IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Hupacasath First Nation v. British Columbia (Minister of Forests) et al.,*** 2005 BCSC 1712

Date: 20051206
Docket: L043095
Registry: Vancouver

Between:

Ke-Kin-Is-Uqs, also known as Judith Sayers, Chief Councillor suing on her own behalf and on behalf of all members of the Hupacasath First Nation, the Hupacasath First Nation Council and the Hupacasath First Nation

Petitioners

And:

Minister of Forests of the Province of British Columbia, the Chief Forester and Brascan Corporation

Respondents

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for Petitioners:	P.R. Grant D. Schultze
Counsel for Respondents Minister of Forests and The Chief Forester:	G.R. Thompson
Counsel for the Respondent Brascan Corporation:	D.R. Clark, Q.C.
Date and Place of Trial/Hearing:	July 11-15, 2005 Vancouver, B.C.

I. INTRODUCTION

[1] The Hupacasath First Nation ("HFN") seeks judicial review of decisions by the British Columbia Minister of Forests and the Chief Forester.

[2] The individual petitioner, Ke-Kin-Is-Uqs (also known as Judith Sayers), is a member and elected Chief of the petitioner HFN. The Hupacasath people were formerly known as the Opetchesaht, and are an aboriginal people of Canada within the meaning of s. 35 of the ***Constitution Act, 1982***, being Schedule B to the ***Canada Act 1982*** (U.K), 1982, c.11.

[3] The respondent Brascan Corporation ("Brascan") controls the lands and is the licensee under the Tree Farm Licence ("TFL") relevant to these proceedings. Brascan has recently changed its name to Brookfield Asset Management Inc., but for convenience I will continue to refer to it as Brascan.

[4] The petitioners seek judicial review of two decisions: (1) the July 9, 2004 decision of the Minister of Forests consenting to the removal of certain privately owned land (the "Removed Lands") from Tree Farm Licence 44 ("TFL 44"); (2) the August 26, 2004 decision of the Chief Forester determining a new allowable annual cut for TFL 44, effective July 9, 2004.

[5] The petitioners seek relief based on an alleged breach of the constitutional duty of the Provincial Crown to consult with them regarding the Crown's decisions to permit removal of the land from TFL 44 and to amend the allowable annual cut for TFL 44. Alternatively, they seek relief based on an alleged failure of the relevant provincial authorities to comply with the governing statutes and regulations. They seek orders quashing or suspending the two decisions, and referring the matter for reconsideration after there has been consultation and compliance with the statutes.

[6] The respondents oppose the petition on a number of grounds, one of the most significant being that the Removed Lands are privately owned. Their position is that there was no duty on the Crown to consult; if there was any duty, it

was met; and if there was any failure in a duty to consult, the relief sought by the petitioners should not be granted in all of the circumstances. Their position is further that the decisions were made in compliance with applicable laws.

[7] The origin of the constitutional duty of the Crown to aboriginal peoples is in s. 35 of the ***Constitution Act, 1982***, which states:

> 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[8] The statutory provision governing the removal of land from a TFL is s. 39.1 of the ***Forest Act***, R.S.B.C. 1996, c. 157, brought into force May 13, 2004:

> 39.1 (1) The minister may change the boundary or area of a tree farm licence with the consent of its holder.
>
> (2) The discretion of the minister under subsection (1) includes the discretion to change the boundary or area of the tree farm licence with the consent of its holder by
>
> (a) adding private land of the holder of the tree farm licence to the area of the licence, or
>
> (b) removing private land from the area of the licence.

The ***Ministry of Forests Act***, R.S.B.C. 1996, c. 300, provides authority for the Minister to enter into agreements:

> 6 The minister may
>
> (a) enter into an agreement or arrangement with any person or province or with Canada relating to a matter included in the minister's duties, powers and functions, and ...

The ***Forest Act*** provides for the determination of the allowable annual cut in s. 8, which states in part:

> 8 (1) The chief forester must determine an allowable annual cut at least once every 5 years after the date of the last determination, for

(a) the Crown land in each timber supply area, excluding tree farm licence areas, community forest agreement areas and woodlot licence areas, and

(b) each tree farm licence area.

[9] Evidence was tendered in the form of affidavits (in a Chambers Record of some 21 volumes). The evidence went in almost entirely without objection, but where objection was taken to evidence or submissions were made as to its weight, I have disregarded the evidence or have taken those submissions into account in weighing it.

II. FACTS

[10] The Hupacasath live near Port Alberni, on Vancouver Island. They assert aboriginal rights and title with respect to some 232,000 hectares of land in central Vancouver Island. They claim that most of the privately owned Removed Lands are within their traditional territory. The territory which they claim is described in the affidavit of Chief Sayers as encompassing:

> … the headwaters of the Ash and Elsie River systems in the northwest, east to the height of land on the Beaufort Range and then southeast to Mount Arrowsmith to Labour Day Lake and the Cameron River system; the southeast boundary includes the China Creek, Franklin River, Corrigan Creek Areas and the north part of the Coleman Creek Area; the southern boundary follows Alberni Inlet to Handy Creek then northwest to follow the height of land between Henderson Lake and Nahmint Lake; the west boundary includes the headwaters of the Sproat Lake and Great Central Lake Areas; and including the river beds and lake beds of all bodies of water.

[11] The HFN occupied their claimed traditional territory at the time of first contact with Europeans, according to the evidence they tendered. They have never surrendered their aboriginal rights and title by treaty.

[12] Hupacasath elders deposed that the Hupacasath have names, which pre-date contact, for places found throughout their traditional territory. They have traditionally used the claimed traditional territory for hunting wildlife (including deer

and marmot), gathering food and medicinal plants, fishing for trout and salmon (a mainstay of their diet) and harvesting red and yellow cedar for numerous uses, including the building of houses and canoes. The Hupacasath traditionally visited sacred sites throughout their traditional territory for spiritual purposes, and continue to do so. The petitioners' evidence is that their sacred sites are secret, specific to families, and must be secluded from, and untouched by, other human beings. One particularly important sacred site is Grassy Mountain, which is in the Removed Lands and has never been logged.

[13] The petitioners' evidence as to their traditional use of the land was not contradicted, although the Crown tendered some evidence regarding overlapping claims to some of the same territory.

[14] Chief Judith Sayers deposed that the Hupacasath have never been conquered. That assertion is questioned by the Crown. Counsel for the Crown referred to some historical sources stating that another First Nation, the Tseshaht, may have been the dominant group in a portion of the land in the upper Alberni Inlet and the lower Somass River at the time the Crown asserted sovereignty in 1846. The Crown also pointed to some evidence that the Ucluelet took another area (called Nahmint) from the Hupacasath. I make no finding on this point, because the scant evidence before me does not permit it, but note that the evidence referred to by the Crown, if accepted, would not on its own ground a conclusion that the Hupacasath had been conquered.

[15] About 50% of the HFN claimed traditional territory is not subject to any competing claim.

[16] With respect to the other 50%, the Tseshaht, Cape Mudge, Comox, Qualicum, Snuneymuxw, Te'mexw, Uchucklesaht and Ucluelet First Nations have advanced claims and indicated consultative boundaries that overlap with some portions of the HFN claimed territory.

[17] The Tseshaht have two Indian Reserves in the middle of the HFN asserted traditional territory. The largest of the Tseshaht Reserves is between two smaller HFN Reserves near the city of Port Alberni.

[18] In 1980 the Nuu-Chah-Nulth Tribal Council, of which the HFN was a member, filed a comprehensive land claim with the federal government.

[19] In 1993, the Nuu-Chah-Nulth Tribal Council provided to the Provincial Crown a Statement of Intent, which included the claims of the HFN, as part of the British Columbia Treaty Process. This led to a Framework Agreement signed with the provincial and federal Crown on March 27, 1996, marking entry into Stage Four of the treaty process.

[20] The HFN provided its own land selection to the Provincial Crown on September 23, 1998. The land selection covered lands in TFL 44, including the Removed Lands, which were then owned by Weyerhaeuser Company Limited ("Weyerhaeuser").

[21] On February 22, 2000, the HFN filed a Statement of Intent to engage in direct treaty negotiations with Canada and British Columbia, following HFN withdrawal from negotiations as part of the Nuu-Chah-Nulth Tribal Council, and confirmed its agreement to resolve overlapping claims. On February 21, 2001, the Crown agreed to resume treaty negotiations directly with the HFN. Those Treaty negotiations are currently at Stage Four.

[22] The Removed Lands are located in the centre of Vancouver Island. The area of the Removed Lands is about 70,000 hectares and is largely within the HFN claimed traditional territory. The Removed Lands roughly form a rectangle that runs along the northwest/southeast plane of Vancouver Island, but exclude an area around Port Alberni that stretches northeast. Their western border cuts through the eastern tip of Great Central Lake and Sterling Arm in Sprout Lake, and their eastern border stops short of Home and Cameron Lakes. Smaller

pockets of the Removed Lands are located within the borders of TFL 44, primarily around Great Central Lake and Sprout Lake, Alberni Inlet, Bamfield and Ucluelet.

[23] The Removed Lands have been privately owned since 1887 when the Dominion of Canada transferred a tract of land (the "Railway Lands") to the Esquimalt and Nanaimo Railway Company. The Dominion had received the lands from the British Columbia Government in 1884 under the ***Settlement Act***, 1884, chap. 14 S.B.C. (***An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province***)).

[24] MacMillan Bloedel Limited owned the lands for a time, and Weyerhaeuser owned them until May, 2005.

[25] Although the lands have been used for logging for over 100 years, some old growth areas remain untouched.

[26] Making an estimate based on the maps provided in evidence, about 40% of the Removed Lands is not subject to any competing claim from other First Nations.

[27] TFLs are created under the ***Forest Act***, and permit logging by private entities on Crown land.

[28] A TFL may also cover private land. This occurs when an owner of private land adjacent to a TFL on Crown land agrees to have the same TFL extend to cover the private land, in order to permit a unified managed logging operation. In the past, private landowners were given tax incentives, preferential harvesting rights, and other economic incentives to bring their land under a TFL.

[29] Once private land has come under a TFL, the land or an interest in the land cannot be alienated to third parties without the prior written consent of the Minister of Forests (s. 54.7 of the ***Forest Act***). The land cannot be used for other non-forestry purposes (s. 2(1) of the ***Forest Practices Code of British Columbia Act,*** R.S.B.C. 1996, c. 159 ("***Forest Practices Code***")). The permission of the Minister

of Forests must be obtained to remove the land from the TFL (s. 39.1 of the ***Forest Act***).

[30] The ***Land Title Act***, R.S.B.C. 1996, c. 250, s. 281, provides that the Minister of Forests may file a written notice in the Land Title Office showing that land for which indefeasible title is registered has become subject to a TFL. The evidence is silent as to whether the Minister had filed a written notice with respect to the TFL covering the Removed Lands.

[31] Around 1945 the then owner of the Removed Lands held a TFL covering adjacent Crown land and agreed to have the Removed Lands brought under that TFL. Brascan produced evidence that the Removed Lands have been moved in and out of the TFL more than once.

[32] Beginning in about 1995, the Provincial Crown engaged in consultation with the HFN and Weyerhaeuser regarding forestry activity within TFL 44.

[33] John Laing, a Tenures Officer of the Ministry of Forests, deposed that there is "a long history of extensive consultations and accommodations with the [HFN] in relation to forestry operations and activities on TFL 44". In the exhibits to Mr. Laing's affidavit, recording consultations with the HFN, there is no indication that those involved in the consultation made a distinction between the private lands and the Crown lands. It appears from the evidence as a whole that in general no distinction was made between the Crown lands and the Removed Lands regarding the fact or degree of consultation.

[34] In 1997, the HFN established a liaison position within the Band to review and respond to forest consultation requests. In 1998, a Joint Forest Council was formed between the Crown and the HFN.

[35] Chief Judith Sayers deposed that the consultation processes dealt with the following concerns: protecting and enhancing fish habitat and rebuilding salmon runs, protecting and enhancing water quality, protecting sacred sites, protecting and managing red and yellow cedar and maintaining old growth trees, protecting

culturally modified trees, protecting and enhancing bird and wildlife habitat, protecting uncommon tree and plant species such as Yew which are used for cultural and medicinal purposes, and providing access to the territory for HFN members to exercise spiritual practices and aboriginal hunting and fishing rights. She swore that between 1998 and June 2004, the HFN and Weyerhaeuser met almost monthly to consult on forestry-related issues and by 2001 had developed an efficient process for considering and integrating aboriginal interests into the operational-level planning of forestry operations, with the result that Ministry intervention was rarely required.

[36] On August 6, 1999, following public consultations, the *MacMillan Bloedel Parks Settlement Agreement*, written by David Perry (the "*Perry Report*") was submitted to government regarding the contemplated removal of private lands from TFL 44 and TFL 39. The report concluded that such a transfer might impinge on aboriginal rights because any removed lands would be subject to the much less restrictive private forest regulations.

[37] On November 30, 2000, Weyerhaeuser entered into a Memorandum of Understanding with the HFN, which included a consultation protocol regarding the Ash River lands, which at that time were being transferred from the Crown to Weyerhaeuser. They form part of the Removed Lands.

[38] In 2001, Weyerhaeuser published a document (*Coastal Competitive Reform: A Proposal for Market-based Stumpage and Tenure Diversification for Coastal B.C.*, October 2001) in which it referred to the economic benefits of removing private lands from Tree Farm Licences. The document states:

> 4.2.2 Removal of Private Lands from TFLs
>
> A few coastal companies have private land within their Tree Farm Licences (TFLs). Private land within TFLs is managed to the Forest Practices Code. Private land outside TFLs is managed to the lower cost and results-based private forest land regulations. Private land inside the TFLs is subject to an AAC approval from the Chief Forester of the Ministry of Forests. Private land outside TFLs is subject to an economic harvest regime. Private land inside the TFLs is subject to

> provincial log export restrictions with the logs financially restricted for being exported. The value of removing private lands from the TFLs is attributed to those three areas: 1) regulatory cost reduction; 2) harvest rate benefit; and 3) log export benefit.

[39] On October 1, 2003, the HFN announced that it had completed the first phase of a *Land Use Plan* for its claimed traditional territory.

[40] Weyerhaeuser wrote to the Minister of Forests on December 5, 2003, requesting removal of private land from both TFL 39 and TFL 44.

[41] Counsel for the petitioners advised the court that the petitioners filed a writ (Van. Reg. No. SO36690) claiming aboriginal title to their traditional territory on December 10, 2003, in order to avoid a possible limitations defence.

