A Duty to Conserve:

Articulating the Crown's Obligation to Protect Species of Significance to Aboriginal Peoples

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INSIGHT 6th Annual Western Canada Aboriginal Law Forum
May 11, 2010, Four Seasons Hotel, Vancouver, British Columbia

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Introduction

Can one hunt if there is nothing to be hunted? The philosophical nature of this question may be perplexing, but in practical terms, the answer is simple. Hunting, fishing, trapping, and gathering practices ("harvesting practices"), cannot be exercised without the existence of the particular resources harvested. That much, at least, seems self-evident. Many of the harvesting practices engaged in by Aboriginal peoples enjoy protection as Aboriginal or Treaty rights under s. 35(1) of the Constitution Act, 1982 ("s. 35 harvesting rights"). Now, there is no question that the rights protected by s. 35 create both substantive and procedural obligations on the part of the Crown. Procedurally, the Crown must consult about potential impacts, and substantively, it must strictly justify any infringement of those rights. Yet, the nature of the Crown's duty to protect s. 35 *harvesting* rights, and the resources which underlie them, remains poorly defined.

Drawing upon the principles established in *Sparrow* and *Mikisew,* and elucidated in recent cases such as *Tsilhqot'in* and *West Moberly First Nations,* I suggest that the constitutional protection for s. 35 harvesting rights imposes upon the Crown a "duty to conserve" the conditions necessary for the exercise of those rights. Like the duty to allocate priority to fisheries resources, established in *Sparrow* and subsequent cases, the duty to conserve obligates the Crown to give the conservation of s. 35 harvesting resources due priority amongst competing legislative objectives, and to tailor administrative decisions to reflect the status of those rights.

After articulating the nature of the duty to consult, I examine some of the implications for the protection of particular species of significance to s. 35 rights. I address the preliminary question of whether s. 35 rights can be defined in a species-specific sense. Then, returning to *West Moberly First Nations,* I explore the implications of the Crown's duty to conserve harvested species in the context of consultation and accommodation.

The Constitutional Basis for the Duty to Conserve

In *Sparrow,* the court first examined the nature of the constitutional protection afforded to Aboriginal and Treaty rights by s. 35 of the Constitution Act, 1982, and what corresponding obligations accrue to the Crown therefrom.[2] Because of s. 35, federal legislative power is circumscribed by its duty to strictly justify negative effects on Aboriginal and Treaty rights:

> Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867.* These powers must, however, now be read together with s. 35(1). **In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.**
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[2] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, S.C.J. No. 49, ("Sparrow"), para. 56.

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. **The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).**[3]

According to the now-familiar test, the court determined that a *prima facie* infringement occurs if the plaintiff establishes an interference with the s. 35 right, such as through the imposition of undue hardship or a denial of the preferred means of exercising the right. To justify an infringement, the Crown must demonstrate a compelling and substantial legislative objective and that the limitation is in keeping with its fiduciary obligations to Aboriginal peoples (taking into account whether consultation has occurred, compensation for expropriation, or if there was the minimal amount of infringement).[4]

The Duty to Prioritize Allocation

The court held that for rights protected by s. 35 to be taken seriously, the Crown had a duty to ensure that its fisheries regulation gave the Musqueam food fishery priority of *allocation* over other users such as commercial and recreational fishers.

> We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.[5]

But *conservation,* the court held, was to take priority over *any* allocation of resources—even over Aboriginal food, social, and ceremonial fisheries.

In *Gladstone,*[6] the Supreme Court of Canada elaborated on the "priority doctrine" by observing that various contextual factors will be examined to ensure that s. 35 rights given due priority in resource allocation:

> That no blanket requirement is imposed under the priority doctrine should not suggest, however, that no guidance is possible in this area, or that the government's actions will

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[3] *Sparrow,* para. 62; 65.
[4] *Sparrow,* paras. 76-82.
[5] *Sparrow,* para. 81.
[6] *R. v. Gladstone,* [1996] 2 S.C.R. 723 ("*Gladstone*").

not be subject to scrutiny. Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in Sparrow relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users. These questions, like those in Sparrow, do not represent an exhaustive list of the factors that may be taken into account in determining whether the government can be said to have given priority to aboriginal rights holders; they give some indication, however, of what such an inquiry should look like.[7]

