2009
FORESTRY CASE LAW BRIEFING

200 - 2006 West 10th Avenue
Vancouver, BC V6J 2B3
www.wcel.org

tel: 604.684.7378
fax: 604.684.1312
toll free: 1.800.330.WCEL (in BC)
email: admin@wcel.org

INTRODUCTION

Many of the leading cases regarding the constitutional duties of the Crown to First Nations have arisen in the forestry context. This Forestry Case Law Briefing provides a brief summary of the legal principles from these cases and the opportunities and challenges they present for defending and exercising Aboriginal Title and Rights in the forestry context.[1]

SUMMARY OF CASE LAW ON KEY FORESTRY ISSUES

Forestry law and the Crown's constitutional duties to First Nations (interim period)

The duty to accommodate may require the Crown to reform its forestry laws or alter/suspend approvals that otherwise conform to its laws, even if a First Nation's Title has not yet been recognized by the courts: "The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations."[2] Varying permits, suspending plans, amending legislation and/or passing new legislation (including taking back corporate tenure rights) are all within the provincial government's control and can be used as remedies to achieve meaningful consultation and accommodation.

As well, the Crown cannot legislate itself out of its duty to consult by amending forestry laws. The BC Supreme Court has stated: "the constitutional duty to consult and accommodate is 'upstream' of the statutes under which the ministerial power has been exercised, so that the district manager is not able to follow a statute, regulation or policy in such a way as to offend the Constitution."[3] In particular, legislative changes that now require licensees to provide only limited information in Forest Stewardship Plans are not an excuse for refusing to provide information First Nations need to understand potential impacts on their title and rights (see "Operational Planning" below).

Forestry law and the Crown's constitutional duties to First Nations (when Aboriginal Title has been recognized by the courts)

In Tsilhqot'in Nation v. *British Columbia*,[4] Vickers J. held that the provincial *Forest Act* and related legislation does not apply at all to forest resources located on Aboriginal Title lands because:

- The definition of "Crown timber" in the *Forest Act* does not include forest resources on Aboriginal Title land. The *Forest Act* permits the Crown only to grant harvest rights related to "Crown timber" on "Crown land," not land or timber belonging to someone else, like the Tsilhqot'in.[5]

- Aboriginal Rights, including Aboriginal Title, "go to the core of Indianness and are protected under s. 91(24)" of the *Constitution Act, 1867*, which gives the federal government jurisdiction over "Indians and lands reserved for Indians." Because the provisions of the provincial *Forest Act* authorizing the

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[1] This briefing was prepared by Jessica Clogg, Executive Director & Senior Counsel, West Coast Environmental Law.

[2] *Haida Nation v. British Columbia (Minister of Forests) 2004 SCC 73* at para. 55 [hereinafter *Haida*].

[3] *Klahoose First Nation* v. *Sunshine Coast Forest District (District Manager),* 2008 BCSC 1642 at para. 131 [hereinafter *Klahoose First Nation*].

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

[5] *Ibid.* at para. 971 and 980.

management, acquisition, removal and sale of timber on Aboriginal Title lands "affect the very core of Aboriginal [T]itle" they cannot apply to Aboriginal Title land.[6]

Therefore, Vickers concludes that BC has no constitutional authority to:

1) include of Tsilhqot'in Title lands in the Timber Supply Area;
2) issue forestry tenures and authorizations in Tsilhqot'in Title lands; or
3) make strategic planning decisions regarding Tsilhqot'in Title lands.[7]

Strategic planning and tenure decisions

The Supreme Court of Canada has confirmed that consultation and accommodation are required with respect to "strategic planning for utilization of the resource."[8] The court has rejected the Crown's argument that consultation at the operational level (e.g., cutting permits) will do: "Decisions made during strategic planning may have potentially serious impacts" on Aboriginal Title and Rights.[9] The courts have noted that: "Consultation at the operational level … has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms," and thus consultation must take place at the strategic level.[10]

Note that the courts use the term "strategic planning" more broadly than it is used technically in BC, so while consultation with respect to strategic land use plans (e.g., Land and Resource Management Plans, Sustainable Resource Management Plans) and Tree Farm Licence Management Plans are caught by this principle, so too are other types of plans or decisions that are higher level than cutting permits or project-specific approvals. For example, the courts have held that consultation and accommodation are required with respect to:

- granting or replacing timber tenures;[11]
- tenure transfer (i.e., the sale of a tenure, or a change in control of a company who holds tenures);[12] and,
- the removal of private land from a timber tenure.[13]

Operational Planning

Although the operational planning requirements under the *Forest Practices Code*, now the *Forest and Range Practices Act* (FRPA) have changed over time, ensuring that First Nations have the information necessary to understand the potential impacts on Aboriginal Title and Rights from proposed logging and roadbuilding remains a fundamental aspect of the duty to consult:

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations

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[6] *Ibid.* at para. 1032 and 1045.

[7] *Ibid.* at para 1049.

[8] *Haida* at para 76.

[9] *Ibid.*

[10] *Ibid.*

[11] *Ibid.*

[12] *Gitxsan and other First Nations* v. *British Columbia (Minister of Forests),* 2002 BCSC 1701 [hereinafter *Gitxsan*]

[13] *Hupacasath First Nation* v. *British Columbia (Minister of Forests) et al.,*2005 BCSC 1712 [hereinafter *Hupacasath*].

