Citation: Westbank v. B.C. (Minister of Forests) and Wenger
2000 BCSC 1139

Date: 20000802
Docket: 47642
Registry: Kelowna

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RON DERRICKSON, CHIEF OF THE WESTBANK FIRST NATION ON BEHALF OF HIMSELF AND ALL MEMBERS OF THE WESTBANK FIRST NATION, AND ON BEHALF OF HIMSELF AND ALL MEMBERS OF THE OKANAGAN NATION

PETITIONERS

AND:

HER MAJESTY THE QUEEN IN THE PROVINCE OF BRITISH COLUMBIA, AS REPRESENTED BY THE MINISTER OF FORESTS, AND JOHN WENGER

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE SIGURDSON

Counsel for Petitioners	Louise Mandell, Q.C. R.M. Mogerman A. Walkem
Counsel for Respondents	Richard J.M. Fyfe K. Kickbush
Dates and Place of Hearing:	April 3, 4, 5, 6 and 7, 2000 Kelowna, BC

INTRODUCTION

[1] The Westbank First Nation, under the ***Judicial Review Procedure Act,*** R.S.B.C. 1996, c. 241, challenges a decision by a Ministry of Forests District Manager to grant a log harvesting and hauling contract to Webber Logging Ltd. in the Mellin-Ellen Forest Services Road area. Although the petition states a number of grounds, essentially only three were advanced at the hearing.

[2] First, the ***Forest Act,*** R.S.B.C. 1996, c. 157, enables the District Manager to authorize cutting by employees and agents of the government. The decision is allegedly invalid because Webber Logging is said to be neither an employee nor an agent of the government.

[3] Second, the petitioners say the decision is void. They argue that the District Manager lacks the jurisdiction to make the decision because that jurisdiction is based on a false assumption that the Province has full ownership in the trees. The petitioners argue such an assumption is contrary to ss. 109 and 91(24) of the ***Constitution Act, 1867***. They say that the decision fails to recognize or purport to deal with the encumbrance on provincial title (i.e. aboriginal title) and that constitutes an error.

[4] Third, the petitioners argue that the decision is void because the respondents, in making the decision to enter the contract, breached their fiduciary duty by not consulting with the petitioners in connection with their asserted aboriginal title. The petitioners say that any consultation was not meaningful or in good faith, so the decision is void and of no effect.

[5] I will deal with each of these arguments in turn. In discussing the third, I will consider the nature of the duty that rests upon a District Manager who makes a decision when there is an assertion of aboriginal title. I will also discuss what consultation occurred and whether it was in breach of any obligation or was shown to be inadequate in the circumstances. First, however, I will review the basic facts.

FACTS

[6] The first petitioner, Ron Derrickson, is the Chief of the other petitioner, Westbank First Nation. The respondent, John Wenger, is the District Manager of the Penticton Forest District.

[7] Chief Derrickson and Westbank (or the “petitioners” as I will refer to them) assert that Westbank has aboriginal title over a territory occupied by the Okanagan Nation prior to the

arrival of settlers in British Columbia. The petitioners' assertion of aboriginal title is the subject of a proceeding concerning a stop work order issued by the Crown to prevent logging by the Westbank First Nation. The question of whether the petitioners have aboriginal title that permits them to log has been directed to go to trial by an order I made on November 12, 1999.

[8] The territory to which the Westbank First Nation, as part of the Okanagan Nation, claims aboriginal title includes an area in the Mellin-Ellen Forest Services Road. That particular area is the subject of the log harvesting and hauling contract that is the subject of this proceeding under the ***Judicial Review Procedure Act***.

[9] The background to the contract is as follows. On November 27, 1999, the Kelowna Courier published an invitation from the respondents for tenders to log, harvest and haul an estimated 3,500 cubic metres in the Mellin-Ellen Forest Services Road area. The purpose of the contract is to allow a company to harvest trees from the Mellin-Ellen area and haul them to the Ministry of Forests Vernon Log Yard with the net proceeds to be paid to the Province for its use and benefit. Webber Logging was the successful bidder.

[10] After receiving approval from the District Manager on December 15, 1999, the Ministry entered into a log hauling and harvesting contract with Webber Logging.

Issue No. 1

Is Webber Logging an agent of the government for the purposes of s. 52 of the *Forest Act*?

[11] The petitioner challenges the District Manager's December 15, 1999 decision to issue the harvesting and hauling contract to Webber Logging. It bases its case on the ground that Webber Logging is neither an employee nor an agent of the government. The petitioners characterize Webber Logging as an independent contractor.

[12] The respondents' position is that Webber Logging is an agent of the government within the meaning of s. 52(1)(b) of the ***Forest Act***.

[13] The operative section, s. 52 of the ***Forest Act***, permits the District Manager to authorize a contract such as the one in question. As amended on July 15, 1999, the relevant part of the section provides that:

> 52 (1) The regional manager or district manager may, in writing, authorize

> (a) employees acting in the course of their duties, and
>
> (b) agents of the government acting in accordance with the terms of the agency
>
> to harvest crown timber...

[14] As it is not suggested that Webber Logging is a government employee, the simple question is whether Webber Logging, when performing that contract, is, as it is required to be, an agent of the government. The province accepts that the decision of the District Manager is not supportable if Webber Logging is not an agent of the government.

[15] There is no dispute about the standard of review since the respondents agree that on this first issue the standard is correctness.

[16] This issue, therefore, is quite narrow.

[17] The petitioners argue that “agent of the government” or “Crown agent” are terms of art. The petitioners used the terms “Crown agent” and “agent of the government” interchangably. The petitioners argue that case law requires the Crown to exert a degree of control to bring a person within the term "agent" as it is used in s. 52 of the ***Forest Act***.

[18] The respondents disagree. They say that the petitioners' argument fails to recognize the distinction between a Crown agent and an agent *simpliciter*. As Mr. Fyfe puts it, Webber Logging, while perhaps not a Crown agent or an agent of the government (if that term were simply synonymous with Crown agent), is nevertheless an agent *simpliciter* in performing this contract and therefore was properly engaged under s. 52 of the ***Forest Act***. Mr. Fyfe argues that under s. 52 the Crown can authorize people to do things on its behalf and that to the extent that those parties perform those services for the Crown, they are agents of the government.

