RECENT CASES AND THEIR IMPLICATIONS FOR THE FOREST SECTOR: *HAIDA*, *TAKU RIVER*, *BERNARD* AND *POWLEY*

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

1.1 Background

The Haida objected to replacements of a Tree Farm Licence held by MacMillan Bloedel from 1981 to 2000 and the transfer of the TFL to Weyerhaeuser in 1999. The Haida had objected to the transfer since at least 1994.

1.2 When is the Honour of the Crown invoked?

The SCC held that 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, from the assertion of sovereignty to the resolution of claims and the implementation of treaties.

Consultation and accommodation are required to reconcile the pre-existence of Aboriginal societies with the sovereignty of the Crown.

1.3 The honour of the Crown gives rise to different duties in different circumstances

(a) Where the Aboriginal interest is defined or proven.
(b) Where the Aboriginal interest not defined or proven.

1.4 Where the Aboriginal interest is defined or proven?

Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty.

The fiduciary duty may vary due to the Crown's other, broader obligations. However, the duty requires the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake.

The term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples.

1.5 What if the Aboriginal right or title has not been defined or proven yet?

Where 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 require the Crown to act in the Aboriginal group's best interest as a fiduciary in exercising discretionary control over the subject of the right or title.

1.6 If not a fiduciary, then what is the nature of the duty?

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".

During the treaty making process, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by section 35 of the Constitution Act, 1982.

1.7 The Role of Section 35 of the *Constitution Act, 1982*

Section 35 represents a promise of rights recognition, and it is always assumed that the Crown intends to fulfil its promises.

Rights are recognized and sovereignty claims are reconciled through the process of honourable negotiation.

This, in turn, implies a duty to consult and, if appropriate, accommodate.

1.8 When does the duty to consult arise?

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.

1.9 Content of the duty is based on the strength of the claim of asserted rights

Difficulties in proving a claim are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

The duty applies as much to unresolved claims as to intrusions on settled claims.

1.10 The content of the duty to consult and accommodate varies with the 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 on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. 'Consultation' in its least technical definition is talking together for mutual understanding.

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.

1.11 Deep Consultation

While precise requirements will vary with the circumstances, deep consultation may entail:

- the opportunity to make submissions for consideration
- formal participation in the decision-making process
- 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.

1.12 Accommodation

The issue of accommodation arises where the consultation process discloses a strong case supporting the asserted aboriginal right and the consequences of the proposed government decision may adversely affect the right in a significant way.

The Crown may have to take steps to avoid irreparable harm or minimize the effects of its decision on the First Nation's asserted rights.

Accommodation requires a process of seeking compromise in an attempt to harmonize the conflicting interests of the Crown and the First Nation.

The duty to consult and accommodate does not require the Crown to reach an agreement with the First Nation; instead it requires a good faith effort to understand the First Nation's concerns and move to address them in a meaningful way.

1.13 Do Third Parties Owe a Duty to Consult and Accommodate?

The duty to consult and accommodate flows from the Crown's assumption of sovereignty over lands and resources formerly held by an Aboriginal group.

The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests. The honour of the Crown cannot be delegated.

As a result, there is no obligation on third parties to consult or accommodate.

The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development, as in the environmental assessment context.

1.14 Third Parties Remain Liable in Other Contexts

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.

Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

1.15 The Crown's Duty in *Haida Nation v. British Columbia*

Based on the evidence, the SCC determined that British Columbia had unequivocal knowledge of the Haida's longstanding title claim, generally and specifically in regard to the TFL.

As well, the Haida had a *prima facie* case in support of Aboriginal title, and a strong *prima facie* case for an Aboriginal right to harvest red cedar.

The court noted that red cedar has long been integral to the Haida culture, but that red cedar was now in short supply due to continued logging in the area claimed by the Haida.

The court held that this pointed to the potential impact on the Aboriginal rights concerned.