> are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action…[14]

Under FRPA only one operational plan, the Forest Stewardship Plan (FSP), now requires approval, and the required content for this plan is minimal. In the *Klahoose First Nation* case, the Ministry of Forests and Range had relied on the limited planning requirements in FRPA and its regulations to deny Klahoose's information requests regarding forest inventory, habitat data and information about the company's access plans. The Court rejected this argument, confirming that forestry law requirements cannot be implemented in a manner inconsistent with the Crown's constitutional duties to First Nations.[15]

Forest and Range Agreements (FRAs)

In the wake of the *Forestry Revitalization Act*, which 'took back' approximately 8.3 million cubic metres of timber from major licensees,[16] the Ministry of Forests developed a template 'Forest and Range Agreement' (FRA) that made economic benefits (money and timber) available to First Nations on a per capita basis, in exchange for accepting substantial limitations on their ability to exercise and defend their constitutionally protected rights during the term of the agreement.[17] Subsequent negotiations with MoFR under the auspices of the First Nations Leadership Council resulted in amendments to the template (now the Forest and Range Opportunities Agreement or FRO) that removed the most problematic limitations on Aboriginal Title and Rights; however, the Crown continued to calculate interim economic accommodation using a per capita approach.

In *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)* the BC Supreme Court rejected the Crown's per capita formulaic approach. Dillon J. found that the use of population-based formulas to determine accommodation pursuant to the FRA program was not good faith consultation and accommodation, as it failed to address the specifics of the Huu-Ah-Aht's situation, and referred to the Crown conduct in taking a one-size fits all, take it-or-leave it approach to FRA negotiations with the Huu-Ah-Aht as "Intransigent."[18]

While it is not bad faith negotiation for the Crown to offer its standard FRA or FRO agreement to a First Nation in the context of consultation on a particular forestry decision, this doesn't mean it has met its duties with respect to that decision unless the First Nation chooses to accept the broader financial arrangements and conditions as set out in the FRA/FRO:

> "[T]he Crown's offer to enter into the Forest and Range Agreement will not fulfill the Crown's duty in respect of the Skeena change of control unless the Gitanyow are prepared to accept the offered sum of money and other concessions as adequate non-cultural accommodation in respect of the Skeena change of control and all logging operations and decisions affecting their claimed territory over the next five years."[19]

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[14] *Halfway River First Nation* v. *BC*, 1999 BCCA 470 at para 160-161 [hereinafter *Halfway River*].

[15] *Klahoose First Nation* at para 131.

[16] *Forest (Revitalization) Amendment Act*, *2003*, S.B.C. 2003, c. 30.

[17] Ministry of Forests, *Strategic Policy Approaches to Accommodation* (July 2003). Available on-line at: www.for.gov.bc.ca/haa/Docs/Accomodation_Policy_final_draft_10.pdf.

[18] *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 at paras 126-127 [hereinafter *Huu-Ay-Aht*].

[19] *Gitanyow First Nation v. British Columbia (Minister of Forests),* 2004 BCSC 1734 at para. 56 [hereinafter *Gitanyow*].

Furthermore, "the fact that some First Nations have accepted the FRA offer indicates only that those groups made a business decision to accept the offer in a practical sense. It is not reflective of the sufficiency either of the consultation process or of the accommodation offered."[20]

Aboriginal logging rights

In *R.* v. *Sappier* and *R.* v. *Gray* the Supreme Court of Canada held that there was an Aboriginal Right to harvest wood for domestic uses as a member of the Aboriginal community on 'Crown' lands traditionally used for that purpose. The harvesting right identified by the court is a communal one[21] that has no commercial dimension.[22] It does, however, include harvesting wood by modern means to be used in the construction of a modern dwelling.[23]

In BC, logging undertaken in 1999 under the authority of permits issued by the Okanagan and Secwepemc Nations, but not authorized under provincial forest legislation, resulted in another ongoing logging rights case. However, in the *Jules* and *Wilson* cases much broader issues are at stake, as the cases are rooted in the ongoing fight of the Secwepemc and Okanagan Nations for recognition of their Aboriginal Title. These cases were the subject of an advance costs award affirmed by the Supreme Court of Canada in 2003,[24] meaning that the Province was required to pay the First Nations' costs of the trial. However, in March 2008, the BC Court of Appeal upheld an order severing the Aboriginal Rights issues from the proceedings regarding Okanagan Title.[25] Although the Province admitted, following *Sappier* and *Gray*, that the Okanagan Indian Band (not the Okanagan Nation) has an Aboriginal Right to harvest timber for domestic use, this legal maneuver could now mean that the question of central importance to the First Nations, namely recognition of their title and decision-making authority, may not go to trial at this time, nor have the benefit of the advance costs award.

CASE BRIEFS

More detailed summaries of the forestry aspects of the cases cited above are provided in this section.[26]

You can download the full text of the cases from the following websites. All citations provided are to the web versions available on these sites.

- Supreme Court of Canada: csc.lexum.umontreal.ca/en
- BC Supreme Court and BC Court of Appeal: www.courts.gov.bc.ca

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[20] *Huu-Ah-Ayt* at para. 128.

[21] *R*. v. *Sappier*; *R*. v. *Gray*, [2006] 2 S.C.R 686, 2006 SCC 54 at para. 26: The right can't be "exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve. It is a right that assists the society in maintaining its distinctive character" [hereinafter *Sappier and Gray*].

[22] "The right so characterized has no commercial dimension. The harvested wood cannot be sold, traded or bartered to produce assets or raise money. This is so even if the object of such trade or barter is the finance the building of a dwelling": *Ibid.* at para 25.

[23] *Ibid.* at para 48.

[24] *British Columbia (Ministry of Forests)* v. *Okanagan Indian Band*, 2003 SCC 71.

[25] *British Columbia (Ministry of Forests)* v. *Okanagan Indian Band*, 2008 BCCA 107. The *Jules* (Secwepemc) proceedings had previously been stayed until after the trial of the Okanagan case: *British Columbia (Ministry of Forests)* v. *Chief Jules et al*, 2005 BCSC 1312.

[26] With the exception of the *Jules* and *Wilson* (Secwepemc and Okanagan) logging rights cases as the trials have not yet been held.

Haida Nation v. British Columbia (Minister of Forests) 2004 SCC 73

This case, now one of the leading Supreme Court of Canada authorities on the duty of consultation and accommodation, arose in the context of the replacement and transfer of Tree Farm Licence 39 on Haida Gwaii.