The justificatory factors cited above all pertain to the efforts government regulators make to ensure that s. 35 rights have can be *exercised* in a meaningful sense, given the fact that there are competing rights and interests at stake in resource management decisions. As summarized in *Delgamuukw,* the protection for s. 35 rights (and the requirement to strictly justify any infringements thereto) applies both to legislation (broadly considered, including regulations, etc) and to the Crown's administrative actions authorized by this legislation. For example, in the fisheries context, the Crown's duty to prioritize allocation applied to both legislative schemes and the application of them:

> . . . the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification **the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery**.[8] (emphasis added)

Prioritized Allocation Requires Prioritized Conservation

The protection of harvesting rights requires the protection of harvesting resources. Because the Crown cannot allocate resources which no longer exist, *conservation,* as recognized in *Sparrow,* is actually a pre-requisite to resource allocation:

> The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource <u>or in the public interest</u>". (Emphasis added.) We find the "public interest" justification to be so vague

[7] *Gladstone,* para. 64.
[8] *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, para. 164.

as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

The justification of conservation and resource management, on the other hand, is surely uncontroversial. In Kruger v. The Queen, [1978] 1 S.C.R. 104, the applicability of the B.C. Wildlife Act, S.B.C. 1966, c. 55, to the appellant members of the Penticton Indian Band was considered by this Court. In discussing that Act, the following was said about the objective of conservation (at p. 112):

> Game conservation laws have as their policy the maintenance of wildlife resources. **It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource.** The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former.

While the "presumption" of validity is now outdated in view of the constitutional status of the aboriginal rights at stake, it is clear that the value of conservation purposes for government legislation and action has long been recognized. **Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.**[9] (emphasis added)

In the euphemistic terms employed by the court in *Kruger*, the destruction of the resources harvested by Aboriginal peoples renders these rights "moot". As subsequent cases have begun to articulate, s. 35 does not merely create a substantive obligation to prioritize the allocation of public resources. It creates a duty to conserve the resources necessary for the exercise of s. 35 rights (a "Duty to Conserve").

The constitutional obligation to conserve harvesting resources was recognized and explored in some depth in *Tsilhqot'in Nation.*[10] Vickers J. held that s. 35 rights obligated the Crown to *sustainably manage the wildlife and habitat* on which the exercise of these rights depended:

> **Recognizing Aboriginal rights to hunt and trap over an area means wildlife and habitat must be managed to ensure a continuation of those rights. Section 35(1) of the Constitution Act, 1982 demands that the protection of those rights is a paramount objective.** The declaration of Aboriginal rights is not intended to be hollow or short lived. Tsilhqot'in Aboriginal rights grew out of the pre-contact society of Tsilhqot'in people. This historical right is intended to survive for the benefit of future generations of Tsilhqot'in people.[11] (emphasis added)

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[9] *Sparrow*, para. 72-74. Conservation was, in fact, the legislative objective relied on by the Crown to justify the net-length restrictions for the Musqueam food fishery licence.

[10] *Tsilhqot'in Nation v. British Columbia*, [2008] 1 C.N.L.R. 112 (B.C.S.C.) (*"Tsilhqot'in")*

[11] *Tsilhqot'in*, para. 1291.

This principle has been elaborated in the treaty context as well. In *Mikisew,*[12] the Supreme Court of Canada explained that Treaty No. 8 and the oral promises made by Crown in relation to it, protect the *continuity* of traditional harvesting practices:

> *Badger* recorded that a large element of the Treaty 8 negotiations **were the assurances of *continuity* in traditional patterns of economic activity.** Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.
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> **The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today.** If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.[13] (emphasis added)

By finding that the Mikisew could have grounds for an infringement action if the land taken up extinguished their "meaningful right to hunt", the court, in effect, recognized that the Crown is under a positive duty to protect the habitat necessary for the exercise of the hunting practices protected by the Treaty. In other words, there is a duty to conserve the *habitat* necessary to exercise s. 35 harvesting rights.