[42] The West Island Woodlands Community Advisory Group ("WIWAG") was formed around 1998. It was sponsored by Weyerhaeuser in compliance with one of the requirements for certification by the Canadian Standards Association ("CSA"). It is composed of representatives from various sectors, including regional and city governments, small businesses, Parks Canada, woodlot owners, sawmill owners, logging contractors, First Nations (Hupacasath and Tseshaht), environmental organizations, Ministry of Forests and contractors.

[43] The *CSA Standard 5.2* (in *Sustainable Forest Management: Requirements and Guidance*) states:

> 5.2 Interested Parties
>
> The organization shall
>
> a) openly seek representation from a broad range of interested parties, including DFA-related workers, and invite them to participate in developing the public participation process;
>
> b) provide interested parties with relevant background information;

c) demonstrate through documentation that efforts were made to contact Aboriginal forest users and communities affected by or interested in forest management in the DFA;

d) demonstrate through documentation that efforts were made to encourage Aboriginal forest users and communities to become involved in identifying and addressing SFM values;

e) recognize Aboriginal and treaty rights and agree that Aboriginal participation in the public participation process will not prejudice those rights;

f) establish and maintain a list of interested parties, including those that chose to participate, those that decided not to participate, and those that were unable to participate. The list shall contain names and contact information, as well as any links to the organization.

[44] The WIWAG minutes show that on September 19, 2002, Tom Holmes of Weyerhaeuser made a presentation to WIWAG in which he advised WIWAG that Weyerhaeuser was "trying to change the status of Private Lands inside of the TFL".

[45] The minutes of the January 8, 2004 meeting of WIWAG state that "[t]he rumor mill has indicated that Private Lands currently in TFL #44 will be taken out of the Tree Farm Licence by March", that the group asked Steve Chambers of Weyerhaeuser for more information, and that he inquired and reported that Weyerhaeuser was not aware of this development.

[46] On February 12, 2004, Stan Coleman, the Unit Manager (West Island Timberlands) for Weyerhaeuser, advised a WIWAG meeting that Weyerhaeuser was "actively seeking to remove its private lands from TFL 44" and addressed "the likely management practices that would apply on those lands after their removal". There was further discussion about the "fate of the private lands in the TFL" at the WIWAG meeting of May 13, 2004.

[47] The minutes of the meetings show that Tawney Lem attended as the HFN representative at all of these meetings and that, with the exception of the

September 19, 2002 meeting, there was apparently no representative of the Provincial Crown present.

[48] Chief Sayers deposed, and her evidence was not contradicted in this respect, that no representative of the Minister or Chief Forester ever contacted her or any other HFN representative to propose consultation regarding the removal of the lands from the TFL.

[49] On June 11, 2004, Chief Sayers, at a meeting with Weyerhaeuser discussing the Removed Lands, proposed certain conditions before Weyerhaeuser could “get the land out”.

[50] Tawney Lem and Judith Sayers both deposed that they believed that Weyerhaeuser and the government were having discussions, but did not know that Weyerhaeuser had made formal application for permission to remove the lands.

[51] The evidence thus shows that the HFN (through WIWAG meetings with Weyerhaeuser) became aware of Weyerhaeuser’s desire to remove the lands from the TFL as early as 2002, and learned of the company’s pursuit of the issue with government in early 2004. The evidence does not show, however, any formal consultation or indeed any discussion between the Minister or other agent of the Crown and the HFN regarding Weyerhaeuser’s initiative.

[52] The Minister of Forests made the removal decision on July 9, 2004, pursuant to the newly-enacted s. 39.1 of the ***Forest Act***. In his letter advising of the decision, the then Minister, the Honourable Michael DeJong, set out a number of terms and conditions. These were:

> *Future Forest Management*
>
> Subject to applicable law and Weyerhaeuser’s operation, risk management and other needs, the current status of “managed forest” on the private property will continue and be subject to all applicable legislation and regulations within the *Private Managed Forest Land Act* that governs planning, soil conservation, harvesting rate and

reforestation. Variable retention and stewardship zoning on old growth areas will be maintained indefinitely. Federally, the Department of Fisheries and Oceans and the *Species at Risk Act* will govern fish habitat and wildlife issues.

Water Quality

Private Forest Watershed Assessment Plan (PFWAP) for key community watersheds will be developed in collaboration with the Ministry of Sustainable Resource Management, Department of Fisheries and Oceans, local stream keepers and municipal governments. Weyerhaeuser will commit to periodic follow-up meetings with impacted stakeholders to verify the commitments have been kept. Weyerhaeuser commits to initiating a PLWAP on the China Creek Watershed within 1-year of closing and other communities with high fisheries value watersheds, within private lands, will be prioritized for PLWAP within 1-year of closing.

Critical Wildlife Habitat

Weyerhaeuser will maintain all current critical wildlife habitat areas within the subject private lands for 2 years while a long-term plan for protecting Ungulate Winter Ranges and Wildlife Habitat Area #1-002 is developed with the Ministry of Water, Land and Air Protection.

Certification

Weyerhaeuser will maintain ISO and/or CSA certifications and continue to subject the private lands to the public advisory as per CSA standards.

Access (Road Systems)

Weyerhaeuser will maintain current access for the public, industrial road user and aboriginal groups.

Log Exports

Weyerhaeuser will maintain its commitment to a voluntary moratorium of log exports from the private lands authorized by this letter for removal from the TFL until February 1, 2006.

Research Installations

Within 60 days of the date of this letter, Weyerhaeuser will enter into a Memorandum of Understanding that reconfirms the relationship between the Ministry of Forests and Weyerhaeuser regarding ministry research installations located on the private lands.

First Nations Consultation

Based on the commitment by Weyerhaeuser with respect to the managed forest designation, land-use does not change significantly. If Weyerhaeuser's use of its private land will interfere with an exercise of an aboriginal right, Weyerhaeuser will endeavour to provide notice and the period of time the areas would be affected.

Powell River Canoe Route

Identifying the canoe route as a high value recreation feature for the Powell River community, subject to applicable law and Weyerhaeuser's operational and risk management needs, Weyerhaeuser in consultation with CSA Community Advisory Group commits to maintaining its protection. This commitment to maintain this important recreational feature will be maintained for the duration of the Forest Stewardship Plan.

Allowable Annual Cut (AAC) Determination

Due to the significance of the private land deletion and its impact on the AAC determination for TFLs 39 and 44, I expect the chief forester will make a new AAC determination reflecting the reduction in size of the TFLs effective the date the private lands are removed.

[53] The HFN received notice of the removal decision on July 13, 2004, and on July 19, 2004, gave notice to the Minister of Forests that it considered that the removal decision infringed its aboriginal rights and title. The HFN informed the Minister that accommodation of HFN rights could be achieved by respecting the HFN *Land Use Plan* and on August 12, 2004, Chief Sayers outlined a list of conditions that Weyerhaeuser would have to satisfy in order to gain HFN acceptance of the removal decision.

[54] Weyerhaeuser informed the HFN on August 20, 2004, that Weyerhaeuser no longer had an obligation to consult with them with respect to activities on the Removed Lands.

[55] On August 26, 2004, the Deputy Chief Forester amended the allowable annual cut for TFL 44, retroactive to July 9, 2004. In his *Rationale for AAC*

Adjustment Resulting from the Deletion of Private Lands (the "*Amendment Rationale*"), the Deputy Chief Forester stated:

> I am satisfied that the assessment provided by Weyerhaeuser is a reasonable portrayal of the impact of reducing the THLB assumed in the 2003 AAC determination. Based on the assessment, my knowledge of the previous analysis, and on expert advice from Ministry staff, I hereby determine that the AAC for TFL 44 is 1 327 000 cubic metres, effective July 9, 2004
>
> Within the AAC, I also conclude that harvesting in the Clayoquot Working Circle should not exceed 29 hectares per year.

[56] The evidence shows that the amendment was based on a Weyerhaeuser assessment and was simply mathematical; the allowable annual cut was reduced by the proportion that the Removed Lands bore to the total TFL area. Kenneth Baker, the Deputy Chief Forester at the time, deposed that the information and factors on which the original determination had been based 13 months earlier had not changed, that he had considered "concerns regarding identified wildlife, wildlife habitat and retention of old growth forests", and that he decided on that basis that a proportional reduction was appropriate.

[57] The province confirmed in September, 2004, that it was ready to resume Stage Four treaty negotiations with the Hupacasath directly.

[58] Weyerhaeuser advised the HFN of the allowable annual cut amendment on September 14, 2004.

[59] In October 2004, Brascan began to negotiate with Weyerhaeuser for the purchase of all of Weyerhaeuser's coastal forestry assets and operations. Brascan has produced evidence, which was uncontradicted, that the removal of the privately owned lands from TFL 44 was a critical consideration in its decision to proceed with the transaction. Its business plan was based on the premise that it would be able to conduct two different logging operations, through two different entities, under different management regimes for the Crown land than for the private land. Unlike lands in the TFL system, private timberlands can be

"harvested to market", thus allowing private owners to harvest the species commanding the best prices in the market. A further benefit for private owners is that they are not subject to TFL restrictions on the export of logs that are surplus to the demands of domestic mills.

[60] The Tseshaht First Nation entered into a Forest and Range Agreement with the Minister of Forests on October 15, 2004, providing the Tseshaht with access to two non-replaceable licences to harvest timber on TFL 44, in areas forming part of the asserted traditional territory of both the Hupacasath and the Tseshaht.

[61] On November 16, 2004, the District Manager of the South Island Forest District sent the HFN the *Amendment Rationale* for the allowable annual cut amendment.

[62] The Supreme Court of Canada handed down its decisions on November 18, 2004, in ***Haida First Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, 2004 SCC 73 and ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, [2004] 3 S.C.R. 550, 2004 SCC 74. The Court held that although there is a duty on the Crown to consult with and accommodate the interests of aboriginal peoples, there is no obligation on third parties (such as Weyerhaeuser) to consult and accommodate, overturning the British Columbia Court of Appeal on that point.

[63] Brascan made a proposal to Weyerhaeuser on December 6, 2004, regarding the purchase of Weyerhaeuser's coastal timber assets, including the Removed Lands. Weyerhaeuser accepted that proposal on December 14, 2004. The parties entered into an exclusivity agreement, which thereafter precluded Brascan from making inquiries of the Crown or of the HFN regarding the legal validity of the removal decision.

[64] This petition was filed on December 15, 2004, and Brascan learned of it on December 16, 2004.

[65] Weyerhaeuser and Brascan publicly announced the agreement for purchase and sale on February 17, 2005, and government approvals were obtained.

[66] The petitioners applied for an order enjoining the completion of the sale pending consultation and accommodation. Madam Justice Ross refused that application on March 11, 2005 (***Hupacasath First Nation v. British Columbia (Minister of Forests)***, [2005] 2 C.N.L.R. 138, 2005 BCSC 345), finding that although there was a triable issue and the potential for irreparable harm, the balance of convenience did not favour granting interim relief.

[67] On April 27, 2005, Weyerhaeuser was joined as a party to the petition by consent and an amended petition was filed.

[68] The sale to Brascan for the total purchase price of $1.4 billion closed on May 30, 2005. The purchase included 258,000 hectares of privately owned timberlands, the annual harvesting rights to 3.6 million cubic metres of Crown timberlands, five coastal sawmills and two remanufacturing facilities.

[69] After receiving Weyerhaeuser's coastal assets, Brascan transferred the Removed Lands to Island Timberlands GP Ltd. to be held beneficially for Island Timberlands Limited Partnership ("Island Timberlands") and it transferred its interest in TFL 44 and the Crown land based operations to Cascadia Forest Products Ltd. ("Cascadia"). Island Timberlands is a limited partnership in which Brascan holds the majority interest and Cascadia is a wholly owned subsidiary of Brascan. (I was advised by counsel for Brascan on November 28, 2005 that Brascan has agreed to sell Cascadia to Western Forest Products Inc., a public company in which Brascan has an indirect non-controlling interest, subject to government approvals.)

[70] For convenience, however, I will refer to Brascan as both the owner of the Removed Lands and the holder of TFL 44.

[71] Brascan considers that Island Timberlands will be significantly more profitable than Cascadia because Island Timberlands will be able to operate outside the more restrictive conditions of the TFL.

[72] On May 30, 2005, Mr. Justice Goepel granted interim relief requiring Brascan to provide the petitioners with seven days notice of any intention to use the Removed Lands in a manner that will interfere with the exercise of an aboriginal right by the petitioners. At the conclusion of the hearing of this petition, I continued that order pending judgment.

III. ISSUES

[73] I will address the issues in the following sequence:

A. Duty to Consult

(1) The Foundational Principles

(2) The Legal Test

(3) Knowledge of the Crown

(4) Contemplated conduct affecting aboriginal rights

a. Could the HFN have aboriginal rights or title with respect to the Removed Lands?

b. Did the Crown contemplate conduct that might adversely affect HFN rights?

(5) The Crown's duty

a. What was the nature and scope of the Crown's duty?

b. Did the Crown fulfill its duty to consult and accommodate?

(6) Amendment to the allowable annual cut

(7) Remedy

B. Compliance with Provincial Statutory Requirements

C. Summary of Conclusions

IV. ANALYSIS

A. Duty to Consult

(1) The Foundational Principles

[74] In ***R. v. Van der Peet***, [1996] 2 S.C.R. 507 at paras. 30-31, Lamer C.J.C., for the majority, described the nature and origin of the aboriginal rights protected under s. 35(1) of the ***Constitution Act, 1982***:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. [emphasis in original]

[75] In ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, the Supreme Court of Canada addressed a claim for aboriginal title over land in British Columbia. The Court held that aboriginal title is *sui generis* and began to sketch an outline of some of its characteristics, which include: it is held communally; it is

inalienable; and it cannot be transferred, sold or surrendered to anyone other than the Crown (paras. 113-15).

[76] The Court held that aboriginal rights cannot be extinguished by provincial laws of general application. It stated that constitutionally recognized aboriginal rights fall along a spectrum. At one end of the spectrum are those aboriginal rights which relate to practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the rights but where the degree of use and occupation of the land is insufficient to support a claim of aboriginal title (para. 138). At the other end of the spectrum is aboriginal title itself. The Court stated that s. 35(1) of the ***Constitution Act, 1982***, whose purpose is to reconcile the prior presence of aboriginal peoples in Canada with the assertion of Crown sovereignty, allows for the possibility that the Crown may infringe aboriginal title so long as such infringement is justified (para. 150). In the context of assessing whether an infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples, the Crown has a duty to consult the aboriginal people in question (para. 168).