In the *Haida* decision, the Supreme Court of Canada rejected the Crown's long-standing argument that that it had no duty to consult First Nations in the absence of a treaty or court decision confirming their rights, noting that: ""To limit reconciliation to the post-proof sphere ….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."[27]

In general, the scope of the duty to consult 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."[28] Furthermore, the duty is not just a procedural one, and the Crown may need to vary its policies or plans to accommodate Aboriginal Title and Rights.

"The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations."[29] Varying permits, amending plans, passing/amending legislation (including taking back corporate tenure rights) are all within the provincial governments control and can be used as remedies to achieve meaningful consultation and accommodation.

The Supreme Court of Canada's decision with respect to consultation at the strategic level is of particular importance in the land use planning and forestry context. McLachlin C.J., writing for a unanimous court stated:

> 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.[30]

The Supreme Court of Canada, however, disagreed with the BC Court of Appeal on the question of whether third party resource developers have a duty to consult, holding that "the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated."

In the result, the court concluded that the Province had failed to meet its duty to engage in "something significantly deeper than mere consultation" with the Haida, and that had good faith consultation occurred it may have lead to an obligation to accommodate.

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[27] *Haida* at para 33.
[28] *Haida* at para 39.
[29] *Haida* at para 55.
[30] *Haida* at para. 76.

Halfway River First Nation v. *BC*, 1999 BCCA 470

In this case, the Halfway River First Nation challenged the decision of the District Manager of Forests to issue a cutting permit to Canfor in an important hunting area referred to as Tusdzuh. At the BC Supreme Court level, Madam Justice Dorgan found that approving the cutting permit was a *prima facie* infringement of the petitioner's Treaty 8 right to hunt that was not justified because the Crown had failed to meet its duty of consultation to Halfway River. She set aside (quashed) the District Manager's decision to issue the cutting permit. The majority of the BC Court of Appeal agreed that the Crown failed to meet its duties to Halfway River, which Finch J.A. characterized as follows:

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action... .
>
> There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.... [31]

Although all three judges on the Court of Appeal panel provided separate reasons (with Madam Justice Huddart agreeing with the result), Finch J.A.'s characterization of the duty has been widely followed in subsequent decisions.

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[31] *Halfway River* at para. 160-61.

***Hupacasath First Nation* v. *British Columbia (Minister of Forests) et al.,* 2005 BCSC 1712; *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505.**

The Hupacasath First Nation challenged the decision of the Minister of Forests to allow a logging company (then Brascan, now Island Timberlands) to remove private lands from Tree Farm Licence 44 and the Chief Forester's decision to amend the allowable annual cut for TFL 44.

The 2005 *Hupacasath* decision established that the duty to consult and accommodate may apply to private forest lands, at least in some circumstances. In particular, Madam Justice Smith found that the Crown had, and continues to have, a duty to consult the Hupacasath prior to allowing the removal of private lands from TFL 44 (the "Removal Decision"), and prior to the decision to amend the allowable annual cut:

> The Crown's honour does not exist only when the Crown is a land-owner. The Crown's honour can be implicated in this kind of decision-making affecting private land. Here, the Crown's decision to permit removal of the lands from TFL 44 is one that could give rise to a duty to consult and accommodate. I refer back to the words of the Supreme Court in ***Haida Nation*** at para. 76: the province may have a duty to consult and perhaps accommodate on TFL decisions, which reflect the strategic planning for the utilization of the resource and which may potentially have serious impacts on aboriginal rights.
>
> I have concluded that the existence of a duty to consult, in these unique circumstances, is not precluded by the fact that these are private lands.[32]

Smith J. rejected the Crown's argument that the removal had no impact on the Hupacasath:

> The removal decision, by all accounts, results in a lower level of possible government intervention in the activities on the land than existed under the TFL regime. There is a reduced level of forestry management and a lesser degree of environmental over-sight. Access to the land by the Hupacasath becomes, in practical terms, less secure because of the withdrawal of the Crown from the picture. There will possibly be increased pressure on the resources on the Crown land in the TFL as a result of the withdrawal of the Removed Lands. The lands may now be developed and re-sold.[33]

In the result, Hupacasath access to sacred sites, food gathering, use of cedar and other plants, and hunting would be affected.

Smith J. found that while the Crown's duty with respect to potential impacts on Hupacasath rights on the private land is on the lower end of the spectrum and didn't require 'deep consultation': "It does require informed discussion between the Crown and HFN in which HFN have the opportunity to put forward their views and in which the Crown considers the HFN position in good faith and where possible integrates them into its plan of action. The Crown has not met that duty." [34]

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[32] *Hupacasath* at paras 199 and 200. The "unique and unusual circumstances" referred to by the judge relate to the historical development of the tenure system in BC, which gave the Minister "specific and significant control" over private lands held within a TFL. In the past, private landowners were given tax incentives, preferential harvesting rights, and other economic incentives to bring their private land under a TFL. Once part of the TFL provincial forestry legislation applied to these lands, they could not be sold to third parties without Ministry of Forests consent, nor used for non-forestry purposes.

[33] *Hupacasath* at para 223.

[34] The Crown's duty with respect to the impact of the removal decision on Hupacasath territory that is considered 'Crown land' required something "closer to deep consultation": *Ibid.* at para 274.

However, because the evidence showed potentially significant prejudice to Brascan/Island Timberlands if the Removal Decision were set aside or suspended, the judge allowed it to stand while the Crown undertook further consultation to meet its duties to the Hupacasath.

In 2008 Hupacasath returned to court. In the 2008 *Ki-Kin-Is-Uqs* decision Smith J. found that the Crown had not yet met its duties.

She confirmed that the Crown's duty "was to work toward accommodation for the Removal Decision's impact on HFN aboriginal rights."[35] In this case the consultation record showed that even after the 2005 court decision the Crown continued to question whether accommodation was necessary. It was this misconception of its duty that led it to conduct the process in a way that was not reasonable.