This principle was applied recently in *West Moberly First Nations,*[14] where the British Columbia Supreme Court made a similar finding with respect to the *species* of wildlife underlying s. 35 harvesting rights. The court suspended three Crown approvals for mining exploration due to the anticipated impacts on a threatened herd of caribou. The court found that West Moberly had a right under Treaty No. 8 to harvest caribou according to their traditional seasonal round, and that with no recovery plan in place for the threatened herd, the Crown's proposed accommodations were unreasonable.[15] This corroborates the principle that the Crown has a duty to conserve the *species* of significance to s. 35 harvesting rights.

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[12] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R. 388 (*"Mikisew").*

[13] ***Mikisew,*** paras. 47-48.

[14] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2010 BCSC 359 ("*West Moberly").*

[15] The mining company had actually drafted a plan to monitor and mitigate some of the impacts to the caribou herd in question. The court however found that although this was a step in the right direction, the absence of a plan to *recover* the threatened caribou rendered the accommodation unreasonable. The court also found that other factors put forward by the Crown as accommodation were not in fact responsive to concerns of West Moberly, including the closure of an access road, the reduction of the coal bulk sample size from 100,000 to 50,000 tonnes, and the use of a high-wall mining system purported to have a minimal environmental impact (*West Moberly,* para. 56-63).

These cases illustrate that the constitutional recognition and affirmation of s. 35 harvesting rights would be rendered meaningless if the Crown did not have a positive duty to protect the conditions necessary for the exercise those rights. The Crown must not only prioritize the allocation of public resources (as directed in *Sparrow, Gladstone,* and subsequent cases), but prioritize the *conservation* of those resources as well, including the habitat (*Mikisew)* and species (*West Moberly)* which give meaning to those rights.

The Duty to Conserve: Infringement Analysis

The Crown must manage public resources to balance the interests of the broader political community of which Aboriginal peoples are a part. Clearly, conservation is not the *only* valid legislative objective with which the Crown may justify an infringement. In *Delgamuukw,* the Supreme Court of Canada indicated that "the pursuit of economic and regional fairness" may be another valid legislative objective as well. It could be argued that this alone defeats the proposition that the Crown is under a constitutional Duty to Conserve.

However, *Delgamuukw* did *not* establish that "the pursuit of regional and economic fairness" would justify infringement *in every circumstance*. On the contrary, the infringement analysis is to be flexible and contextual.[16]

Most pieces of resource management legislation contain more than a single legislative objective. Consequently, the court may be required to examine the scheme to ensure that the *conservation* is given due priority amongst those legislative objectives.

Furthermore, to justify an infringement, legislation (or administrative actions) must accord with the nature of the special fiduciary relationship between the Crown and Aboriginal peoples. Given the Crown's role as the ultimate arbiter of land use decisions and its special duty to protect the continuity of s. 35 rights, it stands to reason that whether a legislative regime or administrative act is justified may depend on contextual factors such as the significance of the particular harvesting resources impacted and/or the scarcity of those remaining resources (as elaborated in more detail below).

In *Tsilhqot'in,* for example, the court applied the infringement analysis to the Crown's forest management regime. Although the relevant legislation contained several ostensible objectives for forest management, Vickers J. held that, in effect, it managed "solely for maximizing timber values". Consequently, he held that the Crown had not given conservation due priority amongst competing resource management objectives. Vickers J. held that the unjustifiable nature of the infringement was evidenced by the failure of the Crown to collect "sufficient credible information" about the hunting needs of the First Nation, such as through "databases" and "needs analyses" of their wildlife and habitat requirements:

> At present, British Columbia does not have **a database that provides information on the individual species of wildlife or their numbers in the Claim Area**. The Province

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[16] *Sparrow,* para. 66.

> has not conducted **a needs analysis** which would inform decision makers on the needs of the Tsilhqot'in people related to their hunting, trapping and trading rights. Such an analysis would ensure those needs are addressed when planning and conducting forestry activities. The absence of a database or a needs analysis indicates that Tsilhqot'in Aboriginal rights in the Claim Area are not a priority with respect to timber harvesting and other forestry activities.
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> **Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area must have some meaning. A management scheme that manages solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot'in Aboriginal rights.** To justify harvesting activities in the Claim Area, including silviculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. In the absence of such information, forestry activities are an unjustified infringement of Tsilhqot'in Aboriginal rights in the Claim Area. As I mentioned earlier, the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights.[17] (emphasis added)

Vickers J.'s analysis suggests that resource management regimes which do not contain procedures to identify the resources of significance to First Nations, the supply of and threats to those resources, and the ability of First Nations to access them, may therefore constitute unjustified infringements of s. 35 harvesting rights. Further, the Crown's constitutional obligations with respect to s. 35 resources will not be met simply by drafting legislation which contains conservation as an objective. Conservation must be given due priority in order to ensure that resources are allocated in a manner respectful of s. 35 and ultimately so as to guarantee the continuance of rights recognized and affirmed under s. 35.

