó:lō Collective and Shxw'ōwhámel First Nation also argued that the Crown is in a conflict of interest as the owner of the Project. They argue that the Crown will be held to the highest standard in meeting its legal obligations to Indigenous peoples, with whom a fiduciary relationship exists.

Trans Mountain reply regarding: consultation and accommodation

Trans Mountain submitted that, as a starting point, the Board's OH-001-2014 Report extensively considered the potential impacts from Project-related shipping on Indigenous interests. The FCA in *Tsleil-Waututh Nation* considered the adequacy of

⁴⁴ *Tsleil-Waututh Nation* at para. 760.

the OH-001-2014 hearing process and stated that it was satisfied that the Board's process was adequate for fulfilling its consultation obligations.

Trans Mountain said that in the MH-052-2018 hearing, the Board has invited new or updated evidence on, among other things, the potential impacts of Project-related marine shipping on Indigenous interests and mitigation measures to avoid, reduce, or offset potential adverse effects. Trans Mountain argued that the information filed in this hearing was generally consistent with the information filed in the OH-001-2014 hearing and no new or updated information has been filed that should cause any of the Board's conclusions in the OH-001-2014 Report to change.

Trans Mountain submitted that it has continued to engage with all potentially affected Indigenous communities in relation to Project-related marine shipping since the conclusion of the OH-001-2014 hearing. Further, it noted that the MH-052-2018 hearing provided opportunities for potentially affected Indigenous communities to learn more about Project-related marine shipping, ask information requests of Trans Mountain and federal government agencies, file written evidence and present oral traditional evidence. Taken together, Trans Mountain argued that Indigenous communities have been provided with extensive opportunities to engage on all aspects of Project-related marine shipping.

Trans Mountain further argued that notwithstanding this, the Board's task is not to assess the adequacy of Crown consultation in its Reconsideration Report. Trans Mountain noted that the Government of Canada has indicated that it intends to carry out additional consultation beyond and outside the NEB process. Trans Mountain submitted that the adequacy of Crown consultation can only be assessed once all consultation has been completed and at such time when the Crown (in this case, Cabinet) renders its final decision on the Project. As such, while the Board can assess the adequacy of Trans Mountains' consultation for the purposes of this Reconsideration, Trans Mountain argued that the Board need not and cannot at this time assess the adequacy of Crown consultation overall. Trans Mountain argued that such an assessment would be premature and beyond the purview of the Board.]

Federal Authorities reply regarding: consultation and accommodation

In response to concerns raised about the Crown relying on the Board's Reconsideration Process to meet its duty to consult, NRCan noted that the Crown can rely on existing regulatory processes, to the extent possible, to fulfill the duty to consult. As such, it said that the Crown may rely on the NEB MH-052-2018 hearing, to the extent possible, to identify, consider and address how the Crown's conduct in relation to Project-related marine shipping might adversely impact potential or established Indigenous and Treaty rights. NRCan said that this approach avoids duplication and ensures that the NEB, which has broad powers to set conditions for the Project, has full access to relevant information on potential adverse Project-related marine shipping impacts on Indigenous and Treaty rights. NRCan noted that the Crown will also consult on Project-related marine shipping impacts in its re-initiated Phase III of the consultation process.

Following the FCA decision in *Tsleil-Waututh Nation*, the Federal Authorities noted that NRCan wrote to Indigenous communities, governments and nations potentially impacted by Project-related marine shipping, encouraging them to participate in the NEB process. NRCan said that officials advised Indigenous communities that the Crown intended to rely on the NEB Reconsideration process, to the extent possible, to fulfill the legal duty to consult related to Project-related marine shipping.

NRCan also submitted that the Minister of Natural Resources wrote to potentially impacted Indigenous communities, governments and nations following the announcement that it would re-initiate Phase III consultations on the Project, outlining the Crown's intentions to engage in a specific and focused dialogue on the Project. NRCan said that the Crown's Phase III consultation and accommodation process will work with Indigenous communities, governments and nations in a manner that aligns with the Crown's commitment to strengthen and renew its relationships with Indigenous peoples while respecting and upholding the rights of Indigenous peoples in Canada.

The Federal Authorities noted argued that in re-initiating Phase III consultation, the Crown said it has been clear that this consultation and accommodation process is not about starting over. The Crown will build on existing relationships, the information submitted by Indigenous communities, governments and nations, and the existing consultation record, while making improvements to ensure the consultation is carried out in a meaningful way.

NRCan stated that the Crown consults in a way that is fully consistent with meeting Canada's obligations under s.35 of the *Constitution Act, 1982*, and the Crown's commitments to advance reconciliation with Indigenous peoples, including the pledge to implement UNDRIP. NRCan further stated that the Crown recognizes that meaningful engagement and consultation with Indigenous peoples aims to secure their free, prior and informed consent and this is especially true when Canada proposes to take actions, which impact them and their rights, including their lands, territories and resources. The Crown also recognizes the rights of Indigenous peoples to participate in decision-making in matters that affect them and their rights. NRCan said that this is what the overall consultation process for this Project is meant to achieve, including the renewed Phase III consultations.

Appendix 1: Lists of Issues

1.1 OH-001-2014 hearing

The Board has decided on a list of 12 issues it will consider during the hearing process.

1. The need for the proposed project.
2. The economic feasibility of the proposed project.
3. The potential commercial impacts of the proposed project.
4. The potential environmental and socio-economic effects of the proposed project, including any cumulative environmental effects that are likely to result from the project, including those required to be considered by the NEB's Filing Manual.
5. The potential environmental and socio-economic effects of marine shipping activities that would result from the proposed Project, including the potential effects of accidents or malfunctions that may occur.
6. The appropriateness of the general route and land requirements for the proposed project.
7. The suitability of the design of the proposed project.
8. The terms and conditions to be included in any approval the Board may issue.
9. Potential impacts of the project on Aboriginal interests.
10. Potential impacts of the project on landowners and land use.
11. Contingency planning for spills, accidents or malfunctions, during construction and operation of the project.
12. Safety and security during construction of the proposed project and operation of the project, including emergency response planning and third-party damage prevention.

The Board does not intend to consider the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline.

1.2 MH-052-2018 hearing

The National Energy Board's (Board) Reconsideration hearing will consider any necessary changes or additions to its May 2016 Recommendation Report (Report), in light of the inclusion of Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit in the "designated project" under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012). This includes issues related to factors described in paragraphs 19(1)(a) through (h) and subsection 19(3) of the CEAA 2012, and to section 79 of the *Species at Risk Act* (SARA).

1. The environmental¹³⁵ effects of Project-related marine shipping, and the significance of these effects.
This includes adverse effects on species at risk, the environmental effects of malfunctions or accidents that may occur, and any cumulative environmental effects.
2. Measures that are technically and economically feasible, and that would mitigate any significant adverse environmental effects of Project-related marine shipping.
Given that the Board found four significant adverse effects related to Project-related marine shipping in its previous assessment¹³⁶ (i.e., greenhouse gas emissions, Southern resident killer whale, traditional Indigenous use associated with Southern resident killer whale, and the potential effects of a large or credible worst-case spill), the consideration of mitigation measures will include these four matters. This issue will also include consideration of whether the mitigation measures will change the Board's previous significance findings.
3. Alternative means of carrying out Project-related marine shipping that are technically and economically feasible, and the environmental effects of such alternative means.
4. Requirements of any follow-up program in respect of Project-related marine shipping.
5. Measures to avoid or lessen the adverse effects of Project-related marine shipping on SARA-listed wildlife species and their critical habitat, monitoring of the measures, and consideration of how to ensure the measures and monitoring are undertaken.
The Board's previous assessment identified the SARA-listed marine fish, marine mammal, and marine bird species that could be found in the area of, or affected by, Project-related marine shipping.¹³⁷ Consideration will also be given to any species that have been newly listed or have seen a change to their designation since the issuance of the Board's Report and that could be affected by Project-related marine shipping.
6. The potential impacts of Project-related marine shipping on Indigenous¹³⁸ interests.
7. Whether there should be any changes or additions to the Board's recommendations set out in its Report, or to the recommended terms or conditions, including Conditions 91, 131 to 134, 144, and 151.

Parties are expected to limit their evidence filings to new or updated evidence (including comments from the public, community knowledge, and Indigenous traditional knowledge) relevant to the above issues. Parties are not required to re-file or re-test evidence on the record of the OH-001-2014 hearing. It is recommended that Parties focus their evidence on aspects of the above issues that were not fully canvassed in the OH-001-2014 hearing. The Board's Filing Requirements for Trans Mountain, and its requests for specialist or expert information or knowledge in the possession of Federal Authorities pursuant to paragraph 20(a) of the CEAA 2012, reflect this.

¹³⁵ All references to environmental effects in this List of Issues include health and socio-economic matters as described in section 5 of the CEAA 2012.

¹³⁶ See the Board's Report at pages 337, 350-351, 363, 378, and 397-398.

¹³⁷ See the Board's Report at pages 338, 341, and 352.

¹³⁸ The Board's use of the term "Indigenous" or "Indigenous peoples" in this hearing has the meaning assigned by the definition of "aboriginal peoples of Canada" in subsection 35(2) of the *Constitution Act, 1982*.

Appendix 2: Overview of work/activity authorized by individual legal instruments

This table is provided as an overview and guide only. The legal instruments themselves provide the actual authorizations. Appendix 3 sets out the list of 156 conditions and illustrates which conditions would attach to each instrument.

Instrument	Work/activity being authorized
1 Line 2 CPCN (CPCN)	Add to Line 2 CPCN (transfer from existing Trans Mountain Pipeline system and put into service on Line 2): • active 150 km NPS 36 pipeline segment from Hinton to Hargreaves • active 43 km NPS 30 pipeline segment from Darfield to Black Pines Authorization to expand the Westridge Marine Terminal (WMT): • tanker loading dock complex at the WMT, with a total of three Aframax-capable berth faces and a utility dock Authorization to construct and operate: • two new parallel NPS 30 delivery pipelines from the Burnaby Terminal to the Westridge Marine Terminal Authorization to construct and operate: • 339 km NPS 36 pipeline from Edmonton to Hinton • 121 km NPS 42 pipeline from Hargreaves to Blue River • 158 km NPS 36 pipeline from Blue River to Darfield • 368 km NPS 36 pipeline from Black Pines to the Burnaby Terminal
2 CPCN OC-2 (OC2)	Authorization to Decommission: • one existing tank at the Edmonton Terminal West Tank Area • one existing tank at the Burnaby Terminal Authorization to Reactivate: • 150 km NPS 24 pipeline segment from Hinton to Hargreaves • 43 km NPS 24 pipeline segment from Darfield to Black Pines • Niton Pump Station Remove from CPCN OC-2 (transfer from Line 1 and put into service on Line 2): • 43 km NPS 30 pipeline segment from Darfield to Black Pines
3 CPCN OC-49 (OC49)	Remove from CPCN OC-49 (transfer from Line 1 and put into service on Line 2): • 150 km NPS 36 pipeline segment from Hinton to Hargreaves Deactivate • Wolf Pump Station
4 NEB Act, s.58 Order (Temp)	Authorization for temporary construction lands and infrastructure: • development of camp locations, stockpile sites, • contractor staging areas (i.e., co-located with camps or stockpile sites), • construction yards, borrow pits, and • access roads for the first 10 km of each pipeline spread (including temporary, clear-span bridges associated with these access roads)

5	NEB Act, s.58 Order (Pump1)	Line 1 Pump Stations Authorization to construct and operate: • Black Pines Pump Station on Line 1 Authorization to: • drag reducing agent (DRA) injection at Jasper Pump Station • add one pump unit to Kamloops Pump Station • add one pump unit to Sumas Pump Station
6	NEB Act, s.58 Order (Pump2)	Line 2 Pump Stations Authorization to construct and operate: • Edmonton Pump Station • Gainford Pump Station • Wolf Pump Station • Edson Pump Station • Hinton Pump Station • Blue River Pump Station • McMurphy Pump Station • Blackpool Pump Station • Black Pines Pump Station • Kamloops Pump Station • Kingsvale Pump Station
7	NEB Act, s.58 Order (Tanks)	New Tanks (Line 1 and Line 2) Authorization to construct and operate: • five new tanks at the Edmonton Terminal West Tank Area • one new tank at the Sumas Terminal • 14 new tanks at the Burnaby Terminal
8	Deactivation order (Deact)	Authorization to deactivate: • Blue River Pump Station

Appendix 3: Conditions applied to legal instruments

In these conditions, the following terms are defined as:

Appropriate Government Authorities	Federal, Provincial, Regional or Municipal government departments or agencies with jurisdiction, statutory obligations, regulatory oversight or a decision-making role in relation to the subject-matter of the specific condition. For location-specific conditions or phased filings, this is limited to those with such a role in relation to the geographic location to which the condition filing applies. (Indigenous groups are treated separately and listed separately in each applicable condition.)
Commencing operations	The Project is opened for oil storage and transmission. Unless otherwise specified, “prior to commencing operations” means an action must be completed prior to commencing operation of any component of the Project, and “after commencing operations” means an action must be completed after all components of the Project are operating.
Construction	Any in-field activity that may have an effect on the environment and that is necessary for installing, deactivating, reactivating¹³⁹ or decommissioning, or preparing to install, deactivate, reactivate¹ or decommission, any component of the Project. Construction activities include, clearing, mowing, grading, trenching, drilling, boring, and blasting. Construction activities <u>do not</u> include activities associated with routine surveying operations or data collection activities, such as geotechnical investigations (e.g., geophysical surveys, bore holes, and test pits), activities required to obtain integrity information on the reactivation pipeline segments, or operations and maintenance activities (to which NEB “Operations and Maintenance Activities on Pipelines under the <i>National Energy Board Act</i> – Requirements and Guidance Notes” apply). Construction at the Westridge Marine Terminal also includes construction activities occurring in the marine environment that are necessary for installing, or preparing to install, any component of the Westridge Marine Terminal expansion. This includes dredging, blasting, and pile drilling.
Consultation	Unless otherwise specified in a condition, Trans Mountain’s consultation must be carried out in a manner that: a) provides, to those to be consulted: i) notice of the matter in sufficient form and detail to allow them to prepare their views or information on the matter; ii) a reasonable period for them to prepare those views or information; and iii) an opportunity to present those views or information to Trans Mountain; b) considers, fully and impartially, the views or information presented; c) provides, to those in a) who request it, a draft summary of the consultation undertaken with that party, and a reasonable period for them to provide feedback to Trans Mountain; and d) provides, to those in a) who request it, a copy of the NEB filing receipt for, or notice of, the condition filing to which the consultation pertained.
Dry commissioning	Dry commissioning involves the systematic inspection and testing of mechanical, piping, electrical, instrumentation, control, and communications systems, prior to the introduction of process fluids , to ensure that they are ready for the introduction of fluids and are expected to function as intended.
For approval	Where a condition requires a filing or filings for NEB approval, Trans Mountain must not commence the indicated activity until the NEB issues its written approval of that filing or filings.
Including	Use of this term, or any variant of it, is not intended to limit the elements to just those listed. Rather, it implies minimum requirements with the potential for augmentation, as appropriate.
Line 1	After the expansion, the 1 147 km Line 1 pipeline will consist of, combined, the following pipeline segments, including segments to be reactivated and currently operating TMPL segments: · the existing 229 km of 609.6 mm outside diameter (NPS 24) and 89 km of 762.0 mm outside diameter (NPS 30) pipeline segments from Edmonton, AB, to Hinton, AB; · the reactivated 150 km of NPS 24 pipeline segment from Hinton, AB, to Hargreaves, B.C. (built in 1957); · the existing 273 km of NPS 24 pipeline segment from Hargreaves, B.C., to Darfield, B.C.; · the reactivated 43 km of NPS 24 pipeline segment from Darfield, B.C., to Black Pines, B.C. (built in 1953); · the existing 325 km of NPS 24 and 38 km of NPS 30 pipeline segments from Black Pines, B.C., to the Burnaby Terminal, B.C.

¹³⁹ Excluding engineering assessment and operations and maintenance activities required to meet Conditions 19 and 31.

Line 2	After the expansion, the approximately 1,180 km Line 2 pipeline will consist of, combined, the new transmission pipeline segments and the two currently operating TMPL segments transferring to Line 2 service: · approximately 339 km of new 914 mm outside diameter (NPS 36) pipeline from Edmonton, AB, to Hinton, AB; · the existing 150 km of NPS 36 pipeline segment from Hinton, AB, to Hargreaves, B.C. (built in 2008); · approximately 121 km of new 1 067 mm outside diameter (NPS 42) pipeline from Hargreaves, B.C., to Blue River, B.C.; · approximately 158 km of new NPS 36 pipeline from Blue River, B.C., to Darfield, B.C.; · the existing 43 km of NPS 30 pipeline segment from Darfield, B.C., to Black Pines, B.C. (built in 1957); and · approximately 368 km of new NPS 36 pipeline from Black Pines, B.C., to the Burnaby Terminal, B.C.
Monitoring	Observing the environmental and socio-economic effects of the Project for the purposes of assessing and measuring the effectiveness of mitigation measures undertaken, identifying unanticipated environmental and socio-economic issues, and, based on the results of these activities, determining any remedial actions required. From an engineering perspective, monitoring involves regularly observing pipelines, terminals and pump stations (e.g., through surveys, patrols, inspections, testing, instrumentation) to ensure their operation is within defined parameters, with the goal of identifying any issues or potential concerns (e.g., pipeline integrity, geohazards, erosion, security) that may compromise the protection of the pipelines, terminals, pump stations, property, persons, and the environment.
Monthly (in relation to a condition filing or posting)	Unless otherwise specified in a condition, a monthly filing shall be made on the 5 th working day of the calendar month following the month to which the filing pertains.
NEB or Board	National Energy Board
New delivery pipelines	Collectively, the two new NPS 30 oil delivery lines between Trans Mountain's Burnaby Terminal and its Westridge Marine Terminal (approximately 2.6 km for the tunnel option and 3.6 km for the street option).
Officer of the company	Where a condition requires a filing to be signed by an officer of the company, the filing must include a statement confirming that the signatory to the filing is an officer of the company duly authorized for that purpose.
Project	The Trans Mountain Expansion Project in all its components, including pipeline construction, reactivation, and changes to operating conditions resulting in operation as Line 1 and Line 2; deactivation, reactivation, construction and operation of or at the respective pump stations; decommissioning of 2 tanks and construction and expanded operation at the existing Edmonton, Sumas and Burnaby Terminals and the Westridge Marine Terminal; construction and operation of the new delivery pipelines; and all infrastructure. The Project does not include Project-related marine shipping.
Quarterly (in relation to a condition filing or posting)	Unless otherwise specified in a condition, a quarterly filing shall be made on the 10 th working day of the quarter following the quarter to which the filing pertains.
Temporary infrastructure	All structures or sites necessary for pipeline, terminal and pump station construction, reactivation, deactivation, modification and expansion approved as part of the Project. Examples of infrastructure include construction camps, stockpile sites, contractor yards, laydown areas, borrow pits, roads, bridges, snow pads, and temporary power supply lines necessary for operating infrastructure and equipment during the construction phase.
Third party (in relation to a report, review or assessment)	An independent consultant, expert, or contractor that, except for receiving payment for acting as a third party, is unaffiliated with Trans Mountain, Kinder Morgan Canada Inc., the principal consultants of either, or any other corporate entity with a financial interest in the Project. A third party is, because of their knowledge, training, and experience, qualified and competent to perform an assessment or review, and was not involved in developing the manual, report, plan, program, or policy being assessed or reviewed.
TMPL	The existing operating Trans Mountain Pipeline system.
Trans Mountain	Trans Mountain Pipeline ULC, as general partner of Trans Mountain Pipeline L.P.

Government authorities are mentioned in certain conditions. If a particular authority's name changes in the future, Trans Mountain's requirements relating to that authority would rest with its successor. Similarly, if a particular authority's function is assumed by another authority, Trans Mountain's requirements relating to that function would rest with the new authority.

Note: Appendix 2 provides a summary of work/activities authorized under each legal instrument.

No.	Overarching conditions	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
1	Condition compliance Trans Mountain must comply with all of the [certificate/order] conditions, unless the NEB otherwise directs.	X	X	X	X	X	X	X	X
2	Compliance with commitments Without limiting Conditions 3, 4 and 6, Trans Mountain must implement all of the commitments it made in its Project application or to which it otherwise committed on the record of the OH-001-2014 proceeding, as well as the MH-052-2018 proceeding.	X	X	X	X	X	X	X	X
3	Environmental protection Trans Mountain must implement or cause to be implemented, at a minimum, all of the policies, practices, programs, mitigation measures, recommendations, and procedures for the protection of the environment included or referred to in its Project application or to which it otherwise committed on the record of the OH-001-2014 proceeding.	X	X	X	X	X	X	X	X
4	Engineering and safety Trans Mountain must cause the Project to be designed, located, constructed, installed, and operated in accordance with, at a minimum, the specifications, standards, policies, mitigation measures, procedures, and other information included or referred to in its Project application or to which it otherwise committed on the record of the OH-001-2014 proceeding.	X	X	X	X	X	X	X	X
5	Certificate expiration (sunset clause) Unless the NEB otherwise directs prior to 30 September 2021 , this [certificate/order] will expire on 30 September 2021 , unless construction of the Project has commenced by that date.	X	X	X	X	X	X	X	X
No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
6	Commitments tracking table Without limiting Conditions 2, 3 and 4, Trans Mountain must implement the commitments contained within its commitments tracking table and must: - file with the NEB, at the following times, an updated commitments tracking table including the status of each commitment: within 3 months after the [certificate/order] date; at least 30 days prior to commencing construction; monthly, from the commencement of construction until the first month after commencing operations; and quarterly thereafter until: all commitments on the table are satisfied (superseded, complete or otherwise closed), at which time Trans Mountain must file confirmation, signed by an officer of the company, that the commitments on the table have been satisfied; or 6 years after commencing operations, at which time Trans Mountain must file with the NEB a summary of any outstanding commitments and a plan and implementation timeline for addressing these commitments; whichever comes earlier; and - post on its company website the same information required by a), using the same indicated timeframes; and - maintain at each of its construction offices: - the relevant environmental portion of the commitments tracking table listing all of Trans Mountain's regulatory commitments, including those from the Project application and subsequent filings, and environmental conditions or site-specific mitigation or monitoring measures from permits, authorizations, and approvals for the Project issued by federal, provincial, or other permitting authorities; - copies of any permits, authorizations, and approvals referenced in i); and - copies of any subsequent variances to permits, authorizations, and approvals referenced in i).	X	X	X	X	X	X	X	X

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
7	Environmental and socio-economic assessment - route re-alignments As applicable, Trans Mountain must file with the NEB <u>for approval</u>, concurrent with its filing of the Plan, Profile and Book of Reference pursuant to section 33 of the National Energy Board Act, an environmental and socio-economic assessment for each proposed detailed route re-alignment that extends beyond the applied-for corridor width of Trans Mountain's preferred route in proximity to: · Ohamil Indian Reserve 1; · Tzeachten Indian Reserve 13; and · Surrey Bend Regional Park. Any assessment must include: - environmental alignment sheets at an appropriate scale, clearly depicting the proposed route re-alignments; - results of any pre-construction surveys within the areas that were not previously subject to such surveys, and an indication of potential residual effects; - all associated mitigation measures that are beyond those identified during the OH-001-2014 proceeding; - analysis supporting the use of the measures in c), including any supplementary reports; - confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information based on any supplemental surveys completed; and - a summary of consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners / tenants, as well as copies of all written comments that may be provided to Trans Mountain by those consulted. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the assessment.	X			X				
8	Design temperatures – terminals and pump stations Trans Mountain must file with the NEB, at least 3 months prior to ordering pipe for terminals and pump stations, confirmation, with rationale, that: - the selected maximum and minimum design temperatures are in accordance with CSA Z662-15, Clause 5.2.1; - the selected design temperatures are based on historical, location-specific extreme daily maximum and minimum temperatures, as opposed to average temperatures; and - the extent of the historical weather data used is commensurate with the expected operational life of the Project.	X				X	X	X	
9	Quality Management Plan Trans Mountain must file with the NEB, at least 4 months prior to manufacturing any pipe and major components for the Project, a Project-specific Quality Management Plan that includes: - material /vendor qualification requirements; - quality control and assurance of pipe, fittings, and components that ensure all materials meet Trans Mountain's specifications (i.e., processes, procedures, specifications, random testing, inspection, and test reports); - mandatory documentation of process conditions during manufacture and verification of the conformance of manufacturer material test reports with Trans Mountain's requirements; - mandatory inspection requirements, inspector competency training, and qualifications; - non-conformance reporting and correction procedures; - change management process; - commissioning requirements; and - material handling requirements during transportation.	X				X	X	X	
10	Phased filings Due to the Project's large spatial extent, Trans Mountain may wish to commence Project construction activities at specific locations at different times (i.e., using a phased approach). This may entail doing so on the basis of pipeline spreads of defined lengths, or by regions, or work areas of Trans Mountain's choosing (such as terminals or pump stations). If Trans Mountain intends to use a phased approach for Project construction, it must undertake the following: Trans Mountain must file with the NEB, at least 7 months prior to commencing construction, a complete list of construction spreads, regions, or work areas that, for the duration of Project construction, will serve as the basis by which Trans Mountain may submit condition filings in a phased approach. Each spread, region, or work area must be clearly delineated (e.g., by	X	X	X	X	X	X	X	X

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	kilometre posts). b) As part of its filing for a), to aid the NEB in anticipating future submissions, Trans Mountain must indicate the specific conditions and related spread(s), region(s) or work area(s) for which it expects to apply this phased approach. Trans Mountain must file updates to this list as they are available. c) When submitting a filing for any condition using this phased approach, Trans Mountain must clearly indicate which spread(s), region(s), or work area(s) that filing applies to. d) Construction of a particular spread, region, or work area must not proceed until all pre-construction conditions using this phased approach have been satisfied for that spread, region, or work area. Prior to commencing construction of the initial spread, region, or work area, all applicable conditions with more general pre-construction timing elements must also be satisfied.								
11	Indigenous, local, and regional skills and business capacity inventory a) Trans Mountain must file with the NEB, at least 6 months prior to commencing construction, an Indigenous, local, and regional skills and business capacity inventory for the Project. The skills and capacity inventory must include: i) a description of the information and data sources; ii) a summary of Indigenous, local, and regional skills and business capacity; iii) an analysis of the Indigenous, local and regional capacity for employment and business opportunities for the Project; iv) plans for communicating employment and business opportunities to Indigenous, local, and regional communities; v) a description of identified or potential skills and business capacity gaps, and any proposed measures to address them or to support or increase skills or capacity; and vi) plans for communicating identified gaps regarding skills and business capacity with Indigenous, local, and regional communities and businesses, and any proposed measures to support or increase skills or capacity. b) Trans Mountain must file with the NEB, at least 3 months prior to commencing construction, any updates to the elements of the inventory described in a)i) through vi).	X							
12	Training and Education Monitoring Plan a) Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to commencing construction, a plan for monitoring the implementation and outcomes of Indigenous, local, and regional training and education measures and opportunities for the Project. The plan must include: i) a description of, and rationale for selecting, the indicators that will be monitored to track the implementation of training and education measures and opportunities; ii) the monitoring methods and schedule, including information and data sources for the indicators being monitored; iii) plans for consulting and reporting on the implementation and outcomes of training and education measures and opportunities with Appropriate Government Authorities, potentially affected Indigenous groups, business, industry, and education and training organizations; and iv) a summary of consultations with Appropriate Government Authorities, potentially affected Indigenous groups, business, industry, and education and training organizations on the development of the plan. b) Trans Mountain must file with the NEB, at least 3 months prior to commencing construction, any updates to the elements of the Training and Education Monitoring Plan described in a)i) through iii) above.	X							
13	Socio-Economic Effects Monitoring Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to commencing construction, a plan for monitoring potential adverse socio-economic effects of the Project during construction. The plan must include the following: a) the factors or indicators to be monitored; b) the methods and rationale for selecting the factors or indicators; c) a description of the baseline, pre-construction socio-economic conditions; d) the monitoring methods and schedule, including third party data source identification; e) data recording, assessment, and reporting details;	X	X		X	X	X	X	

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	f) a discussion of how measures will be implemented to address any identified adverse effects, including: i) the criteria or thresholds that will require measures to be implemented; ii) how monitoring methods and measures implementation to address adverse effects, as necessary, are incorporated into Construction Execution Plans; and iii) a description of the roles and responsibilities of construction prime contractors, sub-contractors, and community relations staff in monitoring socio-economic effects and implementing measures to address adverse effects; g) a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners / tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan; and h) plans for regular consultation and reporting on effects during construction with potentially affected communities, Indigenous groups, local and regional authorities, and service providers.								
14	Technical working group (TWG) – Terms of Reference Trans Mountain must file with the NEB, at least 6 months prior to commencing construction, Terms of Reference for TWGs established in order to address specific technical and construction issues with affected municipalities. The Terms of Reference must be developed in consultation with participating municipalities, and facility owners and operators that will be affected by the Project. The Terms of Reference must, at a minimum: a) identify how TWG membership will be determined; b) identify the TWG structure; c) identify an officer of the company who will be accountable for implementing the Terms of Reference; d) describe the scope and mandate to be addressed or implemented by the TWG, including: i) the TWG's goals; ii) the issues and activities that will be within the TWG's mandate; iii) the protocols and mechanisms for implementing TWG recommendations or decisions; and iv) the protocols for reporting and communicating with TWG members, and other potentially-affected or interested parties; and e) provide a summary of any outstanding concerns raised by participating municipalities, and facility owners and operators regarding the Terms of Reference.	X							
15	Pipeline risk assessment Trans Mountain must file with the NEB, at least 6 months prior to commencing construction, the following information for Line 2 and the new delivery pipelines: a) the results of the updated risk assessment in a tabular format similar to that provided in its Line 2 Consequence Report (Filing A3Z8G5). The risk assessment tables must also include: i) any updates to High Consequence Areas; ii) the risk mitigation method(s); iii) the mitigated Environmental Risk Scores; iv) pre-mitigation maximum outflow volumes; and v) the outflow volumes after mitigation; b) Environmental Risk Score acceptance criteria, with supporting rationale; and c) a detailed description of the adequacy of the following from its Line 2 Consequence Report (Filing A3Z8G5): i) the coefficients used in the scoring system equations; and ii) the values from the scoring tables.	X							
16	Quantitative Geohazard Frequency Assessment Trans Mountain must file with the NEB, at least 6 months prior to commencing construction, an updated Quantitative Geohazard Frequency Assessment for the new Line 2 and delivery pipeline segments that contains a re-assessment of the Frequency of Loss of Containment (FLoC) values based on the results of site-specific field assessments and any required mitigation as determined in the detailed engineering and design process. Trans Mountain must provide in the assessment a plan to manage and mitigate geohazards at any location where the FLoC value is greater than 10^{-5} events per year to reduce the level of risk to As Low As Reasonably Practicable (ALARP), including a detailed explanation of how the ALARP level has been attained at each location.	X							

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
17	Valve locations on Line 2 Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to commencing construction, its final valve location assessment for Line 2. This assessment must include: a) a table showing each valve's location, function, and description (the description must include valve type, valve closure time, and whether the valve can be remotely controlled by the control centre); b) confirmation that the valve closure times provided in a) will not cause unsafe transient pressures according to the final transient analysis, along with a summary of the analysis; c) calculated volume release and elevation plots in a format similar to that provided by Trans Mountain in its Oil Spill Outflow Model Results for Line 2 for May 2014 Route (Filing A3Z8G6); d) clarification of how the Outflow Volume Score for Non-Watercourse Intersects ($S_{v,Nonwatercourse}$) is considered in identifying and prioritizing pipeline segments for valve optimization; e) for each 5-kilometre-long section of Line 2, information demonstrating that the release volumes are minimized to manage risks within the section to a level that is ALARP, based on the valve locations provided in a); f) an outflow volume versus chainage graph illustrating the effectiveness of the valve locations provided in a) showing the outflow limit in a format similar to that provided in Figure 4 of Attachment 2 to Trans Mountain's response to NEB Information Request No. 3.050b) (Filing A4H2D7); g) mitigation measures for the locations shown to exceed the outflow limit in the graph provided in f); and h) full-bore release and spill extent mapping that identifies and plots all geohazards with a FLoC greater than 10^{-5} events per year after mitigation identified by Trans Mountain at the time of its submission, in a format and scale similar to the maps provided by Trans Mountain in Filing A3Z8G7.	X							
18	Valve locations and upgrades – Line 1 Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to commencing construction, its final valve location assessment for Line 1. This assessment must include: a) a plan for upgrading existing manual block valves to automated or remotely operable valves, and a plan for adding new valves, including initiation and completion dates for the required activities; b) a table showing each valve's location, function, and description (the description must include valve type, valve closure time, and whether the valve can be remotely controlled by the control centre); c) confirmation that the valve closure times provided in b) will not cause unsafe transient pressures according to the final transient analysis, along with a summary of the analysis; d) calculated volume release and elevation plots in a format similar to that provided by Trans Mountain in its Oil Spill Outflow Model Results for Line 2 for May 2014 Route (Filing A3Z8G6); e) an outflow volume versus chainage graph illustrating the effectiveness of the valve locations provided in b), in a format similar to that provided in Figure 4 of Attachment 2 to Trans Mountain's response to NEB Information Request No. 3.050b) (Filing A4H2D7); f) full-bore release and spill extent mapping that identifies and plots all geohazards identified by Trans Mountain in its Natural Hazards Management Program or otherwise, at the time of its submission, in a format and scale similar to the maps provided by Trans Mountain in Filing A3Z8G7; and g) the associated Line 1 risk assessment used to determine the new valve locations and planned valve upgrades in a).		X						

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
19	Pipeline segment reactivation (Hinton to Hargreaves; Darfield to Black Pines) – engineering assessment and certificate Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to commencing construction: a) an engineering assessment for the above two pipeline segments, in accordance with Canadian Standards Association (CSA) Z662-15, Clauses 3.3 and 10.15.2; and b) a certificate with a supporting report issued by an independent certification body,¹⁴⁰ stating unconditionally that the above two pipeline segments: i) are fit for service for the specified operating conditions;¹⁴¹ ii) meet all applicable requirements of CSA Z662-15; and iii) will meet the hydrostatic test requirements outlined in CSA Z662-15, Clause 8, at any time during the certified period. The certificate must be valid for at least 5 years and be validated on an annual basis during the certified period. The supporting report must include the qualifications of the independent certification body, the justification used to grant the certificate, and the expiry date of the certificate.		X						
20	Existing NPS 24 delivery pipeline location Trans Mountain must file with the NEB, at least 6 months prior to commencing construction, its decision on whether it intends to “relocate” the existing NPS 24 delivery pipeline to the Burnaby Mountain tunnel (i.e., replace it with a new third pipeline in the Burnaby Mountain tunnel) and, if so, provide: a) details of any required changes to the design, construction, and operation of the proposed Burnaby Mountain tunnel; b) a discussion of the factors Trans Mountain considered in deciding to replace/relocate the existing NPS 24 delivery pipeline; and c) an indication of when Trans Mountain expects to apply for NEB approval to relocate/replace the existing NPS 24 delivery pipeline.	X							
21	Transient hydraulic analysis on the existing NPS 24 delivery pipeline Trans Mountain must file with the NEB, at least 6 months prior to commencing construction, the conclusions of the transient hydraulic analysis undertaken on the existing NPS 24 delivery pipeline from the Burnaby Terminal to the Westridge Marine Terminal. The filed conclusions must: a) demonstrate that the analysis considered the occurrences of maximum surge pressure in the existing NPS 24 delivery pipeline; and b) support Trans Mountain's decision to either retain or eliminate the proposed relief tank at the Westridge Marine Terminal.	X							
22	Updated terminal risk assessments Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to commencing construction, and at the same time as Trans Mountain's filings for Conditions 23, 24 and 25, updated risk assessments for the Edmonton Terminal West Tank Area, the Sumas Terminal, and the Burnaby Terminal. The updated risk assessments must quantify and/or include the following: a) the effect of any revised spill burn rates; b) the potential consequences of a boil-over; c) the potential consequences of flash fires and vapour cloud explosions; d) the cumulative risk based on the total number of tanks in the terminal, considering all potential events (pool fire, boil-over, flash fire, vapour cloud explosion);							X	

¹⁴⁰ For Conditions 19, 122 and 152, an “independent certification body” is an internationally recognized company or organization, such as Lloyd's Register or Det Norske Veritas, which is able to certify compliance to statutory requirements. The independent certification body must have expertise in pipeline integrity. The NEB reserves the right to accept or reject the certificate. In addition, the NEB's decision is not contingent on the results of the certificate.

¹⁴¹ For Conditions 19, 122 and 152, “operating conditions” must include the Project-specific operating conditions, possible transient flow conditions, slack flow conditions, and effects on operating pressure due to temperature changes.

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	e) the domino (knock-on) effect caused by a release of the contents of one tank on other tanks within the terminal's common impoundment area(s), or other tanks in adjacent impoundment areas; and f) risk mitigation measures, including ignition source control methods. For those risks that cannot be eliminated, Trans Mountain must demonstrate in each risk assessment that mitigation measures will reduce the risks to levels that are ALARP while complying with the Major Industrial Accidents Council of Canada (MIACC) criteria for risk acceptability. The quantitative risk analysis must be based on recognized methodology, models, and software. Product release frequencies and event probabilities must be based on recent, documented data sources. The effect of mitigation measures on the risk results must be justified and documented.								
23	Secondary containment – Edmonton Terminal Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to commencing construction, the final design of the Edmonton Terminal West Tank Area, including a report demonstrating the following: a) the drainage system's capability to rapidly and safely channel a significant release from any tank in the West Tank Area Common Impoundment to the Remote Impoundment Annex and Remote Impoundment at the same time that a design precipitation event is occurring, without overtopping the diked areas; b) the adequacy of the design in mitigating the following consequences of an accidental release and /or ignition of hydrocarbons, both within and beyond the Edmonton Terminal property boundary: i) harm to personnel and the public; ii) environmental damage; and iii) damage to facilities; and c) the ability of the Common Impoundment, Remote Impoundment Annex, and Remote Impoundment to contain a release of hydrocarbons from a rupture of the largest tank within the West Tank Area concurrent with a 1-in-100 year, 24-hour storm event. The scenario must include an allowance for water generated from potential firefighting activities and the maximum potential amount of standing water in all areas of the secondary containment system.							X	
24	Secondary containment – Burnaby Terminal Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to commencing construction, the final design of the Burnaby Terminal, including a report demonstrating the following: a) the drainage system's capability to rapidly and safely channel a significant release from either Tank 96, 97, or 98 to the Partial Remote Impoundment at the same time that a design precipitation event is occurring, without overtopping the diked areas; b) the adequacy of the proposed design in mitigating the following consequences of an accidental release and /or ignition of hydrocarbons, both within and beyond the Burnaby Terminal property boundary: i) harm to personnel and the public; ii) environmental damage; and iii) damage to facilities; and c) the ability of the individual secondary containment areas, Common Impoundment areas, Intermediate Stormwater Retention, Partial Remote Impoundment, and Tertiary Containment to contain a release of hydrocarbons from a multiple-tank rupture scenario concurrent with a 1-in-100 year, 24-hour storm event. The scenario must include an allowance for water generated from potential firefighting activities and the maximum potential amount of standing water in all areas of the secondary containment system. The assessment may include a calculation of the probability of exceedance of on-site containment considering all possible tank rupture combinations, excluding those tanks with sufficient individual secondary containment. The calculation may be based on a tank utilization histogram most representative of the expanded terminal operations, similar to that provided in Attachment 1 of Trans Mountain's response to NEB Information Request No. 4.24a) (Filing A4K4X3).							X	

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25	Secondary containment – Sumas Terminal Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to commencing construction, the final design of the Sumas Terminal, including a report demonstrating the following: - the adequacy of the proposed design in preventing the following consequences of an accidental release and/or ignition of hydrocarbons, both within and beyond the Sumas Terminal property boundary: - harm to personnel and the public; - environmental damage; and - damage to facilities; and - the ability of the secondary containment system to contain a release of hydrocarbons from a multiple-tank rupture scenario concurrent with a 1-in-100 year, 24-hour storm event. The scenario must include an allowance for water generated from potential firefighting activities and the maximum potential amount of standing water in all areas of the secondary containment system. The assessment may include a calculation of the probability of exceedance of on-site containment considering all possible tank rupture combinations, excluding those tanks with sufficient individual secondary containment. The calculation may be based on a tank utilization histogram most representative of the expanded terminal operations, similar to that provided in Attachment 1 of Trans Mountain's response to NEB Information Request No. 4.24b) (Filing <u>A4K4X4</u>).							X	
26	Burnaby Mountain tunnel option – design, construction, and operation For the tunnel between the Burnaby Terminal and the Westridge Marine Terminal and related delivery pipelines, at least 6 months prior to commencing Burnaby Mountain tunnel construction activities, Trans Mountain must: - file with the NEB <u>for approval</u>: - a description of the selected tunnel lining method with the rationale for its selection; and - tunnel confined space entry procedures during construction and visual inspections, and, if applicable, following construction; and - file with the NEB: - the results of any geotechnical or geophysical feasibility surveys completed since the evidence filed in the OH-001-2014 hearing; - a description of the tunnel portals and permanent road access, if applicable; - a description of the selected tunnel excavation method with rationale for its selection; - a description of the tunnel backfilling method with rationale for its selection; - a description of the methods to be used for pipe handling and welding; - a discussion on the adequacy of the pipe support methods for the new delivery pipelines during construction, commissioning, hydrostatic testing and operation, if applicable; - a discussion on the adequacy of the selected leak detection methods; - information demonstrating how the precautionary design of the new delivery pipelines would mitigate issues related to limited accessibility for future maintenance and repairs; and - the final tunnel cross-sectional design drawings.	X							
27	Burnaby Mountain tunnel option – backfilling Trans Mountain must file with the NEB, at least 6 months prior to commencing Burnaby Mountain tunnel construction activities, the following information on backfilling the tunnel between the Burnaby Terminal and the Westridge Marine Terminal: - a discussion of the adequacy of the measures to be taken during tunnel backfilling to eliminate or mitigate potential damage to the delivery pipelines; - the method(s) that will be used to confirm the consistency and continuity of the tunnel backfill (i.e., backfilling is completed without any spatial gaps); - the method(s) that will be used for holiday detection and coating repair prior to backfilling; - the methods that will be used to confirm the integrity of the delivery pipelines in the tunnel, both prior to and after backfilling, but prior to commissioning; and - the methods that will be used for monitoring, maintaining, and repairing backfill during operations, considering conditions such as fill deterioration and a potential increase in permeability.	X							

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28	Burnaby Mountain tunnel option – cathodic protection Trans Mountain must file with the NEB, at least 6 months prior to commencing Burnaby Mountain tunnel construction activities , the following information on the cathodic protection system for the delivery pipelines in the tunnel between the Burnaby Terminal and the Westridge Marine Terminal: a) a description of the cathodic protection system design; b) risk mitigation measures for all potential cathodic protection performance issues, such as shielding from the backfill material; and c) a method for verifying the effectiveness of the cathodic protection system during operations.	X							
29	Burnaby Mountain tunnel option – rock mass and waste rock management Trans Mountain must file with the NEB <u>for approval</u> , at least 6 months prior to commencing Burnaby Mountain tunnel construction activities , the following details on rock mass expected to be encountered during construction of the tunnel between the Burnaby Terminal and the Westridge Marine Terminal: a) the characterization of the rock mass quality; b) waste rock management methods during construction and operations, if applicable; c) proposed acid rock mitigation measures, such as the treatment or disposal of acid rock, if encountered; d) the locations, sizes, and designs of all confirmed waste rock disposal areas; and e) plans for disposing any waste rock that is not expected to be stored in the confirmed waste rock disposal areas.	X							
30	Power system protection for pump stations and terminals Trans Mountain must file with the NEB the following details of its electrical power system design for each pump station and each of the following: Westridge Marine Terminal, Burnaby Terminal, Edmonton Terminal, and Sumas Terminal: a) Descriptions of the overcurrent and ground fault protection schemes including: i) a summary of coordination studies between the upstream and downstream protective devices, at least 3 months prior to commencing dry commissioning; ii) relay settings and time-current curves, at least 3 months prior to commencing dry commissioning; iii) the specification of neutral grounding resistors, at least 6 months prior to commencing construction; iv) specifications of contactors, fuses, and circuit breakers, at least 6 months prior to commencing construction; and v) a description of other electrical protections, relay settings, and trip characteristics, at least 3 months prior to commencing dry commissioning. b) Consistent with the NEB's Safety Advisory SA-2015-03, dated 4 May 2015, at least 6 months prior to commencing construction, information confirming that Trans Mountain has performed the ground fault and arcing fault protection designs for each pump station and terminal, including: i) a means to clear ground faults without intentional time delay if the fault currents exceed the design limit set by the neutral grounding resistance; and ii) a means to block the stored energy from other running motors from feeding an electrical fault in another motor running from the same bus. This filing must include a description of the ground fault and arcing fault protection designs including the above measures. c) At least 6 months prior to commencing construction, either: i) a written confirmation that Trans Mountain determined during detailed design that electrical faults will not exceed their design limits and migrate to an arcing fault; or ii) for a station or a terminal for which Trans Mountain determined during detailed design that an electrical fault could exceed its design limit and migrate to an arcing fault, the electrical configuration of that station or terminal and the additional equipment and devices that will be used to mitigate the adverse effects of such arcing faults. d) Single-line diagrams of the electrical power systems, at least 6 months prior to commencing construction.	X				X	X	X	