[19] The petitioners say that even if there is a concept of agent *simpliciter*, which can also be an agent of the government, Webber Logging does not satisfy the definition of agent of the government as it lacks the power to affect the legal position of the Crown, something the petitioner says is essential.

Discussion on Issue No. 1

[20] The term "agent of the government" is not defined in the ***Forest Act***. Whether Webber Logging is an agent of the government is a question that must be answered, I think, by examining the terms of the harvesting and hauling contract and the surrounding circumstances.

[21] First, I will deal with what the contract provides.

[22] The written contract purports to be "authorized under the authority of s. 52 on (*sic*) the ***Forest Act***." Paragraph 2 of the contract reads that "...the Province wishes certain harvest and hauling of Crown timber to be performed."

[23] Paragraph 1.31 is an interesting provision. It says: "The Contractor shall be deemed to be an independent Contractor and not a servant, employee or agent of the Province."

[24] Under the heading "Independent Contractor" the contract provides that:

> 1.32 The Contractor shall accept instructions from the Province, provided that the Contractor shall not be subject to the control of the Province in respect of the manner in which the instructions are carried out.
>
> 1.33 The contractor shall not in any manner whatsoever commit or purports (sic) to commit the Province to the payment of any money.

[25] The contract further provides that the contractor must obtain all licences and permits at its own expense [1.08] and indemnify the Province for any loss sustained by any act or omission of the contractor [1.09].

[26] Section 1.38 provides that “...any property provided by the Province to the Contractor as a result of this Contract shall be the exclusive property of the Province”. Other provisions are that logging is to be done in accordance with a logging plan to be developed [2.01 to 2.03] and that the Province may suspend work if the work is not done to the standard of performance set out in the contract [2.04].

[27] Section 4.03 of the contract provides that "All of the property and/or services ordered/purchased by the Province pursuant to this Contract, are hereby for the use of, and are purchased by, the Province of British Columbia Ministry of Forests, with Crown funds, and are therefore not subject to goods and services tax."

[28] Notwithstanding s. 1.13, the respondents argue that for the purposes of s. 52 of the ***Forest Act***, Webber Logging is an agent of the government. It seems to me that regardless of the language of s. 1.13, whether Webber is an agent of the government for the purposes of s. 52 is largely a question of law.

[29] I start with the familiar concept of a Crown agent. Although there is not a single test to determine whether a person is a Crown agent, the main test appears in the judgment of Ritchie J. in ***Westeel-Rosco Ltd. v. Governors of South***

Saskatchewan Hospital Centre, [1977] 2 S.C.R. 238; (1976), 69 D.L.R. (3d) 334:

> Whether, or not a particular body is an agent of the Crown depends on the nature and degree of control which the Crown exercises over it.

[30] The petitioner says that apart from the express language of the contract, the nature and degree of control that the Crown exercises over Webber Logging indicates that it is not an agent of the government. No suggestion was made that the terms “Crown agent” and “agent of the government”, as those terms are ordinarily used, were, themselves, different concepts.

[31] In ***Re Board of Industrial Relations and Canadian Imperial Bank of Commerce*** (1981), 125 D.L.R. (3d) 487 (B.C.C.A.); affirming 116 D.L.R. (3d) 71 (B.C.S.C.), the Court of Appeal held that the Board, having limited independence and being organized within a government department, was to be treated as a Crown agency for the purposes of s. 107 of the ***Payment of Wages Act***. The Court concluded that the Board did not exercise any degree of independence that would enable it to conclude that the Board was not in any real sense an agent or servant of the Crown.

[32] In ***Installations Electriques, G. Bradley Ltee. v. Nova Scotia (Attorney General)*** (1987), 77 N.S.R. (2d) 327, N.W.J. No. 77 (Q.L.) (N.S. T.D.); appeal dismissed (1987), 79 N.S.R. (2d) 89 (N.S.C.A.); leave to appeal refused [1988] 1 S.C.R. x, the plaintiff, a contractor at the Sydney airport, sought a tax refund. The issue was whether it was acting as an agent of the Federal Crown and was consequently immune from taxation. No contractual provision explicitly appointed the plaintiff as an agent of the Crown. The plaintiff took all the risk, was potentially liable in tort and contract and entered the contract with a view to making a profit on the contract work. The plaintiff relied on ***Montreal (City) v. Montreal Locomotive Works Ltd.*** (1947), 1 D.L.R. 161 (P.C.), where, under the contract, the materials, plant and land involved belonged to the Crown; the corporation took no risk of loss; the company was under no liability and the fees it received were for management services. The corporation in ***Montreal Locomotive*** was held to be an agent of the Crown rather than an independent contractor. However, ***Montreal Locomotive*** was distinguished in ***Installations Electrique*** because in the latter the contractor assumed economic risk and legal liability in contract and tort. Ultimately, in ***Installations Electrique,*** the court held that the contractor was not an agent of the Federal Crown.

[33] What are the factors that are relevant here? I think they appear in the contract, the relevant portions of which were set out above.

[34] Applying the degree and nature of control test, I conclude that Webber Logging is clearly not an agent of the Crown. The logging company takes the risk and the degree of Crown control is minimal, given that the logging company is not bound to follow the Crown's instructions in any particular way. In deciding whether the parties intended the degree or nature of Crown control to be such that Webber Logging was an agent of the Crown, I have to give some weight to the parties' intentions as expressed in their contract. They said that Webber Logging is not "a servant, employee or agent of the Province."

[35] The respondent Crown says that the issue is not a question of determining Crown or government agency for the purposes of taxation or vicarious liability or priority, as is often the case, but rather is a question of whether the logging company is an agent of the government, as contemplated by, and simply for the purposes of s. 52 of the ***Forest Act.*** The respondents say that Webber Logging is an agent of the government for the limited purpose of that section, so I take it that in that sense they use the expression agent

simpliciter. The Crown says that notwithstanding s. 1.13, a contractor may still be an agent of the government pursuant to s. 52 of the ***Forest Act***, in particular, when the contractor disposes of property belonging to the Province on behalf of the Province. The Crown also points to the fact that the logs remain the property of the government; that the contract was under the alleged authority of s. 52; that the contractor is subject to instructions of the Province; that the contractor is restricted from performing services that would give rise to a conflict of interest; that everything produced as a result of the contract belongs to the Province exclusively; and that the work may be suspended by the Crown if it is not conducted to performance standards set out in the contract. In those circumstances, the Crown says that the logging company satisfies a more limited definition of agent, which it argues is contemplated by the section and is sufficient to bring the contract within the District Manager's jurisdiction to approve.