In *Ki-Kin-Is-Uqs* the court found that the Crown had not met its duty to the Hupacasath despite:

- allocating a considerable amount of its officials' time and providing some financial assistance to facilitate Hupacasath's participation in the process;
- offering accommodations in the form of a Planning and Forestry Agreement (similar to an FRO but with additional accommodation offered); and,
- supporting a 'corporate' table process that involved several ministries and continuing with a number of other processes and topics of consultation involving Hupacasath "as it was required to do."

Why? "In short, the Crown's duty required a process focused on the possible impacts of the Removal Decision. Because the consultation process was delayed for various reasons, and because it became enmeshed in other complex processes, that focus was lost."[36] Smith J. held that: "There is no duty to reach agreement, but there is a duty to focus on the relevant issues in the discussions."[37]

In this case, the Crown was not willing to consider matters such as how Hupacasath might retain access to at least the most important of their sacred sites on the removed lands, or how to protect wildlife corridors so that animals hunted by Hupacasath might be available on 'Crown' land.

In the result, the court ordered that a mediator be appointed who would be empowered to set timelines, direct the exchange of information and report to the court if there are difficulties. In doing so Smith J. provided specific direction about the issues that must be considered in the process.

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[35] *Ke-Kin-Is-Uqs* v. *British Columbia (Minister of Forests),* 2008 BCSC 1505 [hereinafter *Ke-Kin-Is-Uqs*].

[36] *Ke-Kin-Is-Uqs* at para 248.

[37] *Ibid.* at para 250.

Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests), 2005 BCSC 697.

In this case the Huu-Ay-Aht challenged the Crown's Forest and Range Agreement (FRA) policy on the basis that it was inconsistent with the Crown's constitutional duties to consult and accommodate the Huu-Ay-Aht First Nation.

In the judgment, Madam Justice Dillon outlined a number of problems with the FRA policy, including its failure to treat each First Nation individually. The *Huu-Ay-Aht* decision makes it clear that "proper consultation considering appropriate criteria must involve active consideration of the specific interests of HFN [Huu-Ay-Aht]."[38] The Crown failed to consider the strength of the Huu-Ay-Aht's 'claim' or the degree of infringement. This "represents a complete failure of consultation based on the criteria that are constitutionally required for meaningful consultation. While a population-based formula approach may be a quick and easy response to the duty to accommodate, it fails to take into account the individual nature of the HFN [Huu-Ay-Aht] claim."[39]

The judge refers to the Crown's approach, in which the Crown gave the appearance of willingness to consider Huu-Ay-Aht 's responses, but in fact never waivered from its position (as expressed in the FRA policy) as "intransigent." Problems with the Crowns conducted included that no alternative was ever offered to Huu-Ay-Aht despite their requests to consider their specific situation, and that logging continued when Huu-Ay-Aht did not accept the FRA. In the result, Dillon J. found that the use of population-based formulas to determine accommodation pursuant to the FRA program was not good faith consultation and accommodation, and granted the declarations sought by the Huu-Ay-Aht.

One hurdle in this case was the Crown's argument that the Crown's duty to consult and accommodate is only triggered by specific decisions. Madam Justice Dillon rejected this argument:

> The question posed by the Crown is how specific the infringement has to be before the duty is triggered. With respect, that is not the question. The obligation arises upon knowledge of a claim and when infringement is contemplated. It is an ongoing obligation once the knowledge component is established. It is a process.

Instead, she found that the duty is related back to the Crown's initial decision to issue timber tenures.

> In this case, the FRA initiative is a creature of statute, the *Forestry Revitalization Act* and the *Forest Act*, which enable the province to make specific agreements with First Nations regarding forest tenure. The FRA is the vehicle that the Ministry chose to deliver those specific agreements. The concept of 'decision' should not be strictly applied when there is legislative enablement for a government initiative that directly affects the constitutional rights of First Nations. [40]

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[38] *Huu-Ay-Aht* at para. 127.

[39] *Ibid.* at para 126.

[40] *Ibid.* at para 104.

In the Matter of CCAA and Skeena Cellulose, et al 2002 BCSC 597; *Gitxsan and other First Nations* v. *British Columbia (Minister of Forests)* 2002 BCSC 1701; *Gitanyow First Nation* v. *British Columbia (Ministry of Forests)* 2004 BCSC 1734

These decisions arose in the context of the financial difficulties of Skeena Cellulose. In 2001 Skeena sought protection under the *Companies' Creditors Arrangement Act* and attempted to reorganize its financial affairs to avoid bankruptcy. Skeena was eventually sold to NWBC Timber & Pulp, a change in control that at that time required consent from the Minister of Forests because Skeena held a TFL and several forest licences.

Chief Justice Brenner was not willing to issue to grant an injunction to stop the Minister for giving his consent. Although there was a "serious question to be tried," namely whether the Minister had met his constitutional duties to the affected First Nations, in making his decision, Brenner, C.J. concluded that the First Nations would not suffer "irreparable harm"[41] and that the "balance of convenience" favoured Skeena, NWBC, the creditors, employees and contractors dependent on Skeena, as well as the public, who, he decided, would suffer greater prejudice than the First Nations.[42]

The Gitxsan, Lax Kw'alaams, Metlakatla, Allied Tsimshian Tribes Association and the Gitanyow were, however, eventually successful a number of months later in their judicial review of the Minister of Forests decision. First, Tysoe J. held that each of the petitioning First Nations had a good *prima facie* claim of Aboriginal Title and a strong *prima facie* claim of Aboriginal Rights with respect to at least part of the lands concerned. He then concluded that the government did have a duty to consult. In so doing, he rejected the Crown's argument that the change in ownership was "neutral" and did not require any consultation. Similar to the situation in the *Haida* case, when the company holding a TFL changes, their philosophy may differ and this could result in different management decisions that impact on the First Nations. In addition, in this case, if Skeena had been allowed to go into bankruptcy, this may have freed up land or tenure for the First Nations. The sale had an additional impact on Gitanyow because of lack of clarity about how certain outstanding silviculture obligations of one of Skeena's subsidiaries, Buffalo Head, would be addressed.[43]

Furthermore, the duty to consult is continuing one, and goes back to the original issuing of the timber tenure: "If a forest tenure licence has been issued in breach of the Crown's duty to consult, the duty continues and the Crown is obliged to honour its duty each time it has a dealing with the licence."[44]

Tysoe J. concluded that there was no meaningful consultation by the Crown with respect to the Minister's decision and "no attempt whatsoever to accommodate their concerns." Tysoe J. did not quash the Minister's decision to consent to the change in control but directed that the Minister be given an opportunity to fulfill the duty.