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31	Reactivation of the Niton Pump Station Trans Mountain must file with the NEB <u>for approval</u> , at least 6 months prior to commencing any pump station construction , an engineering assessment for the Niton Pump Station, in accordance with CSA Z662. The engineering assessment must demonstrate that the pump station is fit for its intended service, and meets all applicable requirements of CSA Z662.		X						
32	Sumas Terminal Geotechnical Report Trans Mountain must file with the NEB, at least 6 months prior to commencing construction at the Sumas Terminal , a geotechnical report that provides feasibility-level geotechnical design recommendations for the proposed expansion at the Sumas Terminal.							X	
33	Westridge Marine Terminal Onshore Geotechnical Report Trans Mountain must file with the NEB, at least 6 months prior to commencing construction at the Westridge Marine Terminal , a geotechnical report that provides feasibility-level geotechnical design recommendations for the proposed new onshore facilities at the Westridge Marine Terminal, including consideration of the potential for seismic damage.	X							
34	Westridge Marine Terminal Offshore Geotechnical Report Trans Mountain must file with the NEB, at least 6 months prior to commencing construction at the Westridge Marine Terminal , the final Preliminary Geotechnical Report on the offshore portion of the Westridge Marine Terminal, based on the selected pile design option, including consideration of the potential for seismic damage.	X							
35	Marine Sediment Management Plan Trans Mountain must file with the NEB, at least 6 months prior to commencing construction at the Westridge Marine Terminal , confirmation whether or not dredging is required at the Westridge Marine Terminal. In the event that dredging is determined to be unavoidable during the expansion of the Westridge Marine Terminal, Trans Mountain must file with the NEB <u>for approval</u> , at least 4 months prior to commencing construction , and also include as part of its Westridge Marine Terminal Environmental Protection Plan, a Marine Sediment Management Plan. This plan must include: a) a summary of any supplemental marine sediment survey results; b) quantification of the area and the volume of marine sediment to be dredged along with an explanation of the measures that have been taken to eliminate or reduce the dredge footprint and volume proposed for disposal at sea; c) results of sediment plume modelling for any areas to be dredged; d) options for dredged sediment management, including the volumes of sediment that will be re-used or disposed of at sea or on land, as well the criteria and methods for determining how the dredged sediment will be disposed of at sea or on land; e) criteria and methods for determining how the dredged sediment will be managed recognizing that any proposed disposal at sea will only be considered for approval under the <i>Canadian Environment Protection Act</i>, 1999, if it is demonstrated to be the most technically and environmentally preferable option; f) confirmation that Trans Mountain will update the Westridge Marine Terminal Environmental Protection Plan to include any relevant information from the Marine Sediment Management Plan; g) details of monitoring that will be undertaken during construction; h) details of monitoring (both abiotic and biotic parameters) that will be undertaken during operations, including a discussion on evaluating the level of contaminants in the marine environment and any changes from pre-construction levels, as well as a proposed reporting schedule; and i) a summary of its consultations with Appropriate Government Authorities and potentially affected Indigenous groups. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan.	X							
36	Pre-construction caribou habitat assessment Trans Mountain must file with the NEB, at least 6 months prior to commencing construction of any Project component potentially affecting each caribou range , a detailed caribou habitat assessment of the Project right-of-way through each caribou range traversed by the Project, including a 500 metre buffer on either side. The framework of the habitat assessment must use the updated critical habitat polygons delineated by the Southern Mountain Caribou Recovery Team and components of critical habitat outlined in the <i>Recovery Strategy for the Woodland Caribou, Southern Mountain Population in Canada (2014)</i> . The habitat assessment must include: a) map(s) indicating the location of the habitat;	X	X		X	X	X		

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	b) a description of the amount of habitat and the existing habitat alteration, in hectares; c) a description of how Trans Mountain has taken available and applicable Indigenous traditional ecological knowledge into consideration into the assessment including demonstration that those Indigenous persons and groups that provided Indigenous traditional ecological knowledge, as reported during the OH-001-2014 proceeding and /or pursuant to Condition 97, had the opportunity to review and comment on the information; d) a description of how Trans Mountain has incorporated input from Appropriate Government Authorities and species experts into the assessment methodology; and e) a description of the type of habitat characterized by the biophysical attributes of critical habitat, as defined in the applicable Recovery Strategy.								
37	Caribou Habitat Restoration Plan (CHRP) Trans Mountain must file with the NEB for approval, in accordance with the timelines below, preliminary and final versions of a CHRP for each caribou range potentially affected by the Project. a) Preliminary CHRP – to be filed at least 6 months prior to commencing construction of any Project component potentially affecting each caribou range. This version of the CHRP must include the following: i) the CHRP's goals and measureable targets for each caribou range, including the goal of avoidance of critical habitat destruction; ii) a detailed description of measures that will be used to avoid or lessen Project activities that impact critical habitat, and the rationale for selecting the measures; iii) a list of criteria used to identify potential caribou habitat restoration sites; iv) conceptual decision-making tree(s) or decision framework(s) that will be used to identify and prioritize potential caribou habitat restoration sites, and mitigative actions to be used at different types of sites, including consideration of typical site factors that may constrain implementation; v) a literature review upon which the decision-making tree(s) or decision framework(s) are based, including: 1) an identification of applicable temporal and spatial caribou habitat restoration methodologies; 2) an assessment of the relative effectiveness of the identified methodologies; and 3) a detailed methodology of how the literature review was conducted. vi) the quantifiable targets and performance measures that will be used to evaluate the extent of predicted residual effects, CHRP effectiveness, the extent to which the goals and measurable targets have been met, and the need for further measures to offset unavoidable and residual effects on caribou habitat; vii) a schedule indicating when mitigation measures will be initiated and their estimated completion dates; viii) a description of how Trans Mountain has taken available and applicable Indigenous traditional ecological knowledge studies into consideration in identifying potential caribou habitat restoration sites including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and /or pursuant to Condition 97, had the opportunity to review and comment on the information; and ix) a summary of its consultations with Appropriate Government Authorities and any potentially affected Indigenous groups. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the preliminary CHRP. b) Final CHRP – to be filed on or before 1 November after the first complete growing season after completing final clean-up. This version of the CHRP must include the following: i) the preliminary CHRP, with any updates identified in a revision log that includes the rationale for any changes to decision-making criteria; ii) a complete tabular list of caribou habitat restoration sites, including locations, spatial areas, habitat quality descriptions, site-specific restoration activities, and challenges; iii) a description of how selected restoration measures are consistent with the <i>Recovery Strategy for the Woodland Caribou, Southern Mountain Population in Canada (2014)</i>; iv) maps or updated Environmental Alignment Sheets showing the site locations; v) specification drawings for the implementation of each restoration method; vi) a qualitative and quantitative and assessment of the total area of direct and indirect disturbance to caribou habitat that will be restored, the duration of spatial disturbance,	X	X		X	X	X		

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	and the area-based extent of the resulting unavoidable and residual effects to be offset, including indirect disturbance; and vii) a summary of its consultations with Appropriate Government Authorities and any potentially affected Indigenous groups. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the final CHRP.								
38	Sowaqua Spotted Owl Mitigation Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to commencing construction of any Project component within the Sowaqua spotted owl wildlife habitat area, a Sowaqua Spotted Owl Mitigation Plan that includes: a) a summary of results from supplemental surveys conducted in the Sowaqua spotted owl wildlife habitat area; b) the area of habitat potentially directly and indirectly affected by the Project; c) a description of how an avoidance, mitigation, and offset hierarchy was considered in the plan; d) mitigation measures to be implemented, including all relevant measures committed to throughout the OH-001-2014 proceeding, any new mitigation measures resulting from supplementary surveys, detailed criteria using clear and unambiguous language that describes the circumstances under which each measure will be applied, and measurable goals for evaluating mitigation success; e) an evaluation of offset options within or outside of the Sowaqua spotted owl wildlife habitat area, an indication of the selected option, and the rationale for the selected option; f) details on post-construction monitoring of mitigation measures and offset measures, including survey methods, corrective measures, detailed criteria using clear and unambiguous language that describes the circumstances under which each measure will be applied, any adjustments to the offset measures, and a proposed reporting schedule; g) a commitment to include results of the monitoring in the post-construction environmental monitoring reports filed under Condition 151; h) details on how the mitigation and monitoring measures are consistent with applicable Recovery Strategies and Action Plans; i) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the mitigation plan including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; j) a summary of its consultations with Appropriate Government Authorities, any species experts and potentially affected Indigenous groups. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the mitigation plan; and k) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information from the mitigation plan.	X	X		X	X	X		
39	Hydrogeological study at Coldwater Indian Reserve (IR) No. 1 Trans Mountain must file with the NEB, at least 6 months prior to commencing construction between Veale Road and Kingsvale Pump Station, a hydrogeological report relating to the aquifer at Coldwater IR No. 1 in British Columbia. The report must: a) describe the methodology and information sources used, including any field investigations; b) delineate the extent of the aquifer in the area of Coldwater IR No. 1; c) characterize the aquifer recharge sources and aquifer confinement; d) characterize the direction and speed of groundwater movement to wells on Coldwater IR No. 1; e) quantify the risks posed to groundwater supplies on Coldwater IR No. 1 in the event of leaks, accidents or malfunctions from the Project; f) based on the assessment of risks, describe proposed measures to address identified risks, including but not limited to considerations related to routing, Project design, operational measures, or monitoring; g) provide justification for the measures proposed to address identified potential risks to groundwater supplies on Coldwater IR No. 1; and h) include a summary of consultations undertaken with the Coldwater First Nation and Appropriate Government Authorities, as well as copies of all written comments that may be provided to Trans Mountain by the Coldwater First Nation or Appropriate Government	X			X		X		

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	Authorities. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from the Coldwater First Nation or Appropriate Government Authorities, into the assessment.								
40	Rare Ecological Community and Rare Plant Population Management Plan Trans Mountain must file with the NEB <u>for approval</u> , at least 5 months prior to commencing construction , an updated Rare Ecological Community and Rare Plant Population Management Plan for ecological communities of concern, rare plants and lichens, and early draft, candidate, proposed, or final critical habitat for plant and lichen species under the <i>Species at Risk Act</i> , that are potentially affected directly or indirectly by the Project during construction or operations, that includes: a) a summary of supplementary survey results, and a demonstration of the overall adequacy of the rare ecological community and rare plant surveys, including the adequacy for the identification of biophysical attributes for any early draft, candidate, proposed, or final critical habitat under the <i>Species at Risk Act</i> ; b) avoidance and mitigation measures to be implemented during construction and operations, including all relevant measures committed to throughout the OH-001-2014 proceeding and any new measures resulting from supplementary surveys, with rationales and unambiguous criteria explaining under what circumstances each measure will be applied, and measurable goals against which the success of each measure will be evaluated; c) a description of how the avoidance, mitigation, and offset hierarchy was considered in developing the plan, with rationales for progressing from avoidance to mitigation to offsets; d) details on post-construction monitoring, including survey methods, the appropriate number of years of monitoring to determine the success of each type of avoidance and mitigation measure, corrective actions that might be necessary, and the circumstances under which each such action would be taken; e) a Preliminary Rare Ecological Community and Rare Plant Population Offset Plan for any ecological communities and rare plant and lichen species that have an at-risk status of S1, S1S2 or S2, or that are listed under federal or provincial legislation for protection, and for any early draft, candidate, proposed, or final critical habitat under the <i>Species at Risk Act</i> , and that, after five years of operations, have ongoing effects. This preliminary plan must include: i) a rationale for why the community, species, or critical habitat cannot be avoided by a sufficient distance to avoid both direct and indirect residual effects; ii) the expected residual effects on that community, species, or critical habitat, including a discussion of the potential for time lags between when Project effects occur and when mitigation measures would become fully functional, and taking into account the success on past projects of the proposed mitigation and corrective measures in b) and d) above; iii) an analysis of the appropriateness of offsets for the community, species or critical habitat, taking their specific features into account, and of any potential limitations on offset effectiveness; iv) a description of how the avoidance, mitigation, monitoring, corrective and offset measures are consistent with any applicable recovery, action or management strategies or plans for the community, species or critical habitat; v) an explanation with rationales of how the need for offset measures will be determined and how quantitative offset objectives will be developed, including the use and selection of offset ratios, with the aim of achieving no-net-loss; vi) the potential types of offset measures, the process for selecting which will be implemented, an estimation of the probability of their success, and how compensation sites will be selected; and vii) a discussion of how the effectiveness of offset measures will be monitored, assessed, and reported on, and problems corrected; f) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; g) a summary of its consultations with Appropriate Government Authorities, any species experts and any potentially affected Indigenous groups. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan; and h) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information from the Rare Ecological Community and Rare Plant Population								
			X	X		X	X	X	X

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	Management Plan, including confirmation that the avoidance, mitigation, monitoring, corrective, and offset measures in the Rare Ecological Community and Rare Plant Population Management Plan will be implemented to the extent feasible in the case of discovery via their inclusion in the Rare Ecological Communities or Rare Plant Species Discovery Contingency Plan.								
41	Wetland Survey and Mitigation Plan Trans Mountain must file with the NEB <u>for approval</u> , at least 5 months prior to commencing construction , a pre-construction Wetland Survey and Mitigation Plan for wetlands potentially affected directly or indirectly by the Project during construction or operations, that includes: a) a summary of supplementary survey results and a demonstration of the overall adequacy of the wetland surveys; b) a description of any wetlands for which ground-based surveys were not possible, an explanation as to why not, attempts made to obtain access, and what further information on each wetland will be collected immediately prior to or during construction; c) a description of the functional condition of each wetland for comparison during post-construction monitoring, including individual functional conditions (e.g., habitat, hydrology and biogeochemistry, including the presence and abundance of migratory birds and species at risk), and a description of the methods used to determine the type and amount of each individual wetland function and the overall functional condition; d) a description of the crossing methods, mitigation measures and reclamation measures to be implemented during construction and operations, with rationales and unambiguous criteria explaining under what circumstances each such method and measure will be applied; e) measurable goals against which the success of wetland mitigation and reclamation will be evaluated, including a description of how such goals incorporate the aim of returning wetlands to their original functionality while allowing for reasonable natural variation, and including measurable goals for each of the first-, third- and fifth-year post-construction monitoring reporting stages for any wetland to which no-net-loss under the Federal Policy on Wetland Conservation applies; f) a description of how the i) avoidance, mitigation, and offset hierarchy; and ii) the goal of no-net-loss of wetland function, were considered in developing the plan, with rationales for progressing from avoidance to mitigation to offsets; g) details of the post-construction monitoring plan for wetlands for the first five years of operations, including corrective actions that might be necessary and the circumstances under which each such action would be taken; h) a Preliminary Wetland Offset Plan for any wetland that has not achieved reclamation success in terms of overall wetland function after five years of operations, and for any wetland to which no-net-loss under the Federal Policy on Wetland Conservation applies and that has had a temporary or ongoing loss in any individual functional condition – this plan must include: i) the expected residual effects on the wetland, including a discussion of the potential for time lags between when Project effects occur and when mitigation measures would become fully functional, taking into account the success on past projects of the proposed mitigation, reclamation and corrective measures in d) and g) above; ii) an analysis of the appropriateness of offsets for the wetland, taking its specific features into account, and of any potential limitations on offset effectiveness; iii) an explanation with rationales of how the need for offset measures will be determined and how quantitative offset objectives will be developed, including the use and selection of offset ratios and indicator species, with the aim of achieving no-net-loss; iv) the potential types of offset measures, the process for selecting which will be implemented, an estimation of the probability of their success, and how compensation sites will be selected; v) a discussion of how the effectiveness of offset measures will be monitored, assessed, and reported on, and problems corrected; and vi) for any wetland to which no-net-loss under the Federal Policy on Wetland Conservation applies, details with rationales on the offset measures that will be implemented before or during the first five years of operations to compensate for expected temporary or ongoing losses to individual functional conditions, including the amount and type of offsets required, the selection of compensation sites, identification of the parties involved in planning and implementation and their respective roles and responsibilities, a timeline for implementation, and the methods and schedule for monitoring and reporting to demonstrate offset success;	X	X		X	X	X	X	

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	i) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; j) a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan; and k) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information from the Wetland Survey and Mitigation Plan.								
42	Grasslands Survey and Mitigation Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 5 months prior to commencing construction, a pre-construction Grasslands Survey and Mitigation Plan for native grasslands in the B.C. interior that are potentially affected directly or indirectly by the Project during construction or operations, that includes: a) a summary of survey results for such grasslands, including but not limited to native plant species diversity, species at risk, the density and distribution of existing invasive plant species, and the presence of cryptogamic crust, together with a demonstration of the adequacy of such surveys and a summary of existing and ongoing land management impacts; b) a description (including quantification) of overlap of the Project with grasslands and of expected residual effects; c) a description of the mitigation and reclamation measures to be implemented for grasslands during construction and operations, including the extent to which native seed will be used, with rationales and unambiguous criteria explaining under what circumstances each such measure will be applied; d) measurable goals against which the success of grassland mitigation and reclamation will be evaluated, including goals related to cryptogamic crust recovery, invasive species control, and access control, and how existing and ongoing land management impacts and land-use changes by landowners outside the control of Trans Mountain will be taken into account; e) a description of how the i) avoidance, mitigation, and offset hierarchy, and ii) the goal of no-net-loss for grasslands, were considered in developing the plan, with rationales for progressing from avoidance to mitigation to offsets; f) details of the post-construction monitoring plan for grasslands for the first ten years of operations, including corrective actions that might be necessary and the circumstances under which each such action would be taken; g) a Preliminary Grasslands Offset Plan for those grasslands that, after ten years of operations, have not achieved reclamation success. This plan must include: i) expected residual effects on the grasslands, including a discussion of the potential for time lags between when Project effects occur and when mitigation measures would become fully functional, taking into account the success on past projects of the proposed mitigation, reclamation and corrective measures in c) and f) above; ii) an analysis of the appropriateness of offsets for the grasslands, taking their specific features into account, and of any potential limitations on offset effectiveness; iii) an explanation with rationales of how the need for offset measures will be determined and how quantitative offset objectives will be developed, including the use and selection of offset ratios, with the aim of achieving no-net-loss; iv) the potential types of offset measures, the process for selecting which will be implemented, an estimation of the probability of their success, and how compensation sites will be selected; and v) a discussion of how the effectiveness of offsets measures will be monitored, assessed, and reported on, and problems corrected; h) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information;	X	X		X	X	X		

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	i) a summary of its consultations with Appropriate Government Authorities, any species experts, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan; and j) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information from the Grasslands Survey and Mitigation Plan.								
43	Watercourse crossing inventory Trans Mountain must file with the NEB, at least 5 months prior to commencing <u>any</u> watercourse crossing construction activities, the following: a) an updated inventory of all watercourses to be crossed, including, for each crossing: i) the name of the watercourse being crossed and an identifier for the crossing; ii) the location of the crossing; iii) the primary and contingency crossing methods; iv) planned construction timing; v) information on the presence of fish and fish habitat; vi) information on the composition of riparian habitat; vii) the provincial instream work window; viii) the proposed least risk biological window and the rationale to support the proposed least risk biological window if it differs from the provincial instream work window; and ix) an indication of whether any of Fisheries and Oceans Canada's applicable "Measures to Avoid Causing Harm to Fish and Fish Habitat" cannot be implemented; b) detailed generic design drawings of trenchless, dry open-cut, frozen open-cut, and isolation crossings of various watercourse types; c) site-specific information for each watercourse crossing where any of Fisheries and Oceans Canada's applicable "Measures to Avoid Causing Harm to Fish and Fish Habitat" cannot be implemented for the primary pipeline construction method: i) detailed crossing-specific design drawings; ii) photographs up-stream, down-stream, and at the crossing location; iii) a description of the fish species and habitat that is present at the crossing location, and if fish spawning is likely to occur within the immediate area; iv) a description of the composition of the riparian habitat at the crossing location and an indication if the riparian habitat has a limiting effect on the productive capacity of the watercourse, and if its removal or disturbance represents a potential influence on fish communities; v) the site-specific mitigation and habitat enhancement measures to be used to minimize impacts; vi) any potential residual effects; vii) proposed reclamation measures; and viii) a discussion of the potential impacts to local fisheries resources within the immediate area as a result of the crossing's construction; d) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the inventory, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; and e) a summary of consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted.	X	X						
44	Wildlife Species at Risk Mitigation and Habitat Restoration Plans Trans Mountain must file with the NEB <u>for approval</u>, at least 4 months prior to commencing construction, Wildlife Species at Risk Mitigation and Habitat Restoration Plans for each species whose draft, candidate, proposed, or final critical habitat is directly or indirectly affected by the Project. Each plan must include: a) a summary of supplementary pre-construction survey results, including surveys for biophysical	X	X		X	X	X		

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	attributes of critical habitat; b) the location and type of critical habitat, for those wildlife species with early draft and candidate critical habitat, including a description of the biophysical attributes, potentially directly and indirectly affected by the Project; c) the location, types and total spatial area for each type of critical habitat for those wildlife species with proposed or final critical habitat, including a description of the biophysical attributes, potentially directly and indirectly affected by the Project; d) a detailed description of measures that will be used to avoid the destruction of critical habitat; e) a detailed description of mitigation and habitat restoration measures to be implemented to reduce direct and indirect Project effects on critical habitat, including all relevant measures committed to throughout the OH-001-2014 proceeding, any new mitigation measures resulting from supplementary surveys, detailed criteria using clear and unambiguous language that describes the circumstances under which each measure will be applied, and measurable targets for evaluating mitigation and critical habitat restoration success; f) identification and review of alternative mitigation and habitat restoration measures to avoid or lessen direct and indirect Project effects on critical habitat, and the rationale for the selected measure(s); g) detailed description of how selected mitigation and critical habitat restoration measures address the potential for time lags between when the Project impacts occur and when mitigation and critical habitat restoration measures are implemented and are fully functional; h) details on post-construction monitoring of mitigation measures and critical habitat restoration measures, including survey methods, corrective measures, detailed criteria using clear and unambiguous language that describes the circumstances under which each measure will be applied, and a proposed reporting schedule; i) details on how the mitigation, critical habitat restoration measures, and monitoring measures are consistent with applicable Recovery Strategies and Action Plans; j) a commitment to include the results of the monitoring in the post-construction environmental monitoring reports filed under Condition 151; k) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plans including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; l) a summary of its consultations with Appropriate Government Authorities, any species experts, potentially affected Indigenous groups and affected landowner/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan; and m) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information from the Wildlife Species at Risk Mitigation and Habitat Restoration Plans.								
45	Weed and Vegetation Management Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 4 months prior to commencing construction, an updated Weed and Vegetation Management Plan for the Project that includes: a) a summary of supplementary survey results, including pre-construction weed surveys, and a demonstration of the adequacy of such surveys; b) measurable goals; c) criteria describing when and where problem vegetation will be managed for each Project phase, including pre-construction, construction, post-construction, and operations; d) a description of potential adverse effects related to treatment measures; e) management procedures and a decision-making framework for selecting appropriate prevention and treatment measures, including a description of relevant specific habitats, land uses and land management plans and how each will be considered and kept up-to-date in selecting prevention and treatment measures; f) the methods and schedule for short- and long-term vegetation monitoring; g) a summary of its consultations with Appropriate Government Authorities, invasive plant councils or committees, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan; and	X	X	X	X	X	X	X	X

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	h) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information from the Weed and Vegetation Management Plan.								
46	Contamination Identification and Assessment Plan Trans Mountain must file with the NEB <u>for approval</u> , at least 4 months prior to commencing construction , a Contamination Identification and Assessment Plan that includes: a) a description of the procedures that have been implemented to-date, and that will be implemented prior to or during construction, to identify and assess pre-existing solid, liquid or gaseous contamination that could be disturbed by, or affect, the Project, including whether site investigations have been or will be undertaken; b) a demonstration of the adequacy of the procedures in a) with reference to relevant standards, guidelines, and best practices, including how historical land use has been taken into account and a discussion of the potential for chemicals of concern to not be detectable by smell or by sight; c) the information that has been or will be reported by Trans Mountain, including to whom and when, concerning pre-existing contamination; d) a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners / tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan; and e) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information from the Contamination Identification and Assessment Plan.	X	X	X	X	X	X	X	X
47	Access Management Plan(s) Trans Mountain must file with the NEB <u>for approval</u> , at least 4 months prior to commencing construction , an Access Management Plan(s) to be included within the updated Environmental Protection Plans required by Conditions 72 and 78. Each plan must address issues related to soil, vegetation, fish and fish habitat, and wildlife and wildlife habitat. Each plan must also describe access control measures proposed to control both human and predator access during construction and operations, and include: a) objectives of the plan; b) measurable goals for evaluating the plan's success in achieving its objectives; c) a summary of any related baseline information that has been or will be collected to aid in evaluating the plan's success, and justification of the adequacy of this baseline information, or a rationale if no baseline information has or will be collected; d) a list of sites where access control measures will be implemented for construction and those that will remain in place throughout operations, the control measure(s) proposed at those sites, and the rationale for selecting those sites and measures; e) the methods for monitoring the effectiveness of access control measures implemented during construction and operations, and justification of the adequacy of such monitoring; f) a description of available adaptive management measures and of the criteria Trans Mountain will use to determine if and when adaptive management measures are warranted based on monitoring results; g) a commitment to report, as part of Trans Mountain's post-construction environmental monitoring reports (required by Condition 151), on the control measures implemented, monitoring undertaken, and the success of control measures in meeting Access Management Plan goals and objectives, as well as a schedule, with rationale, for reporting throughout operations; h) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge studies into consideration including demonstration that those Indigenous persons and groups that provided Indigenous traditional ecological knowledge, as reported during the OH-001-2014 proceeding and /or pursuant to Condition 97, had the opportunity to review and comment on the information; and i) a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners / tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the Plan / Report.	X	X		X	X	X		
48	Navigation and navigation safety plan Trans Mountain must file with the NEB, <u>for approval</u> , at least 4 months prior to commencing construction , a Navigation and Navigation Safety Plan that includes: a) an updated list of navigable waterways to be crossed by or affected by the Project (including power lines, marine terminal, temporary or permanent bridge crossings, or other ancillary works that are physically or operationally connected to the Project);	X	X		X	X	X		

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	b) an updated listing of effects of the Project on navigation and navigation safety for each of the identified waterways identified in a); c) proposed mitigation measures to address Project effects on navigation and navigation safety for each of the identified waterways, including adherence to codes and standards (such as the CSA); and d) a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and waterway users, regarding their navigational use of each of the identified waterways. In its summary, Trans Mountain must: i) describe the Appropriate Government Authorities, potentially affected Indigenous groups, and commercial and recreational waterway users consulted; ii) describe how Trans Mountain identified those consulted; and iii) provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan.								
49	Technical working group (TWG) reports Trans Mountain must file with the NEB, at least 4 months prior to commencing construction and every 6 months thereafter until after commencing operations, a report describing the activities undertaken by the TWGs during the reporting period and the outcomes of these activities. The reports must include, at a minimum: a) a list of all members of each TWG; b) the methods, dates and location of all TWG activities or meetings; c) a summary of all issues or concerns raised or addressed during the TWG activities; d) a description of outcomes or measures that were or will be implemented to address the issues identified or concerns raised; or, if any measures will not be implemented, a rationale for why not; and e) a description of any unresolved issues or concerns, and a description of how these will be addressed, or a rationale for why no further measures will be required.	X							
50	High-voltage alternating current (AC) interference Trans Mountain must file with the NEB, at least 4 months prior to commencing construction: a) a report confirming that Trans Mountain has achieved an engineered solution to mitigate possible damage to pipeline segments caused by the power line fault current from power line footings and other below ground fault current discharge facilities of B.C. Hydro's unshielded transmission power lines that are located less than 30 metres from those segments. The report must include: i) a summary of the above-mentioned engineered solution and an explanation of how the engineered solution adequately mitigates possible damage to the pipeline; ii) a list of pipeline segments where mitigation will be applied; and iii) an explanation of measures taken by Trans Mountain to reach an agreement with B.C. Hydro towards implementing the engineered solution. Trans Mountain must provide a copy of the report to B.C. Hydro at the same time that it is filed with the NEB; b) a report detailing how Trans Mountain's design reduces hazardous induced voltages on its pipeline segments to meet a maximum 15 VAC under all steady state operating conditions; and c) a report demonstrating how Trans Mountain would comply with the requirements of IEEE Standard 80 to limit touch and step potentials to all points of contacts to pipeline segments due to power line faults or switching surges, and include a list of affected pipeline segments.	X							
51	Field changes manual for geohazard mitigation Trans Mountain must file with the NEB <u>for approval</u>, at least 4 months prior to commencing construction, a field changes manual for geohazard mitigation. This manual must include: a) decision criteria for implementing mitigation for any geohazards identified during construction; b) specific criteria for implementing changes to the designs, grading, special materials, protective structures, burial depth, installation procedures, erosion mitigation measures, and monitoring; and c) details regarding the required qualifications of the field staff that will implement the manual.	X							
52	Air Emissions Management Plan for the Westridge Marine Terminal Trans Mountain must file with the NEB <u>for approval</u>, at least 4 months prior to commencing construction at the Westridge Marine Terminal, an Air Emissions Management Plan for the Westridge Marine Terminal that includes:	X							

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	a) locations of air monitoring sites (on a map or diagram), including the rationale for the locations selected; b) confirmation that the new fixed air monitoring stations will be installed and operating at least one year prior to commencing operations at the Westridge Marine Terminal to establish robust local baseline data; c) the methods and schedule for ambient monitoring of contaminants of potential concern in air (e.g., particulate matter [including diesel particulate matter and speciation of PM_{2.5}], nitrogen oxides (including NO₂), sulphur dioxide, hydrogen sulphide, ozone, mercaptans, reduced visibility and volatile organic compounds) following a recognized protocol (e.g., National Air Pollution Surveillance program or U.S. Environmental Protection Agency), and emissions source tracking; d) representative meteorological data (e.g., wind speed, wind direction, air temperature and relative humidity) for the monitoring period; e) description of monitoring equipment and procedures for monitoring station data recording, assessment, quality assurance and reporting details, including a description of how the real time and non-continuous air quality monitoring data will be made available to the public; f) a particulate matter management plan; g) a description of the public and Indigenous communication and complaint response processes; h) the criteria or thresholds that, if triggered or exceeded, would require implementing additional mitigation measures; i) a description of additional mitigation measures that would be implemented as a result of the monitoring data or ongoing concerns; and j) a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan.								
53	Fugitive Emissions Management Plan for the Westridge Marine Terminal Trans Mountain must file with the NEB <u>for approval</u>, at least 4 months prior to commencing construction at the Westridge Marine Terminal, a Fugitive Emissions Management Plan for the Westridge Marine Terminal that includes: a) a description of the sources of the fugitive emissions that will be generated from the Westridge Marine Terminal during construction and operations; b) a description of the emission and odour controls that will be employed to reduce fugitive emissions during tanker loading and other sources identified in a); c) procedures for verifying, tracking, and reporting on: i) fugitive emissions during tanker loading; ii) volatile organic compound collection efficiency; iii) the vapour recovery unit's hydrogen sulphide and mercaptan removal efficiency, as well as its BTEX reduction efficiency; and iv) the vapour combustion unit's hydrogen sulphide and mercaptan; removal efficiency, as well as its combustion efficiency; d) procedures for identifying any leaks or equipment malfunctions during operation of the vapour recovery and vapour combustion units; e) methods for quantifying emissions of particulate matter and volatile organic compounds (with vapour recovery and vapour combustion units in operation); f) any additional mitigation measures that will be employed to further reduce fugitive emissions; g) a description of Trans Mountain's program for addressing complaints with respect to fugitive emissions, including a communication and notification plan; and h) a summary of its consultations with Appropriate Government Authorities. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan.	X							

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54	Fugitive Emissions Management Plan for Edmonton, Sumas and Burnaby Terminals Trans Mountain must file with the NEB <u>for approval</u>, at least 4 months prior to commencing construction at each Terminal, a Fugitive Emissions Management Plan for the Edmonton, Sumas, and Burnaby Terminals. This plan must include: a) a description of the fugitive emission sources within the terminals during construction and operations; b) a description of the emission and odour controls that will be employed to reduce fugitive emissions from the tanks, and any other sources identified in a); c) procedures for verifying the capture and destruction efficiency of tank vapour activation units or any other emission or odour control units at the terminals; d) quantification of fugitive emissions during operations, including the methods used; e) any additional mitigation measures that will be employed to further reduce the fugitive emissions; f) a description of Trans Mountain's program for addressing complaints with respect to fugitive emissions, including a public and Indigenous communication and complaint response process; and g) a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners / tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan.							X	
55	Fugitive Emissions Management Plan for pump stations Trans Mountain must file with the NEB <u>for approval</u>, at least 4 months prior to commencing construction at any pump stations, a Fugitive Emissions Management Plan for the pump stations associated with the Project that includes: a) a description of the procedures implemented for leak detection and the criteria used in selecting target leaking components; b) quantification methods considered and the rationale for the selected method(s); c) monitoring frequency for each target leaking component and the parameters that will be measured; d) a decision framework that will be implemented to repair or replace leaking components; e) a description of record-keeping procedures; and f) a discussion of additional mitigation measures that will be employed to minimize fugitive emissions.		X			X	X		
56	Grizzly Bear Mitigation Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 4 months prior to commencing construction in each vulnerable grizzly bear population unit / grizzly bear management area, a Grizzly Bear Mitigation Plan for each of these areas. Trans Mountain must provide a rationale for why any vulnerable grizzly bear population units / grizzly bear management units potentially affected by the Project are not addressed in the plan. The Grizzly Bear Mitigation Plan(s) must include: a) a summary of results from any supplemental surveys conducted; b) potential direct and indirect effects of Project activities on vulnerable grizzly bear population units and grizzly bear management units; c) mitigation measures to be implemented, including all relevant measures committed to throughout the OH-001-2014 proceeding, any new mitigation measures resulting from supplementary surveys, detailed criteria using clear and unambiguous language that describes the circumstances under which each measure will be applied, and measurable targets for evaluating mitigation success; d) details on post-construction monitoring of mitigation measures, including survey methods, corrective measures, detailed criteria using clear and unambiguous language that describes the circumstances under which each measure will be applied, and a proposed reporting schedule; e) a commitment to include results of the monitoring in the post-construction environmental monitoring reports filed under Condition 151; f) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plan including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; g) a summary of its consultations with Appropriate Government Authorities, any species experts and potentially affected Indigenous groups. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its	X	X		X	X	X		

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	consultation, including any recommendations from those consulted, into the plan(s); and h) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information from the Grizzly Bear Mitigation Plan, including confirmation that the mitigation, monitoring, and corrective measures in this plan will be implemented in the case of discovery via their inclusion in Trans Mountain's Wildlife Species of Concern Discovery Contingency Plan.								
57	Commercial Support for the Project Trans Mountain must file with the Board, at least 3 months prior to commencing construction , confirmation, signed by an officer of the company, that: a) the Project has secured agreements or contracts that remain in force with shippers for a minimum term of 15-years for no less than 60 per cent of its total capacity (890,000 barrels per day); and b) any rights to terminate held by shippers that may have existed in any agreements or contracts between Trans Mountain and shippers (which may have reduced the Project's contracted total capacity to less than 60 per cent for a minimum term of 15 years) have lapsed and or expired because their conditions precedent have been satisfied or waived.	X							
58	Training and education monitoring reports a) Trans Mountain must file with the NEB, at least 3 months prior to commencing construction, and every 6 months thereafter until after commencing operations , monitoring reports for the implementation and outcomes of Indigenous, local, and regional training and education measures and opportunities for the Project. The reports must include the following: i) a description of each training and education measure and opportunity indicator that was monitored, including duration, participant groups, education and training organization, and intended outcomes; ii) a summary and analysis of the progress made toward achieving intended outcomes of each training and education measure and opportunity, including an explanation for why any intended outcomes were not achieved; and iii) a description of identified or potential training or education gaps, and any proposed measures to address them or to support or increase training and education measures and opportunities. b) Trans Mountain must file with the NEB, within 6 months after commencing operations , a final report.	X							
59	Worker accommodation strategy Trans Mountain must file with the NEB <u>for approval</u> , at least 3 months prior to commencing construction , a worker accommodation strategy, developed in consultation with appropriate municipal or provincial authorities. The strategy must include: a) a final summary of all proposed accommodations, including the location of any temporary camp(s); b) the number of workers that will be housed; and c) a description of how the strategy addresses any concerns or requests raised in consultation with municipal or provincial authorities. In the event that temporary camp(s) are to be used, the strategy must also include: i) a description of how the potential environmental and socio-economic impacts have been assessed, and a description of all associated mitigation measures; ii) copies of, or reference to, any mitigation or operational plans that will be required or implemented for the camp(s), including a description of how Trans Mountain has incorporated any additional mitigation measures into relevant Environmental Protection Plan(s); iii) copies of any necessary municipal or provincial permits for any camp(s) that have been received 3 months prior to construction. If camp permits are not yet in place 3 months prior to commencing construction, provide: 1) a list of the outstanding camp permits and a schedule for when these camp permits will be in place; and 2) copies of any outstanding camp permits prior to commencing construction; iv) copies or excerpts of all policies relating to the rules of conduct for workers housed at the camp(s); v) confirmation that all policies relating to the camp(s) will be provided to workers; vi) confirmation that all policies relating to the camp(s) were made available to all local communities and other relevant service providers in proximity to any camp(s) that will be	X	X		X	X	X	X	

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	used for the Project; and vii) a summary of its consultations with affected landowners / tenants where any camp(s) will be located. Trans Mountain must provide: 1) a description of the information provided to landowners / tenants; and 2) description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the Strategy.								
60	Environmental and socio-economic assessment - s.58 temporary construction lands and infrastructure Trans Mountain must file with the NEB <u>for approval</u> , at least 3 months prior to commencing construction , an environmental and socio-economic assessment for all temporary construction lands and infrastructure approved pursuant to this Order. The assessments must include: a) a list of the locations and dimensions of all temporary construction lands and infrastructure; b) environmental alignment sheets or as-built drawings at an appropriate scale, clearly depicting temporary construction lands and infrastructure; c) results of any pre-construction surveys within the areas that were not previously subject to such surveys, and an indication of potential residual effects; d) all associated mitigation measures that are beyond those identified during the OH-001-2014 proceeding; e) analysis supporting the use of the measures in d), including any supplementary reports; f) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information based on any supplemental surveys completed; and g) a summary of consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners / tenants, as well as copies of all written comments that may be provided to Trans Mountain by those consulted. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the assessment.				X				
61	List of temporary infrastructure sites Trans Mountain must file with the NEB, at least 3 months prior to commencing construction , a complete list of all temporary infrastructure sites to be constructed for the Project, and must file any updates as they become available . This list must include information on each site's location, structures to be installed, the anticipated date for commencing construction, and activities involved in its construction. The initial list and any updates must also include the condition numbers (those under the "prior to commencing construction" phase heading) that are applicable to each site and an indication of whether each of those conditions has been or remains to be satisfied.				X				
62	Construction schedule Trans Mountain must file with the NEB, at least 3 months prior to commencing construction , a construction schedule identifying the major construction activities expected and, on a monthly basis, on the first working day of each calendar month from the commencement of construction until after commencing operations , updated detailed construction schedules.	X	X	X	X	X	X	X	X
63	Security Management Programs Trans Mountain must file confirmation, signed by an officer of the company: a) at least 3 months prior to commencing construction , that it has developed a Security Management Program for the construction phase of the Project; and b) at least 3 months prior to commencing operations , that it has amended its operations phase Security Management Program to include operation of the Project; pursuant to the <i>National Energy Board Onshore Pipeline Regulations</i> and CSA Z246.1 (as amended from time to time).	X	X	X	X	X	X	X	X
64	Construction safety manuals Trans Mountain must file with the NEB: a) at least 3 months prior to commencing construction , the Health and Safety Management Plan for the Project; and b) at least 2 months prior to commencing construction , Construction Safety Manuals (Project-Specific Safety Plans) for the applicable Project components. These must include separate Construction Safety Manuals for pipeline construction, terminal and pump station construction, Burnaby Mountain tunnel construction, and Westridge Marine Terminal construction. These manuals must address routine construction activities, as well as blasting, tunneling, avalanche	X	X	X	X	X	X	X	X

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	safety, safe work in proximity to operational pipelines and facilities, and special access procedures that may be required in areas subject to activities other than Project construction.								
65	Hydrology – notable watercourse crossings Trans Mountain must file with the NEB, at least 3 months prior to commencing construction , revised flood frequency estimates for all notable watercourse crossings, as defined by Trans Mountain in its application. These estimates must incorporate the results of field investigations and bathymetric surveys completed since the Project application was filed, and be presented in a format similar to that presented in Application Volume 4A, Appendix I – Route Physiography and Hydrology Report, Appendix B – Notable Water Crossing Catchment Details (Filing A56000).	X							
66	Risk Management Plan for geohazards Trans Mountain must develop and file with the NEB, at least 3 months prior to commencing construction , an updated Risk Management Plan for addressing the threats of existing and potential geohazards during construction of the Project. This plan must be updated as additional site-specific geotechnical information is obtained through detailed investigations, and modified as geohazards are encountered during construction. Trans Mountain must make any updates or modifications available to the NEB upon request .	X			X				
67	Outstanding horizontal directional drilling geotechnical and feasibility reports Trans Mountain must file with the NEB, at least 3 months prior to commencing construction , Geotechnical Reports and Horizontal Directional Drilling Feasibility and Design Reports, along with final design drawings, for each of the following crossings: a) Coldwater River 4 crossing; b) North Thompson River 6 crossing; c) North Thompson River 7 crossing; d) Pembina River crossing. e) Raft River crossing; f) Sumas River crossing (suitability for Direct Pipe® installation); g) any additional river crossing along the new Line 2 pipeline segments where horizontal directional drilling or other trenchless crossing method is being considered; and h) the Coquitlam Landfill, if Horizontal Directional Drilling or other trenchless crossing method is being considered.	X							
68	Seismic reports – liquefaction potential Trans Mountain must file with the NEB, at least 3 months prior to commencing construction , a final report that identifies all sites along the Project, that have “Very High,” “High,” and “Moderate” liquefaction-triggered ground movement potential, and that describes how the potential for liquefaction-triggered ground movement will be mitigated at each site.	X							
69	Fault studies Trans Mountain must file with the NEB, at least 3 months prior to commencing construction , the results of fault-mapping studies that were ongoing during or undertaken after the OH-001-2014 proceeding, for use in the detailed design of the Project. This filing must include conclusions regarding possible seismic activity during the Holocene epoch for Sumas Fault, Vedder Mountain Fault, Fraser River-Straight Creek Fault and Rocky Mountain Trench, and other possible hidden faults, as well as the potential for compounding risks due to the proximity of the Vedder Mountain and Sumas Faults.	X							
70	Strain-based design Trans Mountain must file with the NEB, at least 3 months prior to commencing construction , the following information related to strain-based design, where it is applied: a) the location and rationale for selecting strain-based design in each location; b) a report summarizing the adequacy of the strain-based design for various loading scenarios during pipeline construction and operation for each location provided in a); and c) a list of standards and Project-specific specifications, including testing procedures, used in the strain-based design.	X							
71	Riparian Habitat Management Plan Trans Mountain must file with the NEB for approval , at least 3 months prior to commencing construction , a Riparian Habitat Management Plan that would apply to all defined watercourses crossed by the Project. The plan must be supported with rationales and unambiguous criteria explaining under what circumstances each such measure and strategy would apply, and must include the following.	X	X						

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	a) a description of the methods used to determine pre-construction functionality (e.g., for fish, wildlife, and rare plants) of the riparian habitat, including a justification how such functionality is assessed; b) a description of the mitigation measures and the watercourse reclamation strategies (reclamation method, reclamation measures, and application criteria) for the range of defined watercourses crossed by the Project; c) a description of the generalized vegetation planting plans for the range of defined watercourses crossed by the Project; that includes the diversity and density of species to be planted, planting locations, and application criteria; d) clearly defined measureable reclamation goals and targets for years 1, 3, and 5, post-construction, to determine whether riparian habitat has returned, or is on a sufficient trajectory to return, to pre-construction functionality; e) a discussion of how the mitigation measures, reclamation strategies, and vegetation planting plans are anticipated to return riparian habitat to pre-construction functionality, using the goals and targets provided in d); f) a summary of the information in a)-d) for each defined watercourse crossing, that includes: i) watercourse crossing ID; ii) a defined riparian habitat buffer; iii) a catalogue of the pre-construction species diversity and density of the riparian habitat; iv) classification of riparian habitat functionality; v) area of the riparian habitat to be impacted; vi) the mitigation measures, reclamation strategy, and vegetation planting plan to be implemented; and vii) the measureable goals and targets; g) details of the post-construction monitoring plan for the first five years of operations, including evaluations of reclamation activities, and potential corrective actions and enhancement measures that might be necessary and the circumstances under which each such action would be taken; h) a Preliminary Riparian Habitat Offset Plan, that would apply to all defined watercourse crossings located in watersheds identified as being above the riparian habitat disturbance threshold (>18 per cent of riparian habitat disturbed in the watershed) or classified as High Sensitive fish-bearing by Trans Mountain during the OH-001-2014 proceeding, and, where, after the fifth complete growing season, riparian habitat has not returned, or is not trending towards sufficient pre-construction functionality. The plan must include: i) how the need for offset measures will be determined, including offset ratios; ii) potential offset measures, the process for selecting which will be implemented, and an evaluation of the probability of their success; and iii) how the effectiveness of offset measures will be assessed, monitored, and reported on; i) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; and j) a summary of consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners/tenants. In its plan, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan of updates.								
72	Pipeline Environmental Protection Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to commencing construction, an updated Project-specific Pipeline Environmental Protection Plan for the construction of the pipeline. The updated Pipeline Environmental Protection Plan must be a comprehensive compilation of all environmental protection procedures, mitigation measures, and monitoring commitments, as set out in Trans Mountain's Project application, its subsequent filings, or as otherwise committed to during the OH-001-2014 proceeding. The updated Pipeline Environmental Protection Plan must describe the criteria for implementing all procedures and measures using clear and unambiguous language that confirms Trans Mountain's intention to implement all of its commitments. The updated Pipeline Environmental Protection Plan must include the following: a) environmental procedures (including site-specific plans), criteria for implementing these	X	X						

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	procedures, mitigation measures, and monitoring applicable to all Project phases and activities; b) policies and procedures for environmental training and the reporting structure for environmental management during construction, including the qualifications, roles, responsibilities, and decision-making authority for each job title identified in the updated Pipeline Environmental Protection Plan; c) any additional measures arising from supplemental pre-construction studies and surveys; d) updated contingency plans and management plans; e) updated alignment sheets; f) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the Pipeline Environmental Protection Plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; and g) a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the Pipeline Environmental Protection Plan.								
73	Traffic Control Plans for public roadways Trans Mountain must file with the NEB, at least 3 months prior to commencing construction of the pipeline and at least 2 months prior to commencing construction at each terminal and pump station, Traffic Control Plans for the use of public roadways for the Project. The plans must include: a) information regarding the timing and location of key construction activities (including equipment mobilization and staging, pipe stockpiling, pipeline and pump station construction, and equipment demobilization); b) current traffic volumes and anticipated traffic volumes during the construction period for both day and night times; c) a description of the predicted traffic flows, including vehicle types and volumes, at key construction points, marshalling areas, access roads, and public roadways; d) an assessment of the potential impacts associated with the increased volume of construction-related traffic (e.g., safety hazards, noise, light, dust, etc.) and associated mitigation measures; and e) a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plans.	X	X	X	X	X	X	X	X
74	Horizontal directional drilling (HDD) Noise Management Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to commencing construction of each HDD crossing, a site-specific HDD Noise Management Plan that includes: a) proposed hours of daytime and nighttime work; b) baseline daytime and nighttime ambient sound levels at noise sensitive areas within 500 metres of the HDD entry and exit sites; c) predicted noise levels caused by HDD at the most affected receptors without mitigation measures implemented; d) proposed HDD noise mitigation measures, including all technologically and economically feasible mitigation measures; e) predicted noise levels at the most affected receptors with mitigation measures implemented, including noise contour map(s) showing potentially affected receptors; f) an HDD noise monitoring program, including locations, methodology, and schedule; g) a description of the public and Indigenous communication and complaint response process; h) a contingency plan that contains proposed mitigation measures for addressing noise complaints, which may include the temporary relocation of specific residents; and i) confirmation that Trans Mountain will provide notice to nearby residents in the event that a planned blowdown is required, and that the planned blowdown will be completed during daytime hours whenever possible.	X							