[36] In support of this argument, the respondent refers to G.H.L. Fridman, ***The Law of Agency***, 7th ed. at p.p. 36-37 where he says:

> Thus it is suggested that the term 'agent' can best be used to denote a relationship that is very different from that existing between a master and

> his servant, or an employer and his independent contractor. Although servants and independent contractors are parties to relationships in which one person acts for another, and thereby possesses the capacity to involve that other in liability, yet the nature of the relationship and the kind of acts in question are sufficiently different to justify the exclusion of servants and independent contractors from the law relating to agency, unless at any given time a servant or independent contractor is being employed as an agent, when he should be called such. In other words, the term 'agent' should be restricted to one who has the power of affecting the legal position of his principle by making of contracts ***or the disposition of property***: but who may, *incidentally*, affect the legal position of his principal in other ways. That is the sense in which the term agent is used in this book.
>
> (bold italics added; footnotes omitted)

[37] If a person who disposes of property for another can be an agent of that person, is that the sense in which "agent of the government" is used in s. 52 of the ***Forest Act***? This question of statutory construction includes a consideration of the purpose of s. 52. Is Webber Logging an agent for the purposes of s. 52?

[38] Section 52 appears in Division 9 of the ***Forest Act*** under the heading "Miscellaneous". The language of s. 52 implies that permission under that section - either to harvest Crown timber or to use and occupy Crown land - is given to an employee or an agent within the ordinary or usual sense of those words. The term agent does not, in that context,

contemplate someone who is an agent merely because that person harvests timber for the benefit of the Crown. The section reads, "...agents of the government, acting in the course of their duties...". That suggests that the authorized person has duties as a government employee or agent, not simply that the person is an agent of the government because of the particular task undertaken. For this reason, the respondent Crown's suggested meaning of “agent of the government” under which almost anyone who harvested Crown timber pursuant to an authorization under s. 52 would be an agent of the government, cannot apply. I think that perhaps in some circumstances Webber Logging may have some of the characteristics of a so-called agent *simpliciter*, but I do not think that the term "agent of the government" as found in s. 52 was intended to be used in as narrow a sense as the respondents argue.

[39] In the circumstances, I find that the company is not a Crown agent or an agent of the government under the usual control test and is not an “agent of the government” under s. 52. Although the contract was stated to be made pursuant to s. 52, the contract specifically states, without reservation, that the contractor is not an agent of the Province. I must give some weight to this contract provision in determining if the company is an agent for the purposes of s. 52. In all of

the circumstances, I conclude that Webber Logging is not acting in a capacity where the legislation contemplates it to be authorized under s. 52 to cut Crown timber. As such, the authorization of the contract by the District Manager is void.

[40] In the event that I am wrong in that conclusion, I will turn to a discussion of the next two issues.

Issue No. 2

Section 109 of the *Constitution Act, 1867* and the Burden of Aboriginal Title

The Petitioners' Position

[41] The petitioners argue that the District Manager's decision is also void because it is beyond the powers of the Province. They argue that his decision incorrectly assumes that the Province has full ownership of the trees. That assumption, they argue, is contrary to s. 109 and s. 91(24) of the ***Constitution Act***, ***1867***, because aboriginal title is an encumbrance on Crown title and because, under s. 91(24), the Federal Crown, not the Province, has the power to disencumber Crown title.

[42] For ease of reference, the relevant portion of s. 91 reads as follows:

> ...it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative

> Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects hereinafter enumerated; that is to say –
>
> ...
>
> 24. Indians, and Lands reserved for the Indians.

[43] Section 109 states that:

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

[44] In short, the petitioners' position is that the Provincial Crown has only a perfectible title.

[45] Unless the Federal Government exercises its power to disencumber Crown title, the District Manager's action under s. 52 of the ***Forest Act***, the petitioners argue, is beyond the Province's power. Although s. 52(1) of the ***Forest Act*** enables the District Manager to authorize cutting of Crown timber, the petitioners say that by s. 109 of the ***Constitution Act***, ***1867,*** the Province has no power to deal freely with Crown lands until Crown title is disencumbered of aboriginal title.

[46] In support of the propositions that aboriginal title and Crown title co-exist and that until aboriginal title is extinguished, Crown title is burdened by aboriginal title, the petitioners cite ***R. v. Delgamuukw***, [1977] 3 S.C.R. 1010. The petitioners say that the pre-existing land rights of aboriginal peoples to their territories are to be respected by the Sovereign, and that those rights survive the assertion of Crown sovereignty and continue until properly terminated by law.

[47] The petitioner says that the fact that Provincial title was subject to aboriginal title was recognized over 100 years ago in ***St. Catharines Milling and Lumber Co. v. The Queen*** (1888), 14 App. Cas. 46 (P.C.) affirming (1887), 13 S.C.R. 577. The petitioner argues that the aboriginal title encumbrance or limitation on Provincial Crown title has been recognized in a number of decisions including ***Guerin v. Canada,*** [1984] 2 S.C.R. 335; ***Opetchesaht Indian Band v. Canada,*** [1997] 2 S.C.R. 119; ***Delgamuukw***, *supra*; and ***Osoyoos Indian Band v. Oliver (Town)*** (1999), 172 D.L.R. (4th) 589 (B.C.C.A.)(notice of appeal filed 18 May 2000).

[48] The petitioners also cite ***Delgamuukw*** in support of their argument that a fiduciary relationship exists because aboriginal title is inalienable except to the Federal Crown.

Although the Federal Crown has power to extinguish or interfere with aboriginal title, the process for extinguishment and interference is governed by this fiduciary relationship (see ***R. v. Sparrow,*** [1990] 1 S.C.R. 1075).

