

**CONSULTATION OBLIGATIONS IN THE FOREST SECTOR
RECENT DEVELOPMENTS**

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Consultation Obligations In The Forest Sector -- Recent Developments

The most frequently litigated issue between the forest sector and aboriginal rights claimants in recent years has been the nature and scope of the Government's obligation to consult Aboriginal people before authorizing action that might interfere with their aboriginal rights claims. The nature of the obligation has now been settled by the Supreme Court of Canada, but the practical effect of the legal requirement is still being played out on the ground and in the lower courts.

The rise in importance of this issue has coincided with a realization that the treaty negotiation process does not appear to be likely to resolve the outstanding issues of aboriginal title claims, at least in the near future. Thus the question has shifted to how to define the parties' relationship while aboriginal title claims are outstanding, but remain unresolved.

The purpose of this paper is to review some of the recent developments in this area, with three specific questions in mind:

- (i) What is the scope of aboriginal title?
- (ii) What is the nature of the obligation to consult before interfering with unresolved aboriginal rights and title claims?
- (iii) What is meant by "accommodation", and specifically when, if ever, is "economic accommodation" required.

I. Scope of Aboriginal Title

Most aboriginal claims in recent years have been framed at least in part as claims to aboriginal title to traditional territory. Until recently there has been an ambiguity as to whether the scope of aboriginal title included all the traditional territory of the aboriginal nation, or just the territory which they actually occupied, in the sense of physically living on the particular ground or visiting it so regularly as to amount to physical control and occupation. That ambiguity has now been resolved. The resolution is relevant to the claims of aboriginal nations to which the obligations of consultation and, if appropriate, accommodation, apply.

A. The *Delgamuukw* Ambiguity

Aboriginal title was first described authoritatively in the leading decision, *Delgamuukw v. The Queen*.¹ In this decision, the Supreme Court of Canada explained that aboriginal title was different from common law fee simple, but also not simply a bundle of activity rights. It is instead a *sui generis* right to exclusive possession and occupation of land:

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 land, and is one way in which aboriginal title is distinct from a fee simple.²

The test for proof of aboriginal title was described in this way:

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.³

The critical test for aboriginal title is prior occupation, but the meaning of “occupation” was not made clear by the Court. The first part of the test was elaborated in this way:

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.⁴

¹ [1997] 3 S.C.R. 1010.

² *ibid.*, para. 111

³ *ibid.*, para. 143

⁴ *ibid.*, para. 144

The ambiguity as to the meaning of occupation was recognized by the Court, but not resolved:

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. ... However, ... the source of aboriginal title appears to be grounded both in the common law 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.⁵

Since the *Delgamuukw* decision was released, the debate over the nature of “occupation” that was necessary to support aboriginal title has been somewhat muted. Aboriginal nations have consistently taken the position that the meaning of *Delgamuukw* was that they had aboriginal title over their traditional territory. Maps were drawn, often for treaty negotiation purposes, which showed large areas described as a nation’s traditional territory and hence, land over which aboriginal title was asserted. These areas frequently overlapped with the traditional territories asserted by other aboriginal nations. Because the Governments have regarded treaty negotiations as “rights-neutral”, there has not been an active debate as to whether these large claimed traditional territories could realistically be the subject of aboriginal title. The formal position of the Governments, however, remained that the degree of occupation necessary to support aboriginal title was actual physical occupation, not just land over which sustenance activities occurred.

This issue came to a head in two cases from the Maritimes involving attempts by different members of the Mi’kmaq Nation to harvest and trade in Crown timber with Crown authorization.

⁵ *ibid.*, paras. 146-147

B. The *Marshall/Bernard* Clarification

In these two cases, decided in a single judgment by the Supreme Court of Canada⁶, the issue was whether members of the Mi'kmaq people in Nova Scotia and New Brunswick may engage in commercial logging on Crown lands without authorization, either by reason of their treaty rights or on the basis that the Mi'kmaq held aboriginal title over large areas of those two provinces. The Supreme Court unanimously held that the Mi'kmaq did not have the treaty right to engage in commercial logging, and also that they had not established that they had aboriginal title over the relevant cutblock areas. In doing so, the Court clarified the *Delgamuukw* ambiguity – the meaning of occupation as it relates to the proof of aboriginal title.