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75	Nooksack Dace and Salish Sucker Management Plan a) Trans Mountain must construct all watercourse crossings located within nooksack dace or salish sucker proposed or final critical habitat, as defined by Fisheries and Oceans Canada Recovery Strategies for the species, using trenchless crossing methods with entry and exit points located outside of the riparian habitat area, unless demonstrated to be not feasible. b) At least 3 months prior to commencing construction of any watercourse crossing located within nooksack dace or salish sucker proposed or final critical habitat, Trans Mountain must file a list of these watercourse crossings, and, for each, indicate whether or not a trenchless crossing method is feasible. c) For each watercourse crossing in b) where a trenchless crossing method is not feasible, at least 3 months prior to commencing construction of that crossing, Trans Mountain must file the following with the NEB <u>for approval</u>: i) a summary of the trenchless crossing feasibility studies completed and a discussion of the risks and constraints associated with the trenchless watercourse crossing, and the rationale for not employing a trenchless method; ii) the updated watercourse crossing method, location of crossing, planned construction timing, and the provincial instream work window; iii) any site-specific mitigation and reclamation measures, and species-specific habitat enhancement measures; iv) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include measures listed in iii); v) a discussion of how the site-specific mitigation and reclamation measures, and species-specific enhancement measures, relate to Fisheries and Oceans Canada Recovery Strategies and Action Plans; vi) details on any monitoring to be undertaken and a commitment to include any results in the post-construction environmental monitoring reports filed under Condition 151; vii) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; and viii) a summary of consultations with Appropriate Government Authorities and any species experts. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan. d) For any watercourse crossing identified in b) where Trans Mountain will employ a trenched contingency crossing method, Trans Mountain must file with the NEB, <u>for approval</u>, the information listed in c), at least 30 days prior to commencing construction of the contingency watercourse crossing.	X							
76	Old Growth Management Areas Mitigation and Replacement Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to commencing construction within old growth management areas, an Old Growth Management Areas Mitigation and Replacement Plan for these areas that are potentially affected directly or indirectly by the Project during construction or operations, that includes: a) avoidance and mitigation measures to be implemented during construction and operations, with rationales and unambiguous criteria explaining under what circumstances each measure will be applied, and measurable goals against which the success of each measure will be evaluated; b) a description of how the avoidance, mitigation, and offset hierarchy was considered in developing the plan, with rationales for progressing from avoidance to mitigation to offsets; c) details on post-construction monitoring, including corrective actions that might be necessary and the circumstances under which each such action would be taken; d) the expected residual effects (including quantification) on old growth management areas, including a discussion of the potential for time lags between when Project effects occur and when mitigation measures would become fully functional; e) replacement or other offset measures that will be implemented to compensate for residual effects with the aim of no-net-loss to old growth forests within old growth management areas overall, including: i) discussion of the appropriateness of compensation for the old growth management area, taking its specific features into account, and of any potential limitations of the effectiveness of such replacement or offset measures;	X			X	X	X		

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	ii) an explanation with rationales on the amount and type of replacements or other offsets required; iii) a timeline for their implementation; iv) the selection of compensation sites; v) identification of the parties involved in planning and implementation and their respective roles and responsibilities, and vi) a description of the methods and schedule for monitoring and reporting to demonstrate compensation success; f) a summary of its consultations with Appropriate Government Authorities and any potentially affected Indigenous groups. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan; and g) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information from the Old Growth Management Areas Mitigation and Replacement Plan.								
77	Archaeological and cultural heritage assessment – Lightning Rock Trans Mountain must file with the NEB, at least 3 months prior to commencing construction of the pipeline between the Sumas Terminal and the Sumas Pump Station, a report on archaeological and cultural heritage field investigations undertaken to assess the potential impacts of Project construction and operations on the Lightning Rock site at Sumas, British Columbia. The report must include: a) a detailed description of the assessment plan that was developed, in consultation with the Stó:lō Collective, for the involvement of the Stó:lō Collective in designing and undertaking surveys; b) a description of the pre-construction archaeological and cultural heritage surveys conducted at the site, including: i) survey methodologies used; and ii) data and information sources, including information and Indigenous traditional knowledge provided by the Stó:lō Collective; c) a site description, including maps at appropriate scales and levels of detail, confirming the site boundaries; d) an assessment of the potential environmental and socio-economic impacts of Project construction and operations on the archaeological resources and cultural heritage of the site; e) all associated mitigation measures that are beyond those identified during the OH-001-2014 proceeding to address any identified impacts; f) analysis supporting the use of the measures in e), including any additional relevant reports; g) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) and Environmental Alignment Sheets to include any relevant information based on the surveys completed; and h) a summary of consultations undertaken with the Stó:lō Collective, and Appropriate Government Authorities, as well as copies of all written comments that may be provided to Trans Mountain by the Stó:lō Collective or government authorities. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from the Stó:lō Collective or government authorities, into the assessment.	X			X				

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78	Facilities Environmental Protection Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to commencing construction at the facilities (terminals, pump stations, temporary facilities, and associated infrastructure), an updated Project-specific Facilities Environmental Protection Plan for the construction at the facilities. The updated Facilities Environmental Protection Plan must be a comprehensive compilation of all environmental protection procedures, mitigation measures, and monitoring commitments, as set out in Trans Mountain's Project application, its subsequent filings, or as otherwise committed to during the OH-001-2014 proceeding. The updated Facilities Environmental Protection Plan must describe the criteria for implementing all procedures and measures using clear and unambiguous language that confirms Trans Mountain's intention to implement all of its commitments. The updated Facilities Environmental Protection Plan must include the following: - environmental procedures (including site-specific plans), criteria for implementing these procedures, mitigation measures, and monitoring applicable to all Project phases and activities; - policies and procedures for environmental training and the reporting structure for environmental management during construction, including the qualifications, roles, responsibilities, and decision-making authority for each job title identified in the updated Facilities Environmental Protection Plan; - any additional measures arising from supplemental pre-construction studies and surveys; - updated contingency plans and management plans; - updated facility drawings including relevant site-specific resources and mitigations; - a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the Environmental Protection Plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and / or pursuant to Condition 97, had the opportunity to review and comment on the information; and - a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners / tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the Facilities Environmental Protection Plan.		X	X	X	X	X	X	X
79	Air Emissions Management Plan for the Edmonton, Sumas and Burnaby Terminals Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to commencing construction at each of the Edmonton, Sumas, and Burnaby Terminals, an Air Emissions Management Plan for each of those terminals that includes: - a description of the baseline, pre-construction conditions informed by relevant modelling results and recent existing monitoring data; - descriptions of the locations of air monitoring sites (on a map or diagram), including the rationale for the locations selected; - the timing for installing air monitoring stations; - the methods and schedule for monitoring ambient ground-level concentrations of potential concern (e.g., volatile organic compounds, ozone, hydrogen sulphide, mercaptans, criteria air contaminants, secondary ozone and particulate matter, and reduced visibility) and emissions source tracking; - procedures for monitoring station data recording, assessment, and reporting details, including a description of how the real time and non-continuous air quality monitoring data will be made available to the public; - a description of the public and Indigenous communication and complaint response process; - the criteria or thresholds that, if triggered or exceeded, will require implementing additional emissions reduction measures; - possible measures that will be implemented as a result of the monitoring data or ongoing concerns; and - a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners / tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan.							X	

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80	Noise Management Plan for construction at terminals and pump stations Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to commencing construction at each terminal and pump station, a Noise Management Plan for construction, where residences are within 300 metres of the proposed construction activities. The plan must include: a) proposed hours of daytime and nighttime work; b) noise mitigation measures, including all technologically and economically feasible mitigation measures; c) a noise monitoring program, including locations, methodology, and schedule; d) a description of the public and Indigenous communication and noise complaint response process; and e) a contingency plan that contains proposed mitigation measures for addressing noise complaints, which may include the temporary relocation of specific residents.	X				X	X	X	
81	Westridge Marine Terminal Environmental Protection Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to commencing construction at the Westridge Marine Terminal, an updated Project-specific Westridge Marine Terminal Environmental Protection Plan for the construction at the Westridge Marine Terminal. The updated Environmental Protection Plan must be a comprehensive compilation of all environmental protection procedures, mitigation measures, and monitoring commitments, as set out in Trans Mountain's Project application, its subsequent filings, or as otherwise committed to during the OH-001-2014 proceeding. The updated Westridge Marine Terminal Environmental Protection Plan must describe the criteria for implementing all procedures and measures using clear and unambiguous language that confirms Trans Mountain's intention to implement all of its commitments. The updated Westridge Marine Terminal Environmental Protection Plan must include the following: a) environmental procedures (including site-specific plans), criteria for implementing these procedures, mitigation measures, and monitoring applicable to all Project phases and activities; b) policies and procedures for environmental training and the reporting structure for environmental management during construction, including the qualifications, roles, responsibilities, and decision-making authority for each job title identified in the updated Environmental Protection Plan; c) any additional measures arising from supplemental pre-construction studies and surveys; d) updated contingency plans and management plans; e) updated facility drawings including relevant site-specific resources and mitigations; f) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the Westridge Marine Terminal Environmental Protection Plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; and g) a summary of its consultations with Appropriate Government authorities and any potentially affected Indigenous groups. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the Westridge Marine Terminal Environmental Protection Plan.	X							

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82	Light Emissions Management Plan for the Westridge Marine Terminal Trans Mountain must file with the NEB, at least 3 months prior to commencing construction at the Westridge Marine Terminal, a Light Emissions Management Plan for the Westridge Marine Terminal that includes: a) a summary of the results of an area lighting study, including how potential impacts on surrounding communities and safety and operational requirements were considered; b) a description of the mitigation and best practice measures considered for the terminal lighting design and how the proposed design and operation will minimize the impacts from light on land-based residents and marine users; c) a summary of its consultations with Port Metro Vancouver, as well as copies of all written comments that may be provided to Trans Mountain by Port Metro Vancouver. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from Port Metro Vancouver, into the plan; and d) a plan for how Trans Mountain will communicate its proposed terminal lighting design and associated mitigation measures to limit any nuisance lighting disturbances to land-based residents and marine users.	X							
83	Westridge Marine Terminal (offshore) – pile design Trans Mountain must file with the NEB, at least 3 months prior to commencing construction at the Westridge Marine Terminal, the final design basis for the offshore pile foundation layout of the Westridge Marine Terminal.	X							
84	Emergency release system at the Westridge Marine Terminal Trans Mountain must file with the NEB, at least 3 months prior to commencing construction at the Westridge Marine Terminal, its conclusions on the necessity of an emergency release system for the loading arms at the Westridge Marine Terminal. The conclusions must be supported by a comprehensive study describing the advantages and disadvantages of incorporating an emergency release system. This study must: a) consider the application of: i) emergency release couplers; and ii) an emergency release system, during both normal operating conditions and under abnormal conditions such as seismic events; and b) include a description of the final emergency release system design, if applicable.	X							
85	Air Emissions Management Plan – Burnaby Mountain tunnel construction Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to commencing Burnaby Mountain tunnel construction activities, an Air Emissions Management Plan for tunnel construction. The plan must include: a) proposed hours for daytime and nighttime work; b) sources that would generate air emissions; c) an Air Emissions and Dust Emissions Management Plan that includes mitigation measures, their predicted effectiveness, and implementation timeframes; and d) a description of Trans Mountain's program for addressing complaints received during tunnel construction with respect to air and dust emissions, including a communication and notification plan.	X							
86	Burnaby Mountain Tunnel Construction Noise Management Plan Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to commencing Burnaby Mountain tunnel construction activities, a Burnaby Mountain Tunnel Construction Noise Management Plan that includes: a) proposed hours of daytime and nighttime work; b) baseline daytime and nighttime ambient sound levels at noise sensitive areas within 500 metres of the entry and exit sites for the tunnel; c) predicted noise levels at the most affected receptors caused by tunnel construction without mitigation measures implemented; d) proposed noise mitigation measures, including all technologically and economically feasible mitigation measures; e) predicted noise levels at the most affected receptors with mitigation measures implemented, including noise contour map(s) showing the potentially affected receptors; f) a tunnel construction noise monitoring program, including locations, methodology, and schedule;	X							

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	g) criteria that will be used to determine when tunnel construction would be shut down due to noise; h) a summary of its consultations with Appropriate Government Authorities and any potentially affected receptors (residences and businesses), as well as copies of all written comments that may be provided to Trans Mountain by those consulted. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the plan; i) a description of the public and Indigenous communication and noise complaint response processes; and j) a contingency plan that contains proposed mitigation measures for addressing noise complaints, which may include the temporary relocation of specific residents.								
87	Groundwater Seepage Management Plan – Burnaby Mountain tunnel construction Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to commencing Burnaby Mountain tunnel construction activities, a Groundwater Seepage Management Plan for tunnel construction. The plan must include: a) an estimate quantifying the anticipated average and maximum amounts of groundwater seepage into the tunnel, and an assessment of any potential impacts on the water table; b) a discussion of Trans Mountain's proposed pumping, treatment, and disposal options; c) a description of the potential effects of dewatering of bedrock aquifers, springs and streams on local groundwater and surface water resources, and of measures that Trans Mountain would implement to mitigate such effects; and d) a description of measures that Trans Mountain would implement during the operations phase in the event that there is groundwater seepage into the tunnel.	X							
88	Project organizational structure for Project construction Trans Mountain must file with the NEB, at least 2 months prior to commencing construction, a diagram of the Project's organizational structure (i.e., project management, design, and field staff) that clearly identifies roles, accountabilities, responsibilities, and reporting relationships for construction of the applicable Project components.	X							
89	Emergency Response Plans for construction Trans Mountain must file with the NEB, at least 2 months prior to commencing construction, a Project-specific Emergency Response Plan, including the Trans Mountain Expansion Project Emergency Response Plan and site-specific Emergency Response Plans as referenced in Volume 4B, Section 5.4.2 of its Project application (Filing A3S1K6), that would be implemented during the construction phase. The plan(s) must include spill contingency measures that Trans Mountain will employ in response to accidental spills attributable to construction activities, 24-hour medical evacuation, fire response, and security.	X	X	X	X	X	X	X	X
90	Consultation on improvements to Trans Mountain's Emergency Management Program Trans Mountain must file with the NEB, at least 2 months prior to commencing construction, a consultation plan for its review of its Emergency Response Plans and equipment (including its availability), as referenced in Volume 7, Section 4.8.2 of its Project application (Filing A3S4V5). This plan must include: a) the consultation plan's scope; b) the consultation plan's objectives; c) a preliminary list of Appropriate Government Authorities, first responders, potentially affected Indigenous groups and affected landowners/tenants with whom Trans Mountain will consult; d) a preliminary list of consultation locations and timing; and e) the methods that will be used to track commitments made during consultations and to incorporate them into Trans Mountain's Emergency Management Program, including its Emergency Response Plans.	X					X	X	
91	Plan for marine spill prevention and response commitments Trans Mountain must file with the NEB, within 6 months from the issuance date of the Certificate, a plan describing how it will ensure that it will meet the requirements of Condition 133 regarding marine spill prevention and response. The plan must be prepared in consultation with Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority, Vancouver Fraser Port Authority, British Columbia Coast Pilots, Western Canada Marine Response Corporation, Fisheries and Oceans Canada and the Province of British Columbia, and must identify any issues or concerns raised and how Trans Mountain has addressed or responded to them. Trans Mountain must provide the plan to the above-mentioned parties at the same time as it is filed with the NEB.	X							

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
92	Updates under the Species at Risk Act Trans Mountain must file with the NEB, at least 2 months prior to commencing construction, a summary of any relevant updates under the <i>Species at Risk Act</i>, including new Schedule 1 listings and new or amended Recovery Strategies, Action Plans, and Management Plans for species that have the potential to be affected by the Project. For each species-specific update, the summary must include: a) a discussion of the Project activities' potential effects on the listed species or its critical habitat, including an explanation as to whether additional surveys are required to locate such critical habitat; b) identification of all reasonable alternatives to the Project activities referred to in a), including avoidance measures, and a discussion on the potential effects of the alternatives, the chosen approach, and the rationale for selecting the chosen approach; c) any additional site-specific mitigation; d) any monitoring to be undertaken and a commitment to include monitoring results as part of the post-construction environmental monitoring reports filed under Condition 151; e) an explanation as to how the responses to b), c) and d) above are consistent with applicable Recovery Strategies and Actions Plans; and f) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the summary of updates, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information.	X	X		X	X	X		
93	Water well inventory Trans Mountain must file with the NEB, at least 2 months prior to commencing construction, an inventory of physically verified ("ground-truthed") water wells that are within 150 metres of either side of the centre of the pipeline right-of-way. The filing must contain confirmation that Trans Mountain will maintain and update the inventory until the Project is abandoned or decommissioned pursuant to the NEB Act. The inventory must include a description of the methods used to identify and physically verify wells, including: a) each well's location in proximity to the right-of-way, including its GPS coordinates; b) a description of each well's type or use (e.g., drinking water, agricultural use, use by Indigenous groups, any other uses); c) each well's tenure or ownership (e.g., private, municipal, Indigenous community); d) each well's operational status, including abandoned or decommissioned wells, and information about each well, including well depth, lithology, and water depth, if available; e) a plan for updating the inventory over the life of the Project, including: i) the methods for identifying and verifying abandoned or decommissioned wells, and new or replacement wells; and ii) the frequency of inventory updates; f) a list of any properties or sections of the right-of-way that were not physically verified, including: i) the reason why properties or right-of-way sections were not physically accessed; ii) an estimate of the potential number of wells that have not been physically verified; and iii) a proposed schedule for accessing properties or right-of-way sections; and g) a description of Trans Mountain's plans for communicating information about the locations of water wells to owners or affected users.	X							
94	Consultation reports – protection of municipal water sources Trans Mountain must file with the NEB, at least 2 months prior to commencing construction, and on or before 31 January of each year during construction and of the first 5 years after commencing operations, a report on Trans Mountain's consultations with municipalities and regional districts, communities, and Indigenous groups related to the protection of municipal and community water sources, including those sources currently relied upon and sources identified for potential future use. Each report must include: a) the name of the municipality, regional district, community, or Indigenous group consulted; b) the methods, dates, and locations of all meetings or consultations; c) a summary of all issues or concerns raised; and d) a summary of any steps or measures that have been or will be undertaken, including	X	X			X	X	X	

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	groundwater modelling or monitoring, as a result of consultations with municipalities, regional districts, communities, or Indigenous groups. This summary must include: i) any updates or amendments to maintenance policies, systems, programs, procedures, practices, and activities aimed at preventing pipeline releases; ii) the criteria used to identify and select modelling or monitoring locations and parameters; iii) results of any modelling or monitoring; iv) any measures that have been taken to address modelling or monitoring results; and v) any measures to share or to make accessible to municipalities, regional districts, communities, or Indigenous groups data or issues that arise regarding drinking water (aquifers, groundwater, and well water supplies); or in the alternative to i)-v) above, an explanation why no further action is required to address or respond to issues or concerns raised.								
95	Visual Impact Plan Trans Mountain must file with the NEB, at least 2 months prior to commencing construction, a Visual Impact Plan that includes: a) the results of any supplemental visual modelling surveys conducted of select locations that are highly visible to the public, identified in consultation with Appropriate Government Authorities, and potentially affected Indigenous groups and affected landowners/tenants, where the proposed pipeline corridor deviates from the existing TMPL system right-of-way; and b) mitigation measures to be implemented, including all relevant measures committed to throughout the OH-001-2014 proceeding, and any new mitigation measures resulting from supplementary surveys.	X							
96	Reports on engagement with Indigenous groups – construction Trans Mountain must file with the NEB, at least 2 months prior to commencing construction and every 6 months thereafter until after commencing operations, a report on the engagement activities it has undertaken with potentially affected Indigenous groups. Each report must include, at a minimum, for each Indigenous group engaged: a) the name of the group; b) the method(s), date(s), and location(s) of engagement activities; c) a summary of any issues or concerns raised; and d) the measures taken, or that will be taken, to address or respond to issues or concerns, or an explanation why no further action is required to address or respond to issues or concerns. Trans Mountain must provide a copy of each report to each group engaged (and identified in a) above) at the same time that it is filed with the NEB.	X	X	X	X	X	X	X	X
97	Traditional Land Use (TLU) and Traditional Marine Resource Use (TMRU) Investigation Report Trans Mountain must file with the NEB <u>for approval</u>, at least 2 months prior to commencing construction, a report describing pre-construction TLU and TMRU investigations that were not reported during the OH-001-2014 proceedings and that relate specifically to the Project (up to and including the foreshore lands and boundaries of the water lease for the Westridge Marine Terminal). The report must include: a) the name of the potentially affected Indigenous group to which each investigation pertains; b) a description of any identified potentially affected TLU or TMRU sites, resources, or activities; c) the methods used to identify the potentially affected TLU or TMRU sites, resources or activities; d) a summary of any mitigation measures that Trans Mountain will implement to reduce or eliminate (to the extent possible) Project effects on TLU or TMRU sites, resources or activities; e) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include mitigation measures (summarized in (d)) to reduce or eliminate (to the extent possible) Project effects on TLU or TMRU sites, resources or activities; f) a summary of consultations undertaken with or concerns raised by potentially affected Indigenous groups regarding investigations on Project effects on the current use of lands and resources or marine resource use for traditional purposes, as well as copies of all written comments provided to Trans Mountain by potentially affected Indigenous groups to which each investigation pertains. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those Indigenous groups to which each investigation pertains, into the report; g) a description of any outstanding concerns raised regarding potential Project effects on the current use of lands and resources or marine resource use for traditional purposes, including a description of how Trans Mountain will or address or respond to them, or an explanation why it	X							

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	will not address or respond to them; and h) a summary of any outstanding TLU or TMRU investigations or follow-up activities that will not be completed prior to commencing construction, including estimated completion date(s), if applicable, and a description of how Trans Mountain has already identified, or will identify, any potentially affected TLU and TMRU sites, resources or activities for these outstanding investigations. Trans Mountain must provide a copy of the report to each potentially affected group identified in a) at the same time that it is filed with the NEB.								
98	Plan for Indigenous group participation in construction monitoring Trans Mountain must file with the NEB, at least 2 months prior to commencing construction, a plan describing participation by Indigenous groups in monitoring activities during construction for the protection of traditional land and resource use for the pipelines, terminals and pump stations, and traditional marine resource use at the Westridge Marine Terminal. The plan must include: a) a summary of engagement activities undertaken with Indigenous groups to determine opportunities for their participation in monitoring activities; b) a list of potentially affected Indigenous groups, if any, that have reached agreement with Trans Mountain to participate in monitoring activities; c) the scope, methodology, and justification for monitoring activities to be undertaken by Trans Mountain and each participating Indigenous group identified in b), including those elements of construction and geographic locations that will involve Indigenous Monitors; d) a description of how Trans Mountain will use the information gathered through the participation of Indigenous Monitors; and e) a description of how Trans Mountain will provide the information gathered through the participation of Indigenous Monitors to the participating Indigenous group. Trans Mountain must provide a copy of the report to each potentially affected group identified in b) above at the same time that it is filed with the NEB.	X	X		X	X	X	X	
99	Landowner and tenant consultation reports Trans Mountain must file with the NEB, at least 2 months prior to commencing construction, and every 6 months thereafter until 5 years after commencing Project operations: a) a description of landowner and tenant consultations, including the consultation methods, dates, and a summary of any issues or concerns raised by landowners and tenants; b) a summary of actions that Trans Mountain has undertaken to address or respond to each of the issues or concerns raised, or an explanation for why no actions were taken, and any outstanding concerns; and c) confirmation that Trans Mountain will make available to a landowner or tenant, upon request, a copy of the consultation records related to that landowner or tenant.	X							
100	Heritage resources Trans Mountain must file with the NEB, at least 2 months prior to commencing construction of individual Project components as described in Condition 10(a): a) confirmation, signed by an officer of the company, that it has obtained all of the required archaeological and heritage resource permits and clearances from the Alberta Department of Culture and the British Columbia Ministry of Forests, Lands and Natural Resource Operations; b) confirmation that it has consulted with the British Columbia Ministry of Forests, Lands and Natural Resource Operations, and that the Ministry has reviewed and approved the mitigation measures for disturbance to impacted palaeontological sites within British Columbia; c) a description of how Trans Mountain will meet any conditions and respond to any comments and recommendations contained in the permits and clearances referred to in a) or obtained through the consultation referred to in b); and d) confirmation that Trans Mountain will update the relevant Environmental Protection Plan(s) to include any relevant information from the conditions or recommendations referred to in c).	X	X	X	X	X	X	X	X
101	Uninterruptible Power Supply (UPS) and battery systems Trans Mountain must file with the NEB, at least 2 months prior to commencing construction at each terminal and pump station, confirmation that the UPS system design and planned operation related to that facility, is in compliance with the requirements of CSA 22.1 – 15 or other applicable standard(s) that exceeds the requirements of CSA 22.1 – 15. If another standard is used, this filing must include the name of the standard and an explanation of why the standard was used and how it meets or exceeds the requirements of CSA 22.1 – 15.	X				X	X	X	

No.	Conditions with initial filings due prior to commencing construction, or prior to commencing construction of specified Project component(s)	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
102	Landowner and tenant complaint process / system Trans Mountain must file with the Board, at least 30 days prior to commencing construction, confirmation that it has created and will maintain, up until the Project is abandoned or decommissioned pursuant to the NEB Act, a process / system that chronologically tracks landowner and tenant complaints related to the Project. The filing must contain confirmation that the process / system will track: a) a description of each complaint; b) how each complaint was received (e.g., telephone, letter, email); c) the date each complaint was received; d) subsequent dates of all contact or correspondence with each complainant; e) records of any site visits, monitoring, or inspections; f) contact information for all parties involved in each complaint; g) the date of each complaint's resolution; and h) if a complaint remains unresolved, a description of any further actions to be taken or an explanation for why no further action is required. Trans Mountain must make available to a landowner or tenant, upon request, the records related to the complaint(s) that the landowner or tenant made to Trans Mountain, including any investigations, reports or surveys conducted in relation to the complaint.	X							
103	Utility crossings Trans Mountain must file with the Board, at least 30 days prior to commencing construction, a list of all underground utilities to be crossed by the Project. The list must include the location and owners of the utilities to be crossed, as well as confirmation that all the agreements or crossing permits for those utilities to be crossed have been acquired or will be acquired prior to construction.	X			X				
No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
104	Updated engineering alignment sheets and drawings Trans Mountain must file with the NEB, at least 3 months prior to commencing pipe installation, updated engineering alignment sheets and drawings and, as they become available and prior to their implementation, any modifications to those sheets and drawings.	X							
105	Quality assurance verification Trans Mountain must file monthly summary reports, from commencing construction until after commencing operations, outlining non-conformances with its design, materials, and construction specifications and the disposition of these non-conformances.	X				X	X	X	
106	Construction progress reports Trans Mountain must file with the NEB monthly construction progress reports from commencing construction until after commencing operations. The reports must include information on the progress of activities carried out during the reporting period, including: a) safety, environmental and security issues or non-compliances that occurred during the reporting period; b) measures undertaken to resolve safety and environmental issues or non-compliances identified in a); c) confirmation that security issues identified in a) have been addressed; d) a description and the location of any change made to geohazard mitigation measures pursuant to Condition 51; and e) the location of any pressure tests carried out during the reporting period and a description of any unsuccessful pressure tests, including the reasons for the lack of success of each.	X	X	X	X	X	X	X	X
107	Indigenous, local, and regional employment and business opportunity monitoring reports a) Trans Mountain must file with the NEB, within 3 months after commencing construction, and every 6 months thereafter until after commencing operations, monitoring reports for Indigenous, local, and regional employment and business opportunities for the Project. The reports must include: i) a summary of the elements or indicators monitored; ii) a summary and analysis of Indigenous, local, and regional employment and business opportunities during the reporting period; and iii) a summary of Trans Mountain's consultation, undertaken during the reporting period, with	X							

No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	relevant Indigenous groups and local, regional, community and industry groups or representatives, regarding employment and business opportunities. This summary must include any issues or concerns raised regarding employment and business opportunities and how Trans Mountain has addressed or responded to them. b) Trans Mountain must file with the NEB, within 6 months after commencing operations, a final report on employment during the construction phase.								
108	Contingency watercourse crossings a) For any watercourse crossing where Trans Mountain will employ a contingency crossing method instead of its proposed primary method, and where any of Fisheries and Oceans Canada's applicable "Measures to Avoid Causing Harm to Fish and Fish Habitat" cannot be implemented, Trans Mountain must file with the NEB at least 30 days prior to commencing construction of the contingency watercourse crossing: i) confirmation of the contingency watercourse crossing method that will be employed, the rationale for employing that method, and a summary of the differences between the primary and contingency watercourse crossing methods; and ii) the following site-specific information: 1) detailed crossing-specific design drawings; 2) photographs up-stream, down-stream, and at the crossing location; 3) a description of the fish species and habitat that is present at the crossing location, and if fish spawning is likely to occur within the immediate area; 4) a description of the composition of the riparian habitat at the crossing location and an indication if the riparian habitat has a limiting effect on the productive capacity of the watercourse, and if its removal or disturbance represents a potential influence on fish communities; 5) the site-specific mitigation and habitat enhancement measures to be used to minimize impacts; 6) any potential residual effects; 7) proposed reclamation measures; and 8) a discussion of the potential impacts to local fisheries resources within the immediate area as a result of the crossing's construction; and b) For all other instances where a contingency crossing method will be employed and all of Fisheries and Oceans Canada's applicable "Measures to Avoid Causing Harm to Fish and Fish Habitat" will be implemented, Trans Mountain must file with the NEB a notification, at least 15 days prior to commencing the contingency crossing, that the contingency method will be employed. With this notification, Trans Mountain must explain why the contingency method is being employed and provide a summary of the differences between the primary and contingency watercourse crossing methods. c) Trans Mountain must confirm, within 30 days after commencing operations, that any contingency watercourse crossing(s) identified to the NEB pursuant to a) and b) were the only contingency watercourse crossing(s) implemented for the construction of the pipeline.	X							
109	Authorization(s) under paragraph 35(2)(b) of the Fisheries Act – Westridge Marine Terminal a) In the event that Fisheries and Oceans Canada determines that the Westridge Marine Terminal expansion requires Authorization(s) under paragraph 35(2)(b) of the <i>Fisheries Act</i>, Trans Mountain must file with the NEB, at least 10 days prior to commencing works specified in the respective Authorization(s), a copy of the Authorization(s); and b) Trans Mountain must confirm, within 30 days after commencing operations, that any <i>Fisheries Act</i> Authorization(s) required for the Westridge Marine Terminal expansion were obtained from Fisheries and Oceans Canada and filed with the NEB pursuant to a), or notify the Board if no Authorization(s) was required.	X							
110	Authorization(s) under paragraph 35(2)(b) of the Fisheries Act and Species at Risk permit(s) – pipeline For instream activities, except for those related to the Westridge Marine Terminal: a) for any instream activities that will require Authorization(s) under paragraph 35(2)(b) of the <i>Fisheries Act</i>, Trans Mountain must file with the NEB, at least 10 days prior to commencing the respective instream activities, a copy of the Authorization under paragraph 35(2)(b) of the <i>Fisheries Act</i>. b) for any instream activities that will require a permit(s) under the <i>Species at Risk Act</i>, Trans Mountain must file with the NEB, at least 10 days prior to commencing the respective instream	X	X						

No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	activities, a copy of the permit(s) issued under the <i>Species at Risk Act</i>. c) Trans Mountain must confirm, within 30 days after commencing operations, that: i) any required <i>Fisheries Act</i> Authorization(s) were obtained from Fisheries and Oceans Canada and filed with the NEB pursuant to a), or notify the Board if no Authorization(s) were required; and ii) any required <i>Species at Risk Act</i> permit(s) were obtained from the competent minister under the <i>Species at Risk Act</i> and filed with the NEB pursuant to b), or notify the Board if no permit(s) were required.								
111	Joining Programs Trans Mountain must develop Joining Programs and file them with the NEB at least 45 days prior to commencing welding of, respectively: a) field circumferential production, tie-in, and repair pipeline welds, including the tie-in welds between existing segments and Line 1 or Line 2; and b) terminals and pump stations. The Joining Programs must include: i) welder qualification requirements; ii) requirements for welding inspector qualifications and duties; iii) welding procedure specifications; iv) non-destructive examination (NDE) specifications; v) procedure qualification records for welding procedure specifications and NDE specifications; vi) a quality assurance program for field welds and welding procedures; and vii) any additional information that supports the Joining Program.	X	X			X	X	X	
112	Pressure testing a) Trans Mountain must pressure test the new and reactivated pipeline segments, terminals, and pump stations with a liquid medium. b) Trans Mountain must file with the NEB, at least 3 months prior to commencing pressure testing, a Pressure Testing Program that demonstrates compliance with applicable codes, standards, and regulatory requirements.	X	X			X	X	X	
113	Hydrostatic Testing Plan Trans Mountain must file with the NEB, at least 3 months prior to commencing pressure testing of any Project component, a Hydrostatic Testing Plan for the Project that includes: a) the locations of all water withdrawal and discharge sites; b) a discussion of any clearing activities or any other associated works, if required, that will allow for the transportation of the hydrostatic test water; c) water withdrawal rates; d) water withdrawal volumes; e) the flow rate/volume of water at the withdrawal sites; and f) site-specific mitigation measures to be implemented at the water withdrawal and discharge sites or at any other locations required to allow for the transportation of hydrostatic test water, including a description of the water quality monitoring methods to be used on hydrostatic testing water prior to discharge; and g) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information.	X	X			X	X	X	
114	NDE of final tie-in welds Trans Mountain must delay NDE of final tie-in welds (i.e.: welds which will not be subjected to hydrostatic testing) and any repairs to them for at least 48 hours following weld completion. Trans Mountain must include this requirement in the NDE specification of its Joining Program required by Condition 111.	X	X			X	X	X	

No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
115	SCADA and leak detection system design Trans Mountain must file with the NEB, reports describing the final design of the expanded Trans Mountain Pipeline System's SCADA and leak detection systems. These reports must include: a) for the commercially available external leak detection systems resulting from Trans Mountain's participation in joint industry projects, at least 45 days prior to commencing backfilling on Line 2 and the new delivery pipelines, a status update, including a timeline for implementation; and b) at least 3 months prior applying for leave to open the Project: i) a status update for the following complementary leak detection technologies that Trans Mountain is considering, including a timeline for implementation: 1) a secondary Computational Pipeline Monitoring (CPM) system operating in parallel with the Project's proposed CPM; and 2) aerial surveillance systems resulting from Trans Mountain's participation in joint industry projects; ii) an explanation of how Trans Mountain's complementary leak detection system(s) supports the leak detection capabilities of the primary CPM system(s); iii) for all leak detection systems applicable to the Project, performance targets for: 1) sensitivity; 2) accuracy; 3) reliability; and 4) robustness; iv) a validation plan for the performance targets in iii), including alarm testing, to be implemented within the first year of Project operation; v) rationale for the selected time windows(s) (i.e., averaging periods) for the CPM system(s); vi) a copy of Trans Mountain's public awareness program on recognizing and reporting leaks; vii) a description of how the leak detection system and its relevant procedures comply with CSA Z662 Annex E; viii) a list of other best practices such as API (American Petroleum Institute) recommended practices related to leak detection and control centre management; ix) a description of how Trans Mountain's revised procedures have introduced a rule directing the Control Centre Operator to perform a controlled shut down of the pipeline when a leak cannot be ruled out in a given time period; and x) a plan, including a timeline for implementation, for upgrading the existing measurement and data acquisition instrumentation to improve the leak detection performance of Line 1.	X	X						
116	Control system, SCADA, instruments, and communication Trans Mountain must file with the NEB, at least 2 months prior to completing dry commissioning activities, the block diagrams of the control system for its proposed pipeline that include the interconnection between various devices and components such as: a) programmable logic controllers; b) flow meters, and pressure and temperature measuring devices; c) critical protective elements; d) emergency shut-down systems; e) variable frequency drives; f) control valves; g) block valves; and h) local human machine interface. The block diagrams must demonstrate the primary and backup communication systems, supervisory and control layers of software, firewalls, and how all elements are integrated with the SCADA system.	X							
117	Reporting on improvements to Trans Mountain's Emergency Management Program Trans Mountain must file with the NEB, at least 2 years and 1 year prior to commencing operations, detailed updates for the company's review of its Emergency Management Program (toward meeting the requirements of Condition 124). This filing must include: a) a summary of work undertaken to-date; b) the approximate timing for completing remaining work; and c) a summary of parties that were consulted (Condition 90) and how their comments and feedback were considered in improving the program.	X					X	X	
118	Firefighting capacity at terminals	X						X	

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	Trans Mountain must file with the NEB, at least 1 year prior to commencing operations at the terminals: a) the following information regarding developing appropriate firefighting capacity for a safe, timely, and effective response to a credible worst-case fire at the Westridge Marine Terminal and at the Edmonton, Sumas, and Burnaby Terminals: i) an assessment of necessary resources and equipment, including an explanation of how the assessment was informed by Trans Mountain's terminal risk assessments; ii) a summary of Trans Mountain's consultation with appropriate municipal authorities and first responders, that includes any issues or concerns raised regarding each municipality's respective firefighting capacity and how Trans Mountain has addressed or responded to them; iii) a Firefighting Capacity Framework, informed by the assessment in i) and consultation in ii), and that includes a list of and timeline for completing key activities and milestones leading to the establishment of appropriate firefighting capacity; and b) a plan for responding to a fire exceeding a credible worst-case scenario.								
119	Emergency Preparedness and Response Exercise and Training Program Trans Mountain must file with the NEB, at least 1 year prior to commencing operations, an Emergency Preparedness and Response Exercise and Training Program for the pipeline; the Edmonton, Sumas, and Burnaby Terminals; and the Westridge Marine Terminal. The program's objective is to demonstrate the continual improvement of responder competencies (including control centre personnel) at all levels of the company to prepare for, respond to, recover from, and mitigate the potential effects of emergencies of any type, including tank fires and earthquakes. The program must include the following: a) a defined scope, other objectives in addition to those noted above, and program targets that address responder turn-over and ensure responders' ongoing training and practice; b) a list of mandatory courses for responders; c) a discussion of how Trans Mountain will train its personnel to respond to all hydrocarbon spill scenarios in various seasons, including releases of hydrocarbons in mountain regions during winter conditions, into ice covered watercourses, into watercourses under varying flow conditions and into waterbodies (aquifers or streams) that are used as municipal water supply sources; d) a description of, and schedule for, all emergency response exercises (full-scale, tabletop, drills, functional) that Trans Mountain will conduct prior to operations to test a variety of scenarios; e) a plan, including rationales, for determining the schedule and frequency of all emergency response exercises (full-scale, tabletop, drills, functional) to test a variety of scenarios during the Project's operational life; f) a discussion of how emergency response exercises will meet the objectives of testing Trans Mountain's: i) emergency response procedures; ii) company personnel training; iii) communications systems; iv) response equipment; v) safety procedures; and vi) the effectiveness of its liaison and continuing education programs; g) a learnings implementation plan for exercises that considers how Trans Mountain will update and amend its Emergency Response Plans and related documents following exercises. The learnings implementation plan must consider three main purposes: i) to validate plans; ii) to develop Trans Mountain responder competencies (including control centre personnel) and provide them with the opportunity to carry out and understand their roles in emergency response; and iii) to test Project-specific emergency response procedures; h) a plan for addressing the training requirements contained within the <i>National Energy Board Onshore Pipeline Regulations</i>; and i) confirmation that an independent third party has reviewed and assessed the Emergency Preparedness and Response Exercise and Training Program and that Trans Mountain has considered and incorporated the comments generated by that review and assessment into the program.	X					X	X	

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120	Notification and reporting on emergency response exercises For any tabletop, functional, and full-scale emergency response exercises undertaken as part of its Emergency Preparedness and Response Exercise and Training Program required by Condition 119: a) Trans Mountain must notify the NEB and all potential exercise participants and observers, including Appropriate Government Authorities, first responders and potentially affected Indigenous groups, at least 45 days prior to the date of each exercise, of: - the exercise's date and location(s); - the exercise's objectives; - the participants in the exercise; and - the scenario for the exercise. b) Trans Mountain must file with the NEB, and provide to Appropriate Government Authorities, first responders and potentially affected Indigenous groups, within 3 months after completing each full-scale exercise, a report on the exercise that includes: - the results of the completed exercise; - areas for improvement; and - steps to be taken to correct deficiencies.	X					X	X	
121	Financial Assurances Plan – operations phase a) Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to applying for leave to open Line 2, a Financial Assurances Plan that includes details of the financial resources and secured sources of funds that will be necessary to pay, without limitation, all actual loss or damage, costs and expenses, including cleanup and remediation, and loss of non-use value relating to non-use of a public resource associated with an unintended or uncontrolled release from the Project during the operations phase.¹⁴² These costs may arise from, among other things, potential accidents, malfunctions, and failures during the Project operations phase, including all spills originating from the pipeline and the terminals. The Financial Assurances Plan must be signed by an officer of the company, verifying that it is accurate, complete, and, at a minimum, meets the criteria and coverage levels described below: i) Criteria for financial assurance instruments and plan: - Any letter of credit that forms part of the Financial Assurances Plan must be unconditional and irrevocable, segregated from Trans Mountain's day-to-day business activities, and be dedicated to providing funds to cover the costs described in sub a) above, without limitation. - Third party liability insurance must be current, and broad, respecting the scope of environmental damages covered by the policy; <u>the policy will be consistent with provisions available in the insurance market</u> (i.e., only exceptional / non-standard perils, taking into account the Project's nature and scope, would be excluded from coverage). Such insurance must be structured on a multi-year basis, recognizing potential loss of income by persons sustaining damage caused by Trans Mountain, over a reasonable number of years after the event. - A portion of cash reserves or a portion of future cash flows of the Project may be included as instruments in the Financial Assurances Plan, provided they are secured by a commitment letter from an officer of the company confirming that the funds will be dedicated to the Financial Assurances Plan without restrictions for the period specified by the officer. - Parental and other third party guarantors must be registered within a Canadian jurisdiction and must have financial strength that is demonstrated in balance sheet values and ratios and credit ratings. For example, total assets less total liabilities of the guarantor should be several multiples of the liability assumed in the Trans Mountain guarantee. ii) Financial assurance components and coverage levels: Trans Mountain's Financial Assurances Plan must provide a total coverage, for the Project as a whole, of \$1.1 billion¹⁴³ for the costs described in sub a) above, without limitation. The plan should include the following components and minimum coverage levels:	X	X			X	X	X	

¹⁴² In the context of this condition, "operations phase" refers to the period after the Project receives leave to open approval and prior to it being fully abandoned.

¹⁴³ The NEB's basis for any final coverage level is described in its report to Governor in Council.

No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	1) Ready cash: Trans Mountain must have unfettered access to at least \$100 million to cover costs, including compensation to third parties for losses and damages in the near term, while insurance claims are being processed. Once used, this source of cash must be replenished immediately to cover the costs of a potential future spill. This can be in the form of a letter of credit, surety bond or other form acceptable to the NEB. 2) Core coverage: Trans Mountain must put in effect and maintain current at all times a core financial coverage of at least \$1 billion that includes third party liability insurance and other financial assurance instruments that comply with the criteria. Core coverage must be a portfolio approach with multiple financial instruments used and may not be composed of a single financial instrument (e.g., only third party liability insurance). At least one component of core coverage must be funds that are readily accessible to Trans Mountain (e.g., cash reserves held by the general partner and not distributed to the limited partners). Trans Mountain may use a number of financial and insurance instruments in its Financial Assurances Plan. However, sales of Project assets used for transporting hydrocarbon commodities will not be eligible candidates. Below are some illustrative financial and insurance instruments that could be potential candidates for the Financial Assurances Plan: · Irrevocable, unfettered letter of credit. · Secured line of credit. · Cash reserves held by the general partner and not distributed to the limited partners (and verifiable on Trans Mountain Pipelines Limited Partnership's balance sheet). · Internal cash flow, committed by Trans Mountain to financial assurances. · Industry pooled fund. · Third party liability insurance with exclusions for only exceptional / non-standard perils. · No fault third party liability insurance. · Parental and other third party guarantees provided by parties demonstrating financial strength through balance sheets and credit ratings. · Other instruments developed by Trans Mountain and the insurance and financial markets. b) Trans Mountain must file the following with the NEB: i) At least 6 months prior to applying for leave to open Line 2, a report from an independent third party that has assessed the Financial Assurances Plan and its key components against the criteria and actual experiences of industry damage claims. The report must summarize the key features of each financial and insurance instrument proposed for inclusion in the Financial Assurances Plan. ii) At least 3 months prior to applying for leave to open Line 2, a supplement to the report described in b)i) that provides verification of any third party liability insurance coverage, a copy of the insurance certificate, and a summary of the insurance policy's key features. This summary must include: limits on insurance coverage, deductible amounts, the risks and perils and properties covered by the insurance policy, the exclusions from coverage, Trans Mountain's obligations, effective dates, and names of insurers and reinsurers. iii) With its first leave to open application for Line 2, a report describing the steps it took to eliminate any deficiencies in its Financial Assurances Plan that were identified in the independent third party report referenced in b)i) and the NEB's subsequent review. iv) On or before 31 January of each year after commencing operations, a letter signed by an officer of the company verifying that all components of the Financial Assurances Plan remain as the NEB approved and sufficient to meet the financial assurance coverage levels described in ii). v) At least 2 months prior to any intended change(s) to the Financial Assurances Plan during the Projects operations phase, a letter, <u>for approval</u>, detailing the intended change(s) and how the change(s) provides the same or greater level of protection. vi) Within 30 days after accessing any component of the Financial Assurances Plan, a report detailing the component accessed, the reason for accessing it, and Trans Mountain's plan to ensure that it continues to meet the requirements of its NEB-approved Financial Assurances Plan.								