[49] The petitioners' argument continues by saying that the limitation on Crown title exists in the absence of proof of aboriginal title according to the tests established in ***Delgamuukw***. First, the petitioners say that the doctrine of continuity affirmed in ***Guerin***, *supra*, establishes a presumption that aboriginal title survives sovereignty and continues. They argue that because the Crown has failed to discharge its onus to prove that aboriginal title has been extinguished in British Columbia, aboriginal title must be presumed to exist unless and until the Crown meets its onus in some other way. Second, they argue that in light of the fiduciary relationship arising from the fact that aboriginal title is inalienable except to the Federal Crown, it would be perverse to allow the Province to take full benefit of an encumbered Crown title. Third, the petitioners say that if aboriginal title must be proved to trigger the encumbrance on Provincial Crown title, then the Province could take the benefit of unencumbered title awaiting a successful aboriginal title lawsuit. Fourth, they reiterate their argument that the

Province simply does not have authority to extinguish aboriginal title.

[50] The petitioners say that notwithstanding the fact that their aboriginal title to the site in question has not been proven according to the tests in ***Delgamuukw,*** their argument has equal force. The petitioners argue that the Province, to give effect to s. 91(24) of the ***Constitution Act, 1867***, must allow for the *possibility* of an encumbrance. The petitioners say that this burden was recognized and confirmed in ***Delgamuukw*** and the Province is prevented from legislating in relation to aboriginal title. The petitioners ask, rhetorically, what is the constitutional content of aboriginal title which is embraced by s. 91(24) and which is a burden on Provincial Crown title, short of proof of aboriginal title? The petitioners say that for the purposes of the present case, it is sufficient for the court to consider the complete, full and absolute beneficial interest that the Province assumes for itself, in order to conclude that the Province's decision here is beyond the power of the Province. The petitioners say that given the legal nature of aboriginal title, it must be said that Provincial legislation and action that assumes absolute and complete ownership of the trees will conflict with aboriginal title.

[51] Finally, the petitioners say that the Province cannot use its powers under management legislation (s. 92(5) of the ***Constitution Act, 1867***) to avoid the fact that its ownership is encumbered by an existing interest under s. 109.

The Respondents' Position

[52] The respondents say that the petitioners' argument, based as it is on asserted aboriginal title, is fundamentally flawed. They say that if the petitioners' argument were correct, it would affect most land in British Columbia and be an impediment to the Crown acting with respect to much of the land in the Province.

[53] The respondents acknowledge that aboriginal title is an encumbrance of the type contemplated by s. 109. However, they argue that aboriginal title is site-specific and consequently, it must be proven before it can be an impediment to the District Manager's authority under s. 52. The respondents say that given that aboriginal title to the lands is in issue and unproven, the District Manager's decision cannot be a violation of s. 35 of the ***Constitution Act, 1982.***

The Petitioners' Reply

[54] In reply, the petitioners reassert that there is a fiduciary relationship that imposes obligations on the Crown

prior to proof of aboriginal title and that those obligations include recognition of possible title, consultation and accommodation of aboriginal and Crown interests in the face of asserted rights. The petitioners say that s. 109, as it applies to unproven aboriginal title, applies throughout the Province except where aboriginal title has been accommodated through treaty or under the lands embraced by the Nisga'a agreement.

[55] Fiduciary arguments will also be discussed in connection with the administrative law issue.

Discussion on Issue No. 2

[56] The petitioners are, in effect, saying that there is a burden on Crown title by operation of s. 35 of the ***Constitution Act, 1867*** and s. 109 of the ***Constitution Act, 1982*** sufficient to prevent the District Manager's decision affecting the land unless the decision accommodates asserted aboriginal title.

[57] It is important to distinguish this encumbrance argument from the question of the District Manager's responsibilities either under the law of fiduciaries or procedural fairness in reaching a decision that may affect proven or unproven

aboriginal rights. A discussion of that appears in the next section.

[58] The authorities certainly support the proposition that an established aboriginal interest is a burden on the Crown's title. However, I think that the situation is different when the alleged interest is only an unproven, pending claim that has not been settled or adjudicated upon by the court.

[59] My conclusion on the second issue is as follows. In these circumstances, when there is an unproven aboriginal title claim, the District Manager may authorize cutting on the particular site. I reach that conclusion because I think that the respondents are correct that the encumbrance exists once aboriginal title is proven, given the site-specific and group-specific nature of aboriginal title described in ***Delgamuukw,*** *supra.* Since establishing aboriginal title requires proof of exclusive occupation, the block in question cannot be said to be burdened pursuant to s. 109, so as to impede the District Manager's decision, until the petitioners establish specific aboriginal title to the block.

[60] I think that the authorities dealing with how aboriginal title must be proven support this conclusion. In ***Delgamuukw***, Chief Justice Lamer said:

(143) In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupations relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive

...

(145) On the other hand, in the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. ... aboriginal title crystallized at the time sovereignty was asserted. ...**aboriginals must establish occupation of the land from the date of the assertion of sovereignty in order to sustain a claim for aboriginal title. ...**
(emphasis added)

...

(149) ... Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracks of land for hunting, fishing or otherwise exploiting its resources. ...

(150) In ***Van der Peet,*** I drew a distinction between those practices, customs and traditions of aboriginal peoples which were "an aspect of, or took place in" the society of the aboriginal group asserting the claim and those which were "a central and significant part of the society's distinctive culture". The latter stood apart because they "made the culture of the society distinctive ... it was one of the things that truly made the society what it was". ... The same requirement operates in the determination of the proof of aboriginal title. As I said in ***Adams,*** a claim to title is made up when a

> group can demonstrate “that their connection to the piece of land ... was of central significance to their distinctive culture”.
>
> ...
>
> (160) The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by Federal (e.g., ***Sparrow)*** and Provincial, (e.g., ***Côté***) governments. However, s. 35(1) requires that those infringements satisfy the test of justification.
>
> ...

[61] I think that the foregoing indicates that the title of the Provincial Crown is encumbered to the extent that aboriginal title has been proven on a site-specific basis. In ***Haida Nation v. British Columbia (Minister of Forests),*** [1998] 1 C.N.L.R. 98 (leave to appeal dismissed, May 7, 1998), the British Columbia Court of Appeal held that "the Aboriginal title claimed by the Haida Nation, *if it exists*, constitutes an encumbrance on the Crown’s title to the timber”. (Emphasis added.) Although the petitioner is correct that once aboriginal title to the lands is proven, it encumbers the land and places restrictions on the Province's jurisdiction to deal with the lands in question, that is not the present situation because aboriginal title is not yet established.