[77] In ***R. v. Marshall; R. v. Bernard***, [2005] 3 C.N.L.R. 214, 2005 SCC 43, the Supreme Court of Canada elaborated on what it had previously said about the nature of aboriginal title. The accused had argued that as Mi'kmaq Indians, they were not required to obtain provincial authorization to log because they have a right to log on Crown lands for commercial purposes pursuant to treaty or aboriginal title.

[78] The Court held that aboriginal title is one of the aboriginal rights and that, in order to prove aboriginal title, the claimant must establish aboriginal practices that indicate possession similar to that associated with title at common law. To establish title, claimants must prove "'exclusive' pre-sovereignty 'occupation'" of the land (referring to ***Delgamuukw*** at para. 143) (para. 55). The Court said (at paras. 56-57) that "occupation" means physical occupation and that "exclusive occupation" means "the intention and capacity to retain exclusive control". The

latter is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent. Shared exclusivity could result in joint title and non-exclusive occupation may establish aboriginal rights short of title.

[79] The Chief Justice wrote at para. 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 practices in today's world: see *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Nikal*, [1996] 1 S.C.R. 1013. Aboriginal title, based on occupancy at the time of sovereignty, is one of these various aboriginal rights.

[80] Aboriginal rights refer to specific independent rights, such as the right to hunt or fish and they are not derivative of aboriginal title. This point is highlighted at para. 53:

> Different aboriginal practices correspond to different modern rights. This Court has rejected the view of a dominant right to title to the land, from which other rights, like the right to hunt or fish, flow: *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 26; *R. v Côté*, [1996] 3 S.C.R. 139, at paras. 35-39. It is more accurate to speak of a variety of independent aboriginal rights.

[81] A claim to aboriginal title must be subject to a stringent test, and evidence to establish a claim to aboriginal title must correspond to the core element of a fee simple, that is, it must show “exclusivity” (para. 40). At para. 77 the Court stated:

> … [t]he common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land: *Adams, Côté*.

[82] The Court in ***Marshall*** left open the question of whether the granting of a fee simple by the Crown extinguishes aboriginal title.

[83] The Court of Appeal for British Columbia in ***Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*** (2000), 80 B.C.L.R. (3d) 233, 2000 BCCA 525, concluded that the Registrar of Land Titles had acted correctly in refusing to register a certificate of pending litigation regarding the appellant First Nation's land claim on the basis that aboriginal title was not a registrable interest. Southin J.A. commented at para. 5:

> Sooner or later, the question of whether those who hold certificates of indefeasible title, whether to ranch lands on Kamloops Lake or to a small lot with a house on it on Railway Avenue in the Village of Ashcroft or an office tower on Georgia Street in the City of Vancouver, are subject to claims of aboriginal right must be decided. If it is proper in some aspects of Indian claims to weigh in the balance in favour of the claimant the honour of the Crown, as I thought was right in my dissenting judgment in *Attorney General (British Columbia) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156 (B.C.C.A.), should the honour of the Crown not also be weighed when determining whether a Crown grant in fee simple, at least one made before 17th April, 1982, assures to a person who obtained, founded on the grant, whether through the absolute fee system explained hereafter or directly, a certificate of indefeasible title, and his successors in title, the title for which he paid free of aboriginal claims?

Referring to ***Delgamuukw***, Southin J.A. stated at para. 32:

> It is for the Supreme Court of Canada to tell the courts of this Province what the implications of that judgment are for the holders of certificates of indefeasible title in a case where the issue directly arises, as it may do if the action brought by the appellants goes to trial.

[84] In concurring reasons, MacKenzie J.A. referred to the dangers of a piecemeal approach in deciding these fundamentally important and complex issues, at para. 81-82:

> This submission highlights the complexity of the issues surrounding aboriginal rights in lands alienated by the Crown. Registration is only one aspect and not the most important. More central questions are

> those that have been in the forefront of the Australian litigation - infringement, reconciliation and remedies. The issues may be even more complex in Canada because of the divided jurisdiction over land, and constitutional uncertainties as to the line between federal and provincial powers and responsibilities.
>
> These broader issues are not before the court on this appeal but they underline the danger of a piecemeal approach when many implications may be hidden. I agree with Lamperson J. and Southin J.A. that this appeal from the Registrar is not the place to decide the larger questions.

[85] All parties to this proceeding agreed that, as in ***Skeetchestn***, it is unnecessary and would be inadvisable for this Court to reach a conclusion regarding the broader issues respecting aboriginal rights and title in lands alienated by the Crown.

[86] I note that in these Reasons I generally use “aboriginal rights” as a generic term which, in most contexts, includes aboriginal title.

(2) The Legal Test

[87] In ***Haida Nation*** and ***Taku River***, the Supreme Court of Canada made clear that the Crown’s duty to consult with and possibly accommodate the rights of aboriginal peoples exists prior to the final proof of aboriginal rights in court and prior to the signing of treaties.

[88] In ***Haida Nation***, the provincial Minister of Forests had made certain decisions regarding TFL 39, which covers Crown land in northern coastal British Columbia. The Court summarized the issue at para. 5-6:

> In January of 2000, the Haida people launched a lawsuit objecting to the three replacement decisions and the transfer of T.F.L. 39 to Weyerhaeuser and asking that they be set aside. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.
>
> This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land.

> But the Haida people also claim title to the land - title which they are in the process of trying to prove - and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights? [emphasis in original]

[89] The Supreme Court referred to the finding by the chambers judge that the Haida had a strong claim to aboriginal title to the land, called Haida Gwaii. The Court also referred to the Haida argument that without consultation and accommodation, they might win their aboriginal title claim in the end, but find themselves deprived of the forests vital to their economy and their culture (para. 7).

[90] A summary of the Court's conclusion is found at para. 10 of the reasons for judgment of the Chief Justice:

> I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

[91] Chief Justice McLachlin held that, because the aboriginal interest is insufficiently specific, the duty to consult is not derived from the Crown acting as fiduciary (para. 18). Rather, the source of the duty is the honour of the Crown, which is always at stake in its dealings with aboriginal peoples (para. 16). This concept must be understood generously "in order to reflect the underlying realities from which it stems" (para. 17). The Court held:

> In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw, supra*, at para. 186, quoting *Van der Peet, supra*, at para. 31. (para. 17)

[92] The duty relates not only to the Crown's conduct in decision making about lands but also to the Crown's conduct in the treaty making and interpretation process (para. 19). It includes issues relating to claims to resources. At para. 22 Chief Justice McLachlin wrote:

> The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement"….

[93] The source of the duty was summarized at para. 25:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[94] The duty arises not when aboriginal claims have been proved and resolved, but once claims affecting those interests are being seriously pursued in the process of treaty negotiation and proof. The Court stated:

> It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the

> Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. (para. 27)

[95] The Court distinguished between what is sufficient to trigger the existence of the duty and what is to be considered in determining the scope or content of the duty. It held that:

> Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty. (para. 37)

[96] The Court held that the content of the duty to consult and accommodate varies with the circumstances and is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effect upon the right or title claimed (para. 39).

[97] Thus, the Court said, there will be a spectrum (para. 43). Where, for example, the claim to title is weak, the aboriginal right limited, 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. At the other end of the spectrum are the cases where a strong *prima facie* case for the aboriginal rights claim is established, the right and potential infringement is of high significance to the aboriginal people and the risk of non-compensable damage is high (para. 44). In such cases, “deep consultation”, aimed at finding a satisfactory interim solution, may be required. In discussing what is “meaningful consultation” the Court referred (at para. 46) to the New Zealand Minister of Justice’s *Guide for Consultation with Maori 1997* and to its statement that:

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed...

[98] Emphasizing that the process does not give aboriginal groups a veto over what can be done with land pending final proof of the claim, the Chief Justice said that what is required is “a process of balancing interests, of give and take” (para. 48).

[99] After holding that third parties do not owe a duty to consult and accommodate, the Court rejected the argument that any duty to consult or accommodate rests solely with the federal government and held that the duty may also rest with provincial governments (paras. 52-59).

[100] Discussing the possible role of third parties in a consultation process, and stating that the honour of the Crown cannot be delegated, the Chief Justice wrote at para. 53:

> It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

[101] As to procedure, the matter may come to court by way of judicial review (para. 60). The existence or extent of the duty to consult or accommodate is a question of law reviewable on a correctness standard but it is typically premised on an assessment of the facts; thus, a degree of deference to the finding of fact of the initial adjudicator may be appropriate (para. 61). The examination of the process itself, the Court said, would likely be on a standard of reasonableness with the question being whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question" (para. 62).

[102] Thus, in summary, the Court stated at para. 63:

> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[103] On the facts before it, the Court found that the province had knowledge of the potential existence of aboriginal rights or title and contemplated conduct that might adversely affect them, that it had not consulted with the Haida at all, and 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. (para. 76)

[104] The order approved by the Supreme Court contained a declaration that the provincial Crown had legally enforceable duties to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interest of the Haida people on the one hand and the Crown's objectives to manage the TFL in accordance with the public interest on the other hand.

[105] I pause to comment that although the ***Haida Nation*** case shares a significant aspect of the case before me, in that it arises from a Ministerial decision regarding a TFL, there is also a notable difference: it concerned Crown land, not privately owned land. Counsel for the respondents emphasized that distinction and one other: that in ***Haida Nation*** a claim to aboriginal title was advanced. I will return to these points later.

[106] In ***Taku River***, a mining company sought permission from the provincial government to reopen an old mine in British Columbia and to build a road through a portion of the Taku River Tlinget First Nation's (TRTFN) claimed traditional territory.

[107] The Supreme Court of Canada held that, on the principles discussed in ***Haida Nation***, the Crown was under a duty to consult with the TRTFN regarding the decision to reopen the mine. It further held that the duty had been complied with on the facts of the case. The province had conducted an environmental review process in which the TRTFN had, for the most part, participated fully, putting their views before the decision-makers. Steps had been taken to address the TRTFN concerns. The Court held that it was not necessary for the province to set up a separate aboriginal consultation process.

[108] In discussing the source of the duty on the Crown, the Court stated at para. 24:

> The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida, supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's

> honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

[109] Very recently (one week ago), the Supreme Court of Canada delivered its decision in ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, [2005] S.C.J. No. 71, 2005 SCC 69. I requested from the parties, and have received, their submissions as to its implications for the case before me.

[110] The issue in ***Mikisew*** arose when the federal government approved the construction of a winter road through the Mikisew Reserve, over the protests of the Mikisew. The Mikisew are under Treaty 8, which permits the Crown to "take up" land from time to time for purposes such as settlement, mining, lumbering and trading. Their reserve is in Wood Buffalo National Park, on Crown land.

[111] The Supreme Court held that the Crown had breached its duty of consultation. Binnie J. stated that, given that the Crown was proposing to build a fairly minor winter road on surrendered lands where the Mikisew hunting, fishing and trapping rights were expressly subject to the "taking up" limitation, the Crown's duty lay at the lower end of the spectrum (para. 64). The Court quashed the Minister's approval order and remitted the winter road project to the Minister to be dealt with in accordance with the Court's Reasons.

[112] Much of the discussion in the case relates to the Crown's duties in the context of defined and acknowledged treaty rights, and is not directly relevant to the case before me. However, the Court made some general statements about the duty of consultation which may have some bearing.

[113] In the opening paragraph, Binnie J. wrote:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to

> aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.

[114] Further, in para. 55, he commented:

> … The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. …

[115] With respect to the content of the duty to consult, the Court stated at para. 64 that the duty had both informational and response components. Thus, the Court held that the Crown should have given notice to the Mikisew and engaged directly with them, rather than doing so as an afterthought to a general public consultation with Park users; it should have provided information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests; and it should have solicited and listened carefully to the Mikisew concerns and attempted to minimize adverse impacts on their hunting, fishing and trapping rights.

[116] I note, however, as counsel for the respondents pointed out, that the content of the duty to consult could differ outside the context of a treaty rights case.

[117] In ***Musqueam v. British Columbia (Minister of Sustainable Resource Management)*** (2005), 37 B.C.L.R. (4th) 309, 2005 BCCA 128, the Musqueam Indian Band sought an order quashing a decision by the provincial Crown to sell the University of British Columbia Golf Course (which was on Crown land) to the University of British Columbia. The Musqueam argued that the respondents had not consulted in good faith concerning a possible accommodation of any infringement of the appellant's asserted aboriginal interests in the Golf Course land. The Crown conceded, and the Court held, that the Band had shown a strong claim of aboriginal title to the lands. The Court concluded that the Crown

had failed to consult meaningfully, and ordered that the authorization for the sale be suspended for two years to provide for proper consultation.

[118] Hall J.A. commented that the decision in ***Haida Nation*** pertains to a range of asserted aboriginal rights, including title:

> Thus, provincial governments can justifiably infringe aboriginal title, but as the Supreme Court of Canada recently stated in *Haida*, if there is infringement or potential infringement of an aboriginal right - which of course includes aboriginal title - consultation is required with those affected with a view to reaching some accommodation pending final resolution of the validity of the rights claimed. (para. 87)

In summarizing his conclusions on why the Crown had failed in its duty here, Hall J.A. wrote (at paras. 94-96):

> In my view, the duty owed to the Musqueam by LWBC in this case tended to the more expansive end of the spectrum. The Crown conceded the Musqueam had a prima facie case for title over the Golf Course Land, and the report of the archaeological firm noted that the Musqueam had the strongest case of the bands in the area. Potential infringement is of significance to the Musqueam in light of their concerns about their land base. If the land is sold to a third party, there will likely be no opportunity for the Musqueam to prove their connection to this land again. The Musqueam were therefore entitled to a meaningful consultation process in order that avenues of accommodation could be explored.
>
> In light of my view of the consultation required in this situation, I consider that the consultation process was flawed. If this was only a case where notice was required, the consultation may have been sufficient. However, in the present case, I consider the consultation was left until a too advanced stage in the proposed sale transaction. As McLachlin C.J. observed in Haida, there is ultimately no obligation on parties to agree after due consultation but in my view a decent regard must be had for transparent and informed discussion. Of course, legitimate time constraints may exist in some cases where the luxury of stately progress towards a business decision does not exist, but such urgency was not readily apparent in the present case. These lands have been used as a public golf course for a long time, and the status quo is not about to change having regard to the extant lease arrangements. The Musqueam should have had the benefit of an earlier consultation process as opposed to a series of counter-offers following the decision by LWBC to proceed with the sale.