No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
122	Changing pipeline segment operating conditions (Hinton to Hargreaves; Darfield to Black Pines) Trans Mountain must file with the NEB <u>for approval</u>, at least 6 months prior to applying for leave to open Line 2, the following: a) An engineering assessment in accordance with CSA Z662 for the above two pipeline segments which Trans Mountain proposes to change from operating on the existing TMPL to the proposed Line 2. The engineering assessment must demonstrate that the two pipeline segments are fit for their intended service under the operating conditions of Line 2, and that they meet all relevant requirements of CSA Z662. The engineering assessment must include a schedule of planned integrity monitoring activities. b) A certificate with a supporting report issued by an independent certification body¹⁴⁴, stating unconditionally that the 43-kilometre-long, 762 millimetre outside diameter (NPS 30) pipeline segment from Darfield to Black Pines, B.C. is fit for its intended service under the operating conditions¹⁴⁵ of Line 2. The supporting report must include the qualifications of the independent certification body and the justification used to grant the certificate.	X							
123	Evacuation Plans a) Trans Mountain must file with the NEB, at least 6 months prior to commencing operations at the terminals, an Evacuation Plan for people present in areas potentially affected by an incident at each of Trans Mountain's Edmonton, Sumas, and Burnaby Terminals as well as at the Westridge Marine Terminal. Each Evacuation Plan must, at a minimum: i) describe how areas for evacuation were determined; ii) describe the circumstances under which evacuation may be required, as well as the respective methods and procedures for public notification; iii) describe specific evacuation routes, methods, and destinations; iv) be prepared in consultation with Appropriate Government Authorities, first responders and potentially affected Indigenous groups with the authority to issue evacuation or shelter in place orders during an emergency; v) state how input from Appropriate Government Authorities, first responders and potentially affected Indigenous groups, with the authority to issue evacuation or shelter in place orders during an emergency, was considered in preparing the plan; vi) define the roles, responsibilities, and jurisdictional authority of all parties involved in implementing an evacuation; and vii) confirm that an independent third party has reviewed and assessed the plan and that Trans Mountain has considered and incorporated comments generated by the review and assessment into the plan. b) Trans Mountain must include with its Evacuation Plan for the Burnaby Terminal, a plan specific to Simon Fraser University that includes the requirements in a) i) to vii), above.	X						X	

¹⁴⁴ For Conditions 19, 122 and 152, an "independent certification body" is an internationally recognized company or organization, such as Lloyd's Register or Det Norske Veritas, which is able to certify compliance to statutory requirements. The independent certification body must have expertise in pipeline integrity. The NEB reserves the right to accept or reject the certificate. In addition, the NEB's decision is not contingent on the results of the certificate.

¹⁴⁵ For Conditions 19, 122 and 152, "operating conditions" must include the Project-specific operating conditions, possible transient flow conditions, slack flow conditions, and effects on operating pressure due to temperature changes.

No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
124	Implementing improvements to Trans Mountain's Emergency Management Program Trans Mountain must file with the NEB, at least 6 months prior to commencing operations, a detailed summary of its review of its Emergency Response Plans (as noted in Conditions 125 and 126) and equipment (including its availability), as referenced in Volume 7, Section 4.8.2 of its Project application (Filing A3S4V5). This filing must include a description of changes made to Trans Mountain's Emergency Management Program, as required under the <i>National Energy Board Onshore Pipeline Regulations</i>, including changes to: a) the Pipeline Emergency Response Plan; b) Emergency Response Plans for the Edmonton, Sumas, and Burnaby Terminals, as well as the Westridge Marine Terminal; and c) site-specific plans and documents related to a) and b), such as Geographic Response Plans, Geographical Response Strategies, control point mapping, tactical plans for submerged and sunken oil and tactical plans for high consequence areas. The summary must demonstrate Trans Mountain's ability to prepare for, respond to, recover from, and mitigate the potential effects of emergencies of any type and in any geographic region or season and must include the following: i) a discussion of how the updated plans conform to the requirements contained within the <i>National Energy Board Onshore Pipeline Regulations</i>; ii) a discussion of how the plans consider, and would allow coordination with relevant federal, provincial, municipal and Indigenous community emergency response plans; iii) a discussion of how the results of research initiatives, such as the Scientific Advisory Committee work noted in Trans Mountain's response to NEB Information Request No. 1.63 (Filing A3W9H8) and other research noted during the OH-001-2014 proceeding, have been considered and incorporated into Trans Mountain's emergency response planning; iv) a description of the models used in response planning, including oil trajectory, fate and behavior, and air dispersion models; and v) confirmation that an independent third party has reviewed and assessed the Emergency Response Plans and that Trans Mountain has considered and incorporated the comments generated by the review and assessment into the plans.	X					X	X	
125	Emergency Response Plans for the Pipeline and for the Edmonton, Sumas and Burnaby Terminals Trans Mountain must file with the NEB, at least 6 months prior to commencing operations, updated Emergency Response Plans which must include: a) the following relevant emergency preparedness and response documents: i) an Emergency Response Plan to include the pipeline expansion; ii) updated Emergency Response Plans for the Edmonton, Sumas, and Burnaby Terminals; and iii) all related and accompanying site-specific plans and documents, such as control point mapping, Geographic Response Plans, tactical response plans, volunteer management plans, and fire safety plans; b) an emergency response and preparedness table for the pipeline (including facilities) indicating which plans and documents referenced in a) will be referred to in an emergency response for each 10-kilometre-long pipeline segment. For each pipeline segment, the table must also identify, at a minimum: i) high consequence areas, including environmentally sensitive areas (e.g., wetlands), heritage sites and water supply wells (Condition 93); ii) potentially affected persons or groups; iii) available access to the right-of-way and high consequence areas; iv) nearest control point(s); v) nearest available equipment cache(s); vi) response times for deployment of equipment and Trans Mountain personnel, mutual aid personnel, and third party contractors; vii) the available equipment and trained personnel, whether employed by Trans Mountain, contracted, or available through mutual aid (including contact information); and viii) geological, meteorological, and geographical hazards (e.g., snow avalanche, mud slides, rock slides, and steep slopes); and c) maps depicting the information identified in b).	X				X	X	X	

No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
126	Emergency Response Plan for the Westridge Marine Terminal Trans Mountain must file with the NEB, at least 6 months prior to commencing operations at Westridge Marine Terminal, an updated Emergency Response Plan for the Westridge Marine Terminal which must include: a) all related and accompanying site-specific plans and documents, such as Geographic Response Plans, Geographic Response Strategies, tactical response plans, volunteer management plans, and fire safety plans; b) a list of high consequence areas, including environmentally sensitive areas; c) a list of potentially affected persons or groups; d) nearest available equipment cache(s); e) response times for deployment of equipment and personnel to the incident location and high consequence areas; and f) maps depicting the information identified in a) to e).	X							
127	Terminal fire protection and firefighting systems a) Trans Mountain must file with the NEB <u>for approval</u>, at least 3 months prior to applying for leave to open of any Project component at each respective terminal, an independent third party report confirming the adequacy of the proposed fire protection and firefighting systems implemented or planned to be implemented at the Edmonton Terminal West Tank Area, the Burnaby Terminal, the Sumas Terminal, and the Westridge Marine Terminal. The report must demonstrate that the resources and firefighting systems are capable of suppressing fires associated with all scenarios identified in the above-mentioned terminals' final risk assessments (required by Condition 129). b) Trans Mountain must file with the NEB <u>for approval</u>, at least 2 months prior to beginning the assessment leading to the report in a), the name and qualifications of the proposed independent third party that will prepare the report in a).	X						X	

No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
128	Offset Measures Plan for residual effects on caribou habitat Trans Mountain must file with the NEB for approval, in accordance with the timelines below, an Offset Measures Plan for each affected caribou range, the goal of which is to offset all unavoidable and residual direct and indirect Project-related effects on caribou habitat, after taking into account the implementation of the measures identified in the relevant Environmental Protection Plan(s) for the Project and the Caribou Habitat Restoration Plan (see Condition 37) measures. The Offset Measures Plan must include: a) A preliminary version, to be filed at least 3 months prior to applying for leave to open, with the plan's criteria and measurable goals and that includes: i) an initial quantification of the area of caribou habitat directly and indirectly disturbed by the Project; ii) a list of the potential on-the-ground offset measures available; iii) each potential offset measure's appropriate offset ratio, based on consultation with expert federal and provincial authorities and on a review of the scientific literature on conservation offsets; iv) each potential offset measure's expected effectiveness including a discussion of uncertainty and how measures align with criteria specified in the scientific literature specific to conservation offsets; v) each potential offset measure's relative qualitative and quantitative value toward achieving the offset; and vi) a conceptual decision-making tree(s) or decision framework(s) that will be used to select which specific potential offset measures and accompanying offset ratios will be used under what circumstances. b) A final version, to be filed on or before 31 January after the second complete growing season after completing final clean-up, including: i) the contents of the preliminary Offset Measures Plan, with any updates identified in a revision log that includes the rationale for any changes; ii) a tabular list of the potential offset measures and appropriate offset ratios to be implemented or already underway, including site-specific details and maps showing the locations, and an explanation of how they meet criteria in the scientific literature for offsets; iii) a description of factors considered when determining the location of offset measures, including consideration of how the measures could maximize benefits to landscape variables; iv) a schedule indicating when potential offset measures will be initiated and their estimated completion dates; v) either an assessment of the predicted offset measures' effectiveness including a discussion of uncertainty and a quantitative compilation showing how the measures would offset the previously determined residual effects, or a plan for completing an assessment of the potential offset measures' effectiveness and value; and vi) an update on the restoration success to support offset measure decisions. Both the preliminary and final versions of the plan must also include the following: 1) a summary of its consultations with Appropriate Government Authorities and potentially affected Indigenous groups. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the Offset Measures Plan; 2) a description of how Trans Mountain has taken any available and applicable Indigenous traditional land use and traditional ecological knowledge studies into consideration in developing the plan including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and /or pursuant to Condition 97, had the opportunity to review and comment on the information; and 3) evidence of Trans Mountain's consideration of any updates to the applicable Recovery Strategy, as well as to range boundaries and identified critical habitat made prior and up to the date on which leave to open is granted.								
		X	X		X	X	X		

No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
129	Final terminal risk assessments Trans Mountain must file with the NEB <u>for approval</u> , at least 3 months prior to applying for leave to open for each terminal , final risk assessments for the Edmonton Terminal West Tank Area, the Sumas Terminal, the Burnaby Terminal, and the Westridge Marine Terminal, respectively, including all implemented mitigation measures. Trans Mountain must demonstrate in each risk assessment that mitigation measures will reduce the risks to levels that are ALARP while complying with the MIACC criteria for risk acceptability. The Edmonton Terminal West Tank Area, Sumas Terminal, and Burnaby Terminal must include the elements listed in Condition 22.	X						X	
130	Groundwater Monitoring Program Trans Mountain must file with the NEB <u>for approval</u> , at least 3 months prior to commencing operations , a Groundwater Monitoring Program that pertains to all terminals and pump stations, and for any vulnerable aquifers along the pipeline route. The program must include, at a minimum: - locations of groundwater monitoring wells, their depths, the rationales for well locations (including how groundwater flow direction was considered), groundwater flow velocity, parameters to be monitored and frequency of monitoring; - a description of any program changes required to meet this condition for facilities with an existing Groundwater Monitoring Program; - methods, criteria and rationale for identifying vulnerable aquifers along the pipeline route; - applicable regulatory criteria for comparing monitoring results, and a process outlining what steps will be followed should monitoring results indicate a negative change in groundwater quality; and - a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the program.	X	X			X	X	X	
131	Marine Public Outreach Program As an outcome of the Board's Reconsideration hearing (MH-052-2018), this condition was removed from the list of conditions.								
132	Marine Mammal Protection Program Trans Mountain must file with the NEB, at least 3 months prior to commencing operations , a Marine Mammal Protection Program that focuses on mitigating effects from the Project and associated cumulative effects, and on fulfilling Trans Mountain's commitments as a terminal operator with regard to Project-related marine shipping. The program must include: - the goals and objectives of the program, including a discussion on how they align with the objectives of applicable Fisheries and Oceans marine mammal Recovery Strategies and Action Plans; - a summary of the issues related to marine mammals from the Project and from Project-related marine vessels; - a summary of the initiatives that Trans Mountain has supported or undertaken to-date, including the goals of each initiative and how they relate to the goals and objectives of the program; - a discussion of the outcomes or progress updates of the initiatives identified in c), and how these outcomes have met or are contributing to the objectives of the program; - any other initiatives that Trans Mountain intends to undertake or support in the future that are relevant to the program; and - a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the program, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding, MH-05-2018 Reconsideration proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information.	X							
133	Confirmation of marine spill prevention and response commitments Trans Mountain must file with the NEB, at least 3 months prior to loading the first tanker at the Westridge Marine Terminal with oil transported by the Project , confirmation, signed by an officer of the company, that: Trans Mountain has included in its Vessel Acceptance Standard and Westridge Marine Terminal Regulations and Operations Guide a requirement for tankers nominated to load at the Westridge Marine Terminal to have a suitable arrangement for the proposed enhanced tug escort between the Westridge Marine Terminal and Buoy J prior to departure. The tug escort should be suitable for foreseeable meteorological and ocean conditions and be based on tanker	X							

No.	Conditions with initial filings due during construction / prior to commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	and cargo size; and b) an enhanced marine oil spill response regime is in place that is capable of: i) delivering 20,000 tonnes of capacity within 36 hours of notification, with dedicated resources staged within the study area; and ii) initiating a response within 2 hours for spills in Vancouver Harbour, and within 6 hours for the remainder of the Salish Sea shipping route to the 12-nautical-mile territorial sea limit.								
134	Updated Vessel Acceptance Standard and Westridge Marine Terminal Regulations and Operations Guide Trans Mountain must file with the NEB, at least 3 months prior to loading the first tanker at the Westridge Marine Terminal with oil transported by the Project, and thereafter on or before 31 January of each of the first five years after commencing operations , an updated Vessel Acceptance Standard and Westridge Marine Terminal Regulations and Operations Guide, and a summary of any revisions made to each.	X							
135	Slack line flow conditions Trans Mountain must file with the NEB, at least 2 months prior to commencing operation of Line 1, and at least 2 months prior to applying for leave to open Line 2, respectively , the following: a) a list of locations having potential for slack line flow when each of the pipelines is operated at 100 per cent of its maximum operating pressure (MOP), 80 per cent of its MOP, and 50 per cent of its MOP; and b) a description of the following regarding detecting and preventing slack line flow conditions: i) operational measures on Line 1 and Line 2; and ii) design measures on Line 2.	X	X						
136	Pre-operations full-scale emergency response exercises a) Prior to commencing operations , Trans Mountain must complete a full-scale exercise for each of the following scenarios: i) a 160-cubic-metre diluted bitumen release into Burrard Inlet as a result of a release from the Westridge Marine Terminal. The exercise must also consider emergency preparedness and response planning for a release that exceeds a credible worst-case scenario spill event; and ii) a credible worst-case release volume at the Burnaby Terminal. b) Trans Mountain must notify the NEB and all potential exercise participants and observers, including Appropriate Government Authorities, first responders, and potentially affected Indigenous groups, at least 45 days prior to the date of each exercise in a) , of: i) the exercise's date(s) and location(s); ii) the exercise's objectives; iii) the participants in the exercise; and iv) the scenario for the exercise. c) Trans Mountain must file with the NEB and provide to Appropriate Government Authorities, first responders and potentially affected Indigenous groups, within 3 months after completing each exercise in a) , a report on the exercise that includes: i) the results of the completed exercise; ii) areas for improvement; iii) steps to be taken to correct deficiencies; and iv) confirmation that an independent third party has evaluated and assessed the emergency response exercises and that Trans Mountain will consider the comments generated for future exercises.	X						X	
137	Tank roof design for tanks at the Edmonton Terminal Trans Mountain must install steel pontoon internal floating roofs and fixed roofs with odour control systems on all of its five proposed tanks at the Edmonton Terminal. Trans Mountain must file with the NEB, at least 30 days prior to applying for leave to open the five proposed tanks , a letter signed by an officer of the company that confirms that these roofs were installed.							X	
138	Confirmation of firefighting capacity at terminals Trans Mountain must file with the NEB, at least 30 days prior to commencing operations at the terminal , confirmation that appropriate firefighting capacity, in accordance with Condition 118, is in place.	X						X	

No.	Conditions with initial filings due after commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
139	Project completion Trans Mountain must file with the NEB, within 30 days after commencing operations , confirmation, signed by an officer of the company, that the Project was completed and constructed in compliance with all applicable [certificate/order] conditions. If compliance with any of the conditions cannot be confirmed, the officer of the company must include the reason(s) for this and the proposed course of action to achieve compliance.	X	X	X	X	X	X	X	X
140	Post-construction greenhouse gas (GHG) assessment report Trans Mountain must file with the NEB <u>for approval</u> , within 2 months after commencing operations , an updated GHG assessment report specific to the Project. The report must include: a) the methodology used for the assessment, including the sources of GHG emissions, assumptions, and methods of estimation; b) the total direct GHG emissions generated from Project construction, including land-clearing; c) a breakdown of direct GHG emissions generated by the construction of individual Project components (pipeline, pump stations, tank terminals and Westridge Marine Terminal) and by land-clearing activities; and d) a comparison and discussion of the direct GHG emissions calculated in b) with the predicted emissions in Trans Mountain's application and subsequent submissions.	X			X	X	X	X	
141	Post-construction noise surveys Trans Mountain must file with the NEB, within 3 months after commencing operations , the results of post-construction noise surveys conducted at the Sumas and Burnaby Terminals and at the Westridge Marine Terminal, demonstrating compliance with the British Columbia Oil and Gas Commission's <i>British Columbia Noise Control Best Practices Guideline (2009)</i> , and any further mitigation that Trans Mountain will undertake to achieve compliance.	X						X	
142	GHG Emissions Offset Plan – Project construction Trans Mountain must file with the NEB <u>for approval</u> , within 4 months after commencing operations , a plan for providing offsets for all direct GHG emissions generated from Project construction, as determined in Condition 140. The plan must include: a) a list and discussion of all possible offset options considered; b) the criteria against which each option was assessed for viability; c) a description of the offset option(s) selected for direct GHG emissions generated from Project construction, and the rationale for selecting the option(s); d) confirmation that the selected offset option is registered under the approved quantification protocols and has been verified by an accredited "verification body"¹⁴⁶; e) a schedule indicating when the selected offset options(s) will be initiated; and f) an accounting of offsets confirming no net GHG emissions from Project construction.	X			X	X	X	X	
143	Baseline inspections a) Trans Mountain must conduct the following pipeline inspections on Line 2 and the new delivery pipelines, at the times indicated: i) a high-resolution in-line caliper inspection (i.e., a GEOPIG™ inspection) within 6 months after commencing operations to establish accurate pipeline position and to detect pipe deformations; ii) an in-line ultrasonic crack detection inspection within 2 years after commencing operations; iii) an in-line corrosion magnetic flux leakage inspection in both the circumferential and longitudinal directions within 2 years after commencing operations; iv) an in-line ultrasonic wall measurement inspection within 2 years after commencing operations; and	X							

¹⁴⁶ In these conditions, "verification body" means a competent and independent person, or persons, with responsibility for performing and reporting on the verification process (as defined by ISO 14064).

No.	Conditions with initial filings due after commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	v) a close interval survey within 2 years after commencing operations . b) Trans Mountain must file with the NEB, within 6 months after completing each inspection in a) , a report that includes a summary of the inspection results, the proposed re-inspection interval, and mitigation measures for the anomalies detected through any of the inspections, if required.								
144	Ongoing confirmation of marine spill prevention and response commitments Trans Mountain must file with the NEB, on or before 31 January of each year after commencing operations , confirmation, signed by an officer of the company, that it is continuing to meet the requirements of Condition 133 regarding Trans Mountain's marine spill prevention and response commitments. Trans Mountain must provide each filing to Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority, Vancouver Fraser Port Authority, British Columbia Coast Pilots, Western Canada Marine Response Corporation, Fisheries and Oceans Canada and the Province of British Columbia at the same time as it is filed with the NEB. If a particular party mentioned above requests that it not be provided the annual filing, Trans Mountain may cease providing it to that party.	X							
145	Community Benefits Program progress reports Trans Mountain must file with the NEB, on or before 31 January of each of the first 5 years after commencing operations , a progress report summarizing the initiatives and activities undertaken as benefits that are in addition to compensation for access and potential impacts to community lands, and/or that exceed regulatory requirements. The report must summarize initiatives supported, at a minimum, in the areas of community programs and infrastructure improvements, environmental stewardship, and education and training during the reporting period, including local emergency management enhancements, improvements to community parks, as well as support for events. The filing must contain a commitment from Trans Mountain, and a description of how Trans Mountain will make progress reports publicly available until the Project is abandoned or decommissioned pursuant to the NEB Act. The progress reports must include: a) a description of the initiatives undertaken or supported; b) a list of participants or beneficiaries, including Indigenous groups, local and regional communities, service providers, or others; c) an update on the timing, status, and outcomes of each initiative, including its estimated completion date, if applicable; and d) a summary of Trans Mountain's consultation activities regarding the Community Benefits Program initiatives.	X							
146	Reports on engagement with Indigenous groups – operations Trans Mountain must file with the NEB, on or before 31 January of each of the first 5 years after commencing operations , a report on the engagement activities it has undertaken with Indigenous groups. Each report must include, at a minimum, for each Indigenous group engaged: a) the name of the group; b) the method(s), date(s), and location(s) of engagement activities; c) a summary of any issues or concerns raised; and d) the measures taken, or that will be taken, to address or respond to issues or concerns, or an explanation why no further action is required to address or respond to issues or concerns. Trans Mountain must provide a copy of each report to each group engaged (and identified in a) above) at the same time that it is filed with the NEB.	X	X		X	X	X	X	
147	Natural hazard assessment Trans Mountain must file with the NEB, within 1 year after commencing operations : a) the results of the baseline natural hazard assessment for the Project; and b) confirmation that the natural hazard assessment will be: i) updated at intervals not exceeding 5 years; and ii) integrated into the existing Natural Hazard Management Program for the Trans Mountain Pipeline system.	X				X	X	X	
148	Pipeline Geographic Information System (radio) data Trans Mountain must file with the NEB, within 1 year after commencing operations , Geographic Information System data in the form of an Esri® shape file that contains pipeline segment centre lines and right-of-way boundaries, where each pipeline segment has a unique outside diameter, wall thickness, MOP, external coating, field-applied girth weld coating, and pipe manufacturing specification. If the above values of the pipeline change at any point along the length of the Project, the pipeline(s) should be segmented at that point. Trans Mountain must also provide Geographic	X							

No.	Conditions with initial filings due after commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	Information System locations and names of all Project pump stations, terminals, custody transfer meters, tunnel entrances, pipeline bridges, check valves, and block valves, as applicable. The datum must be NAD83 and projection must be geographic (latitudes and longitudes).								
149	Caribou Habitat Restoration and Offset Measures Monitoring Program Trans Mountain must file with the NEB <u>for approval, on or before 31 January after the first complete growing season after commencing operations</u> , a program for monitoring and verifying the effectiveness of caribou habitat restoration and offset measures implemented as part of the final Caribou Habitat Restoration Plan (Condition 37) and the final Offset Measures Plan (Condition 128). This program must include: a) the scientific methods or protocols for short- and long-term monitoring of the restoration and offset measures, and effectiveness of the measures; b) monitoring frequency, timing, and locations, and the rationale for each; c) protocols for how restoration and offset measures will be adapted, as required, based on the monitoring results from the program's implementation; d) a summary of Trans Mountain's consultation with Appropriate Government Authorities and any species experts on the design of the monitoring program; and e) a proposed schedule for filing reports on monitoring results and adaptive management measures to the NEB, Environment and Climate Change Canada, and appropriate provincial authorities to be contained in the Caribou Habitat Restoration and Offset Measures Monitoring Program as well as at the beginning of each report filed.	X	X		X	X	X		
150	Caribou habitat restoration and offset measures monitoring report(s) Trans Mountain must file with the NEB, based on the approved schedule for the Caribou Habitat Restoration and Offset Measures Monitoring Program (required by Condition 149), a report(s) outlining the monitoring program's results, including the observed effectiveness of habitat restoration and offset measures for each affected caribou range, and how those measures will be adapted, as required, based on monitoring results. Any proposed changes to the NEB-approved reporting schedule must be included within the relevant report prior to any reporting on a revised schedule.	X	X		X	X	X		
151	Post-construction environmental monitoring reports Trans Mountain must file with the NEB, on or before 31 January following the first, third, and fifth complete growing seasons after completing final clean-up , a post-construction environmental monitoring report for the Project that must include: a) a description of the valued components or issues that were assessed or monitored; b) measurable goals for each valued component or issue; c) monitoring methods for each valued component or issue, results of the monitoring, and a comparison to the defined measurable goals; d) corrective actions taken, their observed success, and their current status; e) identification on a map or diagram of the locations where corrective actions were taken; f) any further corrective actions planned and a schedule for monitoring and reporting; and g) a summary of its consultations with appropriate government authorities and any potentially affected Indigenous groups and affected landowners / tenants. In the post-construction environmental monitoring report filed after the fifth full growing season after completing clean-up, Trans Mountain must include: i) an assessment of the effectiveness of mitigative and corrective actions and how learnings have been or will be applied to Trans Mountain's Environmental Protection Program; ii) a detailed description of all valued components or issues for which the measurable goals have not been achieved during the duration of the post-construction monitoring program; and iii) an evaluation of the need for any further corrective actions, measurable goals, assessments, or monitoring of valued components or issues, including a schedule for those. All filed post-construction environmental monitoring reports must address issues related, but not limited, to: soils; weeds; watercourse crossings; riparian vegetation; wetlands; rare plants, lichens and ecological communities; municipal tree replacement; wildlife and wildlife habitat; fish and fish habitat; marine fish and fish habitat; marine mammals; marine birds; and species at risk.	X	X	X	X	X	X	X	X

No.	Conditions with initial filings due after commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
152	Pipeline segment reactivation (Hinton to Hargreaves; Darfield to Black Pines) – new certificate and certificate validation Trans Mountain must file with the NEB, before expiry of the previous certificate identified in Condition 19, a new certificate with a supporting report issued by an independent certification body¹⁴⁷ for the two pipeline segments identified in Condition 19. The certificate and report must demonstrate that the two pipeline segments: a) are fit for service for the specified operating conditions;¹⁴⁸ b) meet all applicable requirements of CSA Z662; and c) will meet the hydrostatic test requirements outlined in CSA Z662, at any time during the certified period. The certificate must be valid for at least 5 years and be validated on an annual basis during the certified period. The supporting report must include the qualifications of the independent certification body, the justification used to grant the certificate, and the expiry date of the certificate.		X						
153	Full-scale emergency response exercises during operations a) Within 5 years after commencing operations, Trans Mountain must complete full-scale exercises to test each of the following five scenarios: i) a full-bore rupture under ice and snow conditions in the Coquihalla Mountain Range; ii) a full-bore rupture into the Athabasca River during high spring flow conditions; iii) a full-bore rupture into Fraser River at the Port Mann Bridge, under peak flow conditions; iv) a full-bore rupture into the North Thompson River during high spring flow conditions; and v) a tank fire at the Burnaby Terminal. b) Trans Mountain must notify the NEB and all potential exercise participants and observers, including Appropriate Government Authorities, first responders and potentially affected Indigenous groups at least 45 days prior to the date of each exercise in a), of: i) the exercise's date and location(s); ii) the exercise's objectives; iii) the participants in the exercise; and iv) the scenario for the exercise. c) Trans Mountain must file with the NEB, and provide to Appropriate Government Authorities, first responders and potentially affected Indigenous groups, within 3 months after completing each exercise in a), a report on the exercise that includes: i) the results of the completed exercise; ii) areas for improvement; iii) steps to be taken to correct deficiencies; and iv) confirmation that an independent third party has evaluated and assessed the emergency response exercises and that Trans Mountain will consider the comments generated for future exercises.	X						X	
154	Riparian Habitat Reclamation Evaluation Report and Offset Plan Trans Mountain must file with the NEB <u>for approval</u>, on or before 31 January after the fifth complete growing season after completing final clean-up, a Riparian Habitat Reclamation Evaluation Report and Offset Plan. a) The report must include, for each defined watercourse crossed by the Project: i) an evaluation of performed reclamation activities against the identified measureable goals and targets (required by Condition 71), that includes an identification of the defined watercourses where riparian habitat that has not returned to, or trending towards a sufficient, pre-construction functionality; ii) a description of the proposed enhancement measures and corrective actions selected and	X	X						

¹⁴⁷ For Conditions 19, 122 and 152, an “independent certification body” is an internationally recognized company or organization, such as Lloyd's Register or Det Norske Veritas, which is able to certify compliance to statutory requirements. The independent certification body must have expertise in pipeline integrity. The NEB reserves the right to accept or reject the certificate. In addition, the NEB's decision is not contingent on the results of the certificate.

¹⁴⁸ For Conditions 19, 122 and 152, “operating conditions” must include the Project-specific operating conditions, possible transient flow conditions, slack flow conditions, and effects on operating pressure due to temperature changes.

No.	Conditions with initial filings due after commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
	the rationale for the selected option(s); and iii) a schedule for when the enhancement measures and corrective actions will be initiated and an estimated timeline for completion, including any monitoring that will be required. b) The plan must include, for defined watercourses crossed by the Project located in watersheds identified as being above the riparian habitat disturbance threshold (>18 per cent of riparian habitat disturbed in the watershed) or classified as High Sensitive fish-bearing by Trans Mountain, during the OH-001-2014 proceeding, and, where, after the fifth complete growing season, riparian habitat has not returned, or is not trending towards sufficient pre-construction functionality: i) a description of the proposed offset measures selected that includes details with rationales on the amount and type of offsets required, how the offset measures would be implemented, and the location of offset sites; ii) a schedule for when the offset measures will be initiated, an estimated timeline for completion, including any monitoring that will be required, and a schedule for when the results of the offsets monitoring will be filed with the Board that demonstrate offset success. iii) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the report/plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; and iv) a summary of consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the report/plan.								
155	Rare Ecological Community and Rare Plant Population Mitigation Evaluation Report and Offset Plan Trans Mountain must file with the NEB <u>for approval</u>, on or before 31 January after the fifth complete growing season after completing final clean-up, a Rare Ecological Community and Rare Plant Population Mitigation Evaluation Report and Offset Plan for ecological communities of concern, rare plants and lichens, and early draft, candidate, proposed, or final critical habitat for plant and lichen species under the <i>Species at Risk Act</i>, that includes: a) an evaluation of avoidance and mitigation success with reference to the measurable goals outlined in the Rare Ecological Community and Rare Plant Population Management Plan required by Condition 40; b) identification of communities, species, and critical habitats that have not yet achieved the intended degree of reclamation success, and an evaluation of the need for ongoing monitoring, reporting and corrective actions; c) identification of any ongoing effects to ecological communities and rare plant and lichen species that have an at-risk status of S1, S1S2 or S2, or that are listed under federal or provincial legislation for protection, or on any early draft, candidate, proposed, or final critical habitat under the <i>Species at Risk Act</i>; d) for the ongoing effects identified in c), a Final Rare Ecological Community and Rare Plant Population Offset Plan that updates the Preliminary Rare Ecological Community and Rare Plant Population Offset Plan required by Condition 40, and that also includes details with rationales on the amount and type of offsets required, the offset measures to be implemented, the selection of compensation sites, identification of the parties involved in planning and implementation and their respective roles and responsibilities, a timeline for implementation, and the methods and schedule for monitoring and reporting to demonstrate offset success; e) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; and f) a summary of its consultations with Appropriate Government Authorities, any species experts and potentially affected Indigenous groups. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the report/plan.	X	X		X	X	X	X	

No.	Conditions with initial filings due after commencing operations	CPCN	OC2	OC49	Temp	Pump1	Pump2	Tanks	Deact
156	Wetland Reclamation Evaluation Report and Offset Plan Trans Mountain must file with the NEB <u>for approval</u>, on or before 31 January after the fifth complete growing season after completing final clean-up, a Wetland Reclamation Evaluation Report and Offset Plan that includes: a) the extent (in hectares), by wetland type, that was impacted by Project construction and associated activities; b) for each wetland impacted, an evaluation of mitigation and reclamation success with reference to the measurable goals outlined in the Wetland Survey and Mitigation Plan required by Condition 41; c) identification of any wetlands that have not yet achieved the intended degree of reclamation success, and an evaluation of the need for ongoing monitoring, reporting and corrective actions; d) for any wetland to which no-net-loss under the Federal Policy on Wetland Conservation applies, an evaluation of any temporary or ongoing loss of any individual functional condition (e.g., habitat, hydrology and biogeochemistry); e) for any wetland that has not achieved reclamation success in terms of overall wetland function, and for any wetland to which no-net-loss under the Federal Policy on Wetland Conservation applies and that has had a temporary or ongoing loss in any individual functional condition, a Final Wetland Offset Plan that updates the Preliminary Wetland Offset Plan required by Condition 41, and that also includes details with rationales on the amount and type of offsets required, the offset measures to be implemented, the selection of compensation sites, identification of the parties involved in planning and implementation and their respective roles and responsibilities, a timeline for implementation, and the methods and schedule for monitoring and reporting to demonstrate offset success; f) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; and g) a summary of its consultations with Appropriate Government Authorities, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the report/plan.	X	X		X	X	X	X	
157	Grasslands Reclamation Evaluation Report and Offset Plan Trans Mountain must file with the NEB <u>for approval</u>, on or before 31 January after the tenth complete growing season after completing final clean-up, a Grasslands Reclamation Evaluation Report and Offset Plan that applies to native grasslands in the British Columbia interior and that includes: a) the extent (in hectares) of grasslands that were impacted by Project construction and associated activities; b) an evaluation of reclamation success with reference to the measurable goals outlined in the Grasslands Survey and Mitigation Plan required by Condition 42; c) an identification of any grasslands that have not yet achieved the intended degree of reclamation success, and an evaluation of the need for ongoing monitoring, reporting and corrective actions; d) for those grasslands that have not yet achieved reclamation success, a Final Grasslands Offset Plan that updates the preliminary plan required by Condition 42, and that also includes details with rationales on the amount and type of offsets required, the offset measures to be implemented, the selection of compensation sites, identification of the parties involved in planning and implementation and their respective roles and responsibilities, a timeline for implementation, and the methods and schedule for monitoring and reporting to demonstrate offset success; e) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the plan, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information; and f) a summary of its consultations with Appropriate Government Authorities, species experts, potentially affected Indigenous groups and affected landowners/tenants. In its summary, Trans Mountain must provide a description and justification for how Trans Mountain has incorporated the results of its consultation, including any recommendations from those consulted, into the report/plan.	X	X		X	X	X		

Appendix 4: Technical details about the Project

Project overview

The general overview of the Project is found in Chapter 1 of this Report. Additional details are provided here:

The existing Trans Mountain Pipeline system transports a range of crude petroleum and refined products to multiple locations in B.C. These include refined product deliveries to Kamloops and Port Moody, and crude petroleum deliveries to Burnaby, the Westridge Marine Terminal (WMT) for offshore export, and Sumas for deliveries on the Trans Mountain Pipeline (Puget Sound) LLC pipeline to Anacortes, Ferndale, and Cherry Point in Washington State. The existing system has an operating capacity of approximately 47 690 m³/day (300,000 barrels/day) shipping 20 per cent heavy crude and 80 per cent light crude and refined products.

Trans Mountain proposes to ship a larger volume of these oils on the expanded system. Line 1 is expected to transport batches of primarily light crude oils and refined products while Line 2 will transport batches of primarily heavy crude oil.

- After the expansion, the 1 147 km Line 1 pipeline will consist of:
 - the existing 229 km of 610 mm outside diameter (NPS 24) and 89 km of 762 mm outside diameter (NPS 30) pipeline segments from Edmonton, AB to Hinton, AB;
 - a reactivated 150 km of 610 mm outside diameter (NPS 24) pipeline segment from Hinton, AB, to Hargreaves, B.C. (built in 1957);
 - the existing 273 km of 610 mm outside diameter (NPS 24) pipeline segment from Hargreaves, B.C., to Darfield, B.C.;
 - a reactivated 43 km of 610 mm outside diameter (NPS 24) 4 pipeline segment from Darfield, B.C., to Black Pines, B.C. (built in 1953); and
 - the existing 38 km of 762 mm outside diameter (NPS 30) and 325 km of 610 mm outside diameter (NPS 24) pipeline segments from Black Pines, B.C., to the Burnaby Terminal, B.C.

After the expansion, the approximately 1 180 km Line 2 pipeline will consist of:

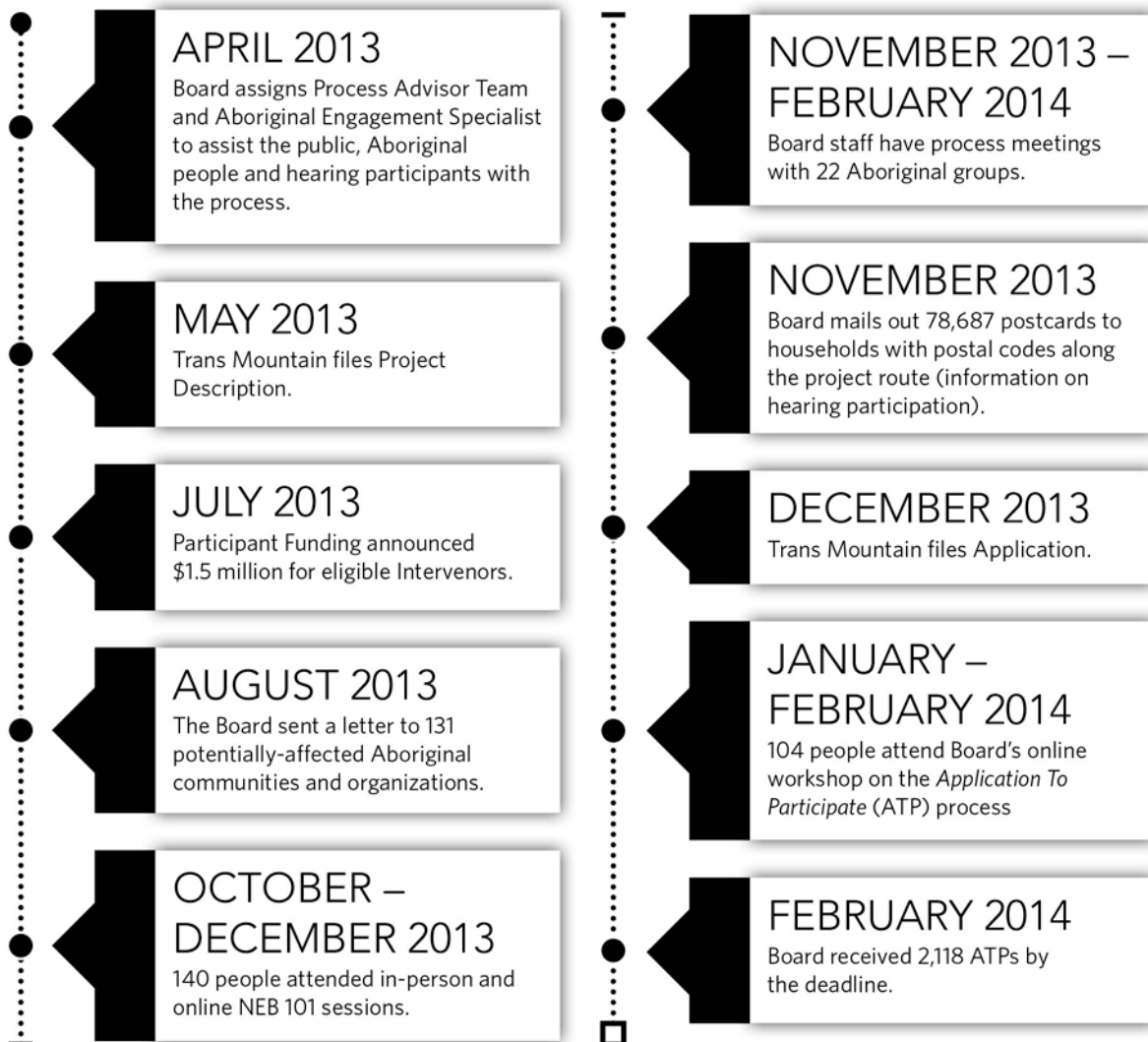
- approximately 339 km of new 914 mm outside diameter (NPS 36) pipeline from Edmonton, AB, to Hinton, AB;
- the existing 150 km of 914 mm outside diameter (NPS 36) pipeline segment from Hinton, AB, to Hargreaves, B.C. (built in 2008);
- approximately 121 km of new 1 067 mm outside diameter (NPS 42) pipeline from Hargreaves, B.C., to Blue River, B.C.;
- approximately 158 km of new 914 mm outside diameter (NPS 36) pipeline from Blue River, B.C., to Darfield, B.C.;
- the existing 43 km of 762 mm outside diameter (NPS 30) pipeline segment from Darfield, B.C. to Black Pines, B.C. (built in 1957); and
- approximately 368 km of new 914 mm outside diameter (NPS 36) pipeline from Black Pines, B.C., to the Burnaby Terminal.

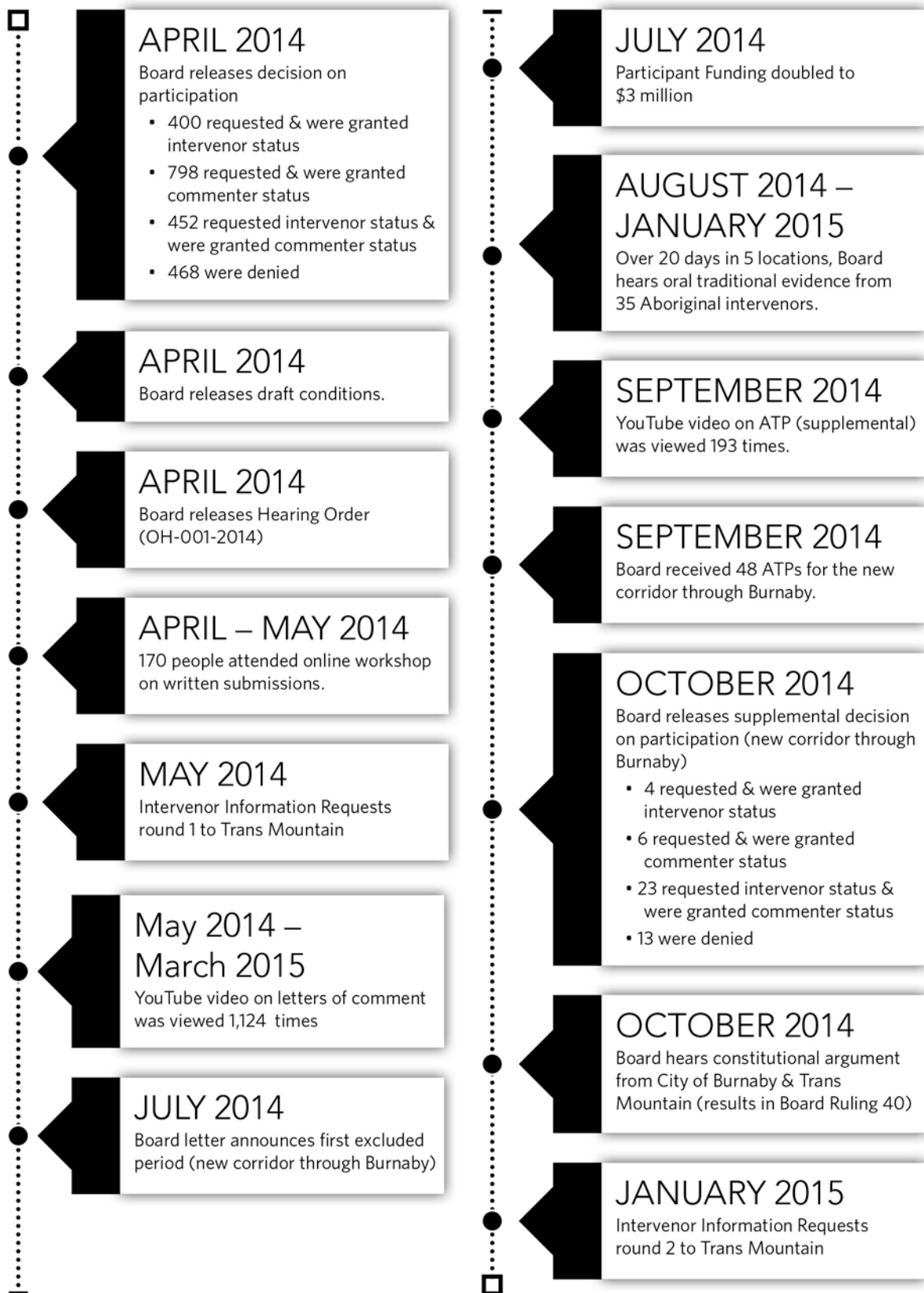
Other major components of the Project would include:

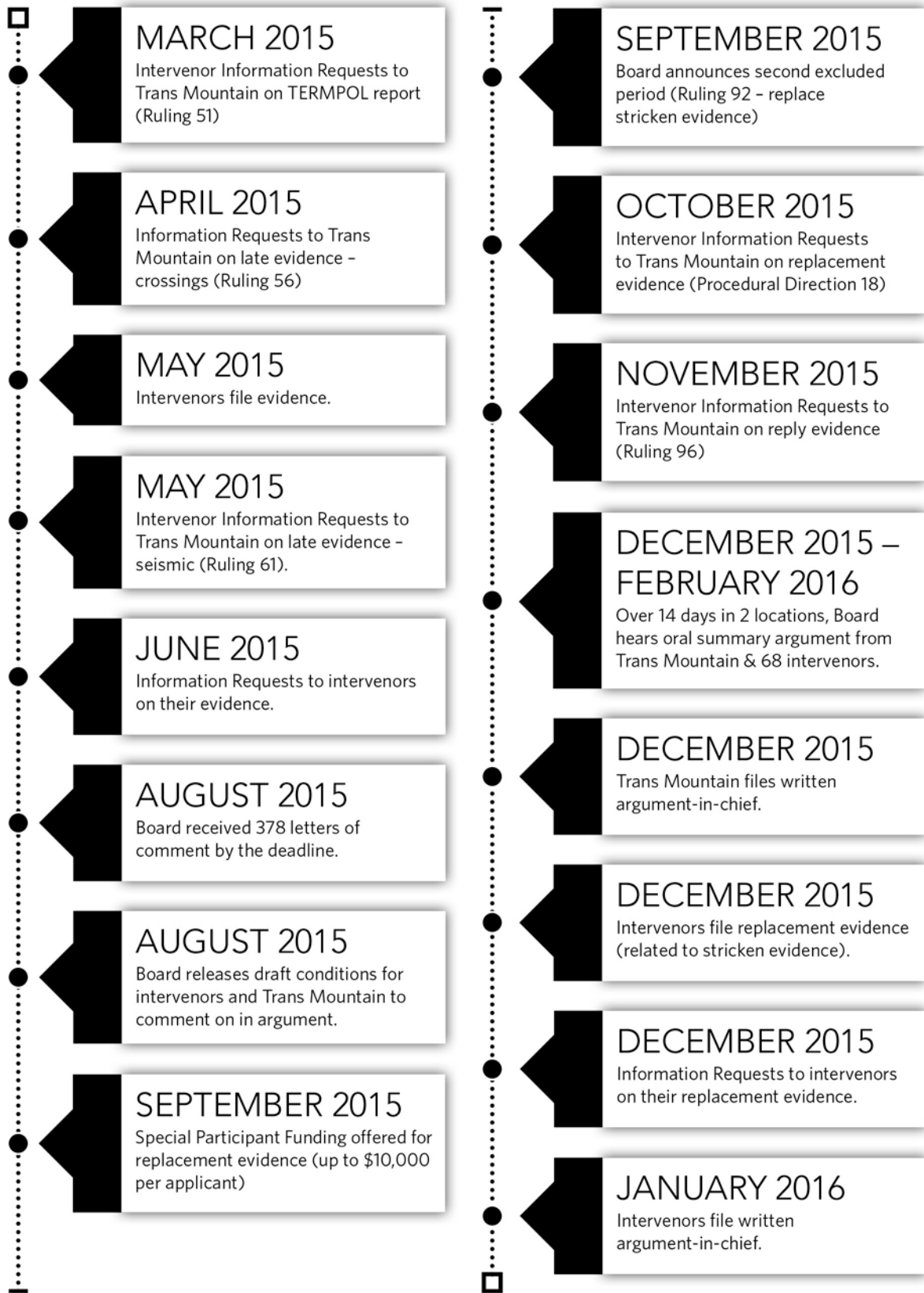
- two 762 mm outside diameter (NPS 30) delivery lines from the Burnaby Terminal to the WMT (Westridge Delivery Pipelines) in B.C. (lengths are approximately 2.6 km for the tunnel option and 3.6 km for the street option);
- adding 12 new pump stations, 10 at existing pump station sites and 2 at a new common pump station site at Black Pines;
- adding 34 new pump units at the new pump stations;
- reactivated existing pump station at Niton, AB;
- re-connecting Jasper Pump Station to Line 1 and adding drag-reducing agent (DRA) injection capability;
- adding one new pump unit at Sumas Pump Station to support additional deliveries to the Puget Sound Pipeline;

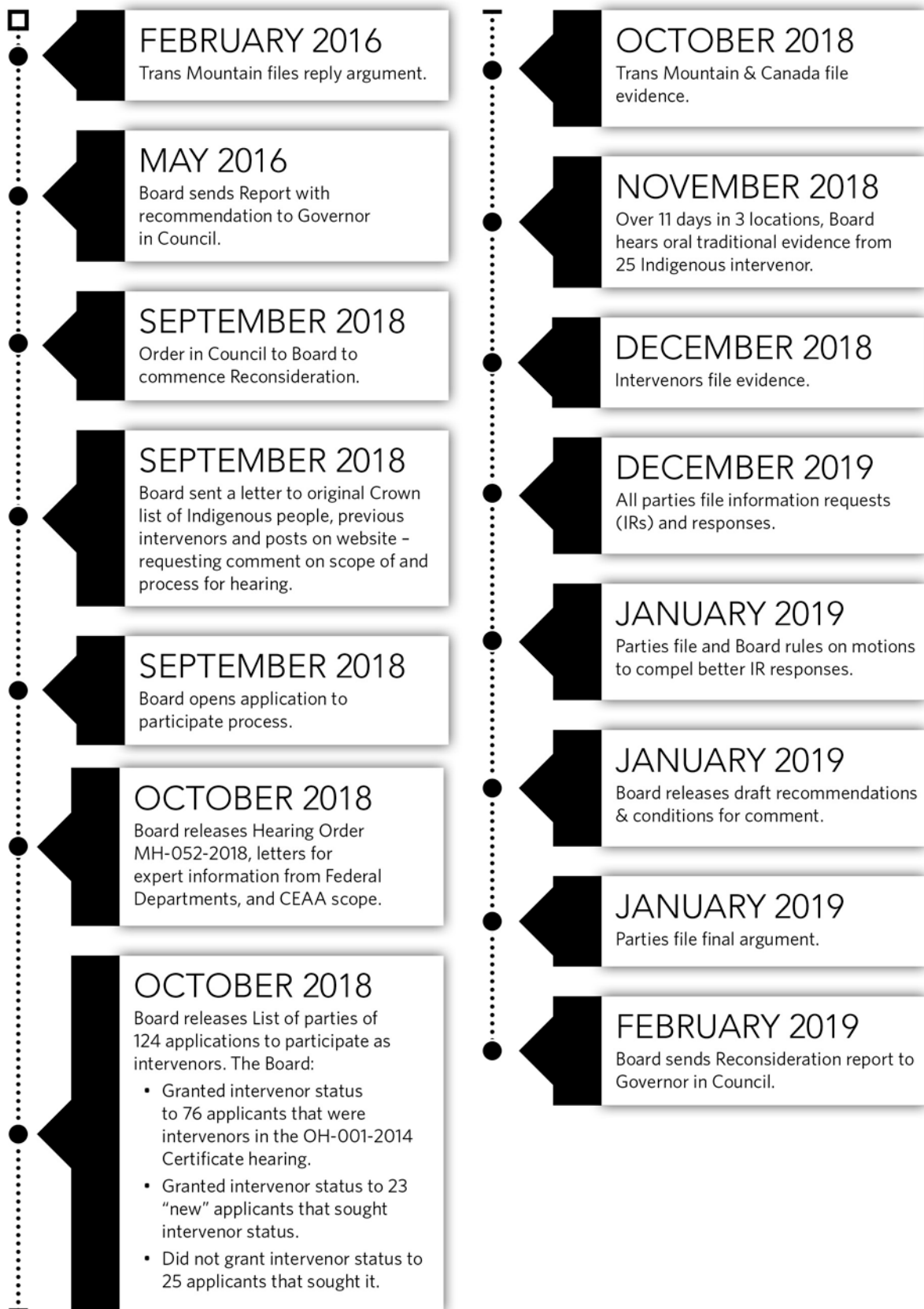
- 20 new tanks at the Edmonton (5), Sumas (1) and Burnaby (14) Terminals, preceded by the demolition of two existing tanks, one each at Edmonton and Burnaby, for a net total of 18 additional tanks;
- 25 new sending or receiving traps;
- deactivate and decommission several components of its existing facilities;
- constructing one new dock complex with a total of three Aframax-capable berth faces and a utility dock; and
- ancillary components and appurtenances, including mainline block valves, scraper traps, pressure reduction or relief stations, containment, power lines, access roads, and temporary infrastructure.