[62] The petitioners argue that because aboriginal title has not been extinguished in British Columbia it must be presumed

to exist and encumber these lands. I disagree. Given the requirements for proof of aboriginal title, I cannot see that the District Manager's decision can be said to be in error for not recognizing a yet unproven encumbrance.

[63] ***Delgamuukw****, supra*, indicates that aboriginal title must be proven, that it is not presumed and that the determination of aboriginal title, according to the test it describes, is done on a site-specific basis. That is not to say that the District Manager may not have to act in a certain way because of the possibility of aboriginal title. Absent proven aboriginal title, I do not think that s. 109 and s. 91(24) of the ***Constitution Act, 1867*** prevent the District Manager from granting approval to the logging contract.

[64] Setting aside the question of any duty to consult or investigate, the District Manager did not err in authorizing the contract when aboriginal title was still unproven. Accordingly, I would have concluded that the petitioners' second ground must fail.

Issue No. 3

Duty to Consult

[65] The petitioners' position is this: the Province is in a fiduciary relationship to aboriginal peoples, a relationship

entrenched in s. 35 of the ***Constitution Act***, ***1982*** and accordingly, must engage in good faith and meaningful negotiations, which it argues has not occurred here. The petitioners argue that the District Manager is under a fiduciary responsibility to them which has been breached and that the decision should be set aside on that ground.

[66] The petitioners say that the decisions in ***Guerin,*** *supra*, and ***Sparrow,*** *supra*, are examples of cases where the fiduciary relationship and duty was found. The petitioners argue that the fiduciary relationship includes a duty to consult. More importantly for the case at hand, the petitioners say that this duty to consult arises prior to proof of aboriginal title and exists in the face of asserted title. For this proposition, the petitioners rely on ***Halfway River First Nation v. British Columbia (Ministry of Forests)*** (1999), 64 (B.C.L.R.). (3d) 206 (B.C.C.A.)***; Nunavik Inuit v. Canada,*** (1998) 164 D.L.R. (4th) 463 (F.C.T.D.); ***Gitanyow First Nation v. Canada*** (1999), 66 B.C.L.R. (3d) 165, [1999] 3 C.N.L.R. 89 (B.C.S.C.), leave to appeal granted, 1999 B.C.C.A. 343; and the lower Court decision in ***Trans Canada Pipelines Ltd. v. Beardmore Township,*** [1997], O.J. No. 5316 (Q.L.) (Ont. Ct. (Gen. Div.).

[67] Finally, the petitioners say that if a duty to consult does not exist prior to the establishment of an aboriginal right or title, then this court should extend the law to include an obligation to consult, investigate or negotiate in good faith. The petitioners rely an article by Sonia Lawrence and Patrick Macklem entitled “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult”, (2000) 79 Can. Bar Rev. 252, which speaks of the expanded nature the duty.

[68] The petitioners say that the respondents’ duty to consult rests on a continuum calibrated to the recognition of aboriginal rights and title. Given the evidence in this case, which the petitioners say is strong, they argue that here there is a high standard, one of good faith. The petitioners say that this obligation includes good faith efforts to reach an accommodation of aboriginal and Crown title. The petitioners argue that the duty to consult cannot be discharged unless the possible existence of aboriginal title is presumed and then investigated. The petitioners argue that the Province's conduct has fallen short on all accounts: consultation, negotiation and/or accommodation.

[69] The respondents, on the other hand, say that the fiduciary relationship only arises in connection with existing

aboriginal rights or title. That is the fundamental difference between the parties.

[70] In addition, the respondents draw a distinction between a fiduciary obligation and the administrative law duty of procedural fairness. The respondents say that the District Manager does not owe the former, but that he has obligations of procedural fairness that stem not from asserted aboriginal rights, but that arise as a matter of provincial policy. The respondents say that any administrative duty of procedural fairness has not been breached.

Discussion on Issue 3

[71] The first question is whether the District Manager was in a fiduciary relationship with the petitioner in connection with this decision; and, secondly, whether there was a breach of any fiduciary duty. If neither the District Manager nor the Province has a fiduciary duty in the circumstances, then the question is what procedural or administrative duty is owed to the petitioners and has it been breached.

Is there a fiduciary duty in those circumstances?

[72] Courts in several Canadian jurisdictions base the Crown’s duty to consult on the establishment of an aboriginal or

treaty right. Subsequent to oral argument, the Ontario Court of Appeal decided ***Ontario (Minister of Municipal Affairs and Housing) v. Transcanada Pipelines Ltd.,*** [2000] O.J. No. 1066 (Q.L.) (Ont. C.A.); application for leave filed June 2, 2000. The Ontario Court of Appeal overturned a decision relied on by the petitioners concerning the duty to consult. In connection with duty of consultation, the court said at paras. 119-120:

> In my view, what these cases decide is that the duty of the Crown to consult with First Nations is a legal requirement that assists the court in determining whether the Crown is constitutionally justified in engaging in a particular action that has been found to prima facie infringe an existing Aboriginal or treaty right of a First Nation. It is only after the First Nation has established such infringement through an appropriate hearing that the duty of the Crown to consult with First Nations becomes engaged as a factor for the court to consider in the justificatory phase of the proceeding....
>
> ... As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the Constitution Act, 1982. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action.

[73] This court has followed a similar course in describing when and how the duty of consultation arises. In ***Kelly Lake Creek Nation v. Canada (Minister of Energy and Mines),*** [1999]

3 C.N.L.R. 126, (1998), B.C.J. No. 2471 (Q.L.), two First Nations groups applied for judicial review of a Ministry of Energy and Forests decision to permit the use of Crown land for gas well development. The First Nations took the position that these exploration activities impacted on their aboriginal treaty and constitutional rights and that the Ministries breached a duty to consult with them in a meaningful way prior to making the decisions.