> I note that McLachlin C.J. suggested there should be some measure of deference when a court considers the adequacy of the government's efforts to consult with an aboriginal group, and that administrative law principles suggest a standard of reasonableness would be used by the court when the question is not a purely legal question. She also observed that what is required is not perfection, but reasonableness in any consultation process followed by the Crown. However, even providing an appropriate measure of deference, for the reasons set out above, the Province in my view did not adequately consult with the Musqueam regarding the sale of the Golf Course Land.

[119] I will next briefly discuss what emerges from some of the recent trial-level decisions on the duty to consult.

[120] ***Gitxsan First Nation v. British Columbia (Minister of Forests)*** (2002), 10 B.C.L.R. (4th) 126, 2002 BCSC 1701 (***Gitxsan First Nation #1***) was decided prior to the Supreme Court of Canada decision in ***Haida Nation***. The claimant First Nations sought to set aside the respondent Minister of Forest's consent to a change in corporate control of Skeena Cellulose, which held a TFL and several forest licences over Crown land. The First Nations asserted rights and title to that land. 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 noted at para. 72:

> The claims for aboriginal rights are stronger than the claims for aboriginal title because they do not require an element of exclusivity, but each claim qualifies for a classification as a good or strong *prima facie* claim.

[121] Tysoe J. rejected the Crown's argument that a *prima facie* case could not be made out because there were overlapping claims to the lands, finding instead that in such a case, the court can "conclude that the competing groups have each established aboriginal rights in respect of the area" (at para. 74). He 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 (para. 82). 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.

[122] The Gitanyow First Nation returned to court in 2004, arguing that the Minister had not provided adequate and meaningful consultation, and that the decision consenting to the change in control should be quashed. Following the Supreme Court of Canada decision in ***Haida Nation***, Tysoe J. declared that the Crown had not yet fulfilled its duty to consult. Rather than granting the further relief requested by the Gitanyow, he ordered the parties to resume negotiations: see (2004), 38 B.C.L.R. (4th) 57, 2004 BCSC 1734 ("***Gitxsan First Nation #2***").

[123] Powers J. in ***Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*** (2004), 39 B.C.L.R. (4th) 263, 2005 BCSC 283, considered an application for judicial review of an amendment to a licence for a salmon farm in Bute Inlet, allowing the introduction of Atlantic salmon to the farm. A company called Marine Harvest held the licence for the salmon farm; the Homalco claimed aboriginal title and rights in that area. The Homalco argued that the introduction of Atlantic salmon could bring potentially serious adverse consequences for the wild salmon stocks, and indeed that the mere presence of a fish farm carried risks. Powers J. noted at para. 16 that the petitioner "correctly argues that the duty arises when the Crown makes decisions that have a serious impact on asserted Aboriginal rights and title" and found at para. 25 that:

> 1. There is a reasonable probability that the Homalco will be able to establish Aboriginal title to at least some parts of the Homalco Territory including portions of Bute Inlet in the vicinity of Church House...
>
> 2. There is a substantial probability that the Homalco will be able to establish Aboriginal rights to harvest wild Pacific salmon and other marine resources of the Homalco territory.

[124] The Court found that a duty to consult existed. In considerable measure the conclusion seemed to flow from the finding regarding the likelihood that the Homalco would be able to establish aboriginal rights to fish in the area they

claimed. The application for judicial review was adjourned. Until the consultation process was complete, the company was not to add additional Atlantic salmon to the site.

[125] At issue in ***Musqueam Indian Band v. Richmond (City)*** (2005), 12 M.P.L.R. (4th) 97, 2005 BCSC 1069 was the decision of the Lottery Corporation (a Provincial Crown corporation) to place a casino on Crown lands against which aboriginal title was asserted. The Court held that a duty to consult was triggered. Brown J. held that the Province was aware that the lands were the subject of a Musqueam claim, and that the placement of the casino might adversely affect the Musqueam's aboriginal title interests. The Court referred to the limited amount of Crown land available to meet the Musqueam First Nation's aboriginal title claims, and held that the Crown had a duty to consult and accommodate. Brown J. declined to set aside the decision to relocate the casino, taking into account the balance of convenience.

[126] In ***Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*** [2005] 3 C.N.L.R. 74, 2005 BCSC 697 (under appeal), the issue was the Crown's application of the Forest and Range Agreement program. The program involved the allocation of forest tenures to First Nations following the enactment of the ***Forest Revitalization Act***, S.B.C. 2003, c. 17, which took back 20% of the allowable annual cut from major replaceable forest licences and TFLs throughout the province. The Huu-Ay-Aht objected to the province's use of a population-based formula for the allocation of forest tenures. One of the Crown's arguments was that its duty to consult and accommodate aboriginal interests is not triggered by the Crown's general management of forestry permits and approvals; rather, it is only triggered by specific decisions that have the potential to infringe on s. 35 rights.

[127] Dillon J. said the following at para. 104:

> …declaratory relief has been granted by this court in several cases involving First Nations disputes concerning the duty to consult. In

> regards to forestry decisions, declaratory relief stems from the initial decisions to issue timber licences. 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. This approach has been approved by the Supreme Court of Canada in *Haida* when it spoke of review of governmental action affecting the duty to consult. The petitioners are entitled to seek the declaratory relief under the *JRPA* that the FRA policy does not meet the Crown's constitutional obligation to consult the HFN.

[128] That the Crown held title to the land was taken as one factor among several in the Court's finding that the First Nation had a strong *prima facie* case (para. 120):

> The HFN and the Crown are near the end of treaty negotiations with an agreement in principle that acknowledges rights related to forest resources and title to certain lands without legally recognizing HFN's rights or title. There have been two previous accommodation agreements (the IMA and IMEA) that, for six years, had provided a process for continuing consultation that had been honoured by both parties. On this basis alone, the HFN have shown a strong *prima facie* claim to title and rights related to forestry resources such that consultation with respect to ongoing operations is warranted. In addition, the Crown holds title to the land in question with the HFN claim based upon occupation of the lands before Crown sovereignty. Although there are overlapping claims over part of the Hahoothlee, a part is exclusively claimed by the HFN. The issue of exclusive possession is challenging but not insurmountable (see *Musqueam* at paras. 87-88). It certainly does not mean that no consultation should occur. The level of potential infringement of rights to timber resources is severe given the harvest rate contemplated by third parties over the next five years.

[129] The duty of consultation and accommodation was applied by the Superior Court of Quebec in ***Betsiamites First Nation v. Attorney General of Canada,*** 2005 J.Q. No. 8173 (QL). That case dealt with the duty to consult and accommodate regarding timber supply and forest management agreements

granted to a private company planning logging operations in an area to which the Betsiamites First Nation ("BFN") asserted aboriginal rights and title. The Court concluded that the Crown, which had conceded that BFN had rights relating to food, ritual and social purposes on the territory, was also aware of the potential existence of aboriginal title, as past negotiations had revealed the nature, extent and complexity of land claims. The parties had reached an advanced stage in treaty negotiations, having achieved an Agreement in Principle.

[130] Grenier J. held that the province of Quebec had violated its constitutional duty to consult the BFN, and ordered the defendant logging company to cease its operations until a judgment on the merits was rendered on the application for an interlocutory injunction. The decision is now on appeal.

[131] In addition to the judicial decisions I have referred to, two decisions of environmental tribunals have come to my attention. While these decisions do not have precedential value, their reasoning is of interest.

[132] In ***TimberWest Forest Corp v. British Columbia (Deputy Administrator, Pesticide Control Act)***, [2003] B.C.E.A. No 31, TimberWest appealed the Deputy Administrator's decision to place a number of conditions on a Pest Management Plan (PMP) TimberWest had submitted for authorization. Under the PMP, TimberWest sought permission to use pesticides on its land (formerly part of the Railway Lands, like the Removed Lands in this case.) The Cowichan First Nation (CFN) claimed aboriginal rights and title to those lands. Before authorizing the PMP, the Deputy Administrator met with representatives of the CFN concerning the proposed PMP. When the final PMP was issued, it took into consideration the CFN's asserted aboriginal rights by restricting the use of pesticides at sites of particular spiritual or ceremonial significance to the CFN.

[133] Before the Environmental Appeal Board, TimberWest argued that the PMP restrictions were based on irrelevant considerations, one of which was the Deputy Administrator's consultation with the CFN. Based on the Court of Appeal decisions in ***Haida Nation***, (2000), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, and

Taku River, (2000), 98 B.C.L.R. (3d) 16, 2002 BCCA 59, the Panel acknowledged that the Deputy Administrator had a duty to consult and accommodate with aboriginals in the circumstances, and held that aboriginal rights and title are not subordinate to the rights of a fee simple owner.

[134] The Panel also held that where the Crown performs a regulatory role, the infringement of an aboriginal right can occur whenever the Crown exercises its decision making powers, regardless of the tenure of lands affected, reasoning:

> … limiting aboriginal people to challenging only the original grant of fee simple, rather than any subsequent Crown authorized use of the private land, would be contrary to the purpose of section 35 of the *Constitution Act, 1982* … (para. 203)

[135] The Panel concluded that the Deputy Minister did have a duty to consult and accommodate CFN interests before issuing his authorization of the PMP, and therefore, that the CFN's claims of aboriginal rights and title were relevant considerations.

[136] In ***Penelakut First Nations Elders v. British Columbia (Regional Waste Management),*** [2005] B.C.W.L.D. 547, elders of the Penelakut First Nation appealed the Regional Waste Manager's decision to authorize the discharge of waste from a land-based fish hatchery on Salt Spring Island that was located on land leased from a third party. The Penelakut First Nation asserted aboriginal rights to harvest food and to visit a sacred burial site near the hatchery site. The Environmental Appeal Board Panel held that the Provincial Crown had a duty to consult and accommodate aboriginal peoples in those circumstances, and that the Crown had met its duty.

[137] To summarize the effect of the judicial authorities, they show a three-step process for considering an alleged failure of the Crown to consult with and accommodate aboriginal people.

[138] First, in determining whether a duty to consult arises, the court must assess whether the Crown has knowledge, real or constructive, of the potential existence

of the aboriginal rights. Second, the court must determine if the Crown contemplated conduct that might adversely affect those rights. If there is such knowledge and contemplated conduct, then the court must take the third step and consider the scope and content of the duty to consult and accommodate, and whether that duty has been met. Determining the scope and content of the duty necessitates a preliminary assessment of the strength of the case supporting the existence of the right, and a consideration of the seriousness of the potentially adverse effect upon the rights claimed.

(3) Knowledge of the Crown

[139] Did the Crown have knowledge, real or constructive, of the existence of potential aboriginal rights pertaining to the Removed Lands and to the surrounding Crown lands?

[140] The petitioners claim that most of the Removed Lands and a portion of Crown lands within TFL 44 are in their traditional territory. They rely on past negotiations and consultations with the Provincial Crown to prove that the Crown knew the extent and nature of their claim.

[141] As part of treaty negotiations, which have reached Stage Four, the HFN presented evidence to the Crown, including a “land selection” which encompasses the area in question. As well, the HFN had provided to the Crown a copy of their *Land Use Plan* for their claimed traditional territory.

[142] Between about 1994 and July 2004 there was consultation between the Crown and HFN with respect to logging plans in TFL 44, including the Removed Lands. During that period, the Crown was in a position to learn the details of the HFN position regarding the territory.

[143] The petitioners produced evidence from ethnographers and anthropologists indicating that Hupacasath people were present in the area in question at the time of first contact with Europeans. At least some of that evidence is in the public domain.

[144] The petitioners also argue that ***R. v. NTC Smokehouse*** (1993), 80 B.C.L.R. (2d) 158 (CA), [1996] 2 S.C.R. 672, shows previous judicial recognition of a Hupacasath aboriginal right to fish for salmon in the Somass River.

[145] In ***NTC Smokehouse***, the defendant company was charged with selling fish allegedly caught illegally by Sheshaht (Tseshaht) and Opetchesaht (Hupacasath) people. The Provincial Court Judge at trial found that the "Sheshaht people" had established an aboriginal right to fish, without specifying whether the finding was meant to include or exclude the Hupacasath. The findings of fact at trial were upheld and adopted in both the British Columbia Court of Appeal and the Supreme Court of Canada. No level of court specifically addressed whether there was a basis for distinction between the Tseshaht and Hupacasath. Wallace J.A. stated that one of the questions before the Court of Appeal was "[d]oes the Aboriginal right of the Sheshaht and Opetchesaht Bands to fish for food encompass the commercial sale of fish?" (at para. 34). At para. 45, Wallace J.A. wrote:

> Section 839(1) of the *Criminal Code* provides that an appeal to this Court from the summary conviction appeal court may "be taken on any ground that involves a question of law alone". Findings of fact and questions of mixed fact and law are not reviewable by the court. The nature and scope of the aboriginal rights of the Seshaht and Opetchesaht peoples in this case were determined as a question of fact on the basis of the traditional practices integral to the aboriginal society of the claimants' ancestors. Accordingly, the trial judge's ruling that the commercial sale of fish cannot be characterized as an aboriginal fishing right of the Seshaht and Opetchesaht Indian Bands should not be disturbed.

[146] In the Supreme Court of Canada, Lamer C.J.C. stated:

> For the purposes of this analysis no distinction will be made between the cultures of the Sheshaht and Opetchesaht because no such distinction was made by the appellant in its factum nor in the decisions of the courts below. Further, the evidence presented at trial did not distinguish between the cultures and history of the two bands. Normally, because the determination of whether or not an aboriginal right exists is specific to the particular aboriginal group claiming the right, distinctions between aboriginal claimants will be significant and

> important; however, in this case it does not appear, as a factual matter, that any significant distinctions exist between the Sheshaht and the Opetchesaht. (para. 23)

[147] There is a Tseshaht reserve at the mouth of the Somass River. The respondents argue that the right to fish for food was recognized basically as a communal right held by a larger community composed of both the Tseshaht and the Hupacasath bands and point out that the Tseshaht now dispute whether the Hupacasath have retained their aboriginal rights to fish in the area and may seek to prevent them from fishing there.

[148] I do not read ***NTC Smokehouse*** as constituting specific judicial determination that the HFN has an aboriginal right to fish in the Somass River, though it does show judicial recognition of such a right on the part of a larger Tseshaht/Hupacasath community, without distinction between the two groups.

[149] I note that the evidence tendered in the ***NTC Smokehouse*** case and the findings of fact of the trial judge were within the knowledge of the Provincial Crown, which appeared as intervener in both the Court of Appeal and Supreme Court of Canada actions.

[150] Given the treaty negotiations, the prior consultations, the publicly available information, and the evidence in ***NTC Smokehouse***, I find that the Crown was aware or should have been aware, when it made the removal decision, of the HFN claims, and of the potential existence of aboriginal rights pertaining to the Removed Lands and the surrounding Crown lands in TFL 44.