The Duty to Conserve Species: Rights Definition

Characterizing Aboriginal Rights

I have suggested that the Crown owes a duty to conserve the resources necessary for exercising s. 35 harvesting rights, which applies both as a guiding principle to its resource management regimes and to the administrative decisions affecting s. 35 harvesting rights. If this is so, it would imply that the Crown is *constitutionally* obligated to protect certain species of wildlife harvested by First Nations. But this raises the preliminary question of whether it is possible, or even permissible, to limit the definition of such rights to particular species, and secondly, whether s. 35 harvesting rights which are *not* species specific may nevertheless garner species-specific obligations on the part of the Crown.

In *Van der Peet,*[18] the Supreme Court of Canada set out the approach for defining an Aboriginal right. To be an Aboriginal right, an activity must be an element of a practice, custom or tradition

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[17] *Tsilhqot'in*, paras. 1293-94.
[18] *R. v. Van der Peet,* [1996] 2 S.C.R. 507.

integral to the distinctive culture of the Aboriginal group claiming the right. In characterizing Aboriginal rights, courts have imposed "site-specific", people-specific, or purpose-specific limitations on the scope of the right. Although the test for defining Treaty rights differs, similar limitations have been imposed. The issue of species-specific definitions of s. 35 harvesting rights was only addressed in a direct fashion in two recent commercial fishing rights cases: *Lax Kw`alaams,*[19] and *Ahousaht* (the "Fisheries Cases").[20]

In both cases, the plaintiffs (the "Fisheries Plaintiffs") sought declarations that they had existing Aboriginal rights to harvest all species of fish, shellfish, and marine plants ("Fisheries Resources") within their tribal territories and to sell them commercially in Canada. In both cases, the Crown urged the court to limit the definition of the right, if any, to particular species. The strongest authority relied on by the Fisheries Plaintiffs was *Sappier; Gray*[21] a case concerning harvesting rights to timber. In that case, the New Brunswick Court of Appeal held that it was *impermissible* to define Aboriginal harvesting rights with respect to either the species harvested or the means for harvesting:

> By way of introduction, and as a summary of what is to follow, the jurisprudence tells us that it is not permissible to characterize an aboriginal right in terms of the species of fish being harvested (e.g. perch or salmon). Nor is it permissible to characterize the nature of the aboriginal right in terms of the means used in furtherance of the harvesting activity (e.g. the use of drift nets). What is of immediate importance is whether the aboriginal right to fish is for purposes of personal consumption or trade.[22]

On appeal, the Supreme Court of Canada characterized the Aboriginal right of the three respondents as a "right to harvest wood for domestic uses", stating (in *apparent* agreement with the New Brunswick Court of Appeal):

> ...Aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people. They are not generally founded upon the importance of a particular resource. **In fact, an aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right.** In characterizing aboriginal rights as *sui generis*, this Court has rejected the application of traditional common law property concepts to such rights: *Sparrow*, at pp. 1111-12.[23] (emphasis added)

The Fisheries Plaintiffs also relied on *Powley,*[24] a case in which the respondents had been charged with unlawfully hunting a moose without a licence. The Supreme Court of Canada applied the test in *Van der Peet* for characterizing an Aboriginal right, noting that the approach is "contextual and site specific". The court ultimately adopted a *purpose*-specific but not a species-

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[19] *Lax Kw'alaams Indian Band v. Canada (Attorney General)* 2008 BCSC 447 (*"Lax Kw'alaams I")*, paras. 285-315.
[20] *Ahousaht Indian Band v. Canada (Attorney General),* 2009 BCSC 1494 (*"Ahousaht")*
[21] *R. v. Sappier; R. v. Gray*, 2006 SCC 54, S.C.J. No. 54 (QL) (*"Sappier; Gray"*)
[22] *R. v. Sappier*, 2004 NBCA 56, [2004] N.B.J. No. 295.
[23] *Sappier; Gray,* para. 21.
[24] *R. v. Powley*, 2003 SCC 43, 2 S.C.R. 207 (*"Powley")*.