The Gitanyow returned to court in 2004, taking the position that the Minister had not provided adequate and meaningful consultation, and that the Minister's decision to allow the change in control should be set aside (quashed). The disputes at this stage related in large part to the Ministry of Forests FRA policy. Among other things, the Gitanyow submitted that the Minister had failed to take into account the specific nature of their rights when it refused to deviate from a standard form FRA.

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[41] Among other things, the conditions on the Minister's consent made it clear that the transaction was explicitly "without prejudice" to Aboriginal Title and Rights: *Gitxsan* at paras 17-18.

[42] *In the Matter of CCAA and Skeena Cellulose et al* 2002 BCSC 597.

[43] *Gitxsan* at para 82-83.

[44] *Gitxsan,* at para 81.

Tysoe J. concluded that "negotiations on the [Forest and Range] Agreement does not constitute consultation and accommodation for the purposes of the Minster's consent to the change in control of Skeena."[45] What was on the table in the FRA discussions was a broader financial arrangement that was really "something different."[46]

Ultimately, Tysoe J. found that the Crown was not acting in bad faith to offer its standard agreement, but that didn't mean that it had met its duty if Gitanyow did not accept it.

> [T]he Crown's offer to enter into the Forest and Range Agreement will not fulfill the Crown's duty in respect of the Skeena change of control unless the Gitanyow are prepared to accept the offered sum of money and other concessions as adequate non-cultural accommodation in respect of the Skeena change of control and all logging operations and decisions affecting their claimed territory over the next five years.

In addition, the judge made a number of non-binding comments about the FRA negotiations, essentially acknowledging the two parties' positions. For example, he acknowledged that the FRA approach may be commercially expedient for the Province and reflects a business decision on both sides. He found the Province's inflexibility "understandable" once it had committed itself to a particular system of compensation. On the other hand, Tysoe J. also stated:

> I can understand the reluctance of the Gitanyow to effectively waive the non-cultural aspect of the duty of consultation and accommodation for a five-year period in exchange for a monetary payment. The amount of the payment is established in advance, but the degree and nature of the infringements of Aboriginal interests over the five year period is not.[47]

Furthermore, if compensation is to be based on a per-capita basis, it was reasonable for the Gitanyow to be "compensated on the basis of their true numbers" rather than the records of the Department of Indian and Northern Affairs.[48]

With respect to the outstanding silvicultural obligations of Buffalo Head, however, Tysoe J. held that the Crown had not yet fulfilled its duties to consult and accommodate. When Skeena was sold the transaction specifically excluded Skeena's subsidiary Buffalo Head, which was instead transferred to a numbered company owned by the Crown. There was no evidence that the eventual owner of the relevant forest licence, Timber Baron Contracting, had the capability or intention of addressing Gitanyow concerns about previously logged areas.

Rather than granting the further relief requested by the Gitanyow, he ordered the parties to resume negotiations.

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[45] *Gitanyow* at para 67.
[46] *Ibid.*at para 50.
[47] *Ibid.* at para 57.
[48] *Ibid.* at para 57.

Klahoose First Nation* v. *Sunshine Coast Forest District (District Manager), 2008 BCSC 1642.

In this case, the Klahoose challenged the approval of a Forest Stewardship Plan submitted by Hayes Forest Services. The *Klahoose* case required the court to address the implications of the 'new' operational planning requirements under the *Forest and Range Practices Act* (FRPA) and particularly the very limited information licensees are required to provide in their FSPs, the only operational plan that now requires approval.

In this case, the District Manager refused information requests from Klahoose (e.g., inventory and habitat data, information about the company's access plans) on the basis that the licensee was not required to provide this information when submitting an FSP for approval. The BC Supreme Court rejected this argument, confirming that: "the constitutional duty to consult and accommodate is 'upstream' of the statutes under which the ministerial power has been exercised, so that the district manager is not able to follow a statute, regulation or policy in such a way as to offend the Constitution."[49]

Similarly, the court rejected the Ministry's submission that the more appropriate time for dealing with such requests would be in the context of operational decisions such as applications for cutting permits.

> I do not consider that to be an adequate response. The relationship of an FSP to the harvesting of timber or construction of a road (the two acts which have the potential for negative impact on the landscape) is made clear by s. 3(1) of the FRPA. Where the duty to consult is deep, it is not an answer to say that there will be further opportunities for consultation when the process that may lead to harm is further advanced, or that the information sought, while important, is not part of the process at this stage.[50]

In *Klahoose*, the BC Supreme Court also confirmed that it was not unreasonable for Klahoose to engage in "hard-nosed" negotiations, in which "[e]ach side attempted to build a position of strength," including denying the timber company access to the watershed through one of their reserves.