(4) Contemplated conduct affecting aboriginal rights

[151] Did the Crown contemplate conduct that could adversely affect aboriginal rights?

[152] I will address this question in two stages. First, could the HFN have aboriginal rights (including possible aboriginal title) with respect to the privately owned land? Second, did the Crown contemplate conduct that might adversely

affect HFN aboriginal rights with respect to the Removed Lands or with respect to the Crown land in TFL 44?

(a) Could the HFN have aboriginal rights with respect to the Removed Lands?

[153] As a threshold issue, I must decide whether the honour of the Crown is at stake only when its dealings relate to Crown land. Does the fact that the Removed Lands are private lands mean that the honour of the Crown cannot be implicated and thus, that a duty to consult and accommodate cannot arise on these facts?

[154] I will first briefly summarize the parties' submissions on this point.

[155] Mr. Thompson for the Crown submitted that ***Haida Nation*** is premised on the fact that the Crown held legal title to the land and that the aboriginal group claimed aboriginal title to that land. He submitted that for claims to give rise to a duty to consult, they must be ones that are capable of realization. He urged that the petitioners in these proceedings do not challenge the original Crown grant or the fee simple title held now by Island Timberlands.

[156] The Crown's position is that aboriginal title and fee simple title are fundamentally incompatible, because the former, which ***Delgamuukw*** described at para. 117 as "the right to exclusive use and occupation of the land" cannot coexist with fee simple title, the highest form of tenure in Canadian law and the most substantial estate that can exist in land.

[157] Thus, Mr. Thompson argued, a claim to aboriginal title over private land is not realizable and no duty to consult can arise.

[158] The Crown referred to the comments of Mahoney J. in the case of ***Hamlet of Baker Lake v. The Queen***, [1980] 1 F.C. 518 at para. 102 (T.D.) (Q.L.):

> The coexistence of an aboriginal title with the estate of the ordinary private landholder is readily recognized as an absurdity. The

> communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land.

[159] The Crown also relies on ***Skeetchesten*** and this statement by MacKenzie J.A. at para. 72:

> The appellant's ultimate objective is stated to be reconciliation of the claimed aboriginal title with Kamlands title to the 6 Mile Ranch in some form of accommodation of interests. The appellant argues that the present use of the lands as a ranch is compatible with aboriginal title but an intensive resort development with hotels, condominiums and golf courses would be incompatible. This submission appears to have an inherent contradiction inasmuch as the claimed aboriginal title and the fee simple title each involve rights to exclusive possession which are mutually exclusive.

[160] In the Crown's view, if the petitioners were to challenge the fee simple owner's title, such a challenge would not succeed either because of the inherent incompatibility of fee simple and aboriginal title or because the infringement of aboriginal title would be justified.

[161] With respect to justification for infringement of aboriginal title, the Crown's position is that both requirements can be met: (a) the infringement is in furtherance of a legislative objective that is compelling, substantial and reconcilable with aboriginal rights and the broader community of which they are a part; and (b) it is consistent with the special fiduciary relationship between the Crown and aboriginal peoples: ***Delgamuukw***, paras. 161-162.

[162] The Crown also submits that aboriginal title to the Removed Lands may have been extinguished as a result of the Federal Crown grant in 1887 to the Esquimault and Nanaimo Railway (although the Crown urges that I should not reach a conclusion regarding extinction of title.)

[163] Further, the Crown's position is that the question of whether aboriginal title and fee simple title can co-exist is inappropriate for a petition on judicial review and should not be decided in this proceeding.

[164] Under the terms of the British Columbia Treaty Process, the petitioners will not be able to obtain title to any private lands, except on a willing seller/willing buyer basis, and the Crown relies on that fact as further support for its position that there is a fundamental incompatibility between aboriginal title and fee simple title. The Crown's position is that it does not recognize aboriginal title to lands that are privately held and that it does not have jurisdiction to provide privately held land if it is claimed.

[165] With respect to aboriginal rights short of title, Mr. Thompson argued that any aboriginal rights exercised by the HFN on the Removed Lands are at the sufferance of the private landowner, which can at any time prohibit access to its private property. He further submitted that aboriginal rights are subject to the right of the fee simple landowners to put their lands to uses that are visibly incompatible with the exercise of aboriginal rights, such as the harvesting of commercial timber.

[166] The Crown submits that a finding by this Court that the petitioners have established a *prima facie* case would "necessitate a finding that aboriginal rights and title not only exist on private land, … but a finding that First Nations must be consulted by the Crown or even private landowners when exercising their rights as fee simple titleholders at common law." The Crown argued that "[s]uch a finding would constitute a step towards a challenge to the entire Torrens property system in British Columbia."

[167] Brascan's argument is consistent with that of the Crown. Brascan argues that the petitioners have not established a credible claim to aboriginal title in the Removed Lands. Mr. Clark pointed to the absence of authority for a duty to consult where the claim is for aboriginal title to privately owned land and emphasized that fee simple is the highest form of tenure in Canadian law and the most substantial estate which can exist in land. Brascan's position is that it is logically impossible for both aboriginal title and fee simple title to co-exist on the same parcel of land. Brascan also stresses that the petitioners are not challenging the fee simple title.

[168] The petitioners respond that the authorities do not exempt private land from the duty to consult, and that the authorities do not support the proposition that aboriginal rights and title are inapplicable on private lands. Mr. Grant for the petitioners argued that aboriginal rights and title can co-exist with fee simple title. Further, he submitted that, although the petitioners are not challenging the fee simple title in this proceeding, they have filed a writ claiming aboriginal title over their traditional territory, which includes the Removed Lands.

[169] Mr. Grant argued that Crown sovereignty continues over all lands, including those held in fee simple, and that the obligation to consult flows simply from s. 35 of the ***Constitution Act, 1982***, and the previous occupation of lands by an aboriginal group.

[170] I will begin my analysis with a review of some of the relevant authorities on the possible co-existence of private land ownership with aboriginal title and rights.

[171] As I read the cases, it has not yet been decided what meaning, if any, aboriginal title continues to have once the land over which it is asserted has been granted in fee simple to a third party.

[172] ***Skeetschten*** holds that aboriginal title is not a registrable interest, but leaves open the larger question of whether aboriginal title can co-exist with fee simple title. Southin J.A. adopted the metaphor used by MacKenzie J.A. that an aboriginal title claim is “upstream” of the certificate of indefeasible title:

> During argument, my colleague, Mr. Justice Mackenzie, encapsulated the Registrar's argument thus: "The claim of the appellant is upstream of the certificate of indefeasible title. The Registrar's duties are downstream of the certificate." (para. 4)

MacKenzie J.A. and Rowles J.A., after making the comment at para. 72 relied on by the Crown, that “the claimed aboriginal title and the fee simple title each involve rights to exclusive possession which are mutually exclusive”, adverted to the complexity of the issues surrounding aboriginal rights in lands alienated by the Crown and concluded that the court was bound by its earlier decision in ***Re Uukw***

et al. v. The Queen in Right of British Columbia et al. (1987), 37 D.L.R. (4th) 408 (B.C.C.A.) regarding registrability of aboriginal land claims (para. 83).

[173] As for aboriginal rights short of aboriginal title, although there is some authority with respect to their continued existence relating to privately owned land, many questions remain open.

[174] In ***Delgamuukw*** at para. 36, the Supreme Court of Canada summarized the Reasons of Macfarlane J.A. in the Court of Appeal regarding aboriginal rights and extinguishment:

> The purpose of the colonial instruments in question was to facilitate an orderly settlement of the province, and to give the Crown control over grants to third parties. It is not inevitable, upon a reading of the statutory scheme, that the aboriginal interest was to be disregarded. They did not foreclose the possibility of treaties or of co-existence of aboriginal and Crown interests. Similarly, even fee simple grants to third parties do not necessarily exclude aboriginal use. For example, uncultivated vacant land held in fee simple does not necessarily preclude the exercise of hunting rights. Moreover, it is clear that, at common law, two or more interests in land less than fee simple can co-exist. However, since the record was not sufficiently specific to permit the detailed analysis of such issues, Macfarlane J.A. suggested that these issues be dealt with in negotiation. He concluded that extinguishment by a particular grant needed to be determined on a case by case basis. [emphasis added]

[175] Lamer C.J.C. later considered whether provincial laws of general application could extinguish aboriginal rights, and concluded:

> It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application. (para. 181)

[176] The relationship between existing treaty rights and private property was considered in ***R. v. Badger,*** [1996] 1 S.C.R. 771. That case involved hunting offences under the Alberta ***Wildlife Act***, S.A. 1984, c. W-9.1. Three accused, with rights under Treaty No. 8, were caught hunting on private land. On appeal, the Court considered whether status Indians under Treaty No. 8 had the right to hunt

for food on private land. The Court considered the text of Treaty No. 8, which provided for hunting, trapping and fishing "throughout the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (para. 40).

[177] Cory J. considered the text of the treaty and the circumstances in which it was signed and concluded:

> … the oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. (para. 58)

As to whether aboriginals had a treaty right of access to hunt on privately owned lands, he concluded they did not where the land is put to a "visible, incompatible use". He held at para. 66:

> Where lands are privately owned, it must be determined on a case-by-case basis whether they are "other lands" to which Indians had a "right of access" under the Treaty. If the lands are occupied, that is, put to visible use which is incompatible with hunting, Indians will not have a right of access. Conversely, if privately owned land is unoccupied and not put to visible use, Indians, pursuant to Treaty No. 8, will have a right of access in order to hunt for food.

[178] Access to private land to practise aboriginal rights, as opposed to treaty rights, was considered in ***R. v. Alphonse*** (1993), 80 B.C.L.R. (2d) 17 (C.A.). That case concerned an appeal from charges under the ***Wildlife Act***, S.B.C. 1982, c. 57, for hunting out of season on private, uncultivated land. The accused alleged that he was exercising an aboriginal hunting right at the time of his arrest. Macfarlane J.A. considered whether this defence was ineffective because Mr. Alphonse was hunting on private land.

[179] Macfarlane J.A. concluded that if legislation, such as the ***Trespass Act***, R.S.B.C. 1979, c. 411, or the ***Wildlife Act***, does not circumscribe the aboriginal rights in question, then those rights can be exercised. He dismissed the Crown's argument that consent of the owner of private land was required, and concluded:

> Applying the Trespass Act to the circumstances of this case, there was no prohibition with respect to hunting on the lands in question. That being so, it was not unlawful to hunt on those lands. Thus, it was not unlawful to exercise an aboriginal right on those lands. (para. 34)

Lambert J.A., in separate and concurring reasons for judgment, held:

> The second aspect of this question relates to whether the exercise by Mr. Alphonse of a hunting right incidental to his aboriginal title or of a separate hunting right over the traditional ancestral lands of the Shuswap people may have been regulated in such a way as to preclude that exercise on land owned by the Onward Cattle Co. Ltd. in fee simple. In my opinion there is nothing in the Wildlife Act, the Trespass Act, or any other Provincial legislation which, by referential incorporation as Federal legislation or otherwise, might be thought to have precluded the exercise by Mr. Alphonse of a right to shoot the mule deer on this private land. The land was uncultivated bush; it was not occupied by livestock; it was not surrounded by a fence or a natural boundary; and it was not posted with signs prohibiting trespass. Just as in *R. v. Bartleman* (1984), 55 B.C.L.R. 78 (B.C.C.A.), where such land was available for the exercise of treaty hunting rights over unoccupied lands, so in this case it was available for the exercise of aboriginal hunting rights. That is not to say that it would not have been available if it had been occupied by livestock or surrounded by a fence. Such a supposition raises a number of questions which it is not necessary to resolve in this appeal. (para. 111)

[180] Read together, ***Badger*** and ***Alphonse*** indicate that existing aboriginal and treaty rights, for example to hunt or fish, may be exercised on unoccupied private land if the activity is permitted by statute or common law and is not prohibited by the private landowner. With treaty rights, at least where a “tracts taken-up clause” is included in the relevant treaty, their exercise is precluded if the private land is occupied and visibly used for incompatible purposes. The exercise of aboriginal rights may also be precluded by visible, incompatible use, although the point does not appear to have been finally determined.

[181] I did not understand the petitioners to dispute that, whatever remains of aboriginal rights (short of title) with respect to private land, the owner of that land can preclude access as part of the owner’s rights to exclusive use and possession.

[182] I turn now to my analysis and conclusions regarding the respondents' argument that the private ownership of the land precludes a claim for aboriginal title and, correspondingly, the existence of a duty to consult.

[183] There are no judicial decisions directly on point, so far as the research of counsel or my own research has disclosed. (As described above, two B.C. Environmental Appeal Board cases have addressed the point, but neither has previously been referred to in a judicial decision as far as I am aware, the cases were not the subject of submissions before me, and in any event, they do not have precedential value.)

[184] The Supreme Court of Canada and B.C. Court of Appeal authorities on the duty to consult (***Delgamuukw***, ***Haida Nation, Taku River***, ***Musqueam*** and ***Mikisew***) all involved Crown land, though they do not explicitly limit the duty to Crown land. The reasons in ***Haida Nation*** and ***Taku River*** do not emphasize Crown ownership of the land in question. Most of the discussion centres on the Crown as decision-maker rather than the Crown as landowner.

[185] The lower court cases decided since ***Haida Nation*** and ***Taku River*** have begun the development of the common law on duty to consult, as envisioned by the Supreme Court of Canada, and show a variety of circumstances in which the duty has been found to exist. Often the reasoning centres on Crown decision-making. However, all cases but one (***Homalco***) clearly involved Crown land.

[186] In ***Gitxsan First Nation #1***, a change of corporate ownership of a company that held a TFL and forest licences over Crown land was challenged. In ***Huu-Ay-Aht***, it was the operation of the provincial Forest and Range Agreement program. ***Musqueam v. Richmond*** and ***Betsiamites*** both concerned directly the use of Crown land or resources.

[187] In ***Homalco***, the issue was the location and choice of fish stock for a fish farm operated by a private party. ***Homalco*** involved a decision whose effect was

possibly to endanger fish stocks in waters where the First Nation claimed an aboriginal right to fish, adjacent to Crown land where they claimed aboriginal title.

[188] Despite the absence of authority on point, direction can be found in the principles articulated by the Supreme Court of Canada.