When the *Marshall/Bernard* decision was released, a number of commentators suggested that it had little relevance to British Columbia because it dealt with Mi'kmaq treaty rights in the Maritimes. This interpretation of the decision is unduly narrow. There were two distinct defences in the case – treaty rights and aboriginal title. The Court dealt with each separately and in distinct portions of the judgment⁷. It is true that the Court's comments with respect to the Mi'kmaq treaty rights have little if any relevance outside the Maritimes, but the Court's explanation of the reasons the aboriginal title claim failed are of direct and significant application. For an understanding of the scope of aboriginal title in British Columbia, *Marshall/Bernard* is the most important judgment of the Supreme Court of Canada since *Delgamuukw*.

The Court begins its discussion with a simple statement of the nature of aboriginal title:

38. Where title to lands formerly occupied by an aboriginal people has not been surrendered, a claim for aboriginal title to the land may be made under the common law. Aboriginal peoples used the land in many ways at the time of sovereignty. Some uses, like hunting and fishing, give rights to continue those

⁶ *R. v. Marshall; R. v. Bernard*, 2005 SCC 43

⁷ The treaty issues are dealt with at paragraphs 7 to 36 under the heading “II. Aboriginal Treaty Rights”; aboriginal title is analysed at paragraphs 37 to 105 under the straightforward heading, “III. Aboriginal Title”. There is nothing about the statements of principle relating to aboriginal title that would limit them to the Maritime provinces.

practices in today's world. ... Aboriginal title, based on occupancy at the time of sovereignty, is one of these various aboriginal rights.⁸

The Court then states that the test for aboriginal title under *Delgamuukw* is based on exclusive occupation at the time of British sovereignty, and that the aboriginal title issue in *Marshall/Bernard* is “the standard of occupation required to prove title.” The trial judges in each of these cases had required a proof of “regular and exclusive use of the cutting sites” to establish aboriginal title. Judges from both Courts of Appeal had held that this test was too strict and applied what the Supreme Court characterized as the “less onerous standard of incidental or proximate occupancy.”⁹ The Supreme Court then resolved the difference of views by adopting the trial judges’ approach.

The Court began its analysis by stating that physical occupation was necessary to support aboriginal title, and quoted a passage from *Delgamuukw* to illustrate the nature of the occupation required:

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. 149.¹⁰

After pointing out that the physical occupation must be exclusive of other claimants, the Court explained the requirement for “regular use” of specific lands by contrasting the elements of aboriginal title and aboriginal activity rights:

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*, *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

⁸ *ibid.*, para. 38

⁹ *ibid.*, para. 41

¹⁰ *ibid.*, para. 56

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.

59. The distinction between the requirements for a finding of aboriginal title and the requirements for more restricted rights, was affirmed in *Côté*, where the Court held the right to fish was an independent right (para. 38). Similarly in *Adams*, the Court held that rights short of title could exist in the absence of occupation and use of the land sufficient to support a claim of title to the land: see *Adams*, at para. 26; *Côté*, at para. 39; *Delgamuukw*, at para. 159. To say that title flows from occasional entry and use is inconsistent with these cases and the approach to aboriginal title which this Court has consistently maintained.

...

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.

C. Significance of *Marshall/Bernard*

The significance of *Marshall/Bernard* lies in its acceptance of a narrower, more specific concept of occupation than has been assumed by many aboriginal claimants. With the benefit of this judgment, it is now possible to see the broad outlines of how section 35 aboriginal rights will be identified on the ground.