> I find no evidence in the record, however, that Klahoose attempted to frustrate the consultation process by refusing to meet or participate in meetings, or by imposing unreasonable conditions; see ***Halfway River First Nation**, supra* at para. 161. While making it clear it did not want Hayes or anyone else to log the area, Klahoose never took the position that it would not participate in any consultation process which would have that result. What Klahoose insisted on was information that related to the whole of the TFL, as opposed to a piecemeal approach, and operational information that would permit it adequately to assess the impact. I do not consider that to be unreasonable; see ***Tzeachten First Nation v. Canada (Attorney General)***, 2008 FC 928 at para. 64-69.[51]

In the result, Grauer J. ordered a stay of all further activity and operations occurring under FSP, with the exception of an amendment application to extend the plan to all of TFL 10 (one of Klahoose's concerns was the piecemeal nature of planning). In turn, any amendment or new FSP would have to be considered in accordance with the "Crown's duty of deep consultation, aimed at finding satisfactory interim solutions."[52]

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[49] *Klahoose First Nation* at para 131.

[50] *Ibid.* at para 129.

[51] *Ibid.* at para 134.

[52] *Ibid. a*t para 150.

R. **v.** ***Sappier*** **and** ***R.*** **v.** ***Gray*****, 2006 SCC 54.**

The Mi'kmaq and Maliseet Respondents in this case were charged with unlawful possession and cutting of Crown timber, and argued in defence that they had an Aboriginal Right to harvest timber for personal use.

The Supreme Court of Canada held that the respondents had an Aboriginal Right to harvest wood for domestic uses as a member of the Aboriginal community, on 'Crown' lands traditionally used for that purposes by members of their respective nations. The harvesting right identified by the court is a communal one[53] that has no commercial dimension. [54] It does, however, include harvesting wood by modern means to be used in the construction of a modern dwelling.[55]

In doing so, the court clarified that a practice undertaken for survival purposes can meet the test for being an Aboriginal Right, if the practice is integral to the pre-contact way of life of the particular Aboriginal communities in question. Here, the record showed "that the practice of harvesting wood for domestic uses including shelter, transportation, fuel and tools" was directly related to the way of life of the Maliseet and Mi'kmac as "migratory communities using the rivers and lakes of Eastern Canada for transportation and living essentially from hunting and fishing."[56]

The Supreme Court of Canada also held that "the regulation of Crown timber through a licensing scheme does not meet the high standard of demonstrating a clear intent to extinguish the Aboriginal Right to harvest wood for domestic uses." [57] This is the case even if regulation may at times have completely prohibited Aboriginal harvesting.

However, the Crown may still be able to enact regulations that infringe the Aboriginal Right to harvest timber if they can "justify" the infringement according to certain tests laid down by the courts. The *Sappier and Gray* decision provides no guidance about when and how, however, as the Crown did not attempt to justify the infringement in this case.

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[53]The right can't be "exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve. It is a right that assists the society in maintaining its distinctive character" *Sappier and Gray* at para 26.

[54] "The right so characterized has no commercial dimension. The harvested wood cannot be sold, traded or bartered to produce assets or raise money. This is so even if the object of such trade or barter is the finance the building of a dwelling": *Ibid.* at para 25.

[55] *Ibid.* at para 48.

[56] *Ibid.* at para. 46.

[57] *Ibid.* at para 60.

Tsilhqot'in Nation v. *British Columbia*, 2007 BCSC 1700

In this BC Supreme Court case, Chief Roger William, on behalf of the Xeni Gwet'in and all Tsilhqot'in people sought a declaration of Aboriginal Title in a portion of their territory, as well as a declaration of Tsilhqot'in Rights to hunt, trap and trade in animal skins and pelts. The case was provoked by proposed logging in areas of Tsilhqot'in territory referred to as Tachelach'ed and the Trapline Territory (the 'Claim Area').

In *Tsilhqot'in*, Mr. Justice Vickers concluded that the evidence before him proved that Tsilhqot'in Title exists in specific portions of Tsilhqot'in territory, comprising approximately 200,000 hectares.[58] However, because of a procedural technicality he did not make a declaration of Aboriginal Title. Vickers J. also found that the Tsilhqot'in people[59] have an Aboriginal Right to hunt and trap, to capture and use wild horses, and to trade in skins and pelts as a means of securing a moderate livelihood.

The court rejected the Crown's arguments that Tsilhqot'in Title and Rights had been extinguished, confirming that provincial legislation cannot extinguish Aboriginal Rights, and further that: "Provincial management of timber and the acquisition, removal and sale of timber by third parties under the provisions of the *Forest Act* does not extinguish Aboriginal title."[60]

Indeed Vickers J. went further, to hold that the provincial *Forest Act* does not apply at all to forest resources located on clearly defined areas that meet the test for Aboriginal Title, because:

- The definition of "Crown timber" in the *Forest Act* does not include forest resources on Aboriginal Title land. The *Forest Act* permits the Crown only to grant harvest rights related to "Crown timber" on "Crown land," not land or timber belonging to someone else, like the Tsilhqot'in.[61]

- Aboriginal rights, including Aboriginal Title, "go to the core of Indianness and are protected under s. 91(24)" of the *Constitution Act, 1867*, which gives the federal government jurisdiction over "Indians and lands reserved for Indians." Because the provisions of the provincial *Forest Act* authorizing the management, acquisition, removal and sale of timber on Aboriginal Title lands "affect the very core of Aboriginal Title" they cannot apply to Aboriginal Title land.[62]

Therefore, Vickers concludes that BC has no constitutional authority to:

4) include of Tsilhqot'in Title lands in the Timber Supply Area;
5) issue forestry tenures and authorizations in Tsilhqot'in Title lands; or
6) make strategic planning decisions regarding Tsilhqot'in Title lands.[63]

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[58] Justice Vickers found that Tsilhqot'in village sites, cultivated land (from the Tsilhqot'in perspective) and their well defined network of trails and waterways demonstrated a clear pattern of seasonal land and resource use sufficient to establish occupation as required by the tests for Aboriginal Title previously laid out by the Supreme Court of Canada: *Tsilhqot'in* at para 944.

[59] In doing so, Vickers J. held that the proper rights holder, whether for Aboriginal Title or Aboriginal Rights was the community of Tsilhqot'in people sharing language, customs, traditions, historical experience, territory and resources. "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": *Ibid.* at para 470.