Appendix 5: Hearing steps









Appendix 6: List of intervenors

The list below does not include intervenors that withdrew from either hearing.

Intervenors in both the OH-001-2014 and MH-052-2018 hearings

Adams Lake Indian Band	May, Elizabeth
Alexander First Nation	Métis Nation BC
BC Nature and Nature Canada	Metro Vancouver
BC Métis Federation	Musqueam Indian Band
BP Canada Energy Group ULC	Natural Resources Canada
Burnaby Residents Opposing Kinder Morgan Expansion	Neskonlith Indian Band
Canadian Association of Petroleum Producers	New Democratic Party of Canada
Canadian Natural Resources Limited	Nooaitch Indian Band
Cenovus Energy Inc.	North Shore No Pipeline Expansion
Chamber of Shipping	Olsen, Adam
Chawathil First Nation	Pacheedaht First Nation
Cheam First Nation	Parks Canada
City of Burnaby	Pauquachin First Nation
City of Port Moody	Pavlovich, Don
City of Vancouver	Pro Information Pro Environment United People Network
City of Victoria	Province of British Columbia
Coldwater Indian Band	Raincoast Conservation Foundation
Cowichan Tribes	Samson Cree Nation
Devon Canada Corporation	Scia'new First Nation
District of North Vancouver	Shackan Indian Band
District of West Vancouver	Shxw'ówhámel First Nation
Ditidaht First Nation	Simpcw First Nation
Environment and Climate Change Canada	Snuneymuxw First Nation
Ermineskin Cree Nation	Squamish Nation
Esquimalt Nation	Stand.earth (formerly ForestEthics Advocacy)
Fisheries and Oceans Canada	Stk'emlupsemc te Secwepmc of the Secwepmc Nation
First Nations of the Maa-nulth Treaty Society	Stó:lō Collective
Friends of Ecological Reserves	Stz'uminus First Nation
Friends of the Earth U.S.	Suncor Energy Marketing Inc.
Georgia Strait Alliance	Swinomish, Tulalip, Suquamish, and Lummi Indian Nations
Government of Alberta	Taplay, Calvin
Greater Vancouver Board of Trade	Total E&P Canada Ltd.
Hallson, Graham	Transport Canada
Husky Energy	Tsartlip First Nation
Imperial Oil Limited	Tsawout First Nation
Independent Contractors and Businesses Association	Tsawwassen First Nation
KGHM International Ltd.	Tsleil-Waututh Nation
Kingman, Brian L.	T'sou-ke First Nation
Kwantlen First Nation	Vancouver Fraser Port Authority
Kwikwetlem First Nation	Washington State Department of Ecology
Living Oceans Society	Weaver, Andrew
Lyackson First Nation	Whitefish (Goodfish) Lake First Nation #128
MacVicar, Rod	Yarrow Ecovillage
Makah Tribal Council	

Intervenors* in the MH-052-2018 hearing only

* John A. Clarkson, the federal government-appointed marine technical advisor, entered into the hearing process in December 2018 and was afforded similar opportunities to the intervenors at that stage, as outlined in the Board's 13 December 2018 letter.

Barkley Sound Stewardship Alliance
BC Chamber of Commerce
BC Coast Pilots Ltd.
Blood Tribe (Kainai First Nation)
Business Council of British Columbia
Canadian Marine Pilots' Association
Concerned Professional Engineers Society
Driftpile Cree Nation
Dunster, Katherine
Graham, Gerald
Health Canada
Heiltsuk First Nation
Hoberg, George
Indigenous Caucus for the Trans Mountain Indigenous
Advisory and Monitoring Committee
Little Shuswap Lake Indian Band

Louis Bull Tribe
Malahat First Nation
MEG Energy Corp.
Pacific Pilotage Authority
Papaschase First Nation #136
Peace, Ian
Resource Works Society
Saddle Lake Cree Nation #125
Seabird Island Band
Stewart, Stephen
Stó:lō Tribal Council
Surrey Board of Trade
Tsuut'ina Nation
Western Canada Marine Response Corporation
Whitefish Lake First Nation #459
Wilderness Committee

Intervenors in the OH-001-2014 hearing only

16580 – 104th Ave (Owners)
Aikman, Allan
Alberta Federation of Labour
Alexis Nakota Sioux Nation
Alfonso, Marc
Amy, Chris
Antoine, Janice
Aseniwuche Winewak Nation
Ashcroft Indian Band
Asini Wachi Nehiyawak Traditional Band
Aulakh, Rupinder
Azevedo, Andhra
Banerjee, Julieta
Barazzuol, Daniela
Bart, Nancy
Basic, Kata
BC Building Trades
BC Electoral District of Oak Bay Gordon Head
BC Wildlife Federation
Bereziak, Ed
Berrettoni, Pat
Bickle, Eric
Bilton, William E.
Black, John and Paetow, Andrea
Black, Robert
Boecking, Hartwig
Bolivar, Ursula
Borle, Thomas
British Columbia Hydro and Power Authority
Brooke, Doris
Burnaby Teachers' Association
Burrard Inlet Marine Enhancement Society
Burrard Inlet Oil Moratorium
Burton, Bruce
Byers, Michael
Canadian Oil Sands Partnership #1
Canadian Parks and Wilderness Society –
BC Chapter
Carr, Goldie Z.
Castellanos, Erika
CCEC Credit Union
Chalmers, Don
Chalmers, Sheila
Chambers, William James

Chan, Cedric
Chan Wong, Sik
Chang, Li Chuan
Chateauneuf, Paul
Chen, Simon
Cheryl, Galandie
Chevron
Choi, Scott
Christensen, Paul
Chung, Vincent (and family)
City of Abbotsford
City of Coquitlam
City of Edmonton
City of Kamloops
City of New Westminster
City of North Vancouver
City of Richmond
City of Surrey
City of White Rock
Collaborative Group of Landowners Affected by Pipelines
Concerned Citizens of Henley Estates
Concerned Owners of Village del Ponte
Concerned Residents of Forest Knolls
Corcoran, Karen
Corcoran, Ward
Corpus Management Group
Costco Wholesale Canada Ltd.
Craig, Lisa
Crane, Mike
Cressey, John S.
Cui, Yubin
Cunningham, Christine
Dalla-Tina, Joy
Danysh, Maria
Develaar, Aubrey
Dean, Larry
Degrassi, Lucio
Deng, Tianmei
Dennert, Shauna
Deshaies, Ruth
Dimarzo, Mike
Dinunzio, Apollonia
District of Clearwater
District of Hope

Doherty, Dorothy
 Dolgin, Noam
 Dossa, Karim
 Douglas, Catherine
 Drummond, Jean
 Dubuc, Sheri
 Dubuc, Stephane
 Earle, Thomas
 Edmonton Chamber of Commerce
 English, Karen
 Enoch Cree Nation
 Farmer, David
 Farquhar, Edward
 Finamore, Denise
 Fofonoff, Christopher
 Follette, Cecilia
 Ford, Lily
 Fraser River Sturgeon Conservation Society
 Fraser Valley Regional District
 Fraser Valley Watersheds Coalition
 Fredette, Anne
 Fung, Thomas
 Gard, Barbara
 Gibson, Terry
 Ginetz, Sharon
 Goettler, Sandy
 Gordon, Elliott
 Graduate Student Society at Simon Fraser University
 Grasslands Conservation Council of BC
 Guan, Hui
 Hackett, Angelika
 Hackett, Robert
 Hale, Michael
 Halston Hills Housing Co-op
 Hansen, Laura
 Hardie, Sabrina
 Hastings Crossing Business Improvement Association
 Hatch, Mary
 Hawes, Frances
 Hayden, Carlin
 Hayden, Maurice
 Healey, Cheryl
 Heard, Kerri
 Hennig Farms
 Hilstad, Helen
 Hong, Xing
 Horse Lake First Nation
 Howard, Pat
 Hsu, Owen
 Hunter-Tate, Kathryn
 Hykaway, Ron
 Indigenous and Northern Affairs Canada
 Inskip, Terrence
 Izzard, Kelly
 Jackson, Art, operating as Alpine Art
 Jan, David
 Jan, Derrick
 Jan, Sandy
 Jensen, Catherine
 Jessa, Nizaralli
 Jessa, Rashida
 Ji, Willmer
 Johannesen, Patricia
 Johnson, Michelle
 Josok, Olav
 Jukic, Petar
 Jung, Ha Sung
 Kain, Waltraud

Kardell, Jeysoca T.
 Katzie First Nation
 Katzmann, Carole
 Kelly Lake Cree Nation
 Kennedy, Terry
 Kerr, Kandace
 Klaassen, Chris
 Klakowich, Ken
 Koessler, Juergen
 Kripalani, Anita
 Lake Cowichan First Nation
 Lang, Jing Cheng
 Larson, Karen
 Lau, Betty
 Lau, Maria
 Lau, Matthew
 Ledgeview Golf Club
 Lee, John C.Y.
 Lee, Kevin
 Lee, Naome
 Leon Black, Michelle
 Lheidli T'enneh First Nation
 Li, Bei
 Li, Long
 Lin, Ping
 Little Fort Group
 Loeffler, Eric
 Lotus Sports Club
 Lower Nicola Indian Band
 Luk, Helen
 MacDonald, Sheilagh
 Majid, Abdul
 Mancinelli, Joyce
 Mathias, Kevin
 Mathias, Louella
 Matsqui First Nation
 MacDonald, Kenneth
 Member of Parliament (Victoria), House of Commons
 Métis Nation of Alberta Gunn Métis Local 55
 Métis Regional Council – Zone IV of the Métis Nation
 of Alberta
 Meung, Lihong
 Michel First Nation
 Mike Wiegele Helicopter Skiing
 Milillo, Teresa
 Millar, Richard
 Miller, Brahm
 Moncada, Bonnie
 Moncada, Jorge
 Montana First Nation
 Moon, Kyung-Mee
 Murillo, Marco Antonio
 Murray, Karen
 Nagy, Ed
 Nexen Marketing
 Nguyen, Phuoc Tat
 Nicola Tribal Association
 Niemzik, Ralf
 Nix, Peter
 Nonis, Silvia
 Northern Gateway Pipelines Inc.
 Northern Health
 NWNA (Nestlé)
 Oakey, Doug
 O'Byrne, Brooke
 O'Chiese First Nation
 Okanagan Nation Alliance
 Olsen, Joni

Pan, Qing
 Pannu, Alex
 Pantusa, Antonio
 Pao, Jessica
 Parents from Cameron Elementary School Burnaby
 Parhar, Raminder
 Paul, Dayson
 Penelakut Tribe
 Peters Band
 Pine Ridge Housing Co-operative
 Pitt-Brooke, Aidan
 Popkum Indian Band
 Porter, Glen
 Porterfield, Doug
 Portillo, Jennifer
 Potvin, Kevin
 Preston, Daniel
 Punnett, Elizabeth
 Rainbow Beach Developments Inc.
 Redwoods Golf Course
 Regional District of Fraser-Fort George
 Riddle, Leilani
 Roberts, Jeremy
 Roberts, Tony
 Rosen, Adam
 Sacilotto, Enio
 Sacilotto, Jeanne
 Salmon River Enhancement Society
 Sartori, Antonietta
 Sartori, Clodine
 Sartori, Serafino
 Sayo, Carlo
 Schrauwen, Ted
 Shoji, Masanobu
 Simon Fraser Student Society
 Simon Fraser University
 Simpson, Graham
 Smid, Oeds
 Smith, Gary
 St. Pierre, Merle
 Stafford, Tarah
 Stanley Park Ecology Society
 Statoil Canada Ltd.
 Stewart, Marie
 Stow, Andr  e
 Strata Council NW655
 Strata NW313

Sucker Creek First Nation
 Sugarloaf Ranches Ltd.
 Sunchild First Nation
 Surrey Teachers' Association
 Syme, Neil
 T. Buck Suzuki Environmental Foundation
 Tang, Sylvia
 Tartini, Gina
 Taylor, Andrew M.
 Taylor, B.
 Tesoro Canada Supply & Distribution Ltd.
 Thompson Drive Water Society
 Thompson-Nicola Regional District
 Tofino Long-Beach Chamber of Commerce
 Township of Langley
 Tseycum First Nation
 Tunner, Greg
 United Fishermen and Allied Workers' Union-Unifor
 Unifor
 Upper Nicola Band
 Varto, Hannah
 Veirs, Val
 Vezina, Danielle
 Village of Belcarra
 Vincenzo, Milillo
 Vogel, Thomas
 Walker, Jackie
 Walling, Janice
 Wang, Wendy
 Waterwealth Project
 Webb, Peter
 Wembley Estates Strata Council
 Weng, Baichang
 Westcoast Energy Inc., carrying on business as Spectra
 Energy Transmission
 Whispering Pines First Nation / Clinton Indian Band
 White, Ryan
 Williams Lake Indian Band
 Wong, Kitson
 Wong, Miki
 Wong, T.W.
 Wright, Ken
 Zhang, Aiping
 Zhang, Willie
 Zheng, Alison
 Zhou and family

Appendix 7: Overview of notices of motion and rulings on other requests

Each notice of motion (motion) was decided on its own merit based on a review of the applicable legal test, evidence or information filed with the motion (or in response to the motion) and the arguments in favour or opposed to the motion. Specific motion decisions are located on the Board's public registry.

7.1 OH-001-2014 hearing

In total, the Board received approximately 291 motions and review applications as of 31 March 2016. During the course of the Board's review process, it issued 121 rulings on motions or review and variance applications. In some instances, such as motions to compel, there were numerous motions, and only one aggregate ruling.

The Board also responded to a number of letters and suggestions (not included in the numbers below). These letters included issues raised by Indigenous groups regarding Indigenous oral traditional evidence and section 18 of the *Canadian Environmental Assessment Act, 2012*. The descriptions below are meant to be summary only and numbers provided should be considered approximate in nature.

Motion category	General description	Number of motions
Late Applications to Participate (ATP) or requests to review and vary participation decisions	Request for an extension to the deadline of the ATP (4); Late application for ATP to request intervenors/commenters standing (18); review of the Board's ruling on participation denying intervenor status (3).	25
Extend Statutory timelines and excluded period or request to take no further steps in hearing process	Request to the Board to seek the Chairperson's approval to extend statutory timeline until Trans Mountain files detailed Quantitative Human Health Risk Assessments (2); request for an extension request until full details on selected and alternative corridors are received (1); section 74 determination – regarding the need for leave to transfer ownership (1); request to withhold issuing a certificate of public convenience and necessity and related approval for the Project until certain specified issues are corrected (1); request to dismiss certificate because no "company" holds the operating certificate (1); various other time to fulfil several requests (5)	11
List of Issues and Completeness of Application	Clarification request on the List of Issues and claim that the Application was incomplete (1); requests to expand List of Issues to include environmental and socio-economic effects associated with upstream and downstream activities (2).	3
Meeting request	One-on-one meeting request for the purpose of discussing issues related to the application.	1
Administrative matters	Replacement of documents with corrected version (2); request to supplement responses to Information requests (IRs) with filing ID number (1); visual aids (1); late filing of affidavit (1)	5
Oral Cross-Examination	Requests to amend the Hearing Order to include a phase for the oral cross-examination of witnesses on all evidence (2); request (after Trans Mountain reply argument filed) to have cross-examination on certain evidence (1).	3
Information requests (IRs) and letters of comment (LOC)	Several requests to extend (5) and further (4) extend the deadline of IRs of intervenors to Trans Mountain; disclosure from Trans Mountain for characteristics of product used in the Gainford study (1); Trans Mountain's request to extend deadline for response to IRs #1 from intervenors (1), striking of IRs (1); Extension of filing deadline for LOC (3), filing of late LOC (9); intervenor seeking leave to direct IRs to another intervenor (1); late filing of IR (1).	26

Motion category	General description	Number of motions
Requests to expand participation in Oct. 9 hearing regarding whether the Board should issue an access Order regarding Trans Mountain's access to City of Burnaby land	Request that the Board reconsider its decision to preclude intervenors from providing submissions regarding access to City of Burnaby lands.	3
Review of ruling	Review of Ruling 101 dated 7 December 2015	1
Constitutional matters	Request seeking a declaration that s. 55.2 of the <i>National Energy Board Act</i> (NEB Act) is unconstitutional as it is alleged to violate freedom of expression and notice of constitutional question and request an oral hearing of the Charter motion on procedural fairness and evidentiary grounds (1); Trans Mountain's rights under paragraph 73(a) of the NEB Act with respect to accessing lands for survey and examination purposes and Notices of Constitutional Question (1); review List of Issues on basis of infringement of section 7 of the <i>Canadian Charter of Rights and Freedoms</i> (1); motion on limited public access with freedom of expression raised (1); motion on independence of temporary Board Members.	5
Amending hearing/Oral Traditional Evidence dates	Requests that the Board reschedule the hearing of their oral traditional evidence to a late date.	4
Section 74	Ownership and certificate issue.	1
Evidence	Requests to remove certain evidence from the record (3); requests to file new evidence (6); filing of late evidence (7); extend the evidence filing deadline (2); replacement of evidence (5);	23
Compel further and better responses	Various requests that the Board compel full and adequate IR responses for first round IRs and second round IRs from Trans Mountain and on the TERMPOL Report by Transport Canada; late motion to compel for round 2 IRs; several motions to compel full and adequate responses from intervenors to IRs from other intervenors, late motion to compel (3).	129
Confidentiality	Various requests to file certain documents confidentially (15) and a request to identified information that was redacted (1).	16
Participant Funding Program concerns	Request to add a round of information requests if funding is provided and reconsider funding allocation.	4
Advertising Costs	Request that Trans Mountain file its advertising costs for the project, that Firm Service Fees collected not go towards advertisement etc.	1
Oral Traditional Evidence - audio recordings	Make audio recordings public and free.	1
Community benefits	Request to nullify and cease Trans Mountain from making Community Benefits Program Agreements with participants.	1
Hearing on argument	Request to attend hearing as a non-participant (1), request to have additional representatives (24), late oral summary argument request (1), motion on limited public access (1).	27
Panel	Allegation of apprehension of bias of Panel Chair – Mr. David Hamilton; request to recuse the Panel, quash the hearing, prevent Mr. Steven Kelly from communicating with Panel and a request to assign a new Panel.	2

Other relief requested and Board rulings

As part of closing argument, a number of intervenors made requests for relief other than requests that specifically addressed the intervenors' positions on the recommendation that the Board ought to make to the GIC under the NEB Act or specific findings under the provisions of the *Canadian Environmental Assessment Act, 2012* or the *Species at Risk Act* (SARA).

In some cases, these requests were presented as alternative requests to the intervenor's primary request that the Board recommend denial of the Project application. In other cases, the relief was advanced as the intervenor's primary position.

In Hearing Order OH-001-2014, issued on 2 April 2014, the Board provided direction that if a party wished to raise question of procedure or substance requiring a Board decision, it was required to file a notice of motion. The Hearing Order described the process for filing a notice of motion and also referenced section 35 of the *National Energy Board Rules of Practice and Procedure, 1995* for further information. In addition, in Procedural Direction No. 20 (PD No. 20), the Board provided direction with respect to motions and preliminary matters that could be raised during oral summary argument. The Board stated that matters should not be raised during oral summary argument which could have been raised with the Board in writing prior to the oral portions of the hearing.

Notwithstanding the Board's prior directions and the *National Energy Board Rules of Practice and Procedure, 1995*, a number of parties made requests for procedural and or substantive decisions within their written closing argument and /or oral summary argument without filing a notice of motion.

These relief requests, submitted as part of closing argument, were made in relation to:

- a) Completeness.
- b) Procedural requests relating to cross-examination and time extensions.
- c) Abandonment of the existing TMPL and changes in the scope of the proposed Project, if approved.

In addition, several intervenors made specific relief requests in relation to Indigenous consultation matters. Indigenous matters are discussed in detail in Chapter 5 of this report and, as such, the Board's views in relation to Indigenous consultation are addressed within the Board's views in Chapter 5.

As part of its Reply Evidence, Trans Mountain requested approval for proposed route re-alignments in proximity to the Lewis Estates community in Edmonton, Alberta, and United Boulevard and Hartley Avenue in Coquitlam, B.C. For the reasons provided in Chapter 11, the Board denies this late request without prejudice to Trans Mountain filing an application for a variance under section 21 of the NEB Act.

In its Reply Evidence, Trans Mountain also sought an exemption from the detailed route approval process, under section 58 of the NEB Act, for clearing activities associated with the first 10 km of each Line 2 spread.

Views of the Board

With respect to Trans Mountain's request that clearing activities associated with the first 10 km of each Line 2 spread be exempt from the detailed route approval process, the Board finds that such clearing activities would not be temporary in nature. They would have lasting consequences and should therefore not take place unless and until a detailed route for Line 2 is approved. As a result, the Board denies this request.

With the exception of PIPE UP, none of the requests for other relief were consistent with the Hearing Order direction requiring a notice of motion. In PIPE UP's case where it filed a notice of motion, this occurred after the hearing record was closed.¹⁴⁹ Most of the requests for other relief were also inconsistent with PD No. 20. For these reasons, all the requests for additional relief are dismissed.

Additional reasons for denying specific requests for other relief are as follows.

- a) Completeness

As part of closing argument, several parties made requests that the Board find the Application incomplete and that the Board therefore either decline to forward a recommendation on that basis, or that it dismiss the Application on the basis of being incomplete.

¹⁴⁹ Pursuant to Procedural Direction No. 18, the hearing record closed immediately after Trans Mountain filed its written argument.

On 2 April 2014, the Board made its finding in relation to completeness of the Application and found it to be complete. No party sought review of this determination. A finding of completeness is a prerequisite for the Board to be able to proceed with the assessment of an application for the purposes of preparing a report in accordance with s.52 of the NEB Act. The final argument stage is well beyond the appropriate time to raise questions about the completeness of a project application. The determination of completeness has already been made by the Board. The Board denies these requests.

b) Procedural requests relating to cross-examination and time extensions

As part of closing argument, the Board also received new requests for cross-examination and time extensions. B.C. Nature and Nature Canada requested that the Board amend its Hearing Order to allow for cross-examination and order Trans Mountain to provide oral testimony and be subject to cross-examination with a declaration that s.52(5) of the NEB Act applies for these purposes; or request to Minister or GIC to issue order under s.52(7) to extend time for NEB report to complete cross.

PIPE UP, as its alternative relief request in its closing argument, asked for cross-examination of experts by parties who have submitted evidence in key areas where expert evidence conflicts or there is uncertainty in respect of severe or irreversible harm. In addition, following the close of argument, on 18 February 2016, PIPE UP also filed a motion seeking this same relief. In its motion, PIPE UP stated that it was seeking a reconsideration of the Board's Ruling No. 14, the Board's ruling with respect to two motions requesting the Board amend its Hearing Order to allow for cross-examination.

In Ruling No. 14, dated 7 May 2014, the Board stated:

In the Board's view, the legislation makes it clear that the Board is master of its own procedure and can establish its own procedures for each public hearing with regard to the conduct of hearings. This includes the authority to determine for a particular public hearing the manner in which evidence will be received and tested. In the circumstances of this hearing, where there are 400 intervenors and much of the information is technical in nature, the Board has determined that it is appropriate to test the evidence through written processes. All written evidence submitted will be subject to written questioning by up to 400 parties, and the Board.

B.C. Nature and Nature Canada stated that there were deficiencies in Trans Mountain's responses to IRs and that as a result, cross-examination was necessary to test the evidence.

PIPE UP argued that it had now emerged that there was conflicting expert evidence in areas which requires the Panel to reconsider its decision to proceed without cross-examination. PIPE UP cited, as examples, conflicting evidence in Muse Stancil and Gunton Reports; conflicting evidence respecting Tank Fire and Boilover; conflicting evidence respecting Trans Mountain's Environmental Record; conflicting evidence respecting the risk and cost of spill events; and Trans Mountain's ability and willingness to finance a credible worst-case scenario.

Trans Mountain provided a response to the PIPE UP motion on 29 February 2016. Trans Mountain stated that the hearing record was closed, that PIPE UP's late request was not properly before the Board, was without basis, and should be denied.

PIPE UP did not provide a reply.

Neither B.C. Nature and Nature Canada nor PIPE UP provided explanation for the delay in their bringing these requests. The appropriate application in the case of concerns that answers to IRs are deficient is a motion to compel full and adequate response, which B.C. Nature and Nature Canada brought, and upon which the Board ruled on 27 April 2015 in Ruling No. 63, denying B.C. Nature and Nature Canada's motion. Now, many months later, and after the close of the evidentiary record, B.C. Nature and Nature Canada say that Trans Mountain's responses to IRs should support their late request for cross-examination. With respect to PIPE UP's argument respecting conflicting evidence, the fact that there is conflicting evidence on the record on various technical issues has not recently emerged. It was apparent with the filing of intervenor evidence in May 2015 that there was conflicting evidence on various topics. PIPE UP does not explain why it waited until after the closing of the record to bring its motion requesting a reconsideration of Ruling No. 14.

The Board finds that these requests for re-opening of the hearing were filed too late and no explanation was given for the late filing. The Board also finds that considering these requests at this late date would result in significant prejudice to Trans Mountain.

In considering the conflicts in evidence, much of which is scientific or technical in nature and none of which involved the credibility of the person providing the sworn evidence, the Board is of the view it is able to determine the weight to give to various evidence filed on the hearing record.

The Board declines B.C. Nature and Nature Canada's request to amend the Hearing Order to allow for cross-examination, and declines PIPE UP's request for a reconsideration of Ruling No. 14.

c) Abandonment of the existing TMPL and changes in the scope of the proposed Project, if approved

The City of Surrey made these requests. In particular, it requested that if the Board recommended approval of the Project, that it also direct that the existing TMPL that runs through Surrey should be abandoned. The City of Surrey further requested that there be an order that the Project should be either twinned or upsized through Surrey.

These requests by the City of Surrey amount to requests that the Board change the scope of the application before it.

There is no application for leave to abandon a portion of the existing TMPL before the Board. Similarly, the Project proposal does not contemplate being twinned or upsized through the City of Surrey.

Such applications, if they were to come before the Board, would be considered on their merits and would require notice to potentially affected parties.

The Board declines to approve the City of Surrey's requests that if it recommends approval of the Project, that the Board direct abandonment of the existing TMPL that runs through Surrey, and that the Project be twinned or upsized for the portion of it that runs through the City of Surrey.

7.2 MH-052-2018 hearing

The Board issued 30 rulings on notices of motions. In some instances, a single ruling addressed multiple notices of motion.

Ruling No.	General description	Summary of decision
1	124 applications to participate received by the 3 October 2018 deadline	List of Parties to the hearing (granted intervenor status to 99 applicants; did not grant intervenor status to 25 applicants)
2	10 late applications to participate	• Granted intervenor status to nine applicants • Did not grant intervenor status to one applicant
3	Late application to participate from Alexis Nakota Sioux Nation	Granted intervenor status
4	Late application to participate from Káínai First Nation (Blood Tribe)	Granted intervenor status
5	Late application to participate from T'Sou-ke First Nation	Granted intervenor status
6	Late application to participate from Malahat First Nation	Granted intervenor status
7	Requests from various Indigenous intervenors regarding the location of oral traditional evidence sessions, and concerns about time limits	Denied main request to hold oral traditional evidence sessions in Lower Mainland, B.C.; however, the Board: • added Calgary as an additional location to facilitate hearing oral traditional evidence remotely • allotted additional presentation time for Indigenous intervenors representing more than one First Nation
8	Late applications to participate from Mr. Albert R. Bud Taylor and Hydrofuel Inc.	Did not grant intervenor status to either applicant
9	Requests from Squamish Nation and Tsleil-Waututh Nation for a 15-day extension to the deadline for intervenors to file opening statements and direct evidence	Granted
10	Late application to participate from Papaschase First Nation #136	Granted intervenor status
11	Late application to participate from Saddle Lake Cree Nation #125	Granted intervenor status
12	Late application to participate from Heiltsuk First Nation	Granted intervenor status

Ruling No.	General description	Summary of decision
13	Request from Mr. Gregory John (member of the public) to attend and observe the oral traditional evidence sessions in Victoria, B.C.	Denied
14	Request from Mr. David Slik for the Board to reconsider the restriction that commenters may not file letters of comment after 20 November 2018, and to limit commenters to a single letter of comment	Denied
15	Request from Tsleil-Waututh Nation to hold its oral traditional evidence hearing session confidentially	Partially granted (the Board would hear a portion of Tsleil-Waututh Nation's oral traditional evidence confidentially)
16	Late application to participate from Neskonlith Indian Band	Granted intervenor status
17	Request from Tsleil-Waututh Nation for confidential treatment of certain evidence	Granted
18	Request from Trans Mountain for a six-day extension to file reply evidence specifically related to intervenor evidence (including confidential evidence) that it had not received by the deadline	Partially granted (provided Trans Mountain with a four day extension to respond to confidential evidence; did not provide an extension to respond to certain evidence received one day late)
19	Request from Pacheedaht First Nation for confidential treatment of certain evidence	Granted
20	Request from Yarrow Ecovillage to file late evidence	Denied
21	Request from Little Shuswap Lake Indian Band to file late information requests	The Board directed Trans Mountain and Fisheries and Oceans Canada to either respond to the questions, or provide reasons why the Board should not allow them. The information requests were responded to.
22	Application for review from Tsleil-Waututh Nation regarding the Board's 12 October 2018 decisions around: i) the spatial extent for the assessment of Project-related marine shipping ii) not holding a <i>de novo</i> hearing iii) the "need for" and "socio-economic effects" in the List of Issues Living Oceans Society and Raincoast Conservation Foundation also filed a separate application for review in relation to i)	i) Denied on the merits ii) Denied on the threshold question, and also on the merits iii) Denied on the threshold question
23	Request from Tsuut'ina Nation to file late evidence	Granted
24	Request from Living Oceans Society and Raincoast Conservation Foundation to require Trans Mountain to conduct a new risk assessment of Project-related marine shipping	Denied

Ruling No.	General description	Summary of decision
25	Request from the Friends of Ecological Reserves to compel the Canadian Association of Petroleum Producers to respond to information requests asked of it when it did not file evidence	Denied
26	Request from Heiltsuk First Nation to file late evidence	Denied (public tribunal decision did not constitute evidence, but could be relied upon by Parties in final argument)
27	Request from Raincoast Conservation Foundation to file late evidence	Denied
28	Requests from 18 Parties to compel full and adequate responses to approximately 280 information requests, or portions of information requests, asked of other Parties	Granted nine specific requests
29	Request from Malahat First Nation to file revised evidence	Granted
30	Application for review of Ruling No. 25 (from the OH-001-2014 hearing) regarding the consideration of upstream and downstream impacts of the Project on greenhouse gas emissions and climate change	Denied for lack of timeliness and on the threshold question

Appendix 8: Sources of information and evidence from Indigenous participants

The table below identifies the sources of information provided by Indigenous intervenors and commenters in the OH-001-2014 hearing, and Indigenous intervenors in the MH-052-2018 hearing.

In the MH-052-2018 hearing, any individual or group that was not an intervenor could file a letter of comment. Further, prior to issuing Hearing Order MH-052-2018, the Board afforded the public an opportunity to provide comments related to the scope of the hearing, and on the hearing process design. Some Indigenous individuals and groups that were not registered intervenors filed letters with the Board through these broader opportunities; however, these letters are not included below.

All information listed can be found in the Project's folder within the Board's online public registry. To fully understand the context of the information filed, please consult the entire public record.

Indigenous participant ¹⁵⁰	OH-001-2014 hearing				MH-052-2018 hearing	
	As intervenors			As commenters	As intervenors	
	Written submissions ¹⁵¹ (Exhibit No.)	Oral traditional evidence (Transcript volume)	Oral summary argument (Transcript volume)	Letter of comment (Filing ID)	Written submissions ² (Folder No.)	Oral traditional evidence (Transcript volume)
Adams Lake Indian Band	C003	15	-		3635142	11
Alexander First Nation	C006	24	37		3635470	-
Alexis Nakota Sioux Nation	C007	-	-			
Antoine, Janice	C011	13	-			
Aseniwuche Winewak Nation of Canada	C013	-	-			
Ashcroft Indian Band	C014	-	-			
Asini Wachi Nehiyawak Traditional Band	C015	-	-			
BC Métis Federation	C039	-	-		3647790	-
Blood Tribe (Kainai First Nation)					3642525	-
Canim Lake Band				A65490		
Chawathil First Nation	C400	-	29		3634816	4
Cheam First Nation	C400	-	29		3635031	4
Coldwater Indian Band	C078	14	27		3634920	-
Cowichan Tribes	C086	-	33		3634701	-
Ditidaht First Nation	C108	-	-		3635144	-
Driftpile Cree Nation					3646251	2

¹⁵⁰ Groups that participated as a single intervenor are listed together.

¹⁵¹ Exhibit/Folder numbers in this column represent each intervenor's main folder that includes all evidence filed (e.g., written evidence, responses to information requests) and written argument-in-chief.

Indigenous participant ¹⁵⁰	OH-001-2014 hearing				MH-052-2018 hearing	
	As intervenors			As commenters	As intervenors	
	Written submissions ¹⁵¹ (Exhibit No.)	Oral traditional evidence (Transcript volume)	Oral summary argument (Transcript volume)	Letter of comment (Filing ID)	Written submissions ² (Folder No.)	Oral traditional evidence (Transcript volume)
Enoch Cree Nation	C120	-	-			
Ermineskin Cree Nation	C122	-	-		3635583	-
Esquimalt Nation	C123	-	-		3635803	-
First Nations of Maa-nulth Treaty Society	C411	-	-		3634925	9
Heiltsuk First Nation					3690219	-
Horse Lake First Nation	C406	22	-			
Hwiltsum First Nation	C166	12	-			
Indigenous Caucus for the Trans Mountain Indigenous Advisory and Monitoring Committee					3635367	5
Katzie First Nation	C187	10	27			
Kelly Lake Cree Nation	C189	-	-			
Kwantlen First Nation	C198	7	35		3634819	4
Kwikwetlem First Nation	C199	-	-		3635034	-
Lake Cowichan First Nation	C409	-	-			
Lheidli T'enneh First Nation	C209	18	-			
Little Shuswap Lake Indian Band					3635146	11
Louis Bull Tribe					3641960	1
Lower Nicola Indian Band	C217	14	-			
Lyackson First Nation	C219	21	31		3647020	10
Makah Tribal Council	C223	-	-		3635257	1
Malahat First Nation				-	3690147	-
Matsqui First Nation	C227	-	-			
Métis Nation of Alberta Gunn Métis Local 55	C232	1	-			
Métis Nation BC	C231	-	-		3646692	-
Métis Regional Council Zone IV of the Métis Nation of Alberta	C233	-	-			
Michel First Nation	C236	3	-			
Montana First Nation	C243	-	-			
Musqueam Indian Band	C246	8	26		3635805	10 (provided additional oral traditional evidence via a video file)

Indigenous participant ¹⁵⁰	OH-001-2014 hearing				MH-052-2018 hearing	
	As intervenors			As commenters	As intervenors	
	Written submissions ¹⁵¹ (Exhibit No.)	Oral traditional evidence (Transcript volume)	Oral summary argument (Transcript volume)	Letter of comment (Filing ID)	Written submissions ² (Folder No.)	Oral traditional evidence (Transcript volume)
Nakcowinewak Nation of Canada	C248	-	-			
Neskonlith Indian Band	C250	16	-		3715856	-
Nicola Tribal Association	C254	-	-			
Nooaitch Indian Band	C258	15	-		3635368	-
O'Chiese First Nation	C265	4	-			
Okanagan Nation Alliance	C266	-	-			
Olsen, Adam	C267	20	29		3635258	8
Olsen, Joni	C268	19	-			
Pacheedaht First Nation	C269	22	-		3635475	-
Papaschase First Nation #136					3689742	3
Paul First Nation				A59856		
Pauquachin First Nation	C277	-	-		3635035	-
Penelakut Tribe	C279	-	-			
Peters Band	C399	9	-			
Popkum Indian Band	C282	-	-			
Saddle Lake Cree Nation #125					3690218	-
Samson Cree Nation	C302	3	-		3635369	-
Scia'new First Nation	C308	-	-		3635037	-
Seabird Island Band					3635149	4
Shackan Indian Band	C310	13	34		3646800	-
Shxw'ōwhámél First Nation	C312	6	-		3647240	9
Simpcw First Nation	C313	17	-		3635150	-
Snuneymuxw First Nation	C318	-	-		3634823	10
Squamish Nation	C319	12	28		3635476	7
Stó:lō Collective	C326	-	28		3634706	7
Stó:lō Tribal Council					3635259	4
Stz'uminus First Nation	C330	20	27		3635370	9
Sucker Creek First Nation	C331	-	-			
Sunchild First Nation	C333	2	38			

Indigenous participant ¹⁵⁰	OH-001-2014 hearing				MH-052-2018 hearing	
	As intervenors			As commenters	As intervenors	
	Written submissions ¹⁵¹ (Exhibit No.)	Oral traditional evidence (Transcript volume)	Oral summary argument (Transcript volume)	Letter of comment (Filing ID)	Written submissions ² (Folder No.)	Oral traditional evidence (Transcript volume)
Swinomish, Tulalip, Suquamish, and Lummi Indian Nations	C336	10,11	29		3634824	6 (provided additional oral traditional evidence via video files)
Stk'emlupsemc te Secwepemc of the Secwepemc Nation	C325	16	-		3635590	11
T'Sou-ke First Nation	C359	19	32		3647798	-
Tsartlip First Nation	C354	19	-		3634707	6
Tsawout First Nation	C355	23	34		3635260	6
Tsawwassen First Nation	C356	-	-		3642510	-
Tseycum First Nation	C357	21	-			
Tsleil-Waututh Nation	C358	6	32		3635371	8
Tsuut'ina Nation					3635040	3
Upper Nicola Band	C363	18	34			
Whispering Pines/Clinton Indian Band	C384	-	-			
Whitefish (Goodfish) Lake First Nation #128	C386	-	-		3635593	-
Whitefish Lake First Nation #459					3647570	3
Williams Lake Indian Band	C388	-	-			

Appendix 9: List of Indigenous groups engaged by Trans Mountain

Edmonton to Alberta/British Columbia Border Region

Alexander First Nation	Montana First Nation
Alexis Nakota Sioux Nation	Nakcowinewak Nation of Canada
Aseniwuche Winewak Nation Canada	O'Chiese First Nation
Asini Wachi Nehiyawak Traditional Band	Paul First Nation
Enoch Cree Nation	Saddle Lake Cree
Ermineskin Cree Nation	Samson Cree Nation
Foothills Ojibway First Nation	Stoney Nakoda First Nation
Horse Lake First Nation	Sturgeon Lake Cree Nation
Louis Bull Tribe	Sucker Creek First Nation
Métis Nation of Alberta Gunn Métis Local 55	Sunchild First Nation
Métis Regional Council Zone IV of the Métis Nation of Alberta	Tsuu T'ina Nation
Michel First Nation	Whitefish (Goodfish) First Nation

Alberta/British Columbia Border to Kamloops Region

Adams Lake Indian Band	Oregon Jack Creek Band
Ashcroft Indian Band	Shuswap Indian Band
Canim Lake Band	Simpw First Nation
Kelly Lake Cree Nation	Skeetchestn First Nation
Kelly Lake First Nation	Splatsin First Nation
Kelly Lake Métis Settlement Society	Sts'wecem'cXgat'tem (Canoe Creek/Dog Creek)
Ktunaxa Nation	Tk'emlups te Secwepemc
Little Shuswap Indian Band	Toosey Indian Band
Lheidli T'enneh First Nation	Whispering Pines/Clinton Band
Lhtako Dene Nation	Williams Lake (T'exelc) Band
Llenlley'nen First Nation (High Bar)	Xat'sull First Nation (Soda Creek)
Neskonlith Indian Band	

Kamloops to Hope Region

Boothroyd Band	Nooaitch Indian Band
Boston Bar Band	Penticton Indian Band
Coldwater Indian Bar	Shackan Indian Band
Cook's Ferry Indian Band	Siska Indian Band
Kanaka Bar	Skuppah Indian Band
Lower Nicola Indian Band	Spuzzum First Nation
Lower Similkameen Indian Band	St'uxwtews (Bonaparte Indian Band)
Lytton First Nation	Upper Nicola Indian Band
Nicomen Indian Band	Upper Similkameen Indian Band

Hope to Burnaby Terminal / Burrard Inlet Region

Aitchelitz First Nation
Chawathil First Nation
Cheam First Nation
Katzie First Nation
Kwantlen First Nation
Kwaw-kwaw-aplit First Nation
Kwikwetlem First Nation
Leq'a:mel First Nation
Matsqui First Nation
Musqueam Indian Band
Peters Band
Popkum First Nation
Qayqayt First Nation (New Westminster)
Scowlitz First Nation
Seabird Island Band
Semiahmoo First Nation
Shxw'ōwhámel First Nation

Shxwha:y Village
Skawahlook First Nation
Skowkale First Nation
Skwah First Nation
Soowahlie Indian Band
Squamish Nation
Squiala First Nation
Sts'ailes Band (Chehalis Indian Band)
Sumas First Nation
Ts'kwaylaxw (Pavillion Indian Band)
Tsawwassen First Nation
Tseil-Waututh Nation
Tzeachten First Nation
Union Bar First Nations
Yakwekwioose Band
Yale First Nation

Marine Corridor

Cowichan Tribes
Ditidaht First Nation
Esquimalt Nation
Halalt First Nation
Huu-ay-aht First Nation
Hwlitsum First Nation
Lake Cowichan First Nation
Lyackson First Nation
Malahat First Nation
Pacheedaht First Nation
Pauquachin First Nation

Penelakut First Nation
Scia'new Indian Band (Beecher Bay)
Sechelt Indian Band
Snaw-Naw-As (Nanoose)
Snuneymuxw First Nation
Songhees Nation
Stz'uminus First Nation (Chemainus)
T'Sou-ke First Nation
Tsartlip First Nation
Tsawout First Nation
Tseycum First Nation

Non-Boundary Specific

BC Métis Federation
Métis Nation of BC

Associations, Councils and Tribes

Cowichan Nation Alliance
Maa Nulth First Nations
Nicola Tribal Association
Nuu-chah-nulth Tribal Council
Okanagan Nation Alliance
Sencot'en Alliance

Shuswap Nation Tribal Council
St'at'imc Chiefs Councils
Stk'emlupsemc te Secwepemc Nation (SSN)
Ts'elxweyeqw Tribe Management Limited (TTML)
Tsilhqot'n National Government

Appendix 10: Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the *Canadian Environmental Assessment Act, 2012* (released on 12 October 2018)

1.0 Introduction

On 16 December 2013, Trans Mountain Pipeline ULC (Trans Mountain) filed an application with the National Energy Board (Board or NEB) proposing to construct and operate the Trans Mountain Expansion Project (Project). As the Project would require more than 40 kilometres of new pipeline and would be regulated under the *National Energy Board Act* (NEB Act), it is a designated project under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and requires a CEAA 2012 environmental assessment for which the NEB is the Responsible Authority. On 20 September 2018, through OIC P.C. 2018-1177, the Governor in Council (GIC) referred aspects of the Board's Report for the Project back to the Board for reconsideration.