[74] Taylor J. set out the following issue for determination on review: if asserted rights may be affected by the decision, was there a duty to consult with one or both of the applicants before the decision was made and if so, was there fulfilment of that duty? The Crown argued that its duty to consult arises only where aboriginal or treaty rights have been established by the courts or by treaty and, in the case of Treaty No. 8, acknowledged that there was a duty to engage in consultation. Taylor J. discussed ***Sparrow*** and ***Delgamuukw***. He pointed out that the focus of the court's decision in ***Sparrow*** was whether there was a justifiable infringement of an "established right". He noted that the court in ***Delgamuukw*** did not establish rights or title, but rather set forth the process under which those could be established. Taylor J. said at paragraph 160:

> It is in respect of that second aspect that the fulfilment of consultation before infringement of established or affirmed rights occur. It is likewise in the context of this second aspect that the concept of the honour of the Crown comes into play in terms of the manner of consultation.

[75] Taylor J. indicated that the question of the duty to consult does not preclude the Crown from establishing, as a matter of policy, consultation with First Nations who assert such rights or title. He indicated that the process requires procedural fairness, the extent of which would be determined by the nature of the decision making process that arises under the statute.

[76] In ***Halfway River,*** *supra,* our Court of Appeal considered an appeal from a judicial review quashing a decision of a District Manager to approve Canfor’s application for a cutting permit. The case concerned the right to hunt under Treaty 8. The petitioners say ***Halfway River****, supra,* supports their contention that there is a fiduciary obligation to consult in the face of asserted, but unproven rights. On appeal, Finch J.A., for the majority, concluded that the only lack of procedural fairness in the District Manager's decision making process was the failure to provide to the petitioners an opportunity to be heard. More importantly for current purposes, he also distinguished between the duty to consult as

an aspect of the test for justification under ***Sparrow*** (where there is a proven right) and procedural fairness. He said at paragraph 158:

> The learned chambers judge found that there had been inadequate consultation with the petitioners, and it is upon this ground that she found the Crown had failed in its attempts to justify the infringement of the petitioner's right to hunt.
>
> It is perhaps worth mentioning here that the difference between adequate notice as a requirement of procedural fairness (considered at paragraph 76-80) and adequate consultation, which is a substantive requirement under the test for justification. The fact that adequate notice of an intended decision may have been given, does not mean that the requirement for adequate consultation has also been met.
>
> 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, whenever possible, demonstrably integrated into the proposed plan of action.

[77] Huddart J.A. wrote concurring reasons but differed on the application of the principles from ***Sparrow***, *supra*. She considered the breach in process a breach of the Crown's fiduciary responsibility that made the application of a ***Sparrow*** analysis premature. She would require a First Nation "to establish the scope of the right at the first opportunity." The decision maker would then ascertain the

scope of the right and weigh the right against the various interests concerned to determine whether the proposed uses were compatible. Any judicial review would focus on this process. However, she concurred with Finch J.A. that the "District Manager was under a positive obligation to the Halfway River First Nation to recognize and affirm its treaty right to hunt" (at para. 178) in determining whether to grant a permit.

[78] In ***Taku River Tlingit First Nation v. Tulsequah Chief Mine Project***, 2000 BCSC 1001, Kirkpatrick J. undertook a judicial review of decisions of relevant Ministers under the statutory framework of the ***Environmental Assessment Act***. Kirkpatrick J. found that substantive aboriginal rights were not relied on, noted that the Tlingit were in treaty negotiations and held, in the circumstances, that after December 1997 the process did not meet "any fiduciary or other obligations owed to the Tlingits", who, until that time, had been full participants in the statutory process. Ultimately, she held that she was "unable to conclude that the Crown respondent was required to extract an agreement from the Tlingits in respect of the Project proposal." However, the Crown was obliged to have meaningful consultation and "must at

least consider solutions concerning the disputes arising in the environmental review process."

[79] Kirkpatrick J. quashed the Ministers' decision. She thought that the Crown's argument that s. 35 of the ***Constitution Act*** was not engaged until aboriginal rights and title are established to be excessively rigid and confining, particularly when considered in light of the Crown's duty to negotiate as defined in ***Delgammukw***. She noted that the Tlingits asserted aboriginal rights at all stages of the environmental review. She held that all fiduciary, or other obligations, were satisfied until December 1997. She concluded that after December 1997, the Ministers' reasons demonstrate that the statutory obligation under the ***Environmental Assessment Act*** to promote sustainability was not fully addressed and the Ministers' obligation, by statute and common law, was not fulfilled. She described the failure of the project committee to discuss with the Tlingits their concerns and report them to the Ministers to be a breach of the rules of procedural fairness.

[80] ***Taku*** is a complex decision concerning the statutory environmental approval process. However, I do not think it or ***Halfway*** stands for the proposition that a fiduciary obligation to consult arises merely in the face of asserted rights.

[81] Also, the petitioners rely on a decision of Williamson J. in ***Gitanyow First Nation v. Canada***, *supra*, as support for the proposition that a fiduciary duty is engaged when the Crown is faced with asserted aboriginal rights. There, the hereditary chiefs of the Gitanyow First Nation sought a declaration that the Federal Crown and British Columbia Crown undertake to negotiate a treaty with them as governed by the B.C. Treaty process and that in negotiating they were obligated to negotiate a treaty in good faith and to make every reasonable effort to conclude a treaty.

[82] Williamson J. said that the longstanding fiduciary relationship cannot be displaced simply because the Crown and First Nations enter into negotiations concerning aboriginal title and/or rights. Williamson J. concluded that in entering negotiations with the Gitanyow Nation pursuant to the B.C. Treaty process, the Crown in Right of Canada and the Crown in Right of British Columbia had a duty to negotiate in good faith. After reviewing ***Nunavik Inuit v. Canada (Minister of Canadian Heritage)***, *supra*, Williamson J. concluded that the Federal Court did not rely on any specific process or framework agreement, but rather on the jurisprudence and on s. 35(1). Williamson J. concluded that the duty to negotiate in

good faith was founded on the fiduciary relationship between the aboriginal people and the Crown.

[83] I think ***Gitanyow,*** *supra,* is distinguishable because it (and ***Nunavik***, *supra*,) arose in the context of an existing treaty negotiation and the issue was whether there was an obligation to negotiate the treaty in good faith.