[60] *Ibid.* at para 1045.

[61] *Ibid.* at para. 971 and 980.

[62] *Ibid.* at para. 1032 and 1045.

[63] *Ibid.* at para 1049.

Despite his decision that the *Forest Act* would not apply to Aboriginal Title lands, in case he is wrong, Vickers J. went on to analyze whether the Crown could justify its infringement of Tsilhqot'in Title and Rights, and concluded that the Province has failed to meet the justification test[64] for a number of reasons.

The legislative objective part of the justification test requires the court to balance the needs of Aboriginal nations against the needs of broader society. In *Tsilhqot'in*, Vickers found that there was no compelling and substantial legislative objective for forestry activities in the Claim Area. He determined that impact of logging on Tsilhqot'in Title and Rights would be disproportionate to the economic benefits to broader society[65] and that logging in the Claim Area was not necessary to deter the spread of the mountain pine beetle. Vickers found that the Province failed to consider how land use planning and forestry activities might infringe on Tsilhqot'in Title and Rights. Since the Province did not turn its mind to infringement, it had no basis to claim that there has been as little infringement as possible to achieve the legislative objective.

Regarding the priority test, Vickers found that a proper determination of priority must be based on adequate information. Without "sufficient credible information," [66] the Province cannot properly assess the impacts on Aboriginal Title and Rights. The onus is on the Province to develop proper baseline information and assess impacts on Aboriginal Rights.[67] Vickers found that the absence of a provincial database providing information about the species and numbers of wildlife in the Claim Area, and BC's failure to conduct a needs analysis indicated that Tsilhqot'in Title and Rights had not been afforded any priority by the Crown.

Vickers J. also observed that the Ministry of Forests' legislative mandate is maximizing the economic return from provincial forests while the needs of wildlife species and the continued wellbeing of First Nations are "low on the scale of priorities."[68] He noted that any model of sustainability that is driven solely by an economic engine is incapable of properly considering social values such as Aboriginal Title and Rights.[69] Moreover, there is no single government agency that views sustainability through a broad lens taking into account the values of the people affected by government decisions.[70] This signals that resource managers will be required to take a broader view of sustainability and assess proposed activities in light of other resource developments to address the cumulative impacts on Aboriginal Title and Rights across habitat areas and areas used by First Nations to

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[64] In determining whether the Crown can justify an infringement of Aboriginal Title or Rights the courts have set out a number of questions to consider, depending on the circumstances: whether there is a compelling and substantial legislative objective; whether the infringement is as minimal as possible to achieve the objective; whether Aboriginal Title and Rights are afforded an appropriate level of priority, considering their constitutional status; whether adequate consultation has occurred; and whether fair compensation is available: *R*. v. *Sparrow* (1990), [1990] 1 S.C.R. 1075.

[65] This finding is significant because the Province often assumes that resource development is automatically a valid legislative objective. By finding that it is not, Vickers rebuts this assumption and signals that economic interests may not be sufficient to override constitutionally protected Aboriginal Title and Rights. Since Aboriginal Rights enjoy constitutional protection while economic rights (e.g., resource tenures) do not, Aboriginal Rights should take priority over economic interests. Vickers J. reaffirms that protection of Aboriginal Rights is paramount objective: *Tsilhqot'in* at para. 1291.

[66] *Ibid*, at para. 1294.

[67] Heather Mahoney, "*Tsilhqot'in Nation* v. *British Columbia*: Cultural Security and the Promise of Site-Specific Rights," in Continuing Legal Education Society Aboriginal Law: *Tsilhqot'in v. British Columbia* Conference Materials, January 18, 2008, (hereinafter "Mahoney Paper") at 3. Mahoney suggests that this will require a shift for provincial agencies that rely on referral responses from First Nations to determine the existence of Aboriginal interests.

[68] *Tsilhqot'in* at para. 1286.

[69] *Ibid*, at para. 1301.

[70] *Ibid.*

exercise their rights.[71] BC's economic agenda and lack of information lead Vickers J. to conclude that Tsilhqot'in Title and Rights were not given proper priority in the Province's land use and forestry planning.

Vickers places Tsilhqot'in Title and Rights at the high end of the *Haida* spectrum, requiring deep consultation and accommodation. He notes the volume of consultation evidence put forth by the Province in *Tsilhqot'in* but finds that these efforts do not amount to genuine consultation for three reasons.

First, Vickers found that BC refused to acknowledge Aboriginal Title and Rights.[72] Vickers confirmed that consultation that is not based on rights-recognition will not be adequate to justify infringements of Aboriginal Title and Rights.[73]

Second, Vickers noted that the Province made no attempts to address or accommodate Tsilhqot'in Title and Rights.[74] He indicated that accommodation requires the Crown to respect the cultural and economic relationship between First Nations and the land base on which their rights are exercised. Therefore, the Crown must take measures to ensure the continuation of Aboriginal Title and Rights and the "continued wellbeing" of First Nations.[75]

Third, Vickers observed that BC failed to reach any compromise based on the mistaken belief that the forestry regime provided no room to accommodate Tsilhqot'in Title and Rights.[76] His finding reaffirms that the Province cannot hide behind its provincial laws to evade its constitutional duties to First Nations. Instead, the provincial regimes can and must accommodate Aboriginal Title and Rights.

Accordingly, Vickers J. concluded that the Province had breached its duty of consultation.

Being unable to find a valid legislative objective, necessity, minimal infringement, appropriate priority, or adequate consultation, Vickers ruled that BC could not justify its infringement of Tsilhqot'in Title and Rights.[77] As a result, the land use planning and forestry activities at issue unconstitutionally violated Tsilhqot'in Title and Rights.

Overall, the *Tsilhqot'in* decision raises the bar for governments seeking to justify infringements to Aboriginal Title and Rights. The decision clarifies that a justification process that does not actually recognize and accommodate Aboriginal Title and Rights will not be sufficient to justify infringements. The decision also provides incentive for the Crown to properly engage First Nations in decision making. Significant legislative and policy changes are required to align the provincial and federal decision making frameworks with the case law.