For the purposes of the environmental assessment under the CEAA 2012, the designated project includes the various components and physical activities as described by Trans Mountain in its 16 December 2013 application submitted to the NEB. On 12 October 2018, the Board determined that Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit is also part of the "designated project" under the CEAA 2012.

As noted in the List of Issues (attached to Hearing Order OH-001-2014), the Board does not intend to consider the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline.

In accordance with paragraph 79(2)(b) of the CEAA 2012, the following provides a description of the factors to be taken into account in the environmental assessment under the CEAA 2012 and of the scope of those factors.

2.0 Factors and scope of the factors

2.1 Factors to be considered

The CEAA 2012 environmental assessment for the designated project will take into account the factors described in paragraphs 19(1)(a) through (h) of the CEAA 2012:

- a) the environmental effects¹⁵² of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;
- b) the significance of the effects referred to in paragraph (a);
- c) comments from the public or any interested party received in accordance with the CEAA 2012;
- d) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;
- e) the requirements of the follow-up program in respect of the designated project;
- f) the purpose of the designated project;
- g) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means; and
- h) any change to the designated project that may be caused by the environment.

In addition, the environmental assessment will also consider community knowledge and Aboriginal traditional knowledge.

¹⁵² Section 5 of the CEAA 2012 further describes the environmental effects that are to be taken into account.

2.2 Scope of the factors to be considered

The environmental assessment will consider the potential effects of the designated project within spatial and temporal boundaries within which the designated project may potentially interact with and have an effect on components of the environment. These boundaries will vary with the issues and factors considered, and will include, but not be limited to:

- construction, operation and maintenance, foreseeable changes, and site reclamation, as well as any other undertakings proposed by the proponent or that are likely to be carried out in relation to the physical works proposed by the proponent, including mitigation and habitat replacement measures;
- seasonal or other natural variations of a population or ecological component;
- any sensitive lifecycle phases of species (e.g., wildlife, vegetation) in relation to the timing of Project activities;
- the time required for an effect to become evident;
- the area within which a population or ecological component functions; and
- the area affected by the Project.

Any works and activities associated with additional modifications or associated with the decommissioning or abandonment phase of the Project would be subject to a future application under the NEB Act and assessed in detail at that time. Therefore, at this time, any works or activities associated with these phases of the Project will be examined in a broad context only. As indicated above, the environmental assessment will consider cumulative environmental effects that are likely to result from the designated project in combination with effects from other physical activities that have been or will be carried out.

Subsection 2(1) of the CEAA 2012 provides definitions potentially relevant to the scope of the factors, including:

“environment” which means the components of the Earth, including

- a) land, water and air, including all layers of the atmosphere;
- b) all organic and inorganic matter and living organisms; and
- c) the interacting natural systems that include components referred to in paragraphs (a) and (b);

and

“mitigation measures” which means measures for the elimination, reduction or control of the adverse environmental effects of a designated project, and includes restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or any other means.

Appendix 11: Study area boundaries for the Environmental and Socio-Economic Assessment

The following describes the study areas that Trans Mountain used in its Environmental and Socio-Economic Assessment of the Project, and which the Board adopted for its own assessment.

Study area boundaries are defined for both the terrestrial and marine aspects considered. Generally, three different study areas were used in assessing the potential effects on each valued component:

- **Footprint study area (FSA)** – The FSA is the fixed area that would be directly disturbed by the Project facilities and associated physical works and activities. This includes the 45-metre-wide construction right-of-way, permanent and temporary access roads, camp and stockpile sites, valves and power lines, pump stations, tanks, and the Westridge Marine Terminal.
- **Local study area (LSA)** – The LSA typically varies depending on the valued component assessed. The LSA is larger than the FSA. It reflects the area where Project construction and operations activities are most likely to affect the valued component assessed. The LSA is sometimes referred to as the “zone of influence.”
- **Regional study area (RSA)** – The RSA typically varies depending on the valued component assessed. The RSA is larger than the LSA. It covers the area where potential effects on the valued component assessed might overlap with the direct and indirect effects of other activities on that valued component, causing cumulative effects.

Valued component	LSA	RSA
Terrestrial		
Soil and soil productivity	Extends 500 metres on either side of the pipeline centreline and surrounding facilities	n/a (potential effects not expected to extend beyond the LSA)
Wetland loss and alteration	Extends 150 metres on either side of the pipeline centreline, with site-specific tailoring to extend around larger wetland complexes	Generally the same as the Aquatics RSA, which includes all watersheds affected by the Project
Vegetation	Extends 150 metres on either side of the pipeline centerline.	Extends 1 kilometre on either side of the pipeline centreline
Wildlife	Area within a 1 kilometre buffer of the centre of the pipeline corridor and power lines, and around the boundary of facilities (pump stations/terminals)	Area within a 15 kilometre buffer of the centre of the pipeline corridor and power lines, and around the boundary of facilities (pump stations/terminals)
Grizzly bear		Defined by the Grizzly Bear Population Units traversed by the pipeline corridor
Caribou		The area where direct and indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on caribou. Includes the Wells Gray and Groundhog caribou ranges, associated ungulate winter ranges and wildlife habitat areas.
Surface water quality and quantity	Zone of influence likely to be affected by direct disturbance and sediment deposition during construction and operations. Also includes the area of riparian vegetation to a width of 30 metres back from each bank edge within the width of the construction right-of-way. Each watercourse to be crossed has an individually determined LSA.	Area where the direct and indirect influence of other land uses and activities could overlap with Project-specific potential effects and cause cumulative effects on fish and fish habitat indicators (includes all watersheds directly affected by the Project)
Fish and fish habitat		

Valued component	LSA	RSA
Atmospheric environment (criteria air contaminants, volatile organic compounds)	Extends 500 metres on either side of the pipeline corridor and 5 kilometres in all directions around tank terminals (due to their proximity, the Westridge Marine Terminal and Burnaby Terminal are combined into one LSA).	Extends 2.5 kilometres on either side of the pipeline corridor and 10 kilometres in all directions around tank terminals (due to their proximity, the Westridge Marine Terminal and Burnaby Terminal are combined into one RSA).
Atmospheric environment (ozone, secondary particulate matter) and visibility	No LSA and RSA defined. Instead, a Lower Fraser Valley study area was used. Emission scenarios were implemented over the inner 4 kilometre domain (boundary: 36 x 12 kilometres) centred on the Lower Fraser Valley.	
Atmospheric environment (greenhouse gas emissions)	International	
Westridge Marine Terminal		
Marine sediment and water quality	Extends 500 metres from the proposed water lease expansion	Area of Burrard Inlet east of the First Narrows, including Indian Arm and Port Moody Arm
Marine fish and fish habitat		
Marine mammals	Extends 300 metres from the proposed water lease expansion	
Marine birds		
Marine transportation		
Marine birds	Extends 1 kilometre on either side of the shipping lanes	Generally centred on the shipping lanes, which extend from the Westridge Marine Terminal through Burrard Inlet; south through the southern part of the Strait of Georgia, the Gulf Islands, and Haro Strait; westward past Victoria and through the Strait of Juan de Fuca out to the 12-nautical-mile limit of Canada’s territorial sea
Marine fish and fish habitat	Extends 2 kilometres on either side of the shipping lanes	
Marine mammals	n/a (all residual effects assessed within the RSA)	
Atmospheric environment (criteria air contaminants, volatile organic compounds)		150 x 150 kilometres – includes the shipping lanes from Westridge Marine Terminal in Burnaby, through the Burrard Inlet, south through the Strait of Georgia, Boundary passage and Haro Strait, then westward past Victoria to the end of the Strait of Juan de Fuca, close to the 12-nautical-mile limit.
Atmospheric environment (ozone, secondary particulate matter) and visibility	No LSA and RSA defined. Instead, a Lower Fraser Valley study area was used. Emission scenarios were implemented over the inner 4 kilometre domain (boundary: 36 x 12 kilometres) centred on the Lower Fraser Valley.	
Atmospheric environment (greenhouse gas emissions)	International	

Valued component	LSA	RSA
Terrestrial		
Human occupancy and resource use	For the proposed pipeline and facilities, the spatial boundary of the LSA is defined by a 2 kilometre wide band extending from the proposed Footprint (<i>i.e.</i> , the Footprint plus 1 kilometre on each side) and is based on the area that could be directly affected by localized, Project-specific effects. The LSA was established to provide adequate consideration to existing land and resource uses (<i>e.g.</i> , farming, livestock grazing, hunting, fishing, protected areas) in the Project area which may experience direct effects associated with the Project beyond the Footprint.	The spatial boundary for the RSA consists of the area extending beyond the LSA boundary and is defined as the area where the direct and indirect influence of other land uses and activities could overlap with Project-specific effects and cause cumulative effects on the HORU indicators. This includes the RSA boundaries of fish and fish habitat, wetlands, vegetation and wildlife. The RSA was selected to reflect the general Project setting and to describe resource use related elements that could be indirectly affected by the Project (<i>e.g.</i> , consumptive and non-consumptive recreation, hunting, trapping and fishing).
Infrastructure and services	No LSA was considered for infrastructure and services. The relevant study area is defined by the areas potentially directly disturbed by Project activities (<i>i.e.</i> , Footprint Study Area) and communities and regions in which people potentially affected by and benefitting from the Project reside.	The area where the direct and indirect influences of other land uses and activities could overlap with Project-related effects and cause cumulative effects on the social and cultural well-being indicators. The Socio-economic RSA considers communities close enough to the Project to potentially be a: source of labour; source of procured goods or services; location of community infrastructure / services influenced by the Project; accommodation or camp location for Project workers; or Project construction office location. This area includes the counties and regional districts crossed by the proposed pipeline corridor (or certain regional sub-areas) and communities approximately 50 kilometres from the proposed pipeline corridor that could participate in or be affected by the Project. It also includes Indigenous communities whose reserves or traditional territory is crossed by the proposed pipeline corridor.
Social and cultural well-being	N/A. The relevant study area is defined by communities and regions where people are potentially affected by and are potentially benefitting from the Project, not by a specific land area.	
Employment and economy	No LSA was considered for employment and economy. The relevant study area is defined by communities and regions in which people potentially directly and indirectly affected by and benefitting from the Project reside (not by a particular land area), as well as at the Provincial and National level.	
Heritage resources	The zone of influence in which heritage resources are most likely to be affected during construction and operations is the Footprint, including any temporary workspace. The potential for impacting archaeological, palaeontological or historical resources is limited to areas of potential clearing or ground disturbance (<i>i.e.</i> , the Footprint). A separate Heritage Resources LSA has not been defined for the Project.	The spatial boundaries of the Heritage Resources RSA for the Project comprise an area extending beyond the Footprint and are defined as an area of intersecting Borden Blocks. A Borden Block measures 10 minutes of latitude by 10 minutes of longitude which is the accepted standard division of land used by archaeologists across Canada. For the Project, the Borden Blocks intersected by the proposed pipeline corridor measure approximately 12 kilometres east-west by 18 kilometres north-south.

Valued component	LSA	RSA
Traditional land and resource use (TLRU)	The TLRU LSA encompasses and extends beyond the Footprint to include the zones of influence of water quality and quantity, air emissions, acoustic environment, fish and fish habitat, wetland loss or alteration, vegetation, wildlife and wildlife habitat and heritage resources since TLRU is dependent on these resources. The TLRU LSA is the area where there is a reasonable potential for localized Project-related effects to affect existing uses of the land for traditional purposes (e.g., trapping, hunting, fishing and gathering areas). The potential effects of the Project are primarily assessed within the Footprint and the TLRU LSA.	The TLRU RSA is the area where the direct and indirect influences of other land uses and activities could overlap with Project-related effects and cause cumulative effects on the TLRU indicators. The TLRU RSA includes the RSA boundaries of water quality and quantity, air emissions, acoustic environment, fish and fish habitat, wetland loss or alteration, vegetation, wildlife and wildlife habitat and heritage resources. Since in some cases, the focus of TLRU may be on lands within a few hundred metres of the Footprint, and in other cases broader territorial uses are identified extending several kilometres from the Footprint, the potential effects of the Project on TLRU are also assessed within the TLRU RSA.
Human health	Tank terminals: the area within a 5 kilometre radius of each of the terminals. The SLHHRA LSA represents the predicted spatial extent of the chemical emissions from the additional tanks to be installed to which people might be exposed.	Separate Air Quality RSAs apply to each of the existing tank terminals, each comprised of a 24 x 24 kilometre area centred on the terminal. The Burnaby Terminal Air Quality RSA was combined with the Westridge Marine Terminal Air Quality RSA due to the close proximity of the two terminals to one another (i.e., less than 3 kilometres apart).
Westridge Marine Terminal		
Human occupancy and resource use	Extends 500 metres from the proposed water lease expansion.	Area east of the First Narrows, including Indian Arm and Port Moody Arm.
Traditional land and resource use		
Human health	The area in the immediate vicinity of the Westridge Marine Terminal where exposure to the chemical emissions from the terminal might be expected to occur. The SLHHRA LSA represents the predicted spatial extent of the chemical emissions from the expansion of the Westridge Marine Terminal to which people might be exposed. The SLHHRA LSA extends over a 5 kilometre radius centred on the Westridge Marine Terminal.	The Air Quality RSA for the Westridge Marine Terminal is a 24 by 24 kilometre area. The Burnaby Terminal Air Quality RSA was combined with the Westridge Marine Terminal Air Quality RSA due to the close proximity of the two terminals to one another (i.e., less than 3 kilometres apart).
Marine transportation		
Marine commercial, recreational and tourism use	Extends 2 kilometres on either side of the shipping lanes.	Generally centred on the shipping lanes, which extend from the Westridge Marine Terminal through Burrard Inlet; south through the southern part of the Strait of Georgia, the Gulf Islands, and Haro Strait; westward past Victoria and through the Strait of Juan de Fuca out to the 12-nautical-mile limit of Canada's territorial sea.

Valued component	LSA	RSA
Traditional marine resource use	Generally the same as the LSA boundaries of marine fish and fish habitat, marine mammals and marine birds since TMRU is dependent on these resources.	Marine RSA encompasses a large portion of the Salish Sea and it generally extends from the western to eastern boundaries of the Salish Sea; however, it confines the northern and southern extents to exclude the central and northern Strait of Georgia and Puget Sound, respectively. Major waterways in the Marine RSA that overlap with the marine shipping lanes extending from the Westridge Marine Terminal through Burrard Inlet, south through the southern part of the Strait of Georgia, the Gulf Islands and Haro Strait, westward past Victoria and Strait of Juan de Fuca out to the 12-nautical-mile limit of Canada's territorial sea.
Human health	Includes the inbound and outbound marine shipping lanes, the area between the shipping lanes, where it exists, and a 5 km buffer extending from the outermost edge of each shipping lane. The shipping lanes extend from the Westridge Marine Terminal in Burnaby, through Burrard Inlet, south through the southern part of the Strait of Georgia, the Gulf Islands and Haro Strait, then westward past Victoria and through the Strait of Juan de Fuca out to the 12-nautical-mile limit of Canada's territorial sea. The LSA represents the predicted spatial extent of the chemical emissions from the Project-related marine vessel traffic to which people along the shipping lanes might be exposed.	A 150 x 150 kilometre area, generally centered on the marine shipping lanes, which extend from the Westridge Marine Terminal through Burrard Inlet, south through the southern part of the Strait of Georgia, the Gulf Islands and Haro Strait, westward past Victoria and the Strait of Juan de Fuca out to the 12-nautical-mile limit of Canada's territorial sea. The Marine Air Quality RSA was used for the purposes of assessing the cumulative health effects associated with the chemical emissions from the increased Project-related marine vessel traffic.

Appendix 12: Criteria, ratings and definitions used in evaluating the likelihood of significant effects

Criteria	Rating	Definition
All criteria	Uncertain	When no other criteria rating descriptor is applicable due to either lack of information or inability to predict.
Temporal Extent	Short-term	An effect, either resulting from a single project interaction or from infrequent multiple ones, whose total duration is usually relatively short-term and limited to or less than the duration of construction, or one that usually recovers immediately after construction. An effect usually lasting in the order of weeks or months.
	Medium-term	An effect, either resulting from a single or infrequent project interaction or from multiple project interactions each of short duration and whose total duration may not be long-term but for which the resulting effect may last in the order of months or years.
	Long-term	An effect, either resulting from a single project interaction of long lasting effect; or from multiple project interactions each of short duration but whose total results in a long lasting effect; or from continuous interaction throughout the life of the project. An effect usually lasting in the order of years or decades.
Reversibility	Reversible	An effect expected to, at a minimum, return to baseline conditions within the life of the Project.
	Permanent	An effect that would persist beyond the life of the project, or last in the order of decades or generations. Some social or cultural effects that persist beyond a single generation may become permanent.
Geographic Extent	Project Footprint	Effect would be limited to the area directly disturbed by the Project facilities and associated physical works and activities, including the width of the right-of-way and temporary work space.
	Local Study Area	Effect would generally be limited to the area in relation to the Project where direct interaction with the biophysical and human environment could occur as a result of construction or operation activities. This area varies relative to the receptor being considered (e.g., 150 metres on either side of the pipeline centerline for Wetlands and Vegetation).
	Regional Study Area	Effect would be recognized in the area beyond the Local Study Area that might be affected on the landscape level. This area also varies relative to the receptor being considered (e.g., for vegetation, the Regional Study Area extends 1 kilometre on either side of the pipeline centreline).
	Global	Effects would be recognized at the global level.

Criteria	Rating	Definition
Magnitude	Low	Effect is minimal, if any; restricted to a few individuals/species or only slightly affects the resource or parties involved; and would impact quality of life for some, but individuals commonly adapt or become habituated, and the effect is widely accepted by society.
	Moderate	Effect would impact many individuals/species or noticeably affect the resource or parties involved; is detectable but below environmental, regulatory or social standards or tolerance; and would impact quality of life but the effect is normally accepted by society.
	High	Effect would affect numerous individuals or affect the resource or parties involved in a substantial manner; is beyond environmental, regulatory or social standards or tolerance; and would impact quality of life, result in lasting stress and is generally not accepted by society.
Evaluation of Significance	Likely to be significant	Effects that are either: (1) of high magnitude; or (2) long-term, permanent, and of regional/global in extent.
	Not likely to be significant	Any adverse effect that does not meet the above criteria for "significant."

Appendix 13: Federally listed terrestrial wildlife species at risk potentially affected by the Project

Species listed under Schedule 1 of the <i>Species at Risk Act</i>	Status	Status of critical habitat under the <i>Species at Risk Act</i>				
		Final	Proposed	Candidate	Early draft	Not yet identified by ECCC
American badger (<i>jeffersonii subspecies</i>)	Endangered				Ü	
Little brown myotis	Endangered					Ü
Northern myotis	Endangered					Ü
Townsend's mole	Endangered		Ü			
Pacific water shrew	Endangered	Ü				
Western screech-owl (<i>macfarlanei subspecies</i>)	Endangered				Ü	
Spotted owl	Endangered					Ü ¹⁵³
Burrowing owl	Endangered	Ü (none identified in Regional Study Area)				
Williamson's sapsucker	Endangered	Ü				
Horned lark (<i>strigata subspecies</i>)	Endangered					Ü
Vesper sparrow (<i>affinis subspecies</i>)	Endangered		Ü (none identified in Regional Study Area)			
Western painted turtle (Pacific coast population)	Endangered					Ü
Oregon spotted frog	Endangered		Ü ¹⁵⁴		Ü	
Oregon forestsnail	Endangered		Ü			
Woodland caribou (southern mountain population)	Threatened	Ü				
Northern goshawk (<i>laingi subspecies</i>)	Threatened					Ü
Ferruginous hawk	Threatened					Ü
Red knot (<i>roselaari subspecies</i>)	Threatened					Ü
Common nighthawk	Threatened					Ü
Lewis's woodpecker	Threatened			Ü		
Olive-sided flycatcher	Threatened					Ü

¹⁵³ As proposed, the Project would cross the Sowaqua Spotted Owl Wildlife Habitat Area (Long-term Owl Habitat Area).

¹⁵⁴ Proposed recovery strategy exists; however, at the time of this report, ECCC had identified two new sites as early draft critical habitat.

Species listed under Schedule 1 of the <i>Species at Risk Act</i>	Status	Status of critical habitat under the <i>Species at Risk Act</i>				
		Final	Proposed	Candidate	Early draft	Not yet identified by ECCC
Loggerhead shrike (prairie population)	Threatened	Ü (none identified in Regional Study Area)				
Sprague's pipit	Threatened	Ü (none identified in Regional Study Area)				
Canada warbler	Threatened					Ü
Western rattlesnake	Threatened				Ü	
Great basin gophersnake (<i>deserticola subspecies</i>)	Threatened				Ü	
Coastal giant salamander	Threatened				Ü	
Great basin spadefoot	Threatened				Ü	
Dun skipper	Threatened					Ü
Mountain beaver (<i>rufa subspecies</i>)	Special concern					Ü
Spotted bat	Special concern					Ü
Great blue heron (<i>fannini subspecies</i>)	Special concern					Ü
Peregrine falcon (<i>anatum subspecies</i>)	Special concern					Ü
Yellow rail	Special concern					Ü
Long-billed curlew	Special concern					Ü
Band-tailed pigeon	Special concern					Ü
Barn owl (western population)	Special concern			Ü		
Flammulated owl	Special concern					Ü
Western screech owl (<i>kennicottii subspecies</i>)	Special concern				Ü	
Short-eared owl	Special concern					Ü
Rusty blackbird	Special concern					Ü
Western painted turtle (Intermountain – Rocky Mountain population)	Special concern					Ü
Western yellow-bellied racer	Special concern					Ü
Northern rubber boa	Special concern					Ü
Western toad	Special concern					Ü
Coastal tailed frog	Special concern					Ü
Northern red-legged frog	Special concern					Ü
Monarch	Special concern					Ü

Appendix 14: Summary of Indigenous concerns, and applicant, government, and NEB responses

This appendix provides a summary of the general and specific concerns and issues raised by Indigenous communities through the MH-052-2018 hearing, as well as summaries of the responses to these concerns provided by the applicant, responses by the Board (including conditions), comments from the Federal Authorities, and applicable requirements provided through regulation and/or legislation. The issues and concerns include those raised directly by Indigenous peoples through their participation in the hearing, as well as summaries of Indigenous concerns and interests as recorded by the applicant in its evidence. Appendix 8 refers to the written and oral submissions by Indigenous Intervenor who participated in the hearing. The Board notes that identifying and referring to issues and concerns as contained within the record (as provided in this appendix) may have resulted in some issues being categorized in a summary manner. Some direct and indirect references within the record of the hearing may therefore not be exhaustively listed in the issues below. Anyone wishing to fully understand the context of the information and evidence provided by Indigenous communities, as well as the applicable responses to these concerns by the applicant, should therefore familiarize themselves with the entire record of the hearing. The Board also notes that Indigenous communities raised concerns regarding the Project beyond marine-shipping related impacts. As these were beyond the scope of the issues being considered in this MH-052-2018 hearing, they are not captured in this chapter or elsewhere in the Report. Instead they have been tracked in a separate document which will be shared publicly with the Government of Canada directly through the Major Projects Management Office which the Board understands will then consider the information as part of its Phase III Consultation process.

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Consultation with Indigenous Communities					
Adequacy of Trans Mountain's engagement with Indigenous Communities	BC Métis Federation	Trans Mountain confirmed that it continues to engage Indigenous communities affected by the Project and will continue to update the Board through compliance with Condition 96. Trans Mountain has started collaboration activities with the Federal Government in relation to the resumption of Phase III consultation, and will participate as appropriate in subsequent consultations with Indigenous groups, to provide proponent and project specific information. Trans Mountain is committed to participating in meaningful dialogue and consultation with Indigenous communities across the Project.	Canada has not delegated the procedural aspects of its Duty to Consult to Trans Mountain. However, it noted that representatives of Trans Mountain will be part of the consultation and accommodation process and participate in meetings with representatives of Indigenous communities, government and nations, where appropriate, although the ultimate responsibility for ensuring that the duty is adequately fulfilled remains with the Crown under the leadership of the Minister of Natural Resources.	In assessing the engagement undertaken by Trans Mountain with Indigenous peoples, the Board evaluated the implementation of Trans Mountain's ongoing engagement activities with regards to Project-related marine shipping. The Board considered the company's activities to engage Indigenous communities and to learn about their concerns and interests, as well as the concerns and views expressed by Indigenous communities within the MH-052-2018 hearing.	5.2.2.1
	Blood Tribe (Kainai First Nation)				5.2.2.6
	Driftpile Cree Nation				5.2.6.1
	Indigenous Caucus for the Trans Mountain Indigenous Advisory and Monitoring Committee (IAMC)				
	Louis Bull Tribe			Trans Mountain has engaged with Indigenous communities since the close of the OH-001-2014 Hearing, and has committed to continue to work with Indigenous communities. The Board expects Trans Mountain to continue to learn about the concerns that Indigenous communities may have about Project-related marine shipping and to discuss ways to address those concerns to the extent possible. The Board also encourages Indigenous communities with an interest in Project-related marine shipping to continue to engage with Trans Mountain.	
	Lyackson First Nation			The Board is satisfied that, with Trans Mountain's commitments and the Board's Conditions 96 and 146, Trans Mountain will continue to engage with Indigenous communities in order to learn more about their interests and concerns and address issues raised by Indigenous communities throughout the Project's operational life. With respect to issues of concern raised by Indigenous communities that were beyond the scope of this MH-052-2018 hearing, The Board expects and encourages Trans Mountain to continue to engage with Indigenous communities on all aspects of the Project that are of concern to the communities themselves	
	Musqueam Indian Band				
	Neskonlith Indian Band				
	Papaschase First Nation #136				
	Stó:lō Tribal Council				
	Tsawwassen First Nation				
	Tsuut'ina Nation				
	Whitefish Lake First Nation #459				

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Crown's duty to consult and accommodate Indigenous peoples					
Adequacy of the Crown's consultation process	Blood Tribe (Kainai First Nation) Ditidaht First Nation Driftpile Cree Nation Lyackson First Nation Musqueam Indian Band Papaschase First Nation #136 Seabird Island Band Shxw'owhámel First Nation Stk'emlupsemc te Secwepmc of the Secwepmc Nation Stó:lō Collective Stz'uminus First Nation Tsartlip First Nation Tsawwassen First Nation Tsleil-Waututh Nation Whitefish Lake First Nation #459	Trans Mountain has continued to engage with all potentially affected Indigenous communities in relation to Project-related marine shipping since the conclusion of the OH-001-2014 hearing. Trans Mountain noted that the MH-052-2018 hearing provided opportunities for potentially affected Indigenous communities to learn more about Project-related marine shipping, to ask information requests of Trans Mountain and federal government agencies, file written evidence and present oral traditional evidence. Trans Mountain said that Indigenous communities have been provided with extensive opportunities to engage on all aspects of Project-related marine shipping. Trans Mountain noted that the Board's task is not to assess the adequacy of Crown consultation in its MH-052-2018 Report. Trans Mountain noted that the Government of Canada has indicated that it intends to carry out additional consultation beyond and outside the NEB process. Trans Mountain submitted that the adequacy of Crown consultation can only be assessed once all consultation has been completed and at such time when the Crown (in this case, Cabinet) renders its final decision on the Project. As such, while the Board can assess the adequacy of Trans Mountain's consultation for the purposes of this Reconsideration, Trans Mountain argued that the Board need not and cannot at this time assess the adequacy of Crown consultation overall. Trans Mountain argued that such an assessment would be premature and beyond the purview of the Board.	The Crown can rely on existing regulatory processes, to the extent possible, to fulfill the duty to consult. As such, the Crown may rely on the NEB MH-052-2018 hearing, to the extent possible, to identify, consider and address how the Crown's conduct in relation to Project-related marine shipping might adversely impact potential or established Indigenous and Treaty rights. NRCan said that this approach avoids duplication and ensures that the NEB, which has broad powers to set conditions for the Project, has full access to relevant information on potential adverse Project-related marine shipping impacts on Indigenous and Treaty rights. The Crown will also consult on Project-related marine shipping impacts in its re-initiated Phase III of the consultation process. The Minister of Natural Resources wrote to potentially impacted Indigenous communities, governments and nations following the announcement that it would re-initiate Phase III consultations on the Project, outlining the Crown's intentions to engage in a specific and focused dialogue on the Project. NRCan said that the Crown's Phase III consultation and accommodation process will work with Indigenous communities, governments and nations in a manner that aligns with the Crown's commitment to strengthen and renew its relationships with Indigenous peoples while respecting and upholding the rights of Indigenous peoples in Canada. A recommendation on whether to approve the Project will only be considered by the GIC once it is satisfied that: (1) the Crown has adequately fulfilled its duty to consult and that consultations with potentially impacted groups have been offered and / or carried out in a meaningful and responsive manner; and (2) accommodations have been considered, where appropriate, and responses have been provided to Indigenous communities, governments and nations.	Recognizing the role of the Board's hearing in the consultation process for this Project, as well as the Government of Canada's ongoing efforts relating to Phase III consultation, the Board is satisfied that its process was impartial and fair and is able to contribute, to the extent possible, to the Crown's obligation to consult and accommodate.	5.2.5.3

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Adequacy of Phase III Consultation / Accuracy of 2016 Consultation and Accommodation Report (CAR)	Blood Tribe (Kainai First Nation) Driftpile Cree Nation Louis Bull Tribe Lyackson First Nation Musqueam Indian Band Neskonlith Indian Band Papachase First Nation #136 Squamish Nation Stoney Nakoda Nations Tsawout First Nation Tsleil-Waututh Nation Tsuut'ina Nation Whitefish Lake First Nation #459	Trans Mountain noted that the Government of Canada has indicated that it intends to carry out additional consultation beyond and outside the NEB process. Trans Mountain submitted that the adequacy of Crown consultation can only be assessed once all consultation has been completed and at such time when the Crown (in this case, Cabinet) renders its final decision on the Project. As such, while the Board can assess the adequacy of Trans Mountain's consultation for the purposes of this Reconsideration, Trans Mountain argued that the Board need not and cannot at this time assess the adequacy of Crown consultation overall. Trans Mountain argued that such an assessment would be premature and beyond the purview of the Board.	The Crown will re-engage in Phase III consultations, outside of the MH-052-2018 hearing, with all impacted Indigenous communities, governments and nations to meaningfully fulfill its duty to consult through understanding, and identifying measures to avoid, mitigate or accommodate, where appropriate, impacts of the project to Indigenous and Treaty rights. The NEB recommendations will inform the Crown's Phase III consultation. A recommendation on whether to approve the Project will only be considered by the GIC once it is satisfied that the Crown's obligation to consult and accommodate has been fulfilled. NRCan offered participant funding to impacted Indigenous communities, governments and nations in November 2018, to support participation in consultation activities with the Crown. The re-initiated Phase III consultation process will build on existing relationships, information submitted by Indigenous communities, governments, and nations to date, and the existing consultation record, while making improvements to ensure the duty to consult is appropriately fulfilled. This new process will result in an updated CAR that will be presented to the Governor in Council prior to a decision being made in accordance with section 54 of the <i>National Energy Board Act</i> , which includes provisions allowing the Crown to seek an extension beyond the mandated three month review period. Prior to completion, Indigenous communities, governments and nations' views and comments on this document will further inform the Crown's assessment, which will then be reflected in the report.	The Board acknowledges the concerns raised by Indigenous intervenors regarding the Crown's overall consultation process, including the 2016 CAR being filed on the Board's record by the Federal Authorities, as well as assertions that the information does not accurately capture the concerns that were raised with the government during the Original Phase III Consultations. The Board understands that this information was filed by the Federal Authorities in an effort to help make the Board aware of Indigenous interests and concerns related to the Project (and in particular to Project-related marine shipping) as they were understood by the Crown as of 2016. The Board notes that this MH-052-2018 hearing is not the appropriate venue to make a determination on the accuracy of the information in that document. The Board also notes that the MH-052-2018 hearing was an opportunity for Indigenous communities to provide information directly to the Board regarding their concerns about Project-related marine shipping through their participation as intervenors and commenters, and the Board has considered all of this direct evidence. The Board notes that as part of the re-initiated Phase III consultations on the Project, new information outlining the potential impacts to the rights and interests of Indigenous communities will be consolidated into an updated CAR, and prior to completion, comments on the CAR from Indigenous communities will be reflected in the document to further inform the Crown. Given that this Phase III Consultation Process is taking place outside the Board's MH-052-2018 hearing and will continue beyond the timelines of the MH-052-2018 hearing, the Board is not making a determination on the adequacy of the Phase III Consultation Process. The Board's mandate, as indicated in Order in Council P.C. 2018-1177, is to reconsider its recommendation taking into account the effects of Project-related marine shipping. It is the Governor in Council's role to make the final decision on the Project, taking into account the Board's Report and the information to be provided by the Federal Authorities regarding the adequacy of the Crown's consultation and accommodation.	5.2.5.3 5.2.2.6 5.2.6.3
	Adam Olsen Adams Lake Indian Band Cowichan Tribes Driftpile Cree Nation	Trans Mountain stated that procedural fairness of the MH-052-2018 hearing was satisfied. Its arguments included the following points: Procedural fairness varies with the context and interests at stake and here the	The Crown was following the guidance from the Federal Court of Appeal and the Crown Recognizes the MH-052-2018 hearing is operating within the broader context of the re-initiated Phase III consultation process. The NEB MH-052-2018 hearing provides a mechanism for	The time limit set out in OIC P.C. 2018-1177 required the Board to issue its Reconsideration report no later than 22 February 2019. Despite the expedited hearing process and narrow scope of the issues, the MH-052-2018 hearing had many steps that were similar to the OH-001-2014 Certificate Hearing. Evidence was	1.5.1 5.2.2.6

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
	Little Shuswap Lake Indian Band Louis Bull Tribe Malahat First Nation Neskonalith Indian Band Nooaitch Indian Band Shxw'ōwhámél First Nation Snuneymuxw First Nation Squamish Nation Stk'emlupsemc te Secwepmc of the Secwepmc Nation Stó:lō Collective Stz'uminus First Nation First Nations of the Maa-nulth Treaty Society Tsartlip First Nation Tsawout First Nation Tsawwassen First Nation Tsleil-Waututh Nation T'Sou-ke First Nation Tsuut'ina Nation Whitefish Lake First Nation #459	Reconsideration was narrow in scope which should inform procedural fairness. • Having a fair but expedited hearing was consistent with the NEB Act and the direction from both the Federal Court of Appeal and the OIC for a prompt redetermination. • All parties had an opportunity to fully and fairly present their case. • In response to a notice of motion from Squamish Nation and supported by other intervenors the Board granted the request for an additional 15 days for filing intervenor evidence. In contrast Trans Mountain had a very limited time to file its reply evidence.	Indigenous communities, government and nations to express their concerns regarding how Project-related marine shipping might adversely impacts potential or established Indigenous and Treaty rights, and related avoidance, mitigation and other accommodation measures. NRCan said that the Crown will rely on the NEB Reconsideration Process, to the extent possible, to consider all forms of mitigation to Project-related marine shipping and to assess the residual effects. The Crown will then assess the potential seriousness of any residual effects of the Project on Indigenous and Treaty rights, taking into account proposed mitigation and/or accommodation measures.	presented in writing and testing of that evidence was carried out through written IRs. Parties had the opportunity to ask the Board to compel other Parties to provide more complete responses to IRs and also to file final argument. The Board offered to hear oral traditional evidence in person at any of the announced locations, or remotely while it sat in Calgary While the Reconsideration time lines were expedited, the Board is satisfied that parties had a fulsome opportunity in the Reconsideration to make their case and challenge evidence from Trans Mountain and federal departments. As stated above, if there were particular circumstances requiring additional time, the Board was open to considering such requests. The Board is of the view that hearing process deadlines, as amended, allowed parties to fully and fairly present their case and challenge evidence, and resulted in a procedurally fair hearing.	1.4.2 1.4.5 1.5.1
Effects on interests, including asserted and established Treaty and Indigenous Rights of Indigenous Communities					
Anchorage in the Southern Gulf Islands	Cowichan Tribes Lyackson First Nation Snuneymuxw First Nation Stz'uminus First Nation	Trans Mountain said that vessels destined to the WMT do not currently anchor and will not anchor in the future, in the areas of concern raised by Indigenous intervenors. It also stated that it intends to manage arriving vessels to minimize the use of anchorages. Trans Mountain said it expected that tankers will anchor at the three anchorages east of Second Narrows, and pressure on anchorages will be reduced by holding tankers at the dock whenever a berth is available.	The Pacific Pilotage Authority confirmed that there were no WMT bound or departing vessels that anchored in the Southern Gulf islands in the last five years. Through the National Anchorages Initiative, Transport Canada is conducting research studies to inform the creation of a National Anchorages Framework, which are expected to be completed in 2019. Transport Canada said that it is consulting with stakeholders and Indigenous communities to develop an approach to identify anchorage sites. Traditional knowledge will be collected during this process. Transport Canada said that it will be undertaking a review and evaluation of the need for regulatory changes for oversight and management of anchorage sites. These activities will allow for the development of a national anchorage framework and best practice guide for ships at anchor.	The Board is satisfied with the evidence of the PPA that no transiting tankers to WMT have used anchorages in the Southern Gulf Islands in recent years, as well as Trans Mountain's evidence that Project-related vessels do not currently anchor and will not anchor in the future, in the areas of concern raised by Indigenous intervenors. The Board also notes that Transport Canada has initiatives underway to mitigate adverse effects due to the use of these anchorages and that these initiatives will include consultation with Indigenous peoples.	5.2.5.3 5.2.6.2

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Adequacy of government programs and initiatives, including Crown consultation on these	Adams Lake Indian Band Cowichan Tribes Ditidaht First Nation Heiltsuk First Nation Indigenous Caucus for the Trans Mountain Indigenous Advisory and Monitoring Committee Lyackson First Nation Musqueam Indian Band Pacheedaht First Nation Squamish Nation Tsartlip First Nation First Nations of the Maanulth Treaty Society	Trans Mountain, as a pipeline operator with no direct control over Project-related marine shipping, believes that multi-party solutions with active collaboration between industry and government are required to ensure continued maintenance and advancement of the marine safety regime. Trans Mountain supports the approach proposed under the OPP, whether or not the Project proceeds.	Canada has a dedicated OPP engagement team that continues to support ongoing dialogue with South Coast First Nations. Transport Canada pointed to the recently launched Indigenous and Local Communities Engagement and Partnerships Program (ILCEPP) as a measure to support any future agreements on the South Coast. The objective of the ILCEPP is to support relationship building and encourage participation in longer-term engagement work on one or more OPP initiatives. Over \$13 million is being made available to eligible Indigenous and local communities to be engaged and participate in the OPP. If Canada contemplates further actions related to Oceans Protection Plan initiatives, and these actions have the potential to impact Indigenous rights, Canada will consult with potentially affected Indigenous communities.	While the Federal Authorities have indicated that the OPP is not Project-specific, components of the OPP directly respond to marine safety concerns raised through previous public consultation, including those on the Trans Mountain Expansion Project, and that certain OPP initiatives apply to the Project's marine shipping components. The Federal Authorities presented evidence describing how these components of the OPP include consultation and partnerships with Indigenous communities that will provide opportunities for Indigenous communities to play a meaningful role in marine safety, including decision-making, and environmental protection. The Board acknowledges the concerns raised by Indigenous communities regarding the level and depth of consultation that is taking place regarding the many initiatives that form the OPP. The Board notes that it is not within the scope of this Reconsideration to assess the adequacy of consultation related to Canada's consultation related to the OPP or other broad initiatives related to marine shipping. That said, the Board is of the view that the OPP is a positive step to addressing concerns related to marine shipping on the south coast of B.C., and is encouraged by Canada's commitment to strengthen partnerships with Indigenous communities. The Board notes that the Federal Authorities have said that if Canada contemplates further actions related to Oceans Protection Plan initiatives, and these actions have the potential to impact Indigenous rights, Canada will consult with potentially affected Indigenous communities. The Board notes that the OPP is a large initiative with many programs and initiatives in various states of progression and encourages continued one-on-one discussions between the Federal Authorities and Indigenous communities so that they are able to understand all of the plans and programs, including how these may be appropriate to address community-specific concerns.	5.2.5.3 5.2.6.2
Involvement of Indigenous peoples in monitoring Project-related marine shipping / IAMC	Chawathil First Nation Cheam First Nation Ditidaht First Nation Driftpile Cree Nation Ermineskin Cree Nation Indigenous Caucus for the	Trans Mountain understands that the IAMC is an Indigenous-led committee, established with a goal to form the basis of a new relationship between Indigenous communities, the government and the NEB in respect of Trans Mountain's activities. Trans Mountain's understanding is that the IAMC is already advancing Indigenous interests with respect to	IAMC participation in the monitoring and oversight of Project-related marine shipping and its potential impacts to the marine environment is pursued primarily by the Marine Shipping subcommittee (the Subcommittee). Between October 2018 and March 2019, the Subcommittee will be engaging with Indigenous communities with interests related to the marine corridor	The Government of Canada established the IAMC as a measure that was to supplement Trans Mountain's commitments to Indigenous communities, the NEB conditions on the Project, and the commitments made by Canada in the OPP. The Board recognizes that the IAMC is not a consultative body and does not take the place of mandated one-on-one consultation between Trans	5.2.5.3 5.2.6.2

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
	Trans Mountain Indigenous Advisory and Monitoring Committee Kwantlen First Nation Louis Bull Tribe Lyackson First Nation Malahat First Nation Métis Nation BC Musqueam Indian Band Seabird Island Band Shackan Indian Band Squamish Nation Stk'emplupsemc te Secwepmc of the Secwepmc Nation Stó:lō Collective Stó:lō Tribal Council First Nations of the Maa-nulth Treaty Society Tsawout First Nation T'Sou-ke First Nation Whitefish Lake First Nation #459 Whitefish (Goodfish) Lake First Nation #128	guardianship and stewardship over land and water operations during the lifecycle of the Project. Trans Mountain said it is supportive of the IAMC's role as it pertains to the Project.	toward a number of marine-related objectives. Canada has committed \$64.7 million to support the IAMC for the Project. So far, the Committee is reviewing or supporting 13 community projects related to the effects of Project-related marine shipping, including projects that analyze vessel traffic associated with the Project, the enhancement of emergency planning, the development of environmental management, and the hiring of emergency response personnel in individual First Nations, among others.	Mountain or the Crown and individual First Nations. That said, the Board is of the view that the existence of the IAMC is a valuable measure to address concerns from Indigenous communities regarding marine shipping activities, including facilitating further Indigenous involvement in the marine safety, inspection and enforcement regime. Thus the Board has included Recommendation 11 as part of this Report, which would require the GIC to work with Transport Canada and the Canadian Coast Guard, to facilitate opportunities, as appropriate, to engage and seek feedback from the Indigenous Advisory Monitoring Committee on the marine safety system, including on the marine inspections and enforcement regime, as well engagement opportunities for Project-related marine shipping activities that intersect with Canadian Coast Guard operational programs.	
SRKW critical habitat proposal for Swiftsure Bank	Ditidaht First Nation Pacheedaht First Nation		DFO explained that the identification of new critical habitat areas is based on scientific advice stemming from research carried out over the last 40 years. It also noted that there is no immediate plan to add new closures or change the fisheries closures that protect the key SRKW foraging areas. DFO will be reviewing its fishery closure approach with Indigenous communities going forward and through these discussions, DFO can address questions such as understanding the information used to inform management measures, considering how other threats interact with the threat of lack of available prey for SRKW, and understanding how best to include and incorporate Indigenous and local knowledge to adaptively manage the mitigation of these threats.	The Board does not have the ability within this proceeding to address the issue of the potential of future fisheries closures, but is of the view that the commitments from the Federal Authorities are appropriate and notes that this is an issue that can be further discussed as part of the Phase III consultation process.	5.2.5.3 5.2.6.2