In most cases, it is likely that an aboriginal nation will present a claim for rights in a traditional territory in which the Aboriginal people had village sites, areas outside but near the villages which they visited on a regular and sustained basis, and areas further out which they visited occasionally, perhaps for seasonal hunting or fishing. The village sites will be areas on which aboriginal title can be maintained (subject to the other requirements set out in *Delgamuukw*), as will the areas which can be described as “definite tracts of land” regularly used by the Aboriginal people. On the other hand, areas further away from the village sites used more occasionally or seasonally for activities such as hunting or fishing, or as travel routes, will likely not support aboriginal title, but may support aboriginal activity rights, assuming the other tests for such rights are met.

This is a sensible hierarchy of rights, depending on the intensity of use and occupation. If an aboriginal nation had aboriginal title over the whole of its traditional territory, it would be difficult to see the purpose of defining other aboriginal rights, since aboriginal title by itself is a sufficient right to encompass all other activity rights.¹¹

The *Marshall/Bernard* clarification will be of considerable importance in subsequent aboriginal title cases, since it directly influences the extent of evidence that must be adduced to establish the degree of occupation necessary for proof of title, but the case is of importance in the pre-proof environment as well. The consultation obligation requires a preliminary assessment of the strength of the claim to inform the scope of the required consultation. The nature of that assessment should be somewhat more precise now that the nature of the occupation required to support aboriginal title is better understood.

II. The Consultation Obligation

While the Supreme Court's clarification of the scope of aboriginal title will be helpful in the disposition of aboriginal title cases, the reality is that most issues of relevance to the forest sector arise in the context of uncertain claims. It takes a very long time to resolve aboriginal title claims – in fact, while we all know aboriginal title exists, there have still not been any cases where the courts have actually declared a specific plot of land to be subject to aboriginal title. In the meantime, forest companies must contend with claims of title from many aboriginal nations, and Aboriginal people continue to be frustrated by ongoing resource activities by third parties over land which they claim as their own. In this context, the courts have developed a requirement of consultation with Aboriginal groups who have a plausible claim to aboriginal title or rights that would be affected by a proposed activity.

The consultation obligation arises from a decision of the Supreme Court of Canada in *Haida Nation v. British Columbia*.¹² In this judgment, the Supreme Court held that in certain

¹¹ other than rights which are incompatible with the activities originally conducted on the land, from which the occupation can be established: see *Delgamuukw*, para. 125-132

¹² 2004 SCC 73

circumstances the Crown (but not third parties) has an obligation to consult with Aboriginal people whose unresolved claims to aboriginal rights or title would likely be affected by proposed activities. A number of questions arise as to when and how this consultation is to take place.

A. When is Consultation Required?

The threshold here is a low one. The Crown must consult whenever the Government has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it.¹³

The Supreme Court does acknowledge the difficulty in addressing rights that have been asserted but not yet proven, and puts some onus on the Aboriginal claimants to clearly outline their claims:

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 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.¹⁴

B. Who must consult with whom?

The Supreme Court decisively resolved one issue on which the British Columbia Court of Appeal had divided. The consultation obligation is that of the Crown, not third parties:

¹³ *Haida*, para. 35

¹⁴ *Haida*, para. 36. For an earlier expression of this obligation, see *Husby Forest Products v. British Columbia*, 2004 BCSC 142 at paras. 94 and 96: "It was incumbent on the Haida, if they did object to the granting of the cutting permits, to clearly define the nature and scope of the aboriginal right they claimed was being infringed.... The Haida must delineate whether they claim the right to red cedar and specifically what that means in relation to these cutting permit application, or the right to harvest cedar, or the right to preserve CMTs, or the right to preserve what they call the archaeological forests or some other right not yet encompassed in the various claims mentioned. They must do so in a site specific way."

The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests.¹⁵

This does not mean that third parties such as forestry companies seeking a cutting permit should simply leave everything to the Government. Since the remedy for inadequate consultation could be a setting aside of the permit, the risk is effectively on the permit holder. Most third parties have found it necessary to participate in the consultation process to assist the Crown in meeting its obligations.