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[71] Mahoney Paper at 3. Mahoney anticipates that the lack of an interagency coordinated approach to assessing impacts on Aboriginal rights will be a significant challenge to Crown resource managers: *Ibid* at 4.

[72] *Tsilhqot'in* at para. 1136.

[73] *Ibid.* at para. 1294.

[74] *Ibid.* at para. 1137.

[75] Mahoney Paper at 5. Mahoney suggests that accommodation may require a measure of direct control over the level and type of resource extraction occurring across the land base.

[76] *Tsilhqot'in* at para. 1139.

[77] *Ibid*, at para. 1141. Vickers did not go on to consider the compensation portion of the justification analysis.

***Wii'litswx* v. *British Columbia (Minister of Forests)* 2008 BCSC 1139**

In this decision, the Gitanyow challenged the decision of the Ministry of Forests (MoFR) Regional Director to replace six forest licences pursuant to s. 15 of the *Forest Act*.

In her reasons, Madam Justice Neilson clarified that it is not strictly speaking the MoFR decision to replace the forest licences that is subject to judicial review, but rather "the Crown's conduct with respect to fulfillment of its duty to consult Gitanyow and to accommodate its interests in the course of making that decision."[78]

Neilson J began by examining whether the Crown properly assessed the scope of its duty to consult and accommodate. She concludes that the Regional Director put too much weight on the fact that Gitanyow had not 'proven' Aboriginal Title in court, and thus minimized the strength of Gitanyow's claim. In terms of the seriousness of the potential impact, Neilson J. noted that the decision to replace the forest licences was a "strategic administrative decision" that represented the first step in allowing the continued removal of "a claimed resource in limited supply" in Gitanyow territory for the next 15 years. She contrasted the total Allowable Annual Cut (AAC) associated with these licensees with the much lower volume offered to Gitanyow in their Gitanyow Forest Agreement (GFA),[79] and notes that the replacements "were superimposed on a long and troubled history of over-logging and unfulfilled silviculture obligations on Gitanyow traditional territory."[80]

Pointing out that a similar argument failed in the Haida case, Neilson J. rejected the Crown's submission that later operational steps like approval of Forest Stewardship Plans and cutting permits reduce the potential impact on the Gitanyow of the strategic decision to replace the Forest Licences. She notes that any measures to protect aboriginal interests at the operational level "are largely discretionary, or may be supplanted by competing interests."[81] She also finds that "the troubled history of logging in Gitanyow traditional territory strongly suggests that operational decisions have not been successful at minimizing the effect of logging on Gitanyow's interests in the past."[82]

Next the judge went on to assess whether the process of consultation was reasonable. In this case, Neilson J. referred to the format for consultation used in this case, including a four-step Consultation Protocol set out in the GFA as "impressive" and concluded that it was "a satisfactory framework for reasonable consultation." She also concludes that the parties acted in good faith to carry out discussions according to this framework. However, Neilson J. want on to stress that court's assessment must also go beyond looking at "procedural adequacy" to examine whether the consultation was "meaningful, in the sense that the Crown made genuine efforts to understand Gitanyow's position, and to attempt to address it, with the ultimate goal of reconciliation in mind."[83] This means the court needs to look at whether interim accommodation was required and if what was provided was reasonable.

In this regard, Madam Justice Neilson rejected the Crown's submission that Interim Accommodation provided for in the GFA should be interpreted as providing reasonable accommodation for the Forest Licence replacement decision. This was based her reading of the agreement as a whole, including the sections that gives

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[78] Relying on *Musqueam Indian Band* v. *BC (Ministry of Sustainable Resource Management*), 2005 BCCA 128, Neilson J. notes that legal proceedings related to the Crown's duties to First Nations are "upstream" of the statutes like the *Forest Act*, and address not the lawful exercise of powers conferred by statute, "but an overarching constitutional imperative": *Wii'litswx* v. *British Columbia (Minister of Forests)* 2008 BCSC 1139 at para 12-13 [hereinafter *Wii'litswx*].

[79] An agreement generally modeled on the standard FRO but with a number of innovative provisions, such as the creation of a Joint Resources Council.

[80] *Ibid.* at para 187.

[81] *Ibid.* at para 161.

[82] *Ibid.* at para 163.

[83] *Wii'litsw* at para 145.

Gitanyow the right to seek additional accommodation during the term of the GFA. Similarly, the Crown could not rely on subsequent operational decisions: "I am not satisfied that reliance on future discretionary decisions, over which Mr. Warner has no control, can be viewed as reasonable accommodation for the decision to replace the FLs."[84]

Perhaps most significantly: "A review of the accommodation with respect to each of Gitanyow's concerns demonstrates that, despite the extensive consultation between the parties, the Crown had not modified its position to accommodate Gitanyow's interests."[85]

For example, Neilson J. stated:

> I am satisfied on the material before me that the Wilp are an integral and defining feature of Gitanyow's society. As such the Wilp system and the related aboriginal rights attract the protection of s. 35 of the Constitution Act, and the honour of the Crown required that they be reconciled with Crown sovereignty by being reasonably accommodated.

However, the Crown's position on this issue remained unchanged throughout the consultation. "Dismissing such recognition as impractical, without discussion or explanation, fell well below the Crown's obligation to recognize and acknowledge the distinctive features of Gitanyow's aboriginal society, and reconcile those with Crown sovereignty."[86]

At the end of the day, while Neilson J. made declarations that the Crown had failed to uphold the honour of the Crown and failed to fulfill its constitutional duty to adequately consult and accommodate Gitanyow's Title and Rights in the course of deciding to replace the six Forest Licences.

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[84] *Ibid.* at para 186.

[85] *Ibid.* at para 194.

[86] *Ibid.* at para 247.