[84] I think the weight of the authority binding on me leads to the following conclusions:

1. There is a fiduciary duty, including a duty to consult, when there is a possible infringement of an existing aboriginal right or title or a treaty right.
2. That in the course of treaty negotiations there is an obligation to negotiate in good faith, which flows from the fiduciary relationship between the Crown and aboriginal peoples.

[85] Based on the authorities I have referred to, and the circumstances of this case, I am unable to find that there is a duty to consult as an aspect of a fiduciary duty that arises prior to the petitioners' establishment of aboriginal title.

[86] I turn to the petitioner's alternate position that there is nevertheless a duty to consult as a matter of procedural fairness.

[87] I think that even in the absence of ongoing negotiations or a possible infringement of a proven right or of aboriginal title, there is, nevertheless, an obligation of procedural fairness on the part of the District Manager when making decisions that he knows might affect asserted aboriginal rights.

[88] In ***Halfway River,*** *supra,* Finch J.A. said that:

> ...the legislation and the Regulations do require consideration of First Nations' economic and cultural needs, and imply a positive duty on the District Manager to consult and ascertain the petitioners' position, as part of an administrative process that is procedurally fair.

[89] In ***Kelly Creek***, *supra,* Taylor J. said:

> The question of the duty to be consulted over established or affirmed rights does not preclude the Crown as a matter of policy of consulting with First Nations who assert such rights or title. That is, in fact, a policy followed in many cases. The invoking of that policy however involves an assessment by the Crown of whether the asserted right has some factual underpinning that would, if established, require the fulfilment of its honour by the undertaking of meaningful consultation as to possible infringements upon the asserted right or title by the affects of a proposed activity.

[90] The existence of the duty to act fairly as a matter of administrative law was stated in ***Cardinal v. Director of Kent Institution***, [1985] 2 S.C.R. 643 at 653 as follows:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual ....

[91] The particular procedures that meet the duty vary with particular circumstances. As the majority said in ***Knight v. Indian Head School Div. No. 19***, [1990] 1 S.C.R. 653 at 682 “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”. The majority held that the existence of a general duty to fairness depends on the nature of the decision to be made by the administrative body; the relationship of that body to the effected party; and, the effect of the decision on the individuals’ rights.

[92] In ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 the Court discussed factors affecting procedural fairness: (i) the nature of the decision being made and the process followed in making it (i.e. its closeness to judicial process); the terms of the statute under which the decision maker operates; (iii) the importance of the

decision to the individuals affected; (iv) the legitimate expectations held by the persons challenging the decisions regarding procedure and result; and (v) the choices of procedure made by the agency itself, particularly where the statute leaves the choice of procedure open or where the agency has expertise regarding appropriate procedures. The factors considered in both ***Knight v. Indian Head*** and ***Baker v. Canada*** go to evaluating the procedure used in light of the circumstances of the case.

[93] The respondents say the Province has developed policies that apply where aboriginal title is asserted. As I understood his submission, Mr. Fyfe said that the scope of the respondents' administrative duty is compliance with these provincial guidelines and policies. That, they submit, is the scope of the obligation of procedural fairness resting on the District Manager.

[94] I turn to the provincial Consultation Guidelines that were in place in September 1998 to deal with Crown land activities which guidelines provide in part, as follows:

> While the nature and scope of consultation may vary depending on specific circumstances, the fundamental principles of consultation are the same for both aboriginal rights and aboriginal title. Consultation efforts must be made in good faith with the intention of substantially addressing a First Nation’s concerns relating to infringement. In

> practical terms, this means the quality of consultation is of prime importance.

[95] The following principles were stated to apply to all consultation efforts:

- As the onus to prove aboriginal title lies with First Nations, staff must not explicitly or implicitly confirm the existence of aboriginal title when consulting with First Nations.
- The Province must assess the likelihood of aboriginal rights and title prior to land resource decisions concerning Crown land activities.
- Consultations should be carried out as early as possible in decision making.
- Consultation is the responsibility of the Crown.
- Statutory decision makers should take steps to ensure consultation activities contain proper representation from all potentially affected aboriginal groups.
- Consultation processes need to be effective and timely, and meet applicable legislative time lines.

[96] It was also noted:

> The real question [before decision makers] is to find out the potential of aboriginal title in the area in question.

[97] I find that given the existence of the particular consultation guidelines of the Provincial Government, it is

not necessary for me to comment on the nature and scope of any administrative duty of procedural fairness that would exist in the absence of those guidelines.

[98] First, let me describe the petitioners' position on consultation. The petitioners say, as I understood their submission, that there has been no meaningful consultation insofar as the issuance of the Mellin-Ellen harvesting and hauling contract as part of the Small Business Forest Enterprise Program ("SBFDP") Forest Development Plan ("FDP") was concerned. The Band asserts that it has provided the Ministry of Forests with credible evidence that it holds aboriginal title that allows it to log in the region, but there has been no effective consultation. The Band says that the District Manager's position is that aboriginal title will only be recognized if the matter goes to court or there is a treaty.

[99] The petitioners say that no effort is made to accommodate or recognize its asserted title; rather, the decisions that concern it are only operational decisions of the Ministry of Forests made by a person without power to accommodate their asserted aboriginal title.

[100] Insofar as this particular cutblock is concerned, the Band informed the Ministry of Forests that it had

aboriginal title to the area and that it was in their traditional territory, land over which they were negotiating a treaty with the Province.

[101] The Band says that the consultation was misleading because Westbank was provided with incomplete information on the cutblock in question. The Mellin-Ellen Block was put out for harvest under timber sale licence A61358 which did not appear on the forest development plan that was provided to Westbank. The petitioners say that the District Manager did not contact Westbank to discuss the Band's concerns about the harvest and haul contract in the Mellin-Ellen area and did not review any of the information provided by Westbank concerning its aboriginal title.

[102] The petitioners say that the overall process in dealing with the Province about their aboriginal title claim is unsatisfactory. Not only has no discussion about title occurred, the Band says, but also the Crown has produced no contradictory evidence. The petitioners say that they have attempted to negotiate in various forums without success. The petitioners say that the Crown will not negotiate regarding past infringements or infringements during the negotiation proceeding. The Crown, they say, refuses to agree to interim

measures and takes contradictory positions as to whether it will or will not recognize aboriginal title.

[103] I turn now to the evidence of various individuals concerning discussions between the Ministry of Forests and the petitioners.