The court held that the Province had a duty to consult and perhaps accommodate on TFL decisions. The court declined, based on the facts, to set out whether consultation would have led to accommodation.

It did suggest that based on the strength of the Haida's Aboriginal rights and title claims and the seriousness of the impacts, that the honour of the Crown may well require significant accommodation to preserve the Haida's interests until the resolution of their claims.

The court held that the Province had failed to meet its duty to engage in something significantly deeper than mere consultation. It had failed to engage in any meaningful consultation at all.

2.0 *Taku River Tlinget First Nation v. British Columbia (Project Assessment Director) [2004] 3 S.C.R. 550*

2.1 Background

The Supreme Court of Canada followed its decision in *Haida Nation* but held in this case that the Province of British Columbia had met its duty to consult and had proceeded to make accommodations.

The Taku River Tlinget First Nation ("TRTFN") objected to the building of a road to a re-opened mine through a portion of their traditional territory. The road was approved in accordance with BC's *Environmental Assessment Act* ("EAA").

2.2 Was there a duty to consult?

The court held that the Province had actual knowledge of the TRTFN's claim due to TRTFN's involvement in the BC treaty process and that the re-opening of the mine had the potential to adversely affect TRTFN's claim.

This engaged the Crown's duty to consult, however the Province's consultations under the EAA fulfilled the requirements of the duty.

As well, the TRTFN had participated fully in the environmental review process for some three and a half years.

TRTFN's views were put before the appropriate Ministers and the final project approval contained measures to address both the immediate and long-term concerns.

The Province was not under a duty to reach an agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

The court did note that the facts of the case only pertained to the project approval certification stage.

TRTFN's outstanding concerns could be more effectively considered at future stages in the project's development.

3.0 Implications for the Resource Sector

The *Haida* and *Taku River* decisions provide greater clarity as to what triggers the Crown's duty and its scope where Aboriginal rights and title have been asserted, but remain unproven.

In *Taku River* the court set out how the Crown could fulfill its duty to consult and accommodate Aboriginal interests through an inclusive and thorough consultation process.

However the court declined to set out a definitive checklist of actions required during consultations. It left this to be developed on a case by case basis.

4.0 *R. v. Marshall*; *R. v. Bernard*, [2005] 3 S.C.R. 511

4.1 Background

In the two earlier 1999 *Marshall* decisions, the SCC had held that the "Peace and Friendship" treaties of 1760 and 1761 concluded by the British and the Mi'kmaq conferred upon the Mi'kmaq the treaty right to engage in commercial fishing activities sufficient to earn a reasonable livelihood.

The Mi'kmaq then asserted that the treaties had also given them the right to harvest and sell other resources, including timber on Crown land. Several Mi'kmaq commenced logging on Crown lands in Nova Scotia and New Brunswick and were arrested and charged for violating provincial forestry laws.

The Mi'kmaq relied on the treaty as a defence. In addition, they argued that they had Aboriginal title to the lands where they had harvested the trees. The Mi'kmaq were convicted and they then appealed.

The Courts of Appeal of Nova Scotia and New Brunswick overturned the convictions, which the governments of Nova Scotia and New Brunswick in turn appealed.

4.2 The Decision

The Supreme Court of Canada upheld the convictions imposed by the trial courts.

As well, the court held that the Mi'kmaq had no treaty right to harvest trees for commercial purposes, nor had the Mi'kmaq established their claim of aboriginal title.

4.3 No Treaty Right to Commercial Tree Harvesting

The court held that while the treaty did protect some rights to harvest and trade certain commodities, commercial logging was not contemplated.

Treaty rights are not frozen in time, however a modern treaty right claim represents a logical evolution from a traditional trading activity at the time the treaty was made.

If anything, commercial logging would interfere with the traditional Mi'kmaq reliance on fishing.

4.4 Aboriginal Title Not Established

The court held that aboriginal title had not been established to the lands where the Mi'kmaq had logged.