The problem of who should be consulted occasionally arises, particularly because there are many overlapping claims in British Columbia. The thrust of the *Haida* decision appears to be that any aboriginal group that makes a credible claim for aboriginal title should be consulted but that those groups with a weak case for title need only receive a low level consultation effort.

C. What is the Content of the Consultation Obligation?

The source of the duty to consult is identified in *Haida* as the honour of the Crown rather than any fiduciary obligation. This appears to be the first time that the honour of the Crown has been used as the source of an obligation rather than an interpretive principle. It does suggest that a technical approach to this duty will not be favoured by the Court.

The Supreme Court offers no bright line test for the content of consultation, but instead uses the by now familiar spectrum approach to determining what must be done.

The content of the duty to consult and accommodate varies with the circumstances. The scope of the duty 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. If the claim is weak or the potential for infringement minor, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. If the claim is strong, the potential infringement significant and the risk

¹⁵ *Haida*, para. 53

of non-compensable damage high, deep consultation, aimed at finding a satisfactory interim solution, may be required. The approach is to be one of balance and compromise on all sides.

A recent decision suggests that adequate consultation has an educative function that requires face to face meetings, even where the Government is of the view that it understands the aboriginal concerns.¹⁶

The Supreme Court does state that there is no duty to agree, a theme the Court returns to in its discussion of accommodation. The Court also adopts a proposition developed in the British Columbia courts that Aboriginal claimants “must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions in cases where, despite meaningful consultation, agreement is not reached.”¹⁷

The approach of *Haida* appears to require that the Crown consult in any instance where there might be any reason to do so and to ensure through consultation that it is aware of and gives due consideration to any aboriginal concerns before making the relevant decision.

D. What must be done substantively to meet the consultation obligation?

Consultation is a procedural requirement, not a substantive one. Consultation may reveal a need to accommodate the aboriginal concerns, in which case the Government must engage in a balancing of aboriginal and non-aboriginal interests. Alternatively, consultation may indicate that accommodation is not necessary, either because the claim for protected rights is weak or because the impact of the proposed activity on the asserted rights will be minimal, or because a balancing of the aboriginal and non-aboriginal interests leads to the conclusion that the proposed activity should go forward, notwithstanding the impact on the asserted claim.

This distinction is clearer in the judgment of the Supreme Court of Canada than it is in the judgments of the lower courts, so care must be taken to reference the Supreme Court’s judgment on this point. Consultation and accommodation are not synonymous. Consultation is almost

¹⁶ *Homalco Band v. British Columbia*, 2005 BCSC 283, para. 108

always required where there is a possibility of interfering with aboriginal rights; accommodation may or may not be required, depending on the results of the consultation.

A B.C. Supreme Court judge expressed the distinction in a recent judgment on this topic:

In some portions of the submissions, it appears the parties are confusing the issues of the obligation to consult and the appropriate accommodation after that consultation.¹⁸

This confusion has extended to the meaning of accommodation, which is the third question to be addressed in this paper.

III. What is accommodation?

The confusion described by Powers J. between the obligation to consult and appropriate accommodation after that consultation takes two forms.

First, it is sometimes assumed that if there is a requirement for consultation, there must be a requirement for accommodation. This assumption finds some support in the lower court decisions leading up to the Supreme Court's decision in *Haida*, but in that decision, the Supreme Court made it clear that whether *any* accommodation is necessary depends on the results of the consultation.

Second, there is a tendency to confuse *accommodation* with *justification*. Justification is the test applied to determine the validity of Crown acts which interfere with established aboriginal rights. Because for example aboriginal title has been said to have an "inescapably economic aspect"¹⁹, some advocates have developed the theory that consultation requires "economic accommodation". This confuses two entirely different concepts.

¹⁷ *Haida*, para. 36

¹⁸ *Homalco*, para. 46, per Powers J.