[189] The Supreme Court has found that consultation and accommodation are required where a First Nation advances a factually credible claim to aboriginal rights. The rights claimed can be as limited as the right to enter upon the land to fish, hunt or visit a sacred site, or as extensive as the right to maintain exclusive possession (aboriginal title). It is not necessary for the claimant to show that the claim will succeed; only that it is a credible claim. The strength of the claim, if it passes the threshold of credibility, does not bear on the existence of the duty; rather, it is relevant to the content of the duty. The Court reiterated in ***Mikisew*** that the initial threshold is low, and that "[t]he flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered" (para. 34).

[190] The duty to consult exists because of the need to reconcile the pre-existence of aboriginal societies with the sovereignty of the Crown.

[191] The Crown is sovereign over all lands, including those held in fee simple. Certain decisions by the Crown, such as this decision to remove the lands from the TFL, may significantly affect land to which aboriginal peoples lay claim, even though the Crown is not the title-holder to the land. Crown sovereignty and its power to make decisions about land during the time (which may be lengthy) when claims of aboriginal rights have been advanced but not yet proved triggers the duty to consult. Crown ownership of the land is not a necessary condition for the existence of that power to make decisions.

[192] Although Crown sovereignty extends to all land, Crown decision-making power about the land does not. Here, the Minister had specific and significant control over activities on the land, could prevent it from being used for non-forestry

purposes, and could even prevent it from being alienated. These are unique and unusual circumstances.

[193] The respondents are asking me to decide at this stage, which is in effect an interim proceeding, that the removal decision could have no effect on aboriginal title. They urge, in general, that aboriginal title and fee simple title are fundamentally inconsistent and that it is logically impossible for them to co-exist on the same parcel of land, and in particular, that with respect to the Railway Lands aboriginal title was extinguished by the Federal Crown grant.

[194] Thus, they are asking me in fact to decide what they say I should refrain from deciding, by seeking a conclusion that the door is closed on aboriginal title claims when land is held in fee simple by a third party.

[195] The petitioners, on the other hand, are not seeking a ruling that aboriginal title continues to exist: only that it might. They are content that the door remain open, as it has been left by the higher courts. They assert aboriginal title without challenging the fee simple title in this proceeding, on the premise that this claim, under the existing state of the law, is sufficiently credible to found a duty to consult.

[196] Here, the Provincial Crown and the HFN are at Stage Four in treaty negotiations. Prior to the removal decision, the province consulted with the HFN regarding its actions within HFN claimed traditional territory as a whole. There is no evidence that the Provincial Crown made any distinction in this consultation process between the Crown land and the private land. When the Removed Lands were under TFL 44, the Crown had the power to restrict significantly the owner's use of those lands, and could refuse to permit the alienation of those lands. The TFL was registrable against title under the ***Land Title Act*** by way of notice. The decision to remove the land from the TFL was a decision with important ramifications for the future of that land.

[197] I do not accept the respondents' argument that this case is distinguishable from ***Haida Nation*** and ***Taku River***.

[198] First, I do not find it significant that the fee simple title is not attacked in this proceeding. Further, the petitioners are advancing a claim to aboriginal title in a separate proceeding.

[199] Second, I conclude that the principles articulated in ***Haida Nation*** and ***Taku River*** can apply outside the context of Crown land. 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.

[200] 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.

(b) Did the Crown contemplate conduct that might adversely affect HFN rights?

[201] The next step is to determine whether the Minister's decision to remove the land from TFL 44 in fact had the potential to affect adversely aboriginal rights or title asserted by the HFN.

[202] The petitioners argue that their ability to exercise their aboriginal rights with respect to the Removed Lands requires that they have access to and protection of the land's wildlife, fish and plant resources and the sacred sites integral to their way of life.

[203] The Removed Lands, when managed as part of TFL 44, were subject to the ***Forest Act***, the ***Forest Practices Code*** and the ***Forest and Range Practices Act***. They are no longer subject to that legislation. The petitioners urge that, as a result, the removal decision has significantly reduced the Crown's ability to control forestry activities on the removed lands; it terminates, for example, the landowner's obligations to submit a management plan, a timber supply analysis, and a 20-year plan and to be subject to an allowable annual cut.

[204] The HFN argues that the removal decision also purports to end the obligation of the Crown to consult with them regarding significant management decisions affecting the Removed Lands, pointing to past consultation and accommodation which led, for example, to protection of their sacred sites.

[205] The petitioners argue that the "management objectives" in the ***Private Managed Forest Land Act***, S.B.C. 2003, c. 88, the legislation which now applies to the Removed Lands, are vague and non-specific, provide significantly reduced protection, and are easily avoided due to the regime's voluntary nature. The legislation permits landowners to withdraw their lands from the managed forest classification at will, subject only to the possible payment of an exit fee to the local taxing authority and the loss of a benefit in terms of property tax rates (ss. 17-19).

[206] They submit that the level of environmental protection on the Removed Lands has been reduced.

[207] They also point to the fact that the owner's powers over the Removed Lands have increased. For example, the owner can now subdivide and develop the lands for housing and sell the lands without the permission of the Minister.

[208] The petitioners concede that the HFN have always needed permission to go on the land since it became privately owned, but argue that previously there was a context in which permission was obtained, and a process under the terms of the TFL for managing the use of the land in consultation with them.

[209] The petitioners also argue that there is a potential adverse affect on their ability to exercise their aboriginal rights to resources on Crown land in TFL 44 because statutory and regulatory forest cover requirements for environmental purposes are often expressed as a proportion of the TFL's total area; thus, the reduction of the total area of TFL 44 reduces in absolute terms the minimum size of the areas which are protected.

[210] The Crown argues that even if a claim does exist, there is no possible adverse impact on, or infringement of, asserted aboriginal rights or title since the petitioners continue to have the same ability to access the lands for cultural and other purposes. It submits that the change in the regulatory regime has not resulted in lesser environmental protections and that the removed lands have never been available for land selection through treaty in any event.

[211] Further, the Crown points to the conditions regarding the Removed Lands imposed by the Minister and agreed to by Brascan, in support of the argument that if the Hupacasath have any claim, their interests were accounted for and protected by the Minister of Forests when the removal decision was implemented, well beyond what would actually have been required.

[212] The Crown's position is that it had an enforceable contract with Weyerhaeuser and that Brascan has subsequently indicated that it considers itself equally bound by the terms and conditions and will continue to manage the private lands in accordance with the provisions of the July 9 letter. It submits that Brascan has also agreed to be bound by the letter of agreement with the Ministry of Water, Land and Air Protection to protect ungulate winter ranges and other habitats and work to develop permanent protections for two years.

[213] The Crown argues that any failure by Brascan to continue to manage the lands under the ***Private Managed Forest Land Act*** would be a contractual breach and subject to remedy or penalty, and that federal legislation (the ***Fisheries Act***, R.S.C. 1985, c. F-14, ***Navigable Waters Protection Act***, R.S.C. 1985, c. N-22, ***Species at Risk Act,*** S.C. 2002, c. 29) and provincial legislation

(***Water Act***, R.S.B.C. 1996, C. 483, ***Heritage Conversation Act***, R.S.B.C. 1996, c. 187, ***Environmental Management Act***, S.B.C. 2003, c. 53) continues to apply. The Crown points to the conditions imposed by the Minister regarding water quality and fish habitat through management objectives under the ***Private Managed Forest Land Act***.

[214] The Crown argues that it is significant that Weyerhaeuser and now Brascan have agreed to maintain International Standards Organization (ISO) and CSA certifications, which require engagement of aboriginal groups in forms of consultation. Brascan submits that these certifications carry a comprehensive set of standards, which are not easily met, and that certification is not lightly obtained. Brascan points to evidence showing that HFN representatives had in fact agreed that CSA certification was preferable to the TFL regime.

[215] The respondents both argue that the petitioners are not entitled to an unchanging regulatory regime. They submit that, while there may be fewer opportunities for judicial review applications because there will be fewer decisions made by government, in any event the entire forest industry is moving towards a "results based" rather than a codified and process-oriented management regime.

[216] As did the Crown, Brascan argues that there in fact will be no change in the ability of the petitioners to access the private lands. It says that sites and objects having historical or cultural value to an aboriginal people, including those located on private land, are protected under the ***Heritage Conservation Act***.

[217] Brascan confirmed in argument that it will abide by the Minister's conditions for the removal decision. In response to a question from the Court as to whether the agreement between the government and Weyerhaeuser is enforceable as between the government and Brascan, Mr. Clark for Brascan stated that there has to be good faith between government and industry. He said that government "calls the shots" and that Brascan will abide by the government's conditions, because if it did not, it would find itself subject to regulation and law reform, and "back to where it started".

[218] Brascan argues that it is maintaining many of Weyerhaeuser's policies and procedures with employees trained to be sensitive to aboriginal cultural issues, that it is in the business of timber harvesting for the long term and that the private lands in question are highly productive and can support in perpetuity large scale commercially viable harvesting on a sustainable basis.

[219] Brascan argues that there is no evidence of any concrete adverse effects from removal decision on the petitioners' asserted rights because both Weyerhaeuser and Brascan have complied fully with the Minister's conditions and the applicable legislation.

[220] In the alternative, Brascan argues that if the HFN did successfully establish aboriginal title in the removed lands, their only remedy could be against the Crown, and not against Brascan's title, because aboriginal title is an encumbrance on the Crown's underlying title and does not attach to fee simple title.

[221] I will now state my conclusions on the question whether the Crown contemplated conduct that might adversely affect Hupacasath aboriginal rights.

[222] The difference between the level of regulation of forestry activities on the land before removal from the TFL, under the ***Forest Act*** and the ***Forest Practices Code***, and after removal under the ***Private Managed Forest Land Act***, is significant enough, according to Brascan, that removal of the lands was a major factor in its decision to enter into the agreement to purchase Weyerhaeuser's coastal assets.

[223] 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.

[224] The conditions in the Minister's letter are not enforceable by the HFN, even if they are enforceable by the Minister.

[225] In agreeing to the removal of the lands, the Crown decided to relinquish control over the activities on the land, control that permitted a degree of protection of potential aboriginal rights over and above that which flows from the continued application of federal and provincial legislation.

[226] Further, it is undisputed that nothing formally prevents Brascan from ceasing its voluntary compliance with the ***Private Managed Forest Land Act*** regime at any time its operational requirements so dictate. The conditions in the Minister's letter to Weyerhaeuser, assuming that they are binding on Brascan, require maintenance of the current status of "managed forest" on the private property "[s]ubject to applicable law and Weyerhaeuser's operation, risk management and other needs." Similarly, the conditions state that "[v]ariable retention and stewardship zoning on old growth areas will be maintained indefinitely", which would seem to allow for a change at any time.

[227] Brascan's agreement to maintain current critical wildlife habitat areas for two years while a long-term plan is developed with the Ministry of Water, Land and Air Protection does not require that any ultimate agreement be reached.

[228] Although there is no evidence that the Hupacasath have experienced problems in exercising specific aboriginal rights on the land since the removal decision, the question is whether a greater potential now exists for such rights to be adversely affected than did before.

[229] The authorities reveal that the contemplated adverse effect need not be obvious. The test, as articulated by ***Haida Nation***, and subsequently followed in a number of cases, focuses on conduct that has the potential to cause an adverse effect. In ***Gitxsan First Nation #1***, Tysoe J. rejected the Crown's argument that

the transfer of a TFL and forest licences was a “neutral” decision that did not require any consultation (para. 82). He held that the potential for an adverse effect did result; the transfer changed the identity of the controlling mind of Skeena and the philosophy of the persons making the decisions associated with the licences and prevented the sale of the licences.

[230] The change from the regulatory regime before July 9, 2004, to the post-removal regime does have the potential to affect adversely aboriginal interests, despite the conditions imposed by the Minister, the continued application of federal and provincial legislation and the effect of the certification requirements. The Crown has relinquished its ability to protect undeclared aboriginal rights and to maintain the integrity of the treaty process.

[231] I find that the petitioners have established that the decision to remove the lands from management under the TFL regime has the potential to affect their ability to exercise aboriginal rights they may have on the Removed Lands (to fish, to hunt, to gather food, to harvest trees, to visit sacred places). I find that when the Minister decided to remove the lands from TFL 44, he contemplated conduct that had the potential to affect adversely the HFN’s aboriginal rights.

[232] I find as well that the Minister’s decision has the potential to affect the HFN’s aboriginal rights with respect to Crown land within their asserted traditional territory. Increased logging on the Removed Lands could have an impact on adjacent Crown land. Although the regulatory regime is not changed within TFL 44, activities such as logging and protection of old growth areas in TFL 44 may be altered as a result of the removal decision. The change has the potential to affect adversely the aboriginal rights asserted by the HFN.

[233] Thus, I find that the Minister contemplated conduct which he knew or ought to have known had the potential to affect adversely Hupacasath aboriginal rights.

(5) The Crown's duty

(a) What was the nature and scope of the Crown's duty?

[234] The scope of the duty is proportionate to a preliminary assessment of the strength of the case and to the seriousness of the potentially adverse effects upon the right or title claimed.

[235] Where the claim to title is weak, the aboriginal right limited, 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. It is different when a strong *prima facie* case is established, the right and potential infringement is of high significance to the aboriginal peoples, and the risk of non-compensable damage is high: deep consultation, aimed at finding a satisfactory interim solution, may then be required: ***Haida Nation***, paras. 43-44.

[236] While the petitioners' position is that they have shown a strong *prima facie* claim for aboriginal rights over all of their traditional territory, the Crown's position is that the claim is non-existent on the Removed Lands and weak, at best, on the Crown land.

[237] In assessing the strength of the HFN claim, I take into account both the evidence as to traditional use (by the HFN and others) and the fact that the Removed Lands are privately owned: thus, I consider in a preliminary way both the factual and legal strength of the claim.

[238] There was some dispute in argument about the extent to which the Deputy Chief Forester acknowledged the claims of the HFN in his rationale for the amendment to the allowable annual cut. I agree with the Crown that he did not acknowledge the validity of those claims, as opposed to the fact that they were being made.

[239] I also agree with the submission of the Crown that the fact that the petitioners were accepted into the B.C. Treaty Process does not in itself reveal

that they have a strong case since there was no evidence as to the criteria imposed for inclusion in the Treaty Process. However, the fact that negotiations are at Stage Four was a factor in my earlier conclusion that the Crown was or should have been aware of the nature and extent of the Hupacasath claim and the potential for adverse effect on aboriginal rights.

[240] The southern part of the asserted HFN traditional territory is subject to extensive overlapping claims by eight other First Nations, and the Crown specifically submitted that the strength of the HFN's claim was reduced in light of historical evidence that they were conquered by the Tseshaht. As stated above, I make no finding as to conquest. I also note that I have taken into account, in assessing the evidence on traditional use and occupation, the submissions of counsel regarding factors bearing on its weight.