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Issues beyond scope of the MH-052-2018 hearing	Adams Lake Indian Band Blood Tribe (Kainai First Nation) Driftpile Cree Nation Little Shuswap Lake Indian Band Louis Bull Tribe Stk'emlupsemc te Secwepmc of the Secwepmc Nation Tsuut'ina Nation Whitefish Lake First Nation #459	Trans Mountain noted that many intervenors raised issues and concerns that were fully canvassed and considered by the Board in the OH-001-2014 proceeding. Trans Mountain submitted that these issues were adjudicated in the OH-001-2014 Hearing and as such it did not provide a reply to these concerns.	NRCan stated that the government will re-engage consultations with all 117 Indigenous communities potentially impacted by the Project. On 5 October 2018, the Minister of Natural Resources communicated the Government's intentions to engage in a specific and focused dialogue with Indigenous communities on the Trans Mountain Expansion Project. It stated that the next round of consultations will lead to an updated CAR that will outline the potential impacts to rights and interests of Indigenous communities in relation to the Project, and how these impacts have been mitigated and, where appropriate, accommodated.	The Board recognizes that Indigenous communities have a broad range of matters and concerns that they wish to raise, discuss and resolve with both the federal and provincial governments. The Board is sharing those concerns it heard that are not in the scope of the Reconsideration with NRCan in a separate document, that will be available on the Major Projects Management Office website and can be used to assist NRCan in its Phase III consultations with Indigenous peoples.	5.2.5.3
					5.2.6.2
Indigenous governance and stewardship	Tsawout First Nation Tsleil-Waututh Nation Little Shuswap Lake Indian Band Neskonlith Indian Band Stk'emlupsemc te Secwepmc of the Secwepmc Nation Shxw'ōwhámél Tsawout First Nation Tsuut'ina Nation First Nations of the Maa-nulth Treaty Society	Trans Mountain's understanding is that the IAMC is already advancing Indigenous interests with respect to guardianship and stewardship over land and water operations during the lifecycle of the Project. Trans Mountain noted that the IAMC provides for collaborative, inclusive and meaningful Indigenous involvement in the review and monitoring of environmental, safety and socio-economic issues, and Trans Mountain is supportive of the IAMC's role as it pertains to the Project.	The Federal Authorities noted that one of the measures for the Species at Risk Action Plan for Northern and Southern Resident Killer Whale (<i>Orcinus orca</i>) in Canada (2017) is to incorporate Indigenous Traditional Knowledge on the behaviour and distribution of Southern resident killer whales and their prey into measures for the recovery of the species. DFO said that Indigenous communities are being engaged through governance bodies such as the SRKW Indigenous and Multi-stakeholder Advisory Group, and the DFO-led SRKW prey availability working group. The Federal Authorities noted that Pillar 3 of the OPP is to strengthen partnerships and launch co-management practices with Indigenous communities, by building local emergency response capacity, marine training and governance strategies for northern shipping.	The Board recognizes that Project-related marine shipping has the potential to affect the rights of Indigenous communities, including those rights established through the Douglas Treaties, the Tsawwassen First Nation Final Agreement, and the Maa-nulth Final Agreement. The Board acknowledges the responsibilities expressed by many Indigenous communities to look after the land and water located within their traditional territories: to be stewards, protectors, and follow their laws and sacred responsibilities. As a result, the Board has included Recommendation 1 which would require the GIC to develop and implement a regional cumulative effects management plan implemented in consultation with Indigenous peoples, other marine users, the Province of British Columbia and local governments, VFPA, and other relevant stakeholders. The Board also notes that the marine shipping aspect of IAMC activities may not be as advanced as the work being done along the pipeline route and within the WMT, but it believes that the IAMC has a valuable role to play in sharing the capacity and knowledge of Indigenous communities in relation to spill preparedness and response, marine stewardship, planning and monitoring, including working with industry, regulators and other governmental bodies.	5.2.5.3
					14.8.3 5.2.5.2 5.2.6.2
Salish Sea marine use planning and establishment of Marine Protected Areas	Chawathil First Nation Cheam First Nation Ermineskin Cree Nation	Trans Mountain said that it is advancing the concept of a Salish Sea Initiative as part of an existing commitment with marine Indigenous communities to enhance their stewardship over the Salish Sea. While conceptual at this	Marine Protected Areas (MPAs) established under section 35 (1) of <i>Oceans Act</i> may prohibit or impose restrictions on classes of activities, such as marine shipping, for the purpose of marine conservation through regulations. For example, the Hecate Strait and	The Board realizes the importance of establishing National Marine Conservation Areas (NMCA), and hence recommends the GIC to expedite the work in completing the feasibility study for establishing a Southern Strait of Georgia National Marine	14.8.3
					14.7.5

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
	Heiltsuk First Nation Indigenous Caucus for the Trans Mountain Indigenous Advisory and Monitoring Committee Kwantlen First Nation Malahat First Nation Seabird Island Band Squamish Nation Stó:lō Tribal Council Tsartlip First Nation Whitefish (Goodfish) Lake First Nation #128	time, the Salish Sea Initiative has been introduced to marine Indigenous communities with a focus on where there is an already existing commitment, and the intention is for the Initiative to be Indigenous-led and developed in partnership with Trans Mountain. Due to Project-uncertainty the long-term initiative was suspended, but pending the resumption of the Project, Trans Mountain said that it would re-engage with interested Indigenous marine communities in the design and scope of the initiative, together with, as appropriate, other marine organizations and authorities.	Queen Charlotte Sound Glass Sponge Reefs Marine Protected Areas Regulations (outside of the Marine RSA) enable navigation activities throughout the MPA, but no anchoring in the core protection zones. It said that no MPAs have yet been established in the Marine RSA, but under the <i>Oceans Act</i> the Minister retains the authority to recommend to the Governor in Council that regulations be made to designate new MPAs at a future time.	Conservation Area, and publicly report on the outcomes of that study, and (if considered feasible) proceed to establish it (Recommendation 4). The Board also notes that Recommendation 2 would also be relevant in that it includes a description of the progress on each of the recommendations. The Board recognizes Canada's commitment to meet marine conservation targets established under the Convention on Biological Diversity to conserve 10 percent of coastal and marine areas through effectively managed networks of protected areas and other effective area-based conservation measures by 2020. The Board notes that network planning has always been emphasized as one of the primary tools in fulfilling government mandates to protect conservation and the protection of the natural environment. The Board expects Government of Canada to consider the possibility of identifying and creating a network of marine protected areas in the Salish Sea as part of its implementation of Recommendation 1.	
Environmental effects of Project-related marine shipping					
Alternative means	BC Métis Federation Squamish Nation Tsleil-Waututh Nation	Trans Mountain said that during the initial Project scoping process, it considered six alternative marine terminal locations, including two locations in Washington State. Trans Mountain said that it assessed information about these locations in the OH-001-2014 hearing, and explained that the Washington locations were eliminated from future consideration early in the planning process because they would require a longer pipeline and would pose complex regulatory issues including additional permits required by Washington State and the United States federal government		The Board is of the view that Trans Mountain has provided an adequate assessment, including consideration of technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations. The Board finds that Trans Mountain's assessment is consistent with the Board's Filing Manual and Canadian Environmental Assessment Agency guidance relating to alternatives means.	14.6.2
Air and Greenhouse Gas emissions from tankers	BC Métis Federation Tsuut'ina Nation Blood Tribe (Kainai First Nation) Driftpile Cree Nation Louis Bull Tribe Shackan Indian Band	Trans Mountain said that it has set the age limits for tankers that would be acceptable to call at the WMT, as part of its Vessel Acceptance Standards. Trans Mountain anticipates that the ongoing improvements to the global fleet with respect to emissions reduction requirements will apply to tankers that transit to and from the WMT. Trans Mountain said that it believes the authorities that regulate marine transportation (i.e., one or more of Transport Canada, Environment and Climate Change Canada, and	Transport Canada said that in 2017, the IMO Member States agreed on an initial strategy for reducing greenhouse gas emissions from ships, which targets at least a 50 per cent reduction from 2008 levels by year 2050. ECCC noted that a federal Clean Fuel standard is under development and will require producers and importers of fossil fuels to reduce the carbon intensity of the fuels they produce and import. ECCC said that pending the ultimate design of these regulations, the carbon intensity of marine fuels sold in Canada could be required to be lower, resulting in greenhouse gas	The Board finds that greenhouse gas emissions from Project-related marine vessels are likely to be significant. The Board recommends that the GIC should support the development and implementation of greenhouse gas reduction measures related to marine shipping that would align with the final International Maritime Organization Strategy in year 2023 for reducing greenhouse gas emissions (Recommendation 10). These measures could include, but not be limited to facilitating the use of low-carbon alternate fuels, use of energy efficient technologies, and market-based	14.7.1

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
		the Canadian Coast Guard), would be better placed to establish any requirements for greenhouse gas emissions, and to monitor and enforce such programs, for all vessels. Trans Mountain said that the IMO (under MARPOL Annex VI) has established emission control areas (ECAs) to reduce emissions of SO_x, NO_x and particulate matter in designated sea areas. Trans Mountain said that for large ships like oil tankers constructed after 1 January 2016, Tier III emission standards for NO_x must be met for a vessel to operate in an Emission Control Areas such as in the Port of Vancouver. It said that relative to Tier I emission standards from year 2000, the Tier III standards are expected to provide a significant reduction in NO_x emissions by 80 per cent or a factor of five. Trans Mountain said that an internationally registered oil tanker that would call at the WMT would be subject to this IMO reduction target. Trans Mountain said that the IMO regime includes two primary measures for improving energy efficiency: Energy Efficiency Design Index and Ship Energy Efficiency Management Plan (SEEMP).	emissions reductions. ECCC said that proposed regulations are planned for spring/summer 2019, to be published in the Canada Gazette, Part I.	measures, such as providing economic incentives for industry investment in the development and use of energy efficient technologies and offsetting any increases in ship emissions. The Board notes that Recommendation 2 would also be relevant in that it includes a description of the progress on each of the recommendations. If the GIC implements the Board's recommendation around development and implementation of GHG reduction measures related to marine shipping that aligns with the final IMO strategy by 2023, GHG emissions from Project-related shipping would be reduced. With the new energy efficiency standards adopted by the International Maritime Organization, and with proposed regulations for federal clean fuel standard planned for spring/summer 2019, GHG emissions will be further diminished.	
Effects on SRKW from Project-related marine traffic operations	Cheam First Nation Chawathil First Nation Ditidaht First Nation Driftpile Cree Nation Kwantlen First Nation Louis Bull Tribe Lyackson First Nation Makah Tribal Council Malahat First Nation Neskonlith Indian Band Nooaitch Indian Band Pacheedaht First Nation Shxw'owhámel First Nation Snuneymuxw First Nation Stó:lō Tribal Council Tsartlip First Nation Tsawout First Nation Tsileil-Waututh Nation T'Sou-ke First Nation Swinomish, Tulalip,	Trans Mountain observed that initiatives solely aimed at Project-related vessels would be inefficient and would have no material benefit to SRKW without also addressing the shipping industry in general.	Since the NEB's OH-001-2014 Report, the Government has advanced a comprehensive strategy to protect ocean ecosystems and to support the recovery of SRKW, which has advanced in three stages: - under the \$1.5 billion national Oceans Protection Plan (OPP) launched in late 2016; - under the \$167 million Whales Initiative launched in June 2018; and - an additional \$61.5 million for additional measures announced in October 2018 designed to further address the imminent threats to the survival and recovery of SRKW Various research and data collection projects are underway, including a Coastal Environmental Baseline Program that will collect data at six pilot sites over the next four years, including in the port of Vancouver; and a national Cumulative Effects of Marine Shipping Initiative at six pilot sites, including one in South Coast B.C., which will include regional cumulative effects assessments at each pilot site and the identification of potential tools and strategies that can be applied to existing or future vessel movements.	The Board recommends that the additional underwater noise and strike risk created by Project-related marine vessels be offset by applying measures to all appropriate vessels, including Project-related marine vessels (Recommendation 5). While the Board maintains its recommendation that there are likely significant adverse effects on SRKW, this offset approach could allow for a reduction in that finding to non-significance if and when Project-related shipping effects have been effectively reduced to net-zero in each section of the shipping route. As noted in Recommendation 5, monitoring is necessary to track progress, and changes should be made if voluntary measures prove ineffective over time, including consideration of mandatory measures. The annual reporting recommended in Recommendation 2 would also be relevant given that it includes a description of progress on each of the other recommendations, as well as a description of consultation activities related to each. In Recommendation 6, the Board recommends that each of the following five mitigations be further considered and their feasibility be publicly reported on: 1. Slowdowns in each section of the marine shipping route.	14.7.2

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
	Suquamish, and Lummi Indian Nations (US Tribes) Whitefish (Goodfish) Lake First Nation #128			2. Limits on the impacts from whale watching boats. 3. Accelerate and confirm the schedule for noise reduction efforts for regularly operating ferries in the area. 4. Identification of specific congregation and migration areas for SARA-listed species, and consideration of mitigations in those areas. 5. Further incentives and requirements for quiet vessel design and refits to address underwater noise over the long term, including maximal international participation. The Board has included two recommendations that seek to address the broader issue of cumulative effects on the marine ecosystems through which Project-related vessels will pass: • In Recommendation 1, the Board recommends GIC develop and implement a regional cumulative effects management plan to assess the overall environmental state of, and cumulative effects on, the Salish Sea, including a long-term strategy to manage those cumulative effects. • In Recommendation 2, the Board recommends GIC annually report on the oversight, progress and status of initiatives and measures to address cumulative effects on, and to support the health of, the Salish Sea.	
Marine fish and fish habitat	Cheam First Nation Chawathil First Nation Heiltsuk First Nation Indigenous Caucus for the Trans Mountain Indigenous Advisory and Monitoring Committee Louis Bull Tribe Kwantlen First Nation Little Shuswap Lake Indian Band Makah Tribal Council Malahat First Nation Musqueam Indian Band Seabird Island Band Snuneymuxw First Nation Stó:lō Tribal Council Squamish Nation	In the MH-052-2018 hearing, Trans Mountain referenced its previous individual assessments for eight marine fish species. Trans Mountain provided new individual assessments of potential residual effects of Project-related marine shipping on Longspine Thornyhead and on Leatherback sea turtle. For each species, Trans Mountain noted either no critical habitat identified in Canadian waters, or (for Northern abalone) no spatial overlap with identified critical habitat. Trans Mountain's assessments concluded that residual effects of routine operation of Project-related vessels on each SARA-listed marine fish are predicted to be negligible or low in magnitude, low in probability, and not significant.	DFO maintained its position that potential effects on marine fish and fish habitat from Project-related marine shipping are likely to be low risk (excluding potential accidents or malfunctions). DFO said, given that there have been no significant changes to the proposed marine shipping component of the Project, it does not anticipate any meaningful changes to its assessment of effects on marine fish and fish habitat, including potential effects on chinook salmon and species that have seen a change in designation, since the filing of its written evidence in the OH-001-2014 hearing.	The Board's recommendations to government concerning the overall cumulative effects on the Salish Sea (see Recommendations 1 and 2) include consideration of the cumulative effects on, and initiatives and measures for, salmon and other fish stocks. The Board is of the view that Project-related marine vessel traffic is not likely to cause significant adverse effects on marine fish and fish habitat.	14.7.3

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
	Stz'uminus First Nation Tsawout First Nation Tsartlip First Nation Swinomish, Tulalip, Suquamish, and Lummi Indian Nations (US Tribes)				
Marine birds	Driftpile Cree Nation Tsawout First Nation Tsleil-Waututh Nation	Trans Mountain said that it is committed to exploring ways to help collect monitoring data in cooperation with local communities, Indigenous groups, regulatory authorities, common marine users, and other stakeholders. Trans Mountain said that it would support an industry-wide marine bird monitoring program led, coordinated, financed (with industry support), and overseen for technical and scientific merit, by government agencies. Depending on the type of monitoring program adopted, and of the specific details required for implementation, Trans Mountain could provide support that might include, but not be limited to, financial support, technical expertise, and direct participation. Trans Mountain said that it remains interested in contributing if collaboration is through the OPP, managed by ECCC and/or TC, and with an emphasis on baseline monitoring on British Columbia's southern coast,. Trans Mountain said it envisions that its contribution to the OPP would be directly linked to establishing and growing the capacity of a local group by providing a means for them to undertake a regional marine bird baseline monitoring program.	ECCC noted that it and other organizations administer a variety of monitoring and research programs related to marine bird sensitivities in the south coast region including surveys. ECCC said that its current monitoring activities focus on tracking populations (e.g., generating population estimates, identifying bird use of important habitats or generating population trend estimates for migratory bird species and some SARA-listed Migratory Birds). ECCC said it was engaged in migratory bird inventory work and the results of past regional migratory bird inventories are available in ECCC technical reports. ECCC stated that it currently allocates approximately \$200,000 annually to marine bird research and monitoring programs in the Project area.	The Board heard that there is uncertainty as to effects of marine traffic on marine birds at the population level and uncertainty as to what mitigation measures may indeed be technically and economically feasible. Given this uncertainty, the Board is of the view that a marine bird monitoring and protection program, if implemented, would allow a better understanding of impacts of vessel use within the Salish Sea on marine bird populations, including species at risk, and would inform implementation of mitigation measures through adaptive management, if warranted by the monitoring results. The Board is of the view that the Government of Canada is best placed to develop and implement a marine bird monitoring and protection program, with support of industry including Trans Mountain. The Board is of the view that this program, and any associated mitigation that follows from monitoring results, should ultimately extend to all marine shipping vessels in Salish Sea. The Board therefore sets out Recommendation 3 to the Governor in Council regarding the implementation of a marine bird monitoring and protection program for the Salish Sea.	14.7.4
Socio-economic effects of Project-related marine shipping					
Effects of operational marine shipping on marine commercial and recreational use	Heiltsuk First Nation	Trans Mountain said the information provided by Indigenous groups about commercial fishing and small vessel safety did not identify any potential effects that were not previously assessed in the OH-001-2014 hearing and the conclusions of these assessments of potential effects have not changed with the additional information provided. Trans Mountain provided an assessment of Project-related marine shipping wakes with focus on the potential for negative effects of wakes on other vessel traffic, including commercial traffic and private recreational vessels, in four locations along the shipping route (Burrard Inlet, Strait of	The Pacific Pilotage Authority said that the resultant wake of an inbound Project-related tanker will be no more than that of any other slow moving bulk carrier transiting the area, and will be a lot less than a fast moving large container ship or a Cape size laden bulk carrier. It also said that the outbound tanker in the loaded condition will be restricted in its speed due to the requirement for a tug either in the vicinity (Georgia Strait and Juan de Fuca) or tethered (Haro Strait and Boundary Passage), and the maximum speed while tethered is 10 knots which will significantly reduce any wash and wake effect and minimize any impact on private recreational vessels. The Federal authorities said that the Oceans Protection Plan outlines several initiatives being undertaken to	The Board notes Trans Mountain's commitments to provide regular updated information on Project-related marine vessel traffic to Indigenous communities, and to initiate a public outreach program prior to the Project operations phase to communicate information on Project-related timing and scheduling with Transport Canada, the Canadian Coast Guard, the Chamber of Shipping for British Columbia, commercial and tourism associations, and potentially affected Indigenous groups. The Board also notes Trans Mountain's commitment to raise awareness amongst Project-related tankers about conditions near Swiftsure Bank in its Port Information and Terminal Operations Manual. The Board acknowledges the safety concerns that were shared	14.8.1
	Lyackson First Nation Makah Tribal Council Pacheedaht First Nation Tsartlip First Nation Musqueam Indian Band Swinomish, Tulalip, Suquamish, and Lummi Indian Nations (US Tribes)				14.8.3

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
		Georgia, Haro Strait and Juan de Fuca Strait). The study concluded that Project-related vessel wakes are substantially smaller in height and substantially less in frequency of occurrence compared to existing and future commercial vessels (particularly ferries) operating along the same vessel routes and, therefore, Project-related wakes are insignificant compared to other vessel wakes already present. The study also concluded that vessel wakes from Project-related traffic are small or insignificant compared to naturally occurring wind waves that occur frequently in local waters and are considered routine by most experienced boaters. Trans Mountain said that raising user awareness and knowledge amongst small vessel operators is of great importance to ensure safety of all waterway users, regardless of Project-related shipping. Trans Mountain noted that multi-party solutions with active collaboration between industry and government are required to ensure continued maintenance and advancement of the marine safety regime, and it supports the approach proposed under the OPP, whether or not the Project proceeds. Trans Mountain committed to provide financial assistance to smaller vessels registered in WCMRC's Vessel of Opportunity program to be fitted with Automatic Identification Systems and radar reflectors, which will aid in locating vessel assets during standard operations, as well as while undertaking response activities, and will enhance safety.	improve marine navigational safety and enhance sharing of marine traffic information with local communities in near real time. The Federal authorities submitted that amendments are being proposed to the <i>Navigation Safety Regulations</i> to extend the requirement for Automatic Identification System to smaller passenger vessels to enhance navigation safety in terms of search and rescue efforts and collision avoidance. The VFPA said that measures to avoid, reduce, and/or offset the impacts of Project-related marine shipping vessels on non-Project-related vessels, including private recreational vessels, included the establishment of Traffic Control Zones in both the First Narrows (TCZ-1) and Second Narrows (TCZ-2) facilitating the safe navigation and efficient movement of vessels in this area of the port. The VFPA said that in addition to the relevant information published in the Port Information Guide, the VFPA publishes the safe boating guides for various parts of the ports jurisdiction, including the Burrard Inlet. The VFPA said that to support the safe and efficient movement of all vessel traffic within the Port of Vancouver, the VFPA issues annual media releases highlighting safe boating initiatives.	by Indigenous communities. Therefore, the Board has included Recommendation 12 which would require the Governor in Council, in conjunction with the Pacific Pilotage Authority and Transport Canada, to continue engagement and awareness activities targeting coastal Indigenous communities, recreational boaters, fishing vessel operators, and operators of small vessels with respect to safety of navigation and prevention of collisions with larger vessels. This should include incorporating the resources and information that Trans Mountain has already provided or will provide to the Pacific Pilotage Authority, such as applicable information on Project-related vessel timing and scheduling. The Board also sees value in the work the Federal Authorities are doing to enhance sharing of marine traffic information with local communities and promote safer navigation. The Board proposes Recommendation 13 that encourages GIC to accelerate the development and implementation of these programs. The Board also notes Trans Mountain's commitment to support the multi-party initiatives that are being led by Transport Canada, the Canadian Coast Guard, DFO, the VFPA, all of which are working to better understand and manage the potential impacts of marine shipping activity throughout the south coast of BC. The Board finds that there will be disruptions to Indigenous marine vessels and harvesters, and that this may disrupt activities or access to sites. The Board is of the view that these disruptions will be temporary, only occurring during the period of time when Project-related tanker vessels are in transit. While there is concern about interactions between Project-related marine vessels and traditional fishing vessels, the Board is of the view that disruptions that may result from interference or collisions with Project-related vessels are considered to be unlikely due to adherence to regulatory standards and navigational and safety measures by marine vessels. The Board is also of the view that any disruptions to Indigenous marine vessel users that would result from Project-related marine vessel traffic would be temporary, that the frequency of Project related marine vessels would be one return transit per day, and that all other marine vessels, including Indigenous marine vessel users, would be able to continue their movements very shortly after the transit of the tanker. In the unlikely event of a collision or damage to or loss of fishing gear, a comprehensive scheme of compensation would be available.	

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Effects of operational marine shipping on heritage resources	Blood Tribe (Kainai First Nation) Tsartlip First Nation Tsawout First Nation	Trans Mountain said there are 81 previously recorded archaeological sites located in proximity to the marine vessel corridor. The combination of existing vessel traffic, Project-related vessel traffic and reasonably foreseeable vessel traffic will increase the frequency of wake waves interacting with the shoreline. Trans Mountain said that as wakes generated by vessels will be within natural wave size variation by the time they reach the shoreline, there is no discernible impact on shorelines associated with the shipping channel.	Parks Canada Agency noted that portions of the proposed shipping route are adjacent to the Gulf Islands National Park Reserve.	The Board is not convinced that effects from the Project-related vessels would translate into impacts on heritage resources. The Board is of the view that Project-related vessel wake will be localized to the shipping lanes and within natural wave size variation by the time they reach the shoreline.	14.8.2
Effects of operational marine shipping on traditional marine resource uses, cultural practices and activities	Adams Lake Indian Band Blood Tribe (Kainai First Nation) Ditidaht First Nation Driftpile Cree Nation Heiltsuk First Nation Kwantlen First Nation Little Shuswap Lake Indian Band Louis Bull Tribe Lyackson First Nation Makah Tribal Council Malahat First Nation First Nations of the Maa-Nulth Treaty Society Musqueam Indian Band Pacheedaht First Nation Seabird Indian Band Shxw'ówhámél First Nation Snuneymuxw First Nation Squamish Nation Stk'emlupsemc te Secwepmc of the Secwepmc Nation Stó:lō Collective Stó:lō Tribal Council Stz'uminus First Nation Tsartlip First Nation Tsawwassen First Nation Tsawout First Nation	Trans Mountain said that the types of impacts presented by Indigenous communities in their written and oral traditional evidence are consistent with those assessed in the original Application, and no new information was presented that changes any of the results from that assessment. Trans Mountain said that it has reviewed the new information provided by Indigenous communities as part of the MH-052-2018 hearing in the context of its original ESA and has determined that the significance conclusions of the ESA with regard to TMRU remain unchanged for both Project-related effects and the contribution to cumulative effects.	Multi-party initiatives are being led by Transport Canada, the Canadian Coast Guard, DFO, the VFPA, all of which are working to better understand and manage the potential impacts of marine shipping activity throughout the south coast of BC.	The Board acknowledges the safety concerns that were shared by Indigenous communities. Therefore, the Board has included Recommendation 12 which would require the Governor in Council, in conjunction with the Pacific Pilotage Authority and Transport Canada, to continue engagement and awareness activities targeting coastal Indigenous communities, recreational boaters, fishing vessel operators, and operators of small vessels with respect to safety of navigation and prevention of collisions with larger vessels. This should include incorporating the resources and information that Trans Mountain has already provided or will provide to the Pacific Pilotage Authority, such as applicable information on Project-related vessel timing and scheduling. The Board also notes Trans Mountain's commitment to support the multi-party initiatives that are being led by Transport Canada, the Canadian Coast Guard, DFO, the VFPA, all of which are working to better understand and manage the potential impacts of marine shipping activity throughout the south coast of BC. The Board is of the view that not only will the Federal Authorities learn from Indigenous communities, the communities themselves will have the opportunity to become more aware of the entirety of marine traffic activity as well as the government's proposed measures in the TMRU areas that are of importance to them.	14.8.3

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
	Tsleil-Waututh Nation T'Sou-ke First Nation Tsuut'ina Nation Swinomish, Tulalip, Suquamish, and Lummi Indian Nations (US Tribes) Whitefish Lake First Nation #459 White Lake (Goodfish) Lake First Nation #128 Lyackson First Nation				
Impacts on Indigenous traditional use due to operational effects of marine shipping on SRKW	Driftpile Cree Nation Ermineskin Cree Nation Lyackson First Nation Makah Tribal Council Malahat First Nation Snuneymuxw First Nation Stó:lō Collective Stz'uminus First Nation Tsartlip First Nation Tsawout First Nation Tsawwassen First Nation Swinomish, Tulalip, Suquamish, and Lummi Indian Nations (US Tribes)	Trans Mountain said that it is of the view that multi-party initiatives are an essential approach to managing cumulative effects on the SRKW population, its critical habitat, and associated effects on traditional Indigenous use of the population. In its evidence, it provided an outline on those initiatives that were already underway, as described elsewhere in this Report, including: • The Oceans Protection Plan • The Action Plan for the Northern and Southern Resident Killer Whale • Pacific Salmon Foundation – Salish Sea Marine Survival Project • ECHO Program • Green Marine • Chair in Cetacean Research at UBC Trans Mountain noted that all of the multi-party initiatives also act in support of the requirements of Condition 132 - Marine Mammal Protection Plan (MMPP). Trans Mountain noted that its Condition 132 compliance filing is required three months prior to commencing operations on the Project, however, it said that it had plans to commence a process to solicit and obtain feedback and comments from Indigenous communities on a draft version of the MMPP no later than 18 months prior to the commencement of Project operations.	Federal Authorities pointed to multi-party initiatives noted by Trans Mountain. They noted that a key principle across all OPP activities is building Indigenous partnerships. They said that funding for Indigenous engagement and participation in the OPP gives recipients the opportunity to take part in developing and improving Canada's marine transportation system and contribute their knowledge towards tailoring marine transportation systems to local conditions and the environment. The Federal Authorities also noted that during engagement on the OPP, as well as during Project-specific reviews and engagement activities, they heard from Indigenous communities that they want to be able to monitor real-time vessel traffic in a system that identifies areas of traditional use, as a potential means to mitigate impacts on this use. Further, Indigenous communities have indicated during this engagement that they may want sensitive areas, such as SRKW habitat, identified in the system. One of the potential sources of information to be displayed in the Enhanced Maritime Situational Awareness system is data relating to the current position of marine mammals, including the SRKW. The Federal Authorities noted that there are various potential sources of this data, which could be shared directly with British Columbia Coast Pilots and the commercial shipping industry to improve their situational awareness and minimize interference with the SRKW. Although the pilot project has not yet begun, the Federal Authorities said that they understand that Indigenous peoples want to be able to monitor real-time vessel traffic in an application that identifies areas of traditional use, as a potential means to mitigate impacts on this use. The Federal Authorities said that meaningful collaboration on potential adverse effects of Project-related marine traffic could be enabled through Proactive Vessel Management forums between Indigenous communities, industry, Non-Governmental Organizations, and federal and other authorities. For example, they noted that	The Board notes that within the MH-052-2018 hearing, Indigenous communities provided additional evidence regarding their familial connections with the SRKW, including the role the SRKW have in their origin stories and the cultural teachings that have been passed down from generation to generation as result of their spiritual connection with the SRKW. The Board finds that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the SRKW. The Board finds that Project-related marine vessel traffic would further contribute to total cumulative effects which are determined to be significant, with or without the Project. Given these conclusions and recognizing the stated cultural importance of the killer whale to certain Indigenous groups, the Board finds that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Indigenous use associated with the SRKW. The Board notes that Indigenous intervenors have indicated that they were not satisfied with the mitigation measures that have been proposed by Trans Mountain or are currently underway as part of the Federal Authorities programs to reduce disturbances on the SRKW in the Salish Sea. The Board notes that embedded in all of these initiatives is consultation with Indigenous communities, with an aim to understanding where traditional marine use activities take place, as well as the incorporation of Indigenous traditional knowledge, where appropriate. The Board is of the view these increased opportunities for Indigenous communities to provide input about their, traditional knowledge, TMRU activities and cultural practices, could, in time, lead to improvements in the mitigation measures. As a result, the Board has included Recommendation	14.8.3

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
			Indigenous communities could raise their concerns in a Proactive Vessel Management Forum around the impacts of vessel traffic patterns on the SRKW populations in their local waterways. Forum participants would then work to gather information and evidence necessary to assess these concerns and identify potential, cooperative (i.e., non-regulatory) measures to address them. The Federal Authorities also noted that a contracted study on how to incorporate traditional knowledge into a proactive vessel management approach has been received and analyzed. The Federal Authorities noted that one of the measures for the Species at Risk Action Plan for Northern and Southern Resident Killer Whale (<i>Orcinus orca</i>) in Canada (2017) is to incorporate Indigenous Traditional Knowledge on the behaviour and distribution of SRKW and their prey into measures for the recovery of the species. DFO said that Indigenous communities are being engaged through governance bodies such as the SRKW Indigenous and Multi-stakeholder Advisory Group, and the DFO-led SRKW prey availability working group.	1 which would require GIC to develop and implement a regional cumulative effects management plan implemented in consultation with Indigenous peoples, other marine users, the Province of British Columbia and local governments, VFPA, and other relevant stakeholders.	
Human Health effects from Project-related marine shipping	BC Métis Federation Driftpile Cree Nation Louis Bull Tribe Shxw'owhámel First Nation Squamish Nation Stz'uminus First Nation Tsuut'ina Nation Tsleil-Waututh Nation Whitefish Lake First Nation #459	During the MH-052-2018 hearing, Trans Mountain submitted a 2017 report prepared for the VFPA titled "Environmental Air Assessment." Annual emission estimates for all of the contaminants of interest including GHGs and NO_x were provided in Tables 37 to 40 for the VFPA Study Area, which extends to the western port jurisdictional boundary at the mouth of the Burrard Inlet. This report indicated that, based on dispersion modelling results with a number of conservative assumptions, which were intended to over-estimate effects, the Project would comply with all applicable ambient air quality objectives in place at that time, including those for nitrogen dioxide (NO₂). Trans Mountain said that it intends to manage arriving vessels to minimize the use of anchorages by holding tankers at the Westridge Marine Terminal dock whenever a berth is available, even if cargo transfer is not planned immediately. Trans Mountain also said that if assigned berth is not immediately available, there is inclement weather, or for any other reason the berth or vessel is not ready, the vessel may anchor at one of the four designated anchorages that have been established within the jurisdiction of the VFPA.	Health Canada said that it is not aware of any information that would alter the views expressed in the department's 2015 Letter of Comment concerning mitigation and monitoring for the potential health effects of Project-related marine shipping. The VFPA Port Information Guide from May 2018 includes guidelines concerning noise and light for all vessels anchoring within the Port of Vancouver. For example, all vessels, while at anchor, should minimize noise levels and light usage in consideration of local residents. VFPA also created a Noise Monitoring Program to help better understand the source and intensity of port-related noise in order to better respond to community concerns. Health Canada said that it does not appear that the sound from three ships docked and idling at the same time was evaluated, which is the worst-case scenario for noise generation from docked vessels. Health Canada also said there is no apparent formal complaint resolution plan identified. In the event of public complaints related to project-related noise as it affects residents adjacent to anchorages, Health Canada recommended that a formal, transparent and readily accessible complaint-response process be in place as a means of identifying and mitigating Project-related noise complaints.	In response to Health Canada's recommendation and NS NOPE's submissions during the MH-052-2018 hearing for a formal complaint resolution process to address concerns about noise and light from tankers docked at the VFPA managed anchorages, the Board is of the view this mitigation measure is not within Trans Mountain's control. The VFPA remains the steward of the Port of Vancouver. The VFPA has guidelines concerning noise and light for all vessels anchoring within the Port of Vancouver; however, it is not clear from the evidence on the record whether the VFPA has a formal complaint resolution process. Therefore, the Board would include Recommendation 16 encouraging GIC, in conjunction with VFPA, to develop a formal complaint resolution program that gathers community feedback, brings together diverse community stakeholders to facilitate discussions about port-related impacts, and resolves complaints about vessels anchored at the VFPA-managed anchorages. Considering that Trans Mountain will be required to adhere to all federal and international emission requirements to reduce emissions from the Project-related marine shipping, the Board finds that the residual effects from Project-related marine shipping is not likely to cause significant adverse effects on human health, including the health of Indigenous people.	14.8.4

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Effects of accidents and malfunctions (oil spills)					
Environmental effects					
Adequacy of ecological risk assessment	Snuneymuxw First Nation Squamish Nation Stz'uminus First Nation Tsleil-Waututh Nation	Trans Mountain said that the information contained in Dr. Short's 2018 report is generally the same as that presented in the OH-001-2014 proceeding, that the report erroneously interpreted the intent and conclusions of Trans Mountain's evidence regarding the fate and behaviour of diluted bitumen, and the opinions presented lack substantiation through provision of specific numbers or reference to relevant expert studies. Trans Mountain said that as such Dr. Short's 2018 report does not change, or cast doubt on, the findings or conclusions in the NEB Report. Trans Mountain said that the Royal Society of Canada (2015) Expert Panel Report on "The Behaviour and Environmental Impacts of Crude Oil Released into Aqueous Environments", commented that the risk assessments conducted for Trans Mountain Expansion Project are impressive documents in their scope and detail, and are among the best of their kind.		The Board finds Trans Mountain's approach reasonable and in Board's view the locations modeled by Trans Mountain provide representative effects.	14.9.1
Effects of accidents and malfunctions (oil spills) on marine fish and fish habitat	Adams Lake Indian Band BC Métis Federation Cheam First Nation Chawathil First Nation Coldwater Indian Band Driftpile Cree Nation Ermineskin Cree Nation Kwawwaten First Nation Little Shuswap Lake Indian Band Musqueam Indian Band Nooaitch Indian Band Seabird Island Band Squamish Nation Stk'emlupsemc te Secwepmc of the Secwepmc Nation Tsartlip First Nation Tsuut'ina Nation Whitefish (Goodfish) Lake First Nation #128	Trans Mountain evaluated potential environmental effects of worst-case and smaller oil spills resulting from marine transportation and these results can be applied to evaluate potential spill-related effects on salmonid fish including Chinook Salmon and Steelhead Trout. Trans Mountain said that the potential effects of marine oil spills on salmonid species, including Coho Salmon and Steelhead Trout, were evaluated and tested during the OH-001-2014 proceeding. It said that there has been no change in Trans Mountain's assessment of potential effects to Pacific salmon species resulting from hypothetical spills along the marine transportation route.	DFO said that in the case of significant spills, it provides advice and input about environmental sensitivities in the spill area and the prioritization of protection measures through the Incident Command System (ICS). It said that the Environmental Unit under the ICS is where technical experts from all response partners combine to provide advice on environmental protection objectives and priorities, strategies and tactic implementation. Species of conservation concern (e.g., <i>Species at Risk Act</i>-listed species) are considered an "elevated priority" when the Environmental Unit determines the protection objective and its subsequent protection strategies and tactical implementation. DFO said that a holistic approach for the protection and treatment of marine mammals, invertebrates, fish and turtles for an oil / chemical spill will draw on all relevant information including physical, chemical, biological, and geographic information.	The Board is of the view that the environmental effects of a spill from a tanker would be highly dependent on the particular circumstances, such as the amount and the type of product(s) spilled, location of the spill, response time, the effectiveness of containment and clean-up, the valued components that are impacted, and the weather and time of year of the spill. In the Board's view, there is a spectrum of potential spill outcomes ranging from small quickly contained spills that do not result in significant effects to credible worst-case spills that would result in significant effects. In between these two extremes are other spills that could also result in significant effects depending upon the circumstances. The Board finds the probability of a worst-case event is very low.	14.9.4

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Effects of accidents and malfunctions (oil spills) on marine mammals	Shxw'ówhámel First Nation Snuneymuxw First Nation Squamish Nation Stz'uminus First Nation		DFO said that a marine mammal oil spill response plan is in development. It focuses on preventing exposure of marine mammals, including resident killer whales, to spills. This includes strategies for monitoring and tracking SRKW; prevention of exposure to oil spills by prioritizing cleanup and booming efforts for key areas; and prevention of exposure using acoustic deterrents to keep resident killer whales away from spill affected areas. There are a number of actions completed or underway to support the strategies described above, including: a real time SRKW tracking network in SRKW critical habitat is in development to assist with locating and determining the direction of travel of SRKWs using hydrophones and cetacean sighting. It said that the current Fisheries and Oceans Canada (DFO) approach is to develop a single marine mammal spill response plan that covers all marine mammal species, including Species at Risk Act-listed species. It focuses on preventing exposure of marine mammals, including resident killer whales, to spills. This includes strategies for monitoring and tracking SRKW; prevention of exposure to oil spills by prioritizing cleanup and booming efforts for key areas; and prevention of exposure using acoustic deterrents to keep resident killer whales away from spill affected areas. DFO said that in the case of significant spills, it provides advice and input about environmental sensitivities in the spill area and the prioritization of protection measures through the Incident Command System (ICS). It said that the Environmental Unit under the ICS is where technical experts from all response partners combine to provide advice on environmental protection objectives and priorities, strategies and tactic implementation. Species of conservation concern (e.g., Species at Risk Act-listed species) are considered an "elevated priority" when the Environmental Unit determines the protection objective and its subsequent protection strategies and tactical implementation. DFO said that a holistic approach for the protection and treatment of marine mammals, invertebrates, fish and turtles for an oil/chemical spill will draw on all relevant information including physical, chemical, biological, and geographic information.	The Board is of the view that the environmental effects of a spill from a tanker would be highly dependent on the particular circumstances, such as the amount and the type of product(s) spilled, location of the spill, response time, the effectiveness of containment and clean-up, the valued components that are impacted, and the weather and time of year of the spill. In the Board's view, there is a spectrum of potential spill outcomes ranging from small quickly contained spills that do not result in significant effects to credible worst-case spills that would result in significant effects. In between these two extremes are other spills that could also be result in significant effects depending upon the circumstances. The Board finds the probability of a worst-case event is very low.	14.9.4
Effects of accidents and malfunctions (oil spills) on marine birds	Malahat First Nation Snuneymuxw First Nation Squamish First Nation Stz'uminus First Nation Tsawout First Nation Tsawwassen First Nation	Trans Mountain said that ECCC would be best placed to collect migratory bird and species at risk data, conduct assessment strategies, identify response strategies, and determine the type and extent of monitoring in relation to informing Wildlife Emergency Response Plans] for marine transportation. Through participation in regional planning and preparedness efforts, Trans Mountain understands that other federal	ECCC said it has been resourced (initially under World Class Tanker Safety Phase II, and currently under Oceans Protection Plan Regional Response Planning sub-initiative) to collect marine bird environmental sensitivities data in marine waters of southern BC, including but not limited to the Salish Sea.	The Board is of the view that the environmental effects of a spill from a tanker would be highly dependent on the particular circumstances, such as the amount and the type of product(s) spilled, location of the spill, response time, the effectiveness of containment and clean-up, the valued components that are impacted, and the weather and time of year of the spill.	14.9.4

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
	Tsleil-Waututh Nation	government agencies, provincial government agencies, Indigenous and local communities, vessel operators, Western Canada Marine Response Corporation, and other stakeholders would also have a role in one or more aspects related to informing a WERP. Trans Mountain said that it would consider opportunities to implement or support or participate in the collection of information that could be used in a WERP.		The Board notes the concern raised by Dr. Short said that small to medium sized oil spills on the order of 100 to 1,000 m3 from the Project can cause substantial mortalities to seabirds, and estimated effects for small to medium spills in Canada and in Alaska. In the Board's view, there is a spectrum of potential spill outcomes ranging from small quickly contained spills that do not result in significant effects to credible worst-case that would result in significant effects. In between these two extremes are other spills that could also be result in significant effects depending upon the circumstances. The Board finds the probability of a worst-case event is very low.	
Effects of accidents and malfunctions (oil spills) on sand verbena moth	Tsawout First Nation	Sand-verbena Moth and Yellow Sand-verbena are terrestrial species that occupy habitats above the high tide limit. There are no identified direct interactions between Sand-verbena Moth (and its host plant) and Project-related marine transportation (routine operations or accidents and malfunctions). Therefore, no adverse effects are anticipated, and no specific mitigation measures are proposed or required.		The Board accepts Trans Mountain's response to this concern.	14.9.4
Socio-economic effects					
Effects of accidents and malfunctions (oil spills) on heritage resources	Tsleil-Waututh Nation	Trans Mountain did not provide updated views on effects of accidents and malfunctions on heritage resources. In the OH-001-2014 hearing, Trans Mountain said that heritage resources could be affected by a spill in a number of ways. Oil and cleanup activities can directly damage artifacts and sites or disturb their context, which may result in permanent loss of information.	The Canadian Coast Guard said that it is the on-water federal lead agency for marine pollution response. It provides oversight of every marine incident and is responsible for ensuring the cleanup of ship-source and mystery-source spills of oil and other pollutants into Canadian waters. Should the polluter be unable, unwilling, or unknown, the Canadian Coast Guard would assume command of the situation and ensure an appropriate response to the incident.	The Board acknowledges the high degree of concern Indigenous groups have regarding potential spills or contamination of the ocean, and how it would impact archaeological sites located on the shoreline. The Board is of the view that the effects of a spill from a tanker would be highly dependent on the particular circumstances, such as the amount and the type of product(s) spilled, location of the spill, response time to contain and recover the spill, the effectiveness of containment and clean-up, and the weather and time of year of the spill. A credible worst-case spill would have adverse effects. The Board is of the view that the effects of a credible worst-case spill on heritage resources could be adverse and significant. However, the Board is of the view that the probability of such an event is very low. The Board encourages Indigenous groups to participate in the spill response planning process with regulatory authorities such as the Canadian Coast Guard and Transport Canada, and the certified response organization WCMRC. The Board also encourages Indigenous groups to share information regarding potential archaeological and cultural heritage sites with the B.C. Ministry of Forests, Lands & Natural Resource Operations.	14.10.2 14.11.3

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Effects of accidents and malfunctions (oil spills) on traditional marine use	Adams Lake Indian Band	Trans Mountain acknowledged the concerns raised by Indigenous communities related to the potential for a marine spill and the adequacy of spill response procedures and mechanisms and the ultimate effect of any oil spill on Indigenous culture and way of life. Trans Mountain submitted that the original assessment conclusions have not changed as a result of the additional evidence provided by Indigenous communities in the MH-052-2018 hearing. Trans Mountain also acknowledged the concerns raised by non-coastal Indigenous communities regarding the impacts of a marine spill adversely affecting the salmon resources returning from the ocean to inland areas. Trans Mountain said it understands the integral cultural and economic importance of the Thomson and Fraser River fisheries to inland Indigenous communities in BC. Trans Mountain noted that Geographic Response Strategies (GRS) are being developed by WCMRC as part of implementing the Enhanced Response Regime (ERR). It further noted that WCMRC continues to develop partnerships with Indigenous and/or coastal communities as part of their overall community engagement process and in order to develop new and improve existing GRS, including the collection of Traditional Marine Resource Use/Traditional Ecological Knowledge information from Indigenous communities to incorporate into its GRS. Trans Mountain stated that upon request of WCMRC it is ready to assist or facilitate conversations between WCMRC and Indigenous communities.	The Canadian Coast Guard said that it is the on-water federal lead agency for marine pollution response. It provides oversight of every marine incident and is responsible for ensuring the cleanup of ship-source and mystery-source spills of oil and other pollutants into Canadian waters. Should the polluter be unable, unwilling, or unknown, the Canadian Coast Guard would assume command of the situation and ensure an appropriate response to the incident.	The Board is of the view that the effects of a credible worst-case spill on the current use of lands, waters and resources for traditional purposes by Indigenous people would likely be adverse and significant. The Board finds that although impacts from a credible worst-case spill would probably be adverse and significant, natural recovery of the impacted areas and species would likely return most biological conditions to a state generally similar to pre-spill conditions. Certain values and uses could be lost or diminished in the interim. The Board notes Trans Mountain's commitment to use available spill response technologies to mitigate spill impacts to ecosystems and assist in species recovery. The Board is of the view that implementation of an appropriate spill response, and measures such as compensation and harvest restrictions or closures would lessen the effects experienced until resource-dependent species recover. The Board finds the probability of a worst-case event is very low.	14.10.5
	Blood Tribe (Kainai First Nation) Ditidaht First Nation Coldwater Indian Band Driftpile Cree Nation Heiltsuk First Nation Indigenous Caucus for the Trans Mountain Indigenous Advisory and Monitoring Committee Little Shuswap Lake Indian Band Lyackson First Nation Neskonlith Indian Band Nooaitch Indian Band First Nations of the Maa-nulth Treaty Society Makah Tribal Council Malahat First Nation Musqueam Indian Band Shxw'ōwhámel First Nation Snuneymuxw First Nation Squamish Nation Stk'emlupsemc te Secwepmc of the Secwepmc Nation Stz'uminus First Nation Stó:lō Collective Stó:lō Tribal Council Tsartlip First Nation Tsawout First Nation Tsawwassen First Nation T'Sou-ke First Nation Tsuut'ina Nation Tsleil-Waututh Nation Swinomish, Tulalip, Suquamish, and Lummi Indian Nations (US Tribes)				14.11.3