¹⁹ *Delgamuukw*, para. 169

In *Haida*, the Court spends some time on the definition of accommodation. It is clear that accommodation does not mean meeting the concerns raised, or compensating the Aboriginal claimant for interference with an unproven right, but rather altering the decision to balance the aboriginal concerns with other non-aboriginal interests. Accommodation refers to reconciling and compromising interests, not payment of money.

Accommodation does not mean the aboriginal group has a veto. This is made very clear in the following passage:

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.²⁰

The Court took this concept of “accommodation” from the dictionary sense of the word:

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": *The Concise Oxford Dictionary of Current English* 9th ed. 1995) at p. 9.²¹

In British Columbia, a practice has developed of equating “accommodation” with some form of compensation for Aboriginal claimants prior to establishing their claims. The term “economic accommodation” has been used to refer to the basket of incentives offered to Aboriginal claimants who challenge government-approved projects on land they claim. This practice seems very much at odds with the concept of accommodation as explained by the Supreme Court.

No British Columbia court has yet required that the Government make a payment to accommodate unproven aboriginal rights claims. In a recent decision concerning the transfer of golf course lands in an urban setting, Hall J.A. suggested but did not direct that economic accommodation may be appropriate:

²⁰ *Haida*, para. 48

²¹ *Haida*, para. 49

I should think there is a fair probability that some species of economic compensation would be likely found to be appropriate for a claim involving infringement of aboriginal title relating to land of the type of this long-established public golf course located in the built up area of a large metropolis. ... While I have observed that having regard to the nature and location of these lands, this may well be a situation where financial compensation could be found to be an appropriate measure of accommodation, I would not wish to limit the parties from engaging in the broadest consideration of appropriate arrangements.²²

On the other hand, in the same case Lowry J.A. expressly declined to join in these comments²³:

I do not wish to be taken to endorse what my colleague suggests may be appropriate forms of interim accommodation in this case. ... There is little in the decided cases from which assistance can be drawn with respect to the measure of interim accommodation that may be required in the circumstances that prevail in this case. **Where, as here, no aboriginal title has been finally established, there may well be questions about whether and to what extent economic compensation or other forms of what might be said to be non-reversible accommodation are necessary or appropriate.**

It is the thesis of this paper that Lowry J.A. correctly reflected the concept of accommodation described by the Supreme Court of Canada in *Haida*.

In *Haida*, the Supreme Court seems to have been careful to relate accommodation to a modification of the Government's plans in order to harmonize those plans with aboriginal interests or concerns whenever reasonably possible, rather than a cash payment for an uncertain claim. Some care is spent on this part of the judgment, even to the point of referencing dictionary definitions of "accommodate". The result is an emphasis on harmonization rather than compensation:

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

²² *Musqueam v. BC (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at paras 98-100

²³ *ibid.*, paras. 104-105 (emphasis added)

require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.²⁴

In understanding further what is meant by accommodation in this context, it is significant that in the *Taku River Tlingit* decision²⁵ which was released on the same day as *Haida*, the Supreme Court held that the consultation had been adequate even though there was no real accommodation of the Tlingit's concerns and certainly no "economic accommodation." There had, however, been a significant degree of consultation, even though in the end the Tlingit felt that their concerns had not been met.

The significance of the *Taku River Tlingit* decision is that it demonstrates that not only is financial payment not required in order to meet the Crown's obligations prior to proof of title, there may be no need for any real accommodation at all if that is what the consultation reveals. Accommodation in other words is a concept entirely distinct from *justification*.

IV. Conclusion

The recent judgments of the Supreme Court of Canada have added some welcome clarification of the law, both in relation to the scope of aboriginal title and also the obligations of the Crown in respect of asserted but unproven claims of aboriginal rights and title. Other cases are reaching the Court on a regular basis, and no doubt there will be further refinements to these principles before the next CLE conference on this important topic.

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²⁴ *Haida* (SCC), para. 49

²⁵ 2004 SCC 74