[241] The respondents conceded that both the northern area of the traditional territory as a whole, and more specifically the northern area of the Removed Lands, are relatively free of overlap.

[242] In ***Gitxsan First Nation #1*** the Court noted, in responding to the Crown's argument that a *prima facie* case could not be made out because of overlapping claims, that:

> … in the event that the overlapping claims result in a finding that aboriginal title to a disputed area has not been established, it is still possible for the Court to conclude that the competing groups have each established aboriginal rights in respect of the area. (para. 74)

[243] In its most recent pronouncement in ***Marshall***, the Supreme Court of Canada stated that aboriginal title requires the intention and capacity to retain exclusive control, that shared exclusivity could result in joint title and that aboriginal title is not negated by occasional acts of trespass or entry onto the land by consent (para. 57).

[244] Because of the private ownership of the land, and the position taken by the province in treaty negotiations, the prospect that the HFN will in the end obtain

exclusive possession of any of the Removed Lands or ownership of the resources on them seems remote.

[245] However, the Removed Lands are contiguous with Crown land, and the removal decision affects the Crown land claimed by the HFN as part of its traditional territory. The prospect exists that the HFN will obtain exclusive possession of some of that Crown land or its resources through treaty.

[246] Based on the evidence before me, including the uncontradicted evidence of the Hupacasath elders regarding traditional use of the territory they describe, for the purposes of this application my preliminary assessment of the strength of the case is as follows.

[247] I will first address the case regarding Crown land. I find that the HFN has shown a strong *prima facie* case for aboriginal rights including title with respect to the portion of their asserted traditional territory on the Crown land which is not subject to any overlapping claims. I reach no conclusions on the strength of the competing claims by other First Nations, but take those claims into account in concluding that the HFN *prima facie* case for aboriginal title to the portion of Crown land subject to overlap is weaker than for the other portion. Regarding the portion of their asserted traditional territory on Crown land subject to overlapping claims, the petitioners have shown a good *prima facie* case for aboriginal rights to hunt, fish, gather food, harvest trees and visit sacred sites. Since those rights do not require exclusivity, the existence of the overlapping claims does not in general weaken the petitioners' case.

[248] Second, with respect to the Removed Lands, I find that the petitioners have shown a *prima facie* case for aboriginal rights to hunt, fish, gather food, harvest trees and visit sacred sites on their asserted traditional territory, subject to the rights of the fee simple owner of that land to prohibit their access. Again, because the exercise of these aboriginal rights does not require exclusivity, I do not find that the existence of overlapping claims in general weakens the HFN case. I find that the petitioners have also shown a *prima facie* case for aboriginal title (if such

title has not been extinguished and continues to exist with respect to the Removed Lands), with respect to the portion of their traditional territory not subject to overlapping claims. As for the portion of the traditional territory on the Removed Lands subject to overlapping claims, given the requirement of exclusivity, I find they have shown a weak *prima facie* case.

[249] On the existing state of the law, the petitioners' aboriginal rights with respect to the Removed Lands are at best highly attenuated. Prior to the removal decision, the owners of the lands could have decided to exclude the Hupacasath from access to the lands at any time, subject to possible intervention by the Crown through its power to control activities on the land under the TFL. Their claimed aboriginal title, if it has not been extinguished, seems very unlikely to result in the Hupacasath obtaining exclusive possession of the Removed Lands in the future. The authorities indicate that the possible availability of the land to satisfy future land claims or treaty settlements is an important consideration in determining the extent of the Crown's duty.

[250] The extent of the Crown's duty is also proportionate to the seriousness of the potential adverse effect on the claimed aboriginal rights.

[251] I have described in the preceding part of these Reasons the potential adverse effects of the removal decision on HFN aboriginal rights.

[252] As a consequence of changes in activities on the Removed Lands, there might be some impact on fishing or hunting on the HFN claimed traditional territory outside the Removed Lands (and on Crown lands). I would say that the potential effect of the removal decision on the claimed aboriginal rights pertaining to the Crown land is modest.

[253] With respect to the Removed Lands themselves, the previous level of regulation of logging, wildlife protection and other activities on the land has been replaced by a different and much more forgiving regime. As well, the use of some of the lands could change altogether, for example through development for

housing. The potential effect of the removal decision on the claimed traditional territory in the Removed Lands is serious.

[254] Taking both the strength of the HFN claim and the seriousness of the potential adverse effects into account, I find that the duty to consult was at a moderate level with respect to the Crown lands, and at a lower level with respect to the Removed Lands.

(b) Did the Crown fulfill its duty to consult and accommodate?

[255] I turn to the question of whether the Crown's duty to consult was in fact fulfilled.

[256] Consultation requires good faith on both sides, which does not preclude hard bargaining. Aboriginal claimants must not frustrate the Crown's reasonable efforts, nor should they take unreasonable positions to thwart government in its consultation attempts: ***Haida Nation*** at para. 42. The standard is reasonableness, not perfection (para. 62). The right to be consulted is not a right to veto (para. 48). What is required is a process of balancing interests, of give and take (para. 48).

[257] The Crown argued that the strength of the *prima facie* case, if it exists, is so slight that at most the HFN was entitled to notice. Mr. Thompson submitted that the after-the-fact public notice released by the Crown on July 13, 2004 was sufficient notice and satisfies the test with respect to the honour of the Crown. He did not refer to any authority in support of his position that after-the-fact notice could suffice as consultation, and I am not persuaded by this submission, which seems inconsistent with the Supreme Court of Canada's pronouncements as to the meaning of consultation.

[258] The Crown conceded that there are remaining Crown lands which may be impacted, that consultation about these lands is ongoing and submitted that

because, in that context, the HFN will have a chance to be consulted about specific impacts flowing from the removal decision, nothing else is necessary.

[259] Both the Crown and Brascan argued that the WIWAG meetings and other interaction between the HFN and Weyerhaeuser fulfilled any consultation requirements on the Crown. The Crown pointed to the fact that the prevailing framework until November 2004 was the B.C. Court of Appeal decision in ***Haida Nation***, which required third party consultation.

[260] Brascan pointed to the statement by the Chief Justice in ***Haida Nation*** at para. 53 that "[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments", and argued that in effect Weyerhaeuser was carrying out the Crown's obligations.

[261] However, there is no evidence that the Crown delegated the procedural (or any) aspects of consultation to Weyerhaeuser. The WIWAG process was not the Crown's, whether directly or indirectly, and the WIWAG process did not involve consultation by the Crown about the pending removal decision.

[262] Most significantly, there is no evidence of any occasion when the Ministry either sought out or had the opportunity to hear the HFN's views about the Weyerhaeuser proposal to remove the lands, or the HFN's views about appropriate measures to accommodate aboriginal interests. Weyerhaeuser's discussions with the petitioners were in a context of asymmetrical information. The HFN did not know that Weyerhaeuser had made formal application to remove the lands, what representations it had made, or what terms and conditions were under discussion. Nor could it be said that the HFN had an opportunity to express their interests and concerns to the Crown, or to ensure that their representations were seriously considered and, where possible, integrated into the proposed plan of action.

[263] The respondents both argued that the HFN's interests were in fact accommodated, beyond what would have been required, by the conditions imposed by the Minister. The Brascan submission put it this way:

> The conditions to the Removal Letter are extensive, unusual and onerous. As will be discussed in more detail below, the conditions not only guarantee aboriginal access and notice, practices originally established on a voluntary basis by Weyerhaeuser, but they also protect aboriginal interests by imposing stringent environmental and forest practice requirements for the management of the lands. Environmental protection was further strengthened by Weyerhaeuser's concurrent agreement to protect ungulate winter ranges and a wildlife habitat area within the removed lands. The owners of privately owned timberlands are not normally required to adhere to such conditions or agreements.

[264] I do not find this to be an answer to the alleged breach of the duty to consult. While the Ministry and Weyerhaeuser may have turned their minds to what would protect aboriginal interests, the HFN have a position about what is necessary to do so and they should have been able to put their views and position forward to the Crown while the Crown was considering whether to accede to the request to remove the land.

[265] The Brascan submission emphasized that the courts do not insist on elaborate consultation or attempts at accommodation where it would be futile in light of inflexible or unreasonable positions taken by aboriginal claimants. Brascan argues that the petitioners have repeatedly asserted that their consent was required for the lands to be removed, and that they would refuse their support unless there was an acknowledgment of Hupacasath rights and title to Brascan's lands, control over resources on Brascan's lands, and agreements with respect to jobs and revenues for the HFN. Thus, Mr. Clark submitted, consultation and attempts at accommodation beyond what in fact took place would have been manifestly useless in the light of the petitioners' intransigence. He referred to ***Heiltsuk Tribal Council v. British Columbia*** (2003), 19 B.C.L.R. (4th) 107 at paras. 71-86, 103-118, 2003 BCSC 1422; ***Halfway River First Nation v. British Columbia (Min. of Forests)*** (1999), 64 B.C.L.R. (3d) 206 at para. 161 per

Finch J.A, 1999 BCCA 470; and ***Lax Kw'Alaams Indian Band v. British Columbia***, 2004 BCSC 420 at para. 62.

[266] In ***Halfway River***, Finch J.A. stated at para. 160-61:

> 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... .

[267] There is no evidence that the HFN refused to meet or to participate. The evidence that the HFN took the position with Brascan that it needed HFN consent to "get the land out" because of their asserted aboriginal rights and title to the land, without more, does not persuade me that they did frustrate or would have frustrated a consultation process. There was no consultation process for them to frustrate.

[268] The Crown argued that there was a duty on the HFN to take steps to deal with the issue, after it received notice on February 12, 2004 at the WIWAG meeting of Weyerhaeuser's application to remove the land, by approaching the Minister of Forests to discuss its concerns about the potential impact of removing the lands from the TFL. The Crown argued that consultation is a "two-way street" (referring to ***Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director***, (1998), 53 B.C.L.R. (3d) 1 at para. 73 (S.C.) and to ***Ryan v. British Columbia (Minister of Forests – District Manager)*** (1994), 40 B.C.A.C. 91 (C.A.)).

[269] While there is no doubt the HFN knew that Weyerhaeuser was trying to persuade the Crown to remove the land, there is no evidence that HFN leaders knew that a formal application had been made, or that the Crown was considering it. I do not find that the failure of the HFN to make representations to the Crown in the February – July 2004 period disentitles them from now seeking review of the Crown's failure to meet its duty to consult and accommodate.

[270] I do not find that what transpired in this case is comparable to what occurred in ***Heiltsuk*** or in ***Lax Hw'Alaams*** or that the HFN failed to meet their reciprocal duty to express their interests and concerns.

[271] Here, despite the previous history of consultation with the HFN about the management of TFL 44, the Crown did not attempt consultation at all. The Crown did not meet what Finch J.A. described as its "positive obligation".

[272] I recognize that, as stated in ***Taku River*** at para. 40, the Crown does not have to develop a special or separate consultation process for aboriginal groups so long as the public consultation process takes aboriginal interests into account. However, the Crown did not conduct any public consultation process with respect to this decision and the participation of HFN representatives in WIWAG did not constitute consultation by the Crown.

[273] In summary, the Crown had a duty to consult with the HFN regarding the removal of the land from TFL 44, and regarding the consequences of the removal of that land on the remaining (Crown land) portion of TFL 44.

[274] The Crown's duty with respect to alleged aboriginal rights on the Removed Land is at a low level and does not require "deep consultation". It does require informed discussion between the Crown and the HFN in which the 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.

[275] The duty on the Crown with respect to the effect of the removal decision on aboriginal rights asserted on Crown land is higher, and requires something closer to "deep consultation". On the evidence, the Crown did not meet that duty.

(6) Amendment to the allowable annual cut

[276] I must also consider whether the Crown met its duty to consult with respect to the decision of the Chief Forester to determine a new allowable annual cut for Crown lands remaining in TFL 44. Did the Crown contemplate that its amendment to the allowable annual cut had the potential to affect adversely HFN aboriginal rights in the Crown land that remained in the TFL area?

[277] The Crown was aware of the HFN claim to the Crown land under the TFL, and had consulted with the HFN in the past regarding decisions relating to the TFL, including the allowable annual cut. As set out above, my preliminary assessment is that the HFN *prima facie* claim to aboriginal rights on the Crown land is strong, particularly so with respect to land that is not subject to overlapping claims.

[278] The petitioners submit that the Chief Forester's amendment decision has the direct (and the potentially adverse) effect of altering the rate at which timber harvesting will take place on lands over which they assert aboriginal rights. Further, they submit the adjustment has the indirect effect of altering the protective measures previously established in TFL 44. They argue the August 26, 2004, adjustment, which they say was made without reference to localized considerations, affects measures previously adopted to conserve wildlife and fish habitat, water quality, and biodiversity.

[279] The Crown submits that the adjustment in question does not have a potential adverse effect on the asserted aboriginal rights of the HFN, as it reduces the level of harvest on a wholly proportional basis. The Crown submits that the adjustment at worst leaves the Hupacasath in the same position they were in prior

to the removal decision, or in fact benefits them. The Crown submits that no duty to consult is triggered.

[280] The Crown also submits that the petitioners failed to respond on two occasions when the Crown contacted them to solicit approval of the original allowable annual cut determination for TFL 44 and that therefore the petitioners' claims of concern regarding the adjustment should be viewed with some scepticism.

[281] Given the Crown's knowledge of the HFN claim, the past history of consultation, and the potential for the allowable annual cut amendment to affect the claimed aboriginal rights, I find that the Crown had a duty to consult the HFN about that decision.

[282] As already described, the authorities show that the scope and content of the duty will be proportional to the strength of the claim and the seriousness of the potentially adverse effect upon the right or title claimed.

[283] Here, the decision reduces the rate of timber harvesting on the Crown land, proportionate to the change in total area in the TFL resulting from the removal of the lands. The HFN position, as I understand it, is that the decision is problematic with respect to their asserted aboriginal rights because the rate was not reduced more.

[284] The Crown points out that the allowable annual cut determination is a lengthy and complex process, taking at least 20 months and occurring every five years. Mr. Thompson also submitted that the Crown had to reduce the rate of timber harvesting in the TFL once the Removed Lands were out; otherwise, there would have been an unsustainable rate of harvesting.

[285] In all of the circumstances, it is fair to characterize the potentially adverse effect, if any, as minor. Under ***Haida Nation***, where potential infringement is minor, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice (para. 43).