Having recited the test for Aboriginal title set out in *Delgamuukw*, the court had to consider how a nomadic or semi-nomadic people could establish exclusive occupation as required by the test.

The court held that rather than prove that the aboriginal group excluded all others from the lands in question, a group has to demonstrate "effective control", i.e. the ability to exclude others if the group chose to do so.

As well, the question for aboriginal title is whether a nomadic group enjoyed sufficient physical possession to give the group title to the land.

Possession of land does not require continuous physical occupation.

4.5 Implications for the Resource Sector

The Supreme Court of Canada has indicated that for proving claims of aboriginal title, while the aboriginal perspective is important in assessing the title claim along with oral histories and other traditional knowledge, the standard of proof remains the common law standard.

For non-treaty aboriginal groups this may make it more difficult to establish aboriginal title because they must prove occupation at the time of first contact with Europeans.

The court's requirement of very strong evidence of occupation of land to prove aboriginal title also creates a high threshold.

In *Bernard*, the cutting site in question was situated near other areas for which numerous archaeological and historical studies were compelling evidence of aboriginal title. The court found that the evidence did not directly relate to the

actual cutting site, which seems to impose a requirement that evidence must relate directly to lands subject to a title claim.

As a result, an Aboriginal right claim for hunting or fishing may have a lower threshold of proof than a claim for Aboriginal title.

In general, groups claiming title to lands where any type of natural resource is located may now have to meet this higher threshold of proof.

5.0 *R. v. Powley*, [2003] 2 S.C.R. 207

5.1 Background

In September, 2003 the Supreme Court of Canada, in a unanimous judgment, held that Steve and Roddy Powley, as members of the Métis community in Sault Sainte Marie, Ontario, could exercise a Métis right to hunt that is protected by s. 35 of the Constitution Act, 1982.

Section 35 of the Constitution Act, 1982:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

The court held that the purpose of section 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of the Métis culture.

5.2 Who is a Métis for the purposes of section 35?

- self-identify as a member of a Métis community;
- the claimant must present evidence of an ancestral connection to a historic Métis community: this requires some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means;
- the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed.

5.3 How a Métis right is proved: the modified *Van der Peet* test

The SCC held that the test for Aboriginal rights set out in *R. v. Van der Peet* [1996] 2 S.C.R. 507 would have to be modified to account for: "the unique post-contact emergence of Métis communities, and the post-contact foundation of their Aboriginal rights."

The court held that "a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority."

However the current difficulty in identifying the Métis is not a basis for defeating their constitutional rights.

The court also held that Ontario's regulatory regime for the moose hunt could not provide a blanket denial to the Métis in regards to their right to hunt for food.

In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where threatened species may be involved.

5.4 Métis Rights in British Columbia

In *R. v. Willison*, [2005] B.C.J. No. 924, the British Columbia Provincial Court (Criminal Division) held that Gregory Willison was a Métis with a right to hunt for food in the Falkland area of BC. Willison adduced expert evidence about the history of Métis peoples' small presence in the area and their nomadic lifestyle.

Willison testified about his own practicing of Métis traditions and tendered comprehensive evidence of his genealogy. The Crown conceded the accused had an ancestral connection to the Métis people.

5.5 Implications for the Resource Sector

As a result of the *Powley* decision, the Métis have a recognized right to hunt for food within the areas they have traditionally done so in. The Crown's duty to consult and perhaps accommodate may be triggered where resource companies wish to develop an area subject to Métis rights.

Despite the problems in identifying the Métis, the 10-part test set by the Supreme Court of Canada may set an easier bar than the test for establishing an aboriginal right. This is so because the court only has to look at the period where a Métis community existed prior to the assertion of Crown sovereignty in that area. For an Aboriginal right, the test is higher because the court must look to the time preceding contact with Europeans.

The greater ease with which a Métis right may be proved may also make it easier to invoke the Crown's duty to consult.