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Human Health effects from accidents and malfunctions (oil spills)	Chawathil First Nation Cheam First Nation Kwantlen First Nation Seabird Island Band Squamish Nation Stó:lō Collective Stó:lō Tribal Council Tsartlip First Nation Tsilil-Waututh Nation	Trans Mountain said that effects of an oil spill from Project-related marine shipping was thoroughly canvassed in the OH-001-2014 hearing. Overall, none of the information filed by Intervenor in the MH-052-2018 hearing is new or updated information that is materially different from the information the Board considered in the OH-001-2014 hearing. As a result, Trans Mountain said that the Board's findings in OH-001-2014 hearing remain valid and no changes to the Conditions are warranted. Trans Mountain said an evaluation of the combined effects of crude oil and dispersants in the Ecological Risk Assessment of Marine Transportation Spills Technical Report is not warranted, given that the use of dispersants is not a pre-approved response technique in the marine RSA,	The Canadian Coast Guard said that it undertakes emergency response planning for marine spills within its mandate, which includes potential spills from Project-related marine shipping. The approach and principles described in the Canadian Coast Guard's response plans are consistent with those described in Health Canada's "Guidance for the Environmental Public Health Management of Crude Oil Incidents – A Guide Intended for Public Health and Emergency Management Practitioners." Both Health Canada and the Canadian Coast Guard prioritize the health and safety of first responders and the public during the spill response. The Canadian Coast Guard submitted version 2.0 of the Greater Vancouver Integrated Response Plan (GVIRP) for Marine Pollution Incidents. At a local level, the GVIRP integrates public health management during both preparedness and response. There are many organizations that were instrumental and agree in principal to support the implementation and ongoing maintenance of the Plan, including First Nation Health Authority and Vancouver Coastal Health Authority. The GVIRP includes information about the role of health authorities during response to marine pollution incidents that occur, or may occur, in the Greater Vancouver Area. CCG said that no dispersants are currently approved for use in response to ship-source oil spills in Canada.	The Board is of the view that, in the event of a spill in the marine environment during shipping, including a large spill, there would be adverse effects on human health. These effects would vary over time and space depending on the location and extent of the spill, and there would likely be exceedances of certain short-term exposure limits for some chemicals of potential concern, including both carcinogenic and non-carcinogenic chemicals, but these would be expected to diminish in the hours following a spill. The Board notes some of the concerns from the OH-001-2014 hearing about the inclusion of local and Indigenous health authorities in marine pollution incidents. The Board is encouraged to see, in the evidence submitted in the MH-052-2018 hearing, that the First Nation Health Authority and Vancouver Coastal Health Authority were instrumental and agree in principal to support the GVIRP. The Board also notes concerns raised by municipalities in the MH-052-2018 hearing about the inclusion of more detailed information in the GVIRP around air quality monitoring. The Board is not including a recommendation to GIC on this topic because the GVIRP is the product of a cooperative effort and the Board is not well positioned to prescribe detailed requirements. In response to the suggestion for Trans Mountain to expand its Marine Public Outreach Program to include risks to public health in the event of a marine spill, the Board is of the view that the federal government has the authority to address such matters. Therefore, the Board would include Recommendation 12 encouraging GIC, in conjunction with the Pacific Pilotage Authority and Transport Canada, to continue engagement and awareness activities targeting Indigenous coastal communities, recreational boaters, fishing vessel operators, and operators of small vessels with respect to safety of navigation and prevention of collisions with larger vessels. The focus of these engagement and awareness activities should be determined by the regulatory authorities who have the appropriate jurisdiction and expertise. Based on the evidence before it, the Board finds that a large spill in Burrard Inlet is not a likely event. The Board is therefore of the view that the potential effects on human health that are predicted to result from such spill scenarios are also not likely to occur.	14.10.6

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Spill prevention, risk analysis, emergency preparedness and response					
Adequacy of spill prevention measures	Makah Tribal Council Heiltsuk First Nation	Current data from the International Tanker Owners Pollution Federation filed by Trans Mountain indicated that there is a continued downward trend in large oil spills (>700 tonnes) and medium sized spills (7 – 700 tonnes) from tankers on a world-wide basis despite a world-wide increase in seaborne oil trade. Trans Mountain said that since the issuance of the OH-001-2014 Report, it has continued to engage and work with the BC Coast Pilots Ltd., Pacific Pilotage Authority, Transport Canada, Canadian Coast Guard and the Vancouver Fraser Port Authority to complete its commitments under the TERMPOL Review Committee's Findings and Recommendations.	The Canadian Coast Guard provided an update on improvements and initiatives related to Marine Communications and Traffic Services (MCTS) and the safe navigation of vessels. The role of the MCTS program is to provide communications services to mariners in Canadian waters on a 24/7 basis. This includes responding to vessels in distress, providing safety services to mariners, communicating with vessels, regulating traffic in vessel traffic zones and identifying and tracking vessels operating in Canadian waters through data sensors such as radar and Automatic Identification System. The Canadian Coast Guard said that modernization and consolidation of MCTS centres across the country and a preliminary assessment of the existing aids to navigation system along the route identified in the Trans Mountain's TERMPOL submission was completed. The Canadian Coast Guard said it is continuing to explore and test e-Navigation concepts and technologies in order to provide current and contextualized marine navigational information to improve marine safety when operating in Canadian waters. From 2024 to 2026, the Canadian Coast Guard will replace its RADAR systems as part of its lifecycle management of these assets. Transport Canada said that pre-identification of potential places of refuge is key in a time-sensitive situation. Pre-planning allows for the deliberate compilation and consideration of information prior to an incident such as information on logistics, environmental sensitivities, human use, navigation, potential use conflicts and local knowledge. It said that it is reviewing and updating the 2007 Places of Refuge Contingency Plan and associated regional plans, with engagement from key partners. The intent is for the work to be completed by 2022. The Vancouver Fraser Port Authority said that it has developed and formalized Traffic Control Zones, formerly known as Movement Restricted Areas, for the purpose of promoting safe and efficient navigation and environmental protection in the waters of the port. The Vancouver Fraser Port Authority also noted that it had proposed to Transport Canada Marine Safety and Security in 2018 that the Vancouver & Approaches Traffic Separation Scheme be amended, with a target date for implementation of 2019. Transport Canada continues to support Trans Mountain's commitment for enhanced tug escort for Project-related tankers being made mandatory through the certificate terms and conditions through the Board's permitting process.	To bolster regulatory oversight and make enhanced tug escort mandatory for Project-related tankers in the Salish Sea, the Board recommends that the Governor in Council develop a regulatory framework for making such tug escort mandatory for Project-related tankers (Recommendation 8). GIC should also consider mandatory enhanced tug escort for other vessels as appropriate. The Board is of the view that the evidence filed by those bodies that regulate marine shipping and by Trans Mountain indicate that there is an acceptable level of safety in place regarding marine shipping associated with the Project.	14.11.1. 14.11.2

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
Adequacy of marine shipping risk analysis	Makah Tribal Council Snuneymuxw First Nation Squamish Nation Stz'uminus First Nation Tsleil-Waututh Nation	Trans Mountain said that the results of its own application of the United States Bureau of Ocean Energy Management's Oil Spill Risk Assessment Model validates the refined results of the risk assessment conducted as part of the original proceeding on the likelihood of oil spill by a Project-related tanker. These results indicated a 16 percent likelihood of an oil spill over 50 years for Project-related tankers.		The Board accepts Trans Mountain's evidence that there are no proposed or widely accepted risk acceptance criteria for marine oil spills. The Board understands that the marine shipping risk assessment performed for the Project-related tankers and the marine shipping risk assessment undertaken for Transport Canada and the report of the Tanker Safety Expert Panel do not recommend stoppage of marine shipping in the area. Rather, such risk assessments are intended to inform mitigation to lessen the potential for an accident to occur, and for spill response planning. That is, the Board does not view the results of these risk assessments as absolute indicators of the actual probability of a spill occurring. The Board has recommended that the Governor in Council consider the need for a transboundary vessel traffic risk assessment in conjunction with relevant United States regulatory authorities (Recommendation 9).	14.11.2
Adequacy of emergency preparedness and response	Chawathil First Nation Cheam First Nation Cowichan Tribes Ditidaht First Nation Driftpile Cree Nation Ermineskin Cree Nation Heiltsuk First Nation Indigenous Caucus for the Trans Mountain Indigenous Advisory and Monitoring Committee Kwantlen First Nation Lyackson First Nation Makah Tribal Council Malahat First Nation Pacheedaht First Nation Nooaitch Indian Band Seabird Island Band Snuneymuxw First Nation Stó:lō Tribal Council Stz'uminus First Nation Tsleil-Waututh Nation T'Sou-ke First Nation Tsuut'ina Nation	Trans Mountain said that it has made numerous enhancements to its Emergency Management Program since the date of the Board's OH-001-2014 Report. These enhancements strengthen marine oil spill prevention, emergency preparedness, and response measures. Trans Mountain concluded that with implementation of its proposed enhanced marine oil spill response regime, WCMRC's response capacity would be commensurate with the legislated worst-case discharge planning standards in the US. It said that the intent of the Canadian regime is to ensure that a level of preparedness exists such that a suitable response is in place and ready to be deployed in the event of any spill, regardless of size and condition. National and international mutual aid agreements are also part of a response organization's capability for spills that exceed their capacity. Trans Mountain said that use of chemical dispersants in response to any oil spill would only be considered on a case by-case basis, in consultation with federal regulators, local authorities and other experts, and where this use would result in net environmental benefit. It also said that the use of Spill Treating Agents in Canadian waters is prohibited under federal law except under certain conditions in relation to	The Canadian Coast Guard said that environmental response planning in the Lower Mainland and South Coast is ongoing as part of regular Coast Guard spill response preparedness activities. The Canadian Coast Guard Marine Spills Contingency Plan – National Chapter establishes the requirement for Geographically Specific Response Planning, and the Coast Guard is working directly with Indigenous communities and other partners on the Lower Mainland and South Coast to develop Geographically Specific Response Plans, like the Greater Vancouver Integrated Response Plan. Canadian Coast Guard said that it maintains a close working relationship with WCMRC. When an incident occurs, the Coast Guard advises WCMRC of the developing situation to initiate any required preparation for response. This enables the WCMRC to mobilize and deploy staff, vessels and equipment accordingly. The Coast Guard and WCMRC maintain regular communication as the incident evolves. The Canadian Coast Guard and other federal participants discussed a number of response planning initiatives under the Oceans Protection Plan and other improvements to federal prevention, preparedness and response capabilities since 2015. The Vancouver Fraser Port Authority said that it co-chairs the Marine Emergency Response Coordination Committee with Canadian Coast Guard. The Marine Emergency Response Coordination Committee provides a venue for interested organizations to dialogue on the coordination of	To promote continued improvement in the marine oil spill response regulatory framework, the Board included Recommendation 7 which would require that the Governor in Council review and update federal marine shipping oil spill response requirements. This recommendation has been crafted such that it would include consideration of the concerns noted by the above parties. To the extent that response planning approaches and methodologies noted by the Nuka report would further enhance marine oil spill response, the Board recommends that the Governor in Council consider such approaches and methodologies as part of any work undertaken in response to Recommendation 7.	14.11.3

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
	Whitefish (Goodfish) Lake First Nation #128 Whitefish Lake First Nation #459	offshore oil exploration and production. Trans Mountain said that it provided comments on requirements for oil spill response organizations to Transport Canada in 2018, as part of the government's consultation on the Oceans Protection Plan Trans Mountain had proposed that the planning standard for response times of response organizations in a local area should be commensurate to the level of risk contributed by industry in the local area. Trans Mountain submitted that this was Trans Mountain's approach in facilitating the largest-ever expansion of spill response personnel and equipment on the BC coast by WCMRC.	marine assets in the Metro Vancouver area during emergency or security response and recovery activities. Under the Marine Emergency Response Coordination Committee is the Environmental Response Sub-Committee which addresses emergency response planning in the Greater Vancouver area. The Environmental Response Sub-Committee also serves as the primary source of subject matter expertise relating to any changes to the Greater Vancouver Integrated Response Plan. The Vancouver Fraser Port Authority noted that it cooperates with the Canadian Coast Guard, Western Canada Marine Response Corporation, first responders, and other agencies in emergency response through training and exercises and by providing information through its operations centre and patrol boats. Canadian Coast Guard said that it maintains storage capacity in the region to store and transport oily waste and that additional Canadian Coast Guard capacity could be cascaded to the impacted area from other regions of Canada, if required. Additional storage capacity, such as tankers and barges, could also be contracted during a response operation to meet any anticipated volume of oily waste. It said that incident-specific waste management plans are developed at the time of an incident based on the specific products, volumes and locations, and are reviewed to ensure that they meet local, provincial and federal laws and regulations. Canadian Coast Guard also described methods for transferring highly viscous oils such as weathered diluted bitumen as part of oily waste management. Transport Canada noted that a response organization must demonstrate that it has sufficient storage capacity to maintain oil/oil water waste recovery operations 24 hours a day. In addition, through mutual aid agreements and arrangements with other response organizations and contractors, responders have access to cascading resources that expand capabilities beyond the Transport Canada-mandated spill threshold of 10,000 tonnes		
Inclusion of Indigenous People in marine oil spill response and planning	Chawathil First Nation Cheam First Nation Indigenous Caucus for the Trans Mountain Indigenous Advisory and Monitoring Committee Kwantlen First Nation Pacheedaht First Nation Seabird Island Nation	Trans Mountain noted that Geographic Response Strategies (GRS) are being developed by WCMRC as part of implementing the Enhanced Response Regime (ERR). It further noted that WCMRC continues to develop partnerships with Indigenous and/or coastal communities as part of their overall community engagement process and in order to develop new and improve existing GRS, including the collection of Traditional Marine Resource Use/Traditional Ecological Knowledge information from Indigenous	Through the Indigenous Community Response Training initiative under the OPP, the Canadian Coast Guard has provided training to Indigenous communities that is then applied in joint operational exercises that incorporate all on-water first response partners, such as the Coast Guard Auxiliary, Indigenous communities, Parks Canada, other federal, provincial and municipal partners and any other implicated organizations. Regional training workshops are available to all coastal Indigenous communities.	The evidence before the Board indicates that since its OH-001-2014 Report, there have been substantial investments made by the federal departments and agencies and WCMRC aimed at including Indigenous people in marine oil spill planning and response. The Board also heard concerns from First Nations regarding the actual implementation of such initiatives. The Board notes that the IAMC has been operational since 2017 and is already participating in emergency	14.10.5 14.11.3

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
	Stó:lō Tribal Council	communities to incorporate into its GRS. Trans Mountain stated that upon request of WCMRC it is ready to assist or facilitate conversations between WCMRC and Indigenous communities.	Canadian Coast Guard said that as a result of training and exercise programs and response planning initiatives, Indigenous groups are pre-established as Incident Commanders in Canadian Coast Guard contingency response plans. Consequently Indigenous governments may choose to participate and lead in environmental response operations activated by the Canadian Coast Guard within their traditional territories in British Columbia.	management and marine exercises. The Board sees value in the role of this existing committee and encourages its participation in ongoing spill planning and response efforts. To promote the continued participation of Indigenous people in marine oil spill planning and response, the Board has specifically included the need for such inclusion in Recommendation 7. Recommendation 11 addresses engagement with, and feedback from, the Indigenous Advisory and Monitoring Committee on the marine safety system and Project-related marine shipping activities that intersect with Canadian Coast Guard operational programs.	
Financial Responsibility, Liability, and Insurance					
Ship-source oil pollution fund	First Nations of the Maa-nulth Treaty Society Esquimalt Nation Scia' new First Nation Pauquachin First Nation Tsleil-Waututh Nation Squamish Nation Stz'uminus First Nation Snuneymuxw First Nation		In October 2018, the Government of Canada introduced legislation to modernize Canada's Ship-Source Oil Pollution Fund, which includes a number of changes from what was described in the OH-001-2014 Hearing to ensure that unlimited compensation would be available to all eligible claims from victims and responders of oil spills from ships. If the Ship-Source Oil Pollution Fund contained insufficient funds to fully pay for a spill, then the Minister of Finance could grant a loan to the Ship-Source Oil Pollution Fund to pay all eligible claims. The Ship-Source Oil Pollution Fund can be replenished through an annual levy on oil receivers and exporters, as well as providing the option to impose a temporary supplementary levy if the annual levy is insufficient. The Ship-Source Oil Pollution Fund would provide emergency funding to the Canadian Coast Guard to respond to a significant oil spill. The Canadian Coast Guard would use these funds to respond to the oil spill and compensate third parties for their response activities under its direction. A simplified and expedited process for claims under \$35,000 would be established, allowing the Ship-Source Oil Pollution Fund to accept small claims without conducting a full investigation and assessment. Transport Canada described the types of losses and damages compensable under the <i>Marine Liability Act</i> to include measures to prevent or minimize damage; clean-up and containment costs; property damage; environmental damage limited to loss of profit, post-spill studies and costs of reasonable measures of reinstatement undertaken or to be undertaken; and economic losses. An economic loss occurs when oil pollution has caused a loss of earnings to persons whose property has not been polluted. Transport Canada listed a number of examples: individuals who derive income from fishing, from the production, breeding, holding or rearing	The Board notes that the <i>Marine Liability Act</i> allows individuals who fish or hunt for food or animal skins for their own consumption or use to claim for losses under the Ship-Source Oil Pollution Fund. [Marine Liability Act, Section 107 (2)(d), Link, Accessed 30 January 2019] The Board notes that Transport Canada held consultations with Indigenous groups regarding the recent changes to the Marine Liability Act, where concerns regarding the scope of the Ship-Source Oil Pollution Fund was discussed. The Board is of the view that the Ship-Source Oil Pollution Fund is a compensation fund where Indigenous communities who have sustained loss or damage, or incurred costs and expenses, in respect of oil pollution may file a claim.	14.12.1

Concern	Indigenous Communities	Company response	Government Response	NEB response	Reconsideration Report Section
			of fish, or from the culture or harvesting of marine plants; owners of fishing vessels, derives income from the rental of fishing vessels to holders of commercial fishing licenses issued in Canada; individuals who derives income from the handling of fish on shore in Canada directly after they are landed from fishing vessels; any person who rents or charters boats in Canada for sport fishing; and workers in a fish plant in Canada. In the case of an incident, Transport Canada noted that any person, entity, or organization, including local governments, may make a claim for costs or damages resulting from a ship-source oil pollution spill either directly to the ship owner and their insurer, or with the Ship-Source Oil Pollution Fund.		
Non-monetary compensation in event of spill	Heiltsuk First Nation T'sou-ke First Nation Nooaitch Indian Band			The Board agrees that it is unclear if all losses are eligible to be claimed under the Ship-Source Oil Pollution Fund. The Ship-Source Oil Pollution Fund does not appear to compensate for losses to non-use values, for Indigenous and non-Indigenous communities. In the event of an oil spill from a ship, not just a Project-related tanker, these losses may occur. The Board notes that section 48.12 of NEB Act establishes that pipeline operators are liable for the loss of non-use values relating to a public resource affected by a release and that the Crown may institute proceedings to recover the loss of non-use values. Thus, the Board has included Recommendation 15, which encourages GIC to work with Transport Canada to determine how a federal marine oil spill compensation regime, existing or otherwise, can include compensation for non-use values, for Indigenous and non-Indigenous communities, including any non-coastal communities that may be impacted as a result of a marine oil spill.	14.12.1

Appendix 15: Summary of comments received on draft conditions and recommendations

On 10 January 2019, the Board issued draft amendments to conditions and recommendations to parties for comment in their written argument-in-chief. The Board received a number of comments, which it considered. Some conditions and recommendations were adjusted in response to comments received. The various chapters of this MH-052-2018 Report provide reasons for changes made or not made, as do the summaries in Parts A and B below. Note that these summaries are not a comprehensive list, anyone wishing to see all submissions should review the entire record of the hearing. Part C provides a comparison of the draft and final versions of the conditions and recommendations.

A. Comments on draft conditions

Subject	Board views / comments
Response time	Some comments said that Condition 133 did not adequately address response times. The condition was changed to address these comments.
Compliance timing	Some comments said that Condition 91 did not clearly set out the timing of compliance requirements. The condition was changed to address these comments.
Specificity	Some comments requested increased specificity in certain conditions, including requests to list specific groups and people to be consulted. The Board has generally left wording broad, which accommodates the intent of the requests, and does not limit the intended scope of the conditions. Therefore, the Board has not made these changes.
Indigenous consultation	Some Indigenous intervenors requested that conditions include additional consultation with them. Consultation with, and participation of, Indigenous communities is already a part of federal government measures (enshrined as one of the pillars of the Oceans Protection Plan). Consultation and inclusion of Indigenous knowledge is already a requirement of many of conditions. Therefore, the Board has not made these changes.
Condition filings for approval	Some comments requested that certain condition filings be subject to Board approval. Regardless of whether this is indicated in a condition, the Board will assess all condition filings to ensure that Trans Mountain is in compliance prior to Trans Mountain being able to commence work on the applicable Project phase or component. If the Board is of the view that Trans Mountain is not in compliance, the Board may ask for further information until compliance is achieved. Therefore, the Board has not made these changes.
Condition commitments made by Trans Mountain	Some comments requested that certain commitments made by Trans Mountain be included in conditions, or be made into conditions themselves. Condition 2 requires Trans Mountain to meet all commitments it has made. Its commitments need not be made into, or added to, conditions for this obligation to continue. Therefore, the Board has not made this change, although it has updated Condition 2 to include commitments made during the MH-052-2018 hearing.
Rules to apply to Project-related marine vessels	Some comments suggested that more rules (e.g., further speed reductions, lighting) be applied specifically to Project-related marine vessels. In these cases, the Board considered whether they more appropriately applied to a broader range of marine vessels. The Board addressed these comments in its recommendations to the GIC, rather than in the conditions related to specifically to the Project and Project-related marine vessels. Therefore, the Board has not made these changes in the conditions.
Condition 131 should remain a condition	In response to the Board's proposal to convert Condition 131 (Marine Public Outreach Program) into a recommendation, some intervenors were of the view that it should remain a condition. Given that the work involved falls within the reach of government (and not Trans Mountain), the Board has made the conversion.

B. Comments on draft recommendations

Subject	Board views / comments
Definition of “Salish Sea”	Some comments requested that “Salish Sea” be defined in the recommendations. The Board has made changes to address these comments.
Additional consultation	Some comments requested that recommendations include additional consultation with Indigenous peoples and other stakeholders. The Board has made changes to address these comments.
Clarity regarding mitigation and monitoring	Some comments requested that recommendations include clear wording to show that they involve mitigation that was feasible and effective, and would involve monitoring. The Board has made changes to address these comments.
Clarity regarding offsets	Some comments suggested there was a lack of clarity in the recommendations regarding offsets and the distinction between them. The Board has made significant adjustments to be more specific about the purpose of these recommendations, and to add specific consultation requirements. Specifically, changes were made to clarify that Recommendation 5 is the overall offset program, whereas Recommendation 6 notes some individual potential mitigation for further consideration within that program.
Cumulative impacts on Indigenous rights and title	Some Indigenous intervenors provided comments regarding the cumulative impacts on the exercise of Indigenous rights and title, and that these matters should be addressed through consultation. While such wording has not been explicitly added to the recommendations, the inclusion of wording regarding consultation with Indigenous peoples will allow for input with respect to impacts on rights and title.
Including the Fraser Watershed in a regional study	Some comments requested that the Fraser Watershed be included in a regional study (Recommendation 1). The recommended study is to look at cumulative impacts on the Salish Sea. The geographic boundaries of the relevant cumulative effects would be determined as part of the planning process.

C. Comparison of draft and final versions of the conditions and recommendations

#	Draft wording	Final wording
Conditions		
91	Plan for marine spill prevention and response commitments Trans Mountain must file with the NEB, at least 2 months prior to commencing construction, a plan describing how it will ensure that it will meet the requirements of Condition 133 regarding marine spill prevention and response. The plan must be prepared in consultation with Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority, Vancouver Fraser Port Authority, British Columbia Coast Pilots, Western Canada Marine Response Corporation, Fisheries and Oceans Canada and the Province of British Columbia, and must identify any issues or concerns raised and how Trans Mountain has addressed or responded to them. Trans Mountain must provide the plan to the above-mentioned parties at the same time as it is filed with the NEB.	Plan for marine spill prevention and response commitments Trans Mountain must file with the NEB, within 6 months from the issuance date of the Certificate, a plan describing how it will ensure that it will meet the requirements of Condition 133 regarding marine spill prevention and response. The plan must be prepared in consultation with Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority, Vancouver Fraser Port Authority, British Columbia Coast Pilots, Western Canada Marine Response Corporation, Fisheries and Oceans Canada and the Province of British Columbia, and must identify any issues or concerns raised and how Trans Mountain has addressed or responded to them. Trans Mountain must provide the plan to the above-mentioned parties at the same time as it is filed with the NEB.
131	Marine Public Outreach Program The Board proposed converting this condition into a recommendation (see Recommendation 12).	Marine Public Outreach Program The Board has converted this condition into a recommendation (see Recommendation 12).
132	Marine Mammal Protection Program Trans Mountain must file with the NEB, at least 3 months prior to commencing operations, a Marine Mammal Protection Program that focuses on mitigating effects from the Project and	Marine Mammal Protection Program Trans Mountain must file with the NEB, at least 3 months prior to commencing operations, a Marine Mammal Protection Program that focuses on mitigating effects from the Project and associated cumulative effects, and

#	Draft wording	Final wording
	associated cumulative effects, and on fulfilling Trans Mountain's commitments as a terminal operator with regard to Project-related marine shipping. The program must include: a) the goals and objectives of the program, including a discussion on how they align with the objectives of applicable Fisheries and Oceans marine mammal Recovery Strategies and Action Plans; b) a summary of the issues related to marine mammals from the Project and from Project-related marine vessels; c) a summary of the initiatives that Trans Mountain has supported or undertaken to-date, including the goals of each initiative and how they relate to the goals and objectives of the program; d) a discussion of the outcomes or progress updates of the initiatives identified in c), and how these outcomes have met or are contributing to the objectives of the program; [previous e) and f) deleted] e) any other initiatives that Trans Mountain intends to undertake or support in the future that are relevant to the program; and f) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the program, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding, MH-052-2018 Reconsideration proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information.	on fulfilling Trans Mountain's commitments as a terminal operator with regard to Project-related marine shipping. The program must include: a) the goals and objectives of the program, including a discussion on how they align with the objectives of applicable Fisheries and Oceans marine mammal Recovery Strategies and Action Plans; b) a summary of the issues related to marine mammals from the Project and from Project-related marine vessels; c) a summary of the initiatives that Trans Mountain has supported or undertaken to-date, including the goals of each initiative and how they relate to the goals and objectives of the program; d) a discussion of the outcomes or progress updates of the initiatives identified in c), and how these outcomes have met or are contributing to the objectives of the program; e) any other initiatives that Trans Mountain intends to undertake or support in the future that are relevant to the program; and f) a description of how Trans Mountain has taken available and applicable Indigenous traditional land use and traditional ecological knowledge into consideration in developing the program, including demonstration that those Indigenous persons and groups that provided Indigenous traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding, MH-052-2018 Reconsideration proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information.
133	Confirmation of marine spill prevention and response commitments Trans Mountain must file with the NEB, at least 3 months prior to loading the first tanker at the Westridge Marine Terminal with oil transported by the Project, confirmation, signed by an officer of the company that: a) Trans Mountain has included in its Vessel Acceptance Standard and Westridge Marine Terminal Regulations and Operations Guide a requirement for tankers nominated to load at the Westridge Marine Terminal to have a suitable arrangement for the proposed enhanced tug escort between the Westridge Marine Terminal and Buoy J prior to departure. The tug escort should be suitable for foreseeable meteorological and ocean conditions and be based on tanker and cargo size. b) An enhanced marine oil spill response regime capable of delivering 20,000 tonnes of capacity within 36 hours of notification, with dedicated resources staged within the study area is in place.	Confirmation of marine spill prevention and response commitments Trans Mountain must file with the NEB, at least 3 months prior to loading the first tanker at the Westridge Marine Terminal with oil transported by the Project, confirmation, signed by an officer of the company that: a) Trans Mountain has included in its Vessel Acceptance Standard and Westridge Marine Terminal Regulations and Operations Guide a requirement for tankers nominated to load at the Westridge Marine Terminal to have a suitable arrangement for the proposed enhanced tug escort between the Westridge Marine Terminal and Buoy J prior to departure. The tug escort should be suitable for foreseeable meteorological and ocean conditions and be based on tanker and cargo size; and b) an enhanced marine oil spill response regime is in place that is capable of: i) delivering 20,000 tonnes of capacity within 36 hours of notification, with dedicated resources staged within the study area; and, ii) initiating a response within 2 hours for spills in Vancouver Harbour, and within 6 hours for the remainder of the Salish Sea shipping route to the 12-nautical-mile territorial sea limit.
134	Updated Vessel Acceptance Standard and Westridge Marine Terminal Regulations and Operations Guide Trans Mountain must file with the NEB, at least 3 months prior to loading the first tanker at the Westridge Marine Terminal with oil transported by the Project, and thereafter on or before 31 January of each of the first five years after commencing operations, an updated Vessel Acceptance Standard and Westridge Marine Terminal Regulations and Operations Guide, and a summary of any revisions made to each.	same

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144	Ongoing confirmation of marine spill prevention and response commitments Trans Mountain must file with the NEB, on or before 31 January of each year after commencing operations confirmation, signed by an officer of the company, that it is continuing to meet the requirements of Condition 133 regarding Trans Mountain's marine spill prevention and response commitments. Trans Mountain must provide each filing to Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority, Vancouver Fraser Port Authority, British Columbia Coast Pilots, Western Canada Marine Response Corporation, Fisheries and Oceans Canada and the Province of British Columbia at the same time as it is filed with the NEB. If a particular party mentioned above requests that it not be provided the annual filing, Trans Mountain may cease providing it to that party.	same
151	Post-construction environmental monitoring reports Trans Mountain must file with the NEB, on or before 31 January following the first, third, and fifth complete growing seasons after completing final clean-up, a post-construction environmental monitoring report for the Project that must include: a) a description of the valued components or issues that were assessed or monitored; b) measurable goals for each valued component or issue; c) monitoring methods for each valued component or issue, results of the monitoring, and a comparison to the defined measurable goals; d) corrective actions taken, their observed success, and their current status; e) identification on a map or diagram of the locations where corrective actions were taken; f) any further corrective actions planned and a schedule for monitoring and reporting; and g) a summary of its consultations with appropriate government authorities and any potentially affected Indigenous groups and affected landowners / tenants. In the post-construction environmental monitoring report filed after the fifth full growing season after completing clean-up, Trans Mountain must include: i) an assessment of the effectiveness of mitigative and corrective actions and how learnings have been or will be applied to Trans Mountain's Environmental Protection Program; ii) a detailed description of all valued components or issues for which the measurable goals have not been achieved during the duration of the post-construction monitoring program; and iii) an evaluation of the need for any further corrective actions, measurable goals, assessments, or monitoring of valued components or issues, including a schedule for those. All filed post-construction environmental monitoring reports must address issues related, but not limited, to: soils; weeds; watercourse crossings; riparian vegetation; wetlands; rare plants, lichens and ecological communities; municipal tree replacement; wildlife and wildlife habitat; fish and fish habitat; marine fish and fish habitat; marine mammals; marine birds; and species at risk.	same

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Recommendations		
1	The Governor in Council should develop and implement a regional cumulative effects management plan that assesses the overall environmental state of, and cumulative effects on, the Salish Sea, and use that better understanding to help inform a long-term approach to managing those cumulative effects, as well as informing the consideration of future proposed projects. This plan should include, but not be limited to: a) consideration of the many impacts on the Salish Sea, including contamination from point and diffuse land-based sources, the multiple impacts on salmon and other fish stocks, and the impacts from all vessel traffic; b) incorporation of the work the federal authorities are already planning in the area, such as under the Coastal Environmental Baseline Program and the Cumulative Effects of Marine Shipping initiative (including its regional cumulative effects assessment); c) development of short-, medium-, and long-term targets for addressing cumulative effects, including consideration of the feasibility of reducing total underwater noise, strike/collision risk of vessels with marine species, and key contaminant levels over time; and d) any monitoring necessary to help determine the extent of cumulative effects, the success of measures to manage those effects, and progress towards meeting targets.	The Governor in Council should develop and implement a regional cumulative effects management plan. This plan should assess the overall environmental state of, and cumulative effects on, the Salish Sea (including the Strait of Juan de Fuca and out to the 12-nautical-mile territorial sea limit), and should include a long-term strategy for managing those cumulative effects. It should also be used to inform the consideration of future proposed projects. This plan should include, but not be limited to: a) consideration of the many impacts on the Salish Sea, including contamination from point and diffuse land-based sources, the multiple impacts on salmon and other fish stocks, and the impacts from all vessel traffic; b) incorporation of the work the federal authorities are already planning in the area, such as under the Coastal Environmental Baseline Program and the Cumulative Effects of Marine Shipping initiative (including its regional cumulative effects assessment); c) development of short-, medium-, and long-term targets for addressing cumulative effects, including consideration of the feasibility of reducing total underwater noise, strike/collision risk of vessels with marine species, and key contaminant levels over time, and feasible and effective measures for achieving those targets; and d) monitoring to help determine the extent of cumulative effects, the success of measures to manage those effects, and progress towards meeting targets. The Governor in Council should consider whether a regional study pursuant to sections 73 or 74 of the CEAA 2012 should be undertaken as part of the cumulative effects management plan, and include in its public reporting a rationale on whether this would be advantageous. The plan should be developed and implemented in consultation with Indigenous peoples, other marine users, the Province of British Columbia and local governments, Vancouver Fraser Port Authority (VFPA), and other relevant stakeholders.
2	The Governor in Council should report publicly, on an annual basis, on the oversight, progress, and status of initiatives and measures to address cumulative effects on, and to support the health of, the Salish Sea, including but not limited to: a) progress on addressing Recommendation 1 above; b) the Ocean Protection Plan, the Whales Initiative, and any other relevant commitments made by federal authorities during the Board's MH-052-2018 Reconsideration hearing; c) relevant initiatives and measures being undertaken by others, such as the marine shipping measures of the Enhancing Cetacean Habitat and Observation Program (ECHO) Program; d) species status updates for Species at Risk Act-listed species, including any relevant measures proposed in recovery documents under the Species at Risk Act; e) progress on addressing Recommendations 3 through 13 below; and f) consultation activities related to these initiatives and measures, including with Indigenous peoples and other marine users. The reporting should include an explanation of how these various initiatives and measures work together, the identification of any notable gaps, and plans for how those gaps will be addressed.	The Governor in Council should report publicly, on an annual basis, on the oversight, progress, and status of initiatives and measures to address cumulative effects on, and to support the health of, the Salish Sea (including the Strait of Juan de Fuca and out to the 12-nautical-mile territorial sea limit), including but not limited to: a) progress on addressing Recommendation 1 above, including monitoring results and progress towards meeting targets; b) the Ocean Protection Plan, the Whales Initiative, and any other relevant commitments made by federal authorities during the Board's MH-052-2018 Reconsideration hearing; c) relevant initiatives and measures being undertaken by others, such as the marine shipping measures of the Enhancing Cetacean Habitat and Observation Program (ECHO) Program, for the duration such initiatives or measures are undertaken; d) species status updates for <i>Species at Risk Act</i>-listed species, including any relevant measures proposed in recovery documents under the <i>Species at Risk Act</i>; e) progress on addressing Recommendations 3 through 16 below, including results of monitoring to determine the effectiveness of measures and any adaptive management as part of a follow-up program; and f) consultation activities related to these initiatives and measures,

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		including with Indigenous peoples, other marine users, the Province of British Columbia and local governments, VFPA, and other relevant stakeholders. The public reporting should include an explanation of how these various initiatives and measures work together, the identification of any notable gaps, and plans for how those gaps will be addressed.
3	The Governor in Council should implement, with support from industry, a marine bird monitoring program to better understand impacts of all vessel use within the Salish Sea on marine bird species, including species at risk. This program would allow for the implementation of adaptive measures by the Government of Canada to avoid or reduce marine bird mortality and sensory disturbance.	The Governor in Council should develop and implement, with support from industry, a marine bird monitoring and protection program to better understand impacts of all vessel use within the Salish Sea on marine bird species, including species at risk, and, if adverse effects are found, implement mitigation from those impacts. This program should include adaptive management measures by the Government of Canada where warranted by monitoring results, to avoid or reduce marine bird mortality and sensory disturbance. This program should be developed and implemented in consultation with relevant marine shipping stakeholders and Indigenous peoples.
4	The Governor in Council should expedite the work in completing the feasibility study for establishing a Southern Strait of Georgia National Marine Conservation Area, publicly report on the outcomes of that study, and (if considered feasible) proceed to establish it.	The Governor in Council should expedite the work in completing the feasibility study for establishing a Southern Strait of Georgia National Marine Conservation Area Reserve, publicly report on the outcomes of that study, and (if considered feasible) proceed to establish it. Its potential establishment should include consideration of other initiatives under the Oceans Protection Plan, such as the Ports Modernization Review and the National Anchorage Strategy. This work should be done in consultation with potentially affected Indigenous and coastal communities and with relevant marine shipping stakeholders including Transport Canada, Canadian Coast Guard and the VFPA.
5	The Governor in Council should implement a suite of measures to offset both the increased underwater noise and the increased strike risk posed to Species at Risk Act-listed marine mammal and fish species (including Southern resident killer whale) due to Project-related marine shipping, at each relevant section of the marine shipping route (i.e., Strait of Georgia, Boundary Pass, Haro Strait, Juan de Fuca Strait, and out to the 12-nautical-mile territorial sea limit), and at the relevant times of year. Each offset measure should apply to all appropriate vessels for that measure (i.e., not limited to Project-related vessels). There should be periodic reporting that includes measured or estimated underwater noise and strike risk due to Project-related marine shipping, and the extent over time to which that additional noise and strike risk has been offset by measures that apply to all appropriate vessels.	The Governor in Council should develop an Offset Program to offset both the increased underwater noise and the increased strike risk posed to <i>Species at Risk Act</i>-listed marine mammal and fish species (including Southern resident killer whale) due to Project-related marine shipping, at each relevant section of the marine shipping route (i.e., Strait of Georgia, Boundary Pass, Haro Strait, Strait of Juan de Fuca, and out to the 12-nautical-mile territorial sea limit), and at the relevant times of year. Each offset measure should apply to all appropriate vessels for that measure (i.e., not limited to Project-related vessels), to be determined on a case-by-case basis according to the type of measure and the type(s) of vessels it is targeted at. The Offset Program should be developed and implemented in consultation with Indigenous peoples, other marine users, the Province of British Columbia and local governments, VFPA, and other relevant stakeholders. The Offset Program should include any further research and data collection that is necessary to successfully undertake it, including consideration of whether further information on the number of vessel strikes on marine mammals can be gathered. There should be periodic public reporting that provides, at the appropriate times, the information necessary to demonstrate a robust Offset Program. This should include measured or estimated underwater noise and strike risk due to Project-related marine shipping, and the extent over time to which that additional noise and strike risk has been offset in each section of the route, including the monitoring/modelling used to demonstrate that.
6	As part of Recommendation 5 to offset the underwater noise and strike risk added by Project-related marine shipping, the Governor in Council should further consider each of the following specific measures, each applicable to all appropriate vessels (i.e., not limited to Project-related vessels), and publicly report on the feasibility of each (including consideration of socio-economic effects): slowdowns in each section of the marine shipping route (i.e., Strait of Georgia, Boundary Pass, Haro Strait, Juan de Fuca Strait, and out to the 12-nautical-mile territorial sea limit) and	As part of the Offset Program in Recommendation 5, the Governor in Council should further consider each of the following specific measures, each applicable to all appropriate vessels (i.e., not limited to Project-related vessels), and publicly report on the feasibility and likely effectiveness of each (including consideration of navigational safety, international coordination and socio-economic effects): a) Slowdowns in each section of the marine shipping route (i.e., Strait of Georgia, Boundary Pass, Haro Strait, Strait of Juan de Fuca, and out to the 12-nautical-mile territorial sea limit).

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	that apply to all appropriate vessels; - potential limits on the number of whale watching boats (and /or their time on water); - explicit noise reduction targets for regularly operating ferries in the area; - identification of specific whale congregation and migration areas (including for resident killer, Humpback, Grey, and Fin whales, as well as basking shark) and consideration of specific routing and speed restrictions in those areas; and - further incentives and requirements for quiet vessel design to address underwater noise over the long term.	b) Potential limits on the activities of whale watching boats (such as the number of boats and /or their time on water, and other potential ways to limit their impacts). c) Noise reduction efforts for regularly operating ferries in the area, and an accelerated schedule for implementation. d) Identification of specific foraging, congregation and migration areas of the <i>Species at Risk Act</i>-listed species (including Humpback, Grey, Fin and killer whales, as well as Basking shark and Leatherback sea turtle) and consideration of mitigations in those areas (including Swiftsure Bank). e) Further incentives and requirements for quiet vessel design and refits to address underwater noise over the long term, including maximal participation in relevant initiatives and committees of the International Maritime Organization. Consideration of the above measures should include consultation with Indigenous peoples, other marine users, the Province of British Columbia and local governments, VFPA, and other relevant stakeholders.
7	The Governor in Council should review and update federal marine shipping oil spill response requirements. This review should include consideration of the following: - updating response organization standards; - response planning methodologies; - public reporting by response organizations to promote transparency of information; - inclusion of Indigenous peoples and local communities in response planning; and - a requirement for additional response resources on all ocean-going vessels.	The Governor in Council should review and update federal marine shipping oil spill response requirements. This review should include consideration of the following: a) updating the 1995 Response Organization Standards; b) response planning methodologies; c) response planning for <i>Species at Risk Act</i>-listed species, including marine mammals; d) how completed and ongoing research related to oil fate and behaviour and response methods and technology will be considered in response planning, procedures, and equipment; e) salvage requirements; f) public reporting by response organizations to promote transparency of information; g) inclusion of Indigenous peoples and local communities in response planning; and h) a requirement for additional response resources on all ocean-going vessels.
8	The Governor in Council should develop a regulatory framework for making enhanced tug escort mandatory in the Salish Sea for appropriate ocean-going vessels, including Project-related tankers. The framework should include oversight and enforcement mechanisms.	The Governor in Council should develop a regulatory framework for making enhanced tug escort mandatory in the Salish Sea for Project-related tankers. The framework should include oversight and enforcement mechanisms. Mandatory enhanced tug escort should also be considered for other vessels as appropriate.
9	The Governor in Council should, in conjunction with relevant United States regulatory authorities, consider the need for a Canada/United States Transboundary Vessel Traffic Risk Assessment.	same
10	The Governor in Council should accelerate the development and implementation of greenhouse gas reduction measures related to marine shipping that would support the final International Maritime Organization Strategy in year 2023 for reducing greenhouse gas emissions. These measures could include, but not be limited to: a) facilitating the use of low-carbon alternate fuels (such as liquefied natural gas) for marine vessels by developing any necessary marine safety regulatory framework, training programs, and bunkering infrastructure requirements; and b) market-based measures, such as providing economic	The Governor in Council should actively support the development and implementation of greenhouse gas reduction measures related to marine shipping that would align with the final International Maritime Organization Strategy by year 2023 for reducing greenhouse gas emissions. These measures could include, but not be limited to: a) facilitating the use of low-carbon alternate fuels (such as liquefied natural gas) for marine vessels by developing any necessary marine safety regulatory framework, training programs, and bunkering infrastructure requirements;

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	incentives for industry investment in the development and use of energy efficient technologies, and offsetting any increases in ship emissions. In implementing the measures, the Governor in Council could also consider a mechanism to establish and monitor such reductions and to develop regulations under an appropriate legislation.	b) use of energy efficient technologies, such as engine and propulsion upgrades and hull modifications; and c) market-based measures, such as providing economic incentives for industry investment in the development and use of energy efficient technologies, and offsetting any increases in ship emissions. In implementing the measures, the Governor in Council could also consider a mechanism to establish and monitor such reductions and to develop regulations under an appropriate legislation.
11	The Governor in Council should, in conjunction with Transport Canada and the Canadian Coast Guard, facilitate opportunities, as appropriate, to engage and seek feedback from the Indigenous Advisory and Monitoring Committee on the marine safety system, including on the marine inspections and enforcement regime; in addition to identifying engagement opportunities for Project-related marine shipping activities that intersect with Canadian Coast Guard operational programs.	same
12	(in place of Condition 131 from the OH-001-2014 hearing): The Governor in Council should, in conjunction with the Pacific Pilotage Authority and Transport Canada, continue engagement and awareness activities targeting recreational boaters, fishing vessel operators, and operators of small vessels with respect to safety of navigation and prevention of collisions with larger vessels. This should include incorporating the resources and information that Trans Mountain has already provided or will provide to the Pacific Pilotage Authority, such as applicable information on Project-related vessel timing and scheduling.	The Governor in Council should, in conjunction with the Pacific Pilotage Authority and Transport Canada, continue engagement and awareness activities targeting coastal Indigenous communities, recreational boaters, fishing vessel operators, and operators of small vessels with respect to safety of navigation and prevention of collisions with larger vessels. This should include incorporating the resources and information that Trans Mountain has already provided or will provide to the Pacific Pilotage Authority, such as applicable information on Project-related vessel timing and scheduling.
13	The Governor in Council should accelerate the development and implementation of the Enhanced Maritime Situational Awareness initiative and the proposed extension of the Automatic Identification System to smaller passenger vessels.	The Governor in Council should, in order to enhance the safety of all sizes of marine vessels, accelerate the development and implementation of the Enhanced Maritime Situational Awareness initiative and the proposed extension of the Automatic Identification System to smaller passenger vessels.
14	new	In order to foster a more rapid development and employment of new oil recovery technologies, the Governor in Council should administratively combine its current initiatives and investigate the use of new paths for the delivery of government grants and contributions in order to provide financial incentives to promote innovation in such developments.
15	new	The Governor in Council, in conjunction with Transport Canada, should review the federal marine oil spill compensation regimes with regards to compensation for non-use values, for Indigenous and non-Indigenous communities, including any non-coastal communities that may be impacted as a result of a marine oil spill.
16	new	The Governor in Council, in conjunction with VFPA, should develop a formal complaint resolution program that gathers community feedback, brings together diverse community stakeholders to facilitate discussions about port-related impacts, and resolves complaints about marine vessels anchored at the VFPA-managed anchorages.