[286] The HFN first received notice on July 13, 2004 that it was likely the Chief Forester would amend the allowable annual cut on, when a copy of the Minister of Forests' letter of July 9, 2004 was forwarded to them. That letter stated:

> Allowable Annual Cut (AAC) Determination
>
> Due to the significance of the private land deletion and its impact on the AAC determination for TFLs 39 and 44, I expect the chief forester will make a new AAC determination reflecting the reduction in size of the TFLs effective the date the private lands are removed

[287] More generally, the HFN were aware, or should have been aware, that the allowable annual cut would be changed if the "management assumptions" on which it was based changed. The original *Rationale for Allowable Annual Cut (AAC) Determination for Tree Farm Licence 44 effective August 1, 2003*, provided at p. 33:

> …If additional significant new information is made available to me in respect of the management assumptions upon which I have predicated this decision, or First Nations' interests, then I am prepared to revisit this determination sooner than the five years required by legislation

[288] The HFN received notice of the allowable annual cut amendment from Weyerhaeuser, on September 14, 2004, and the *Amendment Rationale* from the Ministry of Forests on November 16, 2004.

[289] The HFN had notice that it was likely the allowable annual cut was going to be amended and knew, or should have known, that the Chief Forester had explicitly reserved the right to amend the allowable annual cut if the assumptions on which the original cut was based changed. There is no evidence that the HFN contacted the Chief Forester after the removal decision was made but before the allowable annual cut was adjusted to discuss how their aboriginal interests would be affected. At the same time, there is no indication that the Crown approached them or asked them for their views.

[290] I have concluded that in these circumstances, where the Crown gave notice and disclosed information regarding its decision, and where there is no evidence

that it failed to respond to concerns raised by the HFN, it fulfilled its duty to consult.

> *(7) What remedy, if any, should be granted as a result of the breach of duty to consult and accommodate?*

[291] First, the petitioners sought declaratory relief.

[292] There will be a declaration that the Minister of Forests had, prior to the removal decision on July 9, 2004, and continues to have, a duty to consult with the Hupacasath in good faith and to endeavour to seek accommodation between their aboriginal rights and the objectives of the Crown to manage TFL 44 in accordance with the public interest, both aboriginal and non-aboriginal.

[293] There will be a declaration that making the removal decision on July 9, 2004 without consultation with the Hupacasath was inconsistent with the honour of the Crown in right of British Columbia in its dealings with the Hupacasath.

[294] There will be a declaration that the Chief Forester had, prior to the August 26, 2004 decision to amend the allowable annual cut for TFL 44, and continues to have a duty to meaningfully consult in good faith with the Hupacasath and to endeavour to seek accommodation between their aboriginal rights and the objectives of the Crown to manage TFL 44 in accordance with the public interest, both aboriginal and non-aboriginal.

[295] Second, the petitioners urge that unless this Court orders, in addition to declaratory relief, that the Minister's decision be quashed or suspended in its effect, any consultation would be a purely formal and empty exercise because the Minister has "stripped himself" of the ability to exercise statutory powers over the Removed Lands.

[296] The petitioners ask that I set aside or stay the effects of the removal decision, and refer the matter for reconsideration after further consultation with the petitioners and after the seeking of meaningful workable accommodation.

Mr. Grant for the petitioners referred to the Crown's conduct in this matter as "egregious" and described the possible impact on Hupacasath aboriginal rights of leaving the removal decision in place as very serious. In particular, he emphasized the right to fish and the right to carry on sacred practices on the land.

[297] The petitioners argue that Brascan was well aware of their position and of this petition when it completed the purchase of the Weyerhaeuser coastal assets and that it should not now be able to assert prejudice resulting from its reliance on the validity of the removal decision.

[298] The Crown argues that there is a duty on the HFN to take steps and advise the Crown of its concerns and that First Nations cannot frustrate the consultation process by refusing to meet or participate or by imposing unreasonable conditions, as set out in ***Halfway River*** at para. 161; thus, a remedy should be refused.

[299] As stated above, I do not find that construction of the facts to be accurate. It has not been established on the evidence that the HFN refused to meet, imposed unreasonable conditions or was intransigent.

[300] The Crown also argued that the petitioners did not commence this proceeding until over five months after the removal decision and that there has been a significant delay in filing materials, a factor for the exercise of discretion against granting relief.

[301] The petitioners notified the Minister of their position very shortly after they learned of the removal decision and have proceeded relatively expeditiously. I do not find that the remedy granted should be affected by alleged delay on their part.

[302] The Crown argued that remedies under judicial review are wholly discretionary and that the court may withhold a remedy for objective reasons, including a balancing of potential prejudices to parties who have relied on the Minister's consent in good faith. The Crown argued that private landowners have spent money and taken steps in reliance on the Minister's decision, a factor

weighing against setting it aside. It also urged that granting the relief sought by the petitioners would affect the public interest because it would "subvert public confidence in the finality of government decisions".

[303] The Crown argues that setting aside the decision and restoring the Removed Lands to TFL 44 would serve no purpose since the petitioners are not challenging the fee simple title of Brascan and any aboriginal rights asserted are subject to the visible and incompatible use doctrine and can only be exercised at the sufferance of Brascan.

[304] The Crown argued that the impact on the public interest and third parties far outweighs the speculative prejudice alleged by the petitioners.

[305] Brascan joined in the Crown's submission.

[306] In addition, Mr. Clark for Brascan argued that a key factor for Brascan in purchasing Weyerhaeuser's property was the prospect of high quality, privately owned timberlands and that when Brascan learned that this petition had been filed on December 16, 2004, Brascan was already deeply committed and the essential terms of the proposed purchase were already in place. He argued that Brascan was justified in relying on the validity of the removal decision when it bought Weyerhaeuser's assets, pointing to evidence of Brascan's understanding about the background to the removal decision: namely, that similar previous removal decisions by the Minister had not been challenged and that Weyerhaeuser had had positive working relationships with First Nations and had informed HFN representatives of its quest to have the lands removed.

[307] Mr. Clark argued that the petitioners are really seeking the right to consent and approval, and that the Court should exercise its discretion against the remedies sought by the petitioners for three main reasons: (1) the immateriality of the alleged failure to consult and accommodate, especially in light of the practical futility of the remedies sought; (2) the serious and irremediable prejudice Brascan and many others would suffer if the remedies were granted; and (3) the public

interest in the validity and reliability of administrative decisions with respect to private land in British Columbia.

[308] In support of the assertion of prejudice, Mr. Clark tendered evidence in the form of an affidavit from Reid Carter, the Managing Partner of Brascan Timberlands Management LP.

[309] Mr. Carter deposed that Island Timberlands' operations are based in Nanaimo, employing about 285 people in operating the privately owned timberlands and the sale of logs, and holding agreements with independent logging contractors which employ about 450 – 500 people. He deposed that in forming Island Timberlands, Brascan represented to potential institutional partners the advantages of the privately owned timberlands. He swore that Brascan's estimate is that the profit margin on the sale of timber from the privately owned timberlands business is about $25- $30 per cubic metre higher than the margin attainable from the timber within TFL 44, and that Island Timberlands could face a loss of $15-$24 million annually if the Removed Lands are returned to TFL 44 because of this difference in margin. He stated that the value of the Brascan purchase from Weyerhaeuser would be seriously impacted by such an outcome.

[310] Mr. Carter stated opinions in his affidavit about the wide economic consequences of a reversal of the removal decision for Brascan, its shareholders, Island Timberlands, its investment partners and employees, and the surrounding communities. The petitioners objected to this opinion evidence, and I have disregarded it because Mr. Carter's qualifications to provide expert opinion evidence were not set out in the affidavit or otherwise provided to the Court

[311] I do take into account other aspects of Mr. Carter's evidence, including his statements that if the privately owned timberlands were returned to TFL 44 the forced co-mingling of two incompatible businesses would result and that Island Timberlands would need to reassess and reconfigure its business plans in a significant way possibly leading to reduced production and job losses.

[312] I also take into account the context in which Brascan made its decision to go forward with the purchase.

[313] On November 30, 2005, in conjunction with his submissions on the impact of the ***Mikisew*** case, counsel for Brascan also advanced arguments based on the increased prejudice to third parties that would flow from an order setting aside the removal decision, in the light of the recent sale of Cascadia to Western Forest Products Inc., and offered to provide affidavit evidence in support of those arguments. Counsel for the petitioners objected to this. I have not taken those recent submissions as to increased prejudice into account in reaching my conclusions.

[314] I am satisfied on the evidence before me that there would be significant prejudice to Island Timberlands and to Brascan if the Removal Decision were set aside or suspended in its effects.

[315] Finally, Mr. Clark argued that third parties are not responsible for the Crown's failure to consult or accommodate and indeed the honour of the Crown can weigh in favour of third parties, as stated by Madam Justice Southin in ***Skeetchestn*** at para. 5. He submitted that if there is to be any remedy, it should be to direct the Crown and the petitioners to engage in consultation and if necessary, arrive at appropriate accommodation measures that engage the resources of the Crown and not Brascan.

[316] Should the decision to permit the removal of lands from TFL 44 be quashed and set aside, or suspended in its effects?

[317] In the light of the substantial prejudice to third parties which could flow from quashing or suspending the removal decision, compared with the lesser prejudice which could befall the HFN if the removal decision is left in effect, I have concluded that the removal decision should not be quashed or set aside.

[318] However, I believe that a meaningful remedy can be granted pending the completion of consultation.

[319] Both of the respondents took the position that the conditions in the Minister's letter of July 9, 2004, amounted to more than reasonable accommodation of the HFN's interests. Counsel for the petitioners argued forcefully, however, that those conditions are not enforceable by the HFN and are imprecise in some respects.

[320] I have concluded that appropriate interim relief for the Crown's breach of its duty to consult and accommodate regarding the removal decision can be built upon the conditions in the Minister's letter.

[321] The following will be terms of this Court's order and will be in effect for two years from the date of entry of this order or until the province has completed consultations with the HFN, whichever is sooner:

1. Brascan will maintain the current status of "managed forest" on the Removed Lands and will keep the land under the ***Private Managed Forest Land Act***, subject to all of its provisions and regulations governing planning, soil conservation, harvesting rate and reforestation;
2. Brascan will maintain variable retention and stewardship zoning on old growth areas in the Removed Lands;
3. Brascan will fulfill its commitments in the Minister's letter regarding maintenance of water quality on the Removed Lands;
4. Brascan will maintain all current wildlife habitat areas on the Removed Lands;
5. Brascan will maintain ISO or CSA certifications and will continue to subject the Removed Lands to the public advisory process as per CSA standards;
6. Brascan will maintain current access for aboriginal groups to the Removed Lands;

7. Brascan will provide to the HFN seven days notice of any intention to conduct activities on the land which may interfere with the exercise of aboriginal rights asserted by the HFN.

[322] This order will apply to Brascan, Island Timberlands, and their successors in interest.

[323] The parties will exchange positions as to what kinds of activities might interfere with the exercise of aboriginal rights and if there is a failure to agree on a framework, the matter will go to mediation. The Crown will facilitate the operation of this term of the order, including, if requested by the petitioners and Brascan, providing the services of independent mediators at Crown expense.

[324] The petitioners also seek orders for disclosure of information relevant to the consultation.

[325] I will order that the Crown and the petitioners provide to each other such information as is reasonably necessary for the consultation to be completed. Counsel for the Crown suggested that there should be discussion between the parties as to the exact type and extent of the information to be provided, as in ***Homalco*** (at para. 124) and ***Gitxsan First Nation #1*** (at para. 113). I agree. I direct that the Crown and the petitioners attempt to agree on the information exchange. If they are unable to agree, the matter will go to mediation.

[326] As well, the Crown and the petitioners will attempt to agree on a consultation process and if they are unable to agree on a process, they will go to mediation. If mediation fails, they may seek further directions from the Court.

B. Compliance with Provincial Statutory Requirements

[327] In addition to the claims based on the Crown's duty to consult and accommodate, the HFN also claims that the decisions of both the Minister of Forests to remove the lands from TFL 44 and the Deputy Chief Forester to amend

the allowable annual cut did not comply with applicable statutes, and that therefore, this Court should quash or suspend those decisions.

[328] First, the petitioners argue that the Minister of Forests' decision to remove the private lands from TFL 44 did not comply with the requirements of the ***Forest Practices Code***, and its successor the ***Forest and Range Practices Act,*** S.B.C. 2002 c. 69 ["***FRPC***"]. The HFN claims that the removal decision changes Resource Management Zones, thus invoking the comment and review requirements of s. 3(3) of the ***Forest Practices Code.***

[329] They also claim that the removal decision is invalid because it purports to cancel a wildlife habitat area (specifically, WHA #1-002) that only the Minister of Water, Land and Air Protection (WLAP) has the authority to repeal.

[330] Second, the petitioners submit that the adjustment to the annual allowable cut is invalid because the Deputy Chief Forester did not turn his mind to all the factors that must be considered to properly fulfill that officer's statutory decision-making function. They submit that under s. 8(8) of the ***Forest Act***, the Chief Forester is required to consider, among other things, what rate of timber production can be sustained in the area. They claim that the former deputy's proportional adjustment was purely mathematical and ignored the localized considerations that would need to be considered to meet the guiding objectives.

[331] I have considered the evidence, the authorities and the submissions of counsel and have concluded that the alleged statutory breaches in this case would not, even if they were established, warrant the exercise of my discretion to grant an order to quash or suspend the removal decision or the allowable annual cut amendment, given the balance of convenience and prejudice.

[332] Since I have granted relief to the petitioners on the basis of the breach of the Crown's duty to consult, it is unnecessary for me to decide the issues raised regarding breach of statutory duties.

C. Summary of Conclusions

[333] The Minister of Forests' decision to remove lands from TFL 44 gave rise to a duty on the Provincial Crown to consult the Hupacasath. The Crown failed to meet that duty.

[334] The Chief Forester's decision to amend the allowable annual cut for TFL 44 gave rise to a duty on the Provincial Crown to consult the Hupacasath. The Crown met that duty.

[335] The petitioners will have declaratory relief. I decline to order that the removal decision be quashed or suspended. Certain conditions regarding the use of the Removed Lands for up to two years, pending the completion of consultation and accommodation, are imposed as terms of this order. Where the parties fail to agree on matters regarding the consultation they will go to mediation.

[336] I find it unnecessary to decide the issues raised regarding the alleged breach of statutory duties.

[337] The petitioners have largely been successful, and will have their costs of these proceedings.

[338] I am not seized of this matter.

"Lynn Smith, J."
The Honourable Madam Justice Lynn Smith