[104] According to his affidavit, Brent Turmel, a registered Professional Forester employed as the Liaison Officer, Aboriginal Affairs for the Penticton Forest District, was responsible for coordinating, establishing and attending the Forest Development Plan consultation meetings with First Nations, including Westbank. He deposed to numerous meetings. He said that in February or March of each year from 1996, a letter went out to Westbank informing them of the newly proposed draft (SBFEP) Forestry Development Plan and encouraging them to review it and provide comments. Between February and June consultation meetings were arranged and held, he said, usually at Westbank's offices. Mr. Turmel's staff gave an overview to ensure, he said, that consultation took place to make note of any information and comments and to provide Westbank with an opportunity to view and discuss the proposed Forest Development Plan in regard to aboriginal rights and uses that might be affected.

[105] Mr. Turmel said that in May 1996, at a meeting, Dr. Tim Raybould (for the petitioners) said that Westbank had unextinguished aboriginal rights in their traditional territory and that all referrals regarding forestry development should be dealt with at the treaty table.

[106] Westbank's representative, Dr. Raybould, described the subsequent years' meetings, including one in 1999, that he coordinated with newly elected Chief Derrickson, the Council of the Westbank First Nations and the members of the Penticton Forest Department. At the meeting, John Wenger, the District Manager of the Penticton Forest Department, said that he wanted to continue consultation efforts. Westbank's representative, Dr. Raybould, said at the April 1999 meeting, its position, was that the petitioners had unextinguished aboriginal title and that Westbank territory was subject to a land claim. Dr. Raybould said that Westbank was looking at harvesting areas within their traditional territory. Mr. Turmel said that at that meeting no comments were made concerning the cutblock in question and no information was provided concerning aboriginal uses or rights to the block that is the subject of the logging contract.

[107] Raymond Crampton of the Penticton Forest District was responsible for formulating the Small Business Forest

Enterprise Program Forest Development Plan for most of 1996 to 1999. He said that from 1996 to 1999, during his efforts to consult with Westbank, Westbank maintained that all the lands and resources fell, in whole or in part, within their traditional territory and were subject to an aboriginal land claim. He understood that Westbank did not wish to comment on the presentations and they would neither approve nor disapprove of the proposals in the SBFEP Forest Development Plan; rather, they wanted the presentations dealt with in the treaty making process although Mr. Crampton said the petitioners provided him with neither details of their claim to rights or title, nor any specific input in the development proposals in the Mellin-Ellen operating area.

[108] Mr. Wenger advertised the subject contract, under the Small Business Forest Enterprise Program, in newspapers on November 27, 1999. He deposed that no complaints were received until he received a fax on December 13, 1999, attaching a letter from Westbank's legal counsel. On December 14, 1999, he received a bid from Heartland Economics Ltd., signed by Ron Derrickson. According to Mr. Wenger, the tenders ranged from $32.55 per cu. meter from Heartland to $22.75 per cubic metre submitted by Webber Logging. Mr. Wenger deposed that he decided there had been adequate

consultation with Westbank on the 1999 and previous years' Small Business and Enterprise Program Forest Development Plans and that Westbank was aware that the land to be harvested was identified as Cutblock 118.

[109] Mr. Wenger takes issue with certain statements of Chief Derrickson including the assertion that the Mellin-Ellen area was exclusively occupied by Okanagan people. He says that although Westbank identified the area as part of its nation, the Upper Nichola Band had also claimed the area. Although Chief Derrickson says that the Province was well aware of the title asserted by Westbank, Mr. Wenger says that at the various meetings he attended with Chief Derrickson and his staff, no details of the claims of rights and title were provided by Westbank. Mr. Wenger says that they simply said they had rights and title and that ***Delgamuukw*** supported this claim. Mr. Wenger wrote a letter on May 17, 1999, requesting a meeting to discuss any specific information Westbank may have had regarding aboriginal rights and title and he said that he had not received a reply.

[110] Although Chief Derrickson says that Westbank was advised by the Ministry of Forest employees that they cannot deal with aboriginal rights and title and that it can only be dealt with through the British Columbia Treaty Commission

process, Mr. Wenger says that his staff repeatedly consulted with Westbank on matters of aboriginal rights.

[111] Various of the deponents that I have referred to have been cross-examined on their affidavits. Mr. Wenger indicated that he did not see potential for Westbank to establish aboriginal title, but if he had, he would have established a team from the Ministry of Forests to look into the question. According to the District Manager, he did not attempt to accommodate aboriginal title because it had not been proved; but even if his investigation had shown a probability that they had title, Westbank, he said, would have to go to court or settle a treaty before title could be accommodated as a matter of Provincial policy.

[112] In cross-examination, Chief Derrickson described John Wenger as a person without a mandate to do anything.

[113] In the particular circumstances of this case I am not persuaded that the petitioners have demonstrated a breach of procedural fairness to them, in relation to the approval of the log harvesting and hauling contract. I do not find it necessary to attempt to determine the precise scope or source of the obligation of procedural fairness that was owed by the District Manager to the petitioners to conclude that the petitioners have not, in these circumstances, been denied

procedural rights. Here I am satisfied that the petitioners were made aware of the respondents' proposed plans, including the particular plan for the logging contract. However, the respondents were also well aware through the consultation process of the petitioners' position, which was that they had aboriginal title to the lands in question. The petitioners response to the contract, as part of the respondents' plan, was that the petitioners' claim for aboriginal title should be resolved in treaty discussions. At the time of the approval of the contract by the District Manager, there was already an order of this Court remitting to trial the dispute between the Crown and Westbank over aboriginal title.

[114] The precise scope of the duty of procedural fairness, how it arises in the context of asserted yet unproven aboriginal rights, and whether there has been a breach, are questions that have to be resolved on the particular facts and circumstances of each case. Here, although there is a serious dispute between the parties that will have to be settled or resolved at trial, the petitioners have not demonstrated that in these particular circumstances they have been treated unfairly or there has been a breach of the obligation of procedural fairness owed by the respondents.

CONCLUSION

[115] The District Manager’s decision authorizing the contract with Webber Logging is set aside. The petitioners are entitled to costs.

“J.S. Sigurdson, J.”
The Honourable Mr. Justice J.S. Sigurdson