specific characterization of the right, holding that "the relevant right was not to hunt moose but to hunt for food in the designated territory."[25] The plaintiffs in *Ahousaht* also relied on *Tsilhqot'in,* in which Vickers J. rejected Canada's position that the asserted right to trap was limited to particular species. Vickers J. held that to limit the Tsilhqot'in Aboriginal right to trade in skins and pelts to particular species would unduly frustrate its modern expression.[26]

In response to the arguments put forward by the Fisheries Plaintiffs, the Crown observed that there could be no rule against species-specific characterizations of Aboriginal rights because in *Gladstone*, the Supreme Court of Canada affirmed that the Heiltsuk First Nation had a right to trade in herring spawn on kelp.[27]

The reasons for judgment for the trial decision in *Lax Kw'alaams* were issued on April 16, 2008. Madam Justice Satanove found that trade in "prestige goods" such as eulachon grease was integral to the Tsimshian Coastal people's distinctive culture, but that the sharing of salmon and other `subsistence goods at potlatches and festivals was merely a form of "gift exchange" characteristic of a "kinship economy". Although apparently agreeing with the principle that an Aboriginal right could not be species-specific, Satanove J. found that the trade in eulachon grease could not form the basis for a modern right to fish *all species* commercially.[28]

> I agree that an aboriginal right, once proven, is not limited in terms of species of the specific resource which formed the subject of the ancestral activity on which the aboriginal right is based.
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> However, the plaintiffs' simplistic position that the ancient trade in eulachon grease has transmogrified to a modern day right to commercial fishing of salmon, halibut and all other marine and riverine species of fish, ignores the fundamental fact that the Coast Tsimshian fished for sustenance, not for trade. The rendering of the eulachon into oil was a unique ancestral practice that brought wealth and prestige to the society, but it was not inter-related with the subsistence fishing of salmon, halibut, and other Fish Resources and Products.
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> In my opinion, it would be stretching the concept of an evolved aboriginal right too far to say that the Coast Tsimshian practice of trading in eulachon grease is equivalent to a modern right to fish commercially all species in their Claimed Territories.[29]

Ahousaht was decided approximately one and a half years later, but it resulted in a different outcome. Madam Justice Garson found that the Nuu-chah-nulth plaintiffs possessed an Aboriginal right to fish commercially for *any* species of fish within their territories.[30] In her assessment of the historical record, Garson J. appeared less inclined to distinguish between the various forms of exchange which characterized Nuu-chah-nulth trade in fish.[31] Garson J.

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[25] *Powley,* paras. 19-20.
[26] *Tsilhqot'in*, para. 1046.
[27] *Gladstone*, para. 29.
[28] *Lax Kw'alaams I,* para. 501.
[29] *Lax Kw'alaams I,* paras. 498-451.
[30] *Ahousaht,* paras. 383; 489.
[31] *Ahousaht,* paras. 281-286.

appears to have placed greater emphasis on the object of defining aboriginal rights not only with reference to their pre-contact form but their evolution and modern expression as well:

> Elsewhere in these Reasons, I discuss the proper characterization of the right claimed. I explain that the characterization of the right should be sufficiently broad to encompass the activity that is integral to the way of life at contact **as it has evolved to the present day.** The activity in question here is fishing, and to require the plaintiffs to prove that right in respect to each species is inconsistent with the evidence regarding their way of life. The Nuu-chah-nulth people followed a seasonal round which corresponded to the seasonal availability of various species of fish. Species gained and lost importance depending upon their abundance. That was the pattern during both pre- and post-contact periods, and it has continued to modern times. **In my view, it would be an artificial limitation of the characterization of the plaintiffs' fishing right to limit it to certain species.** I use "fishing right" and "harvesting right" interchangeably.[32] (emphasis added)

On December 23, 2009, the trial decision in *Lax Kw'alaams* was upheld in all material respects by the BC Court of Appeal in.[33] The court held that as with site-specific and purpose-specific limitations, there is no categorical rule against defining a s. 35 right in relation to a particular species:

> It seems to me there is much to be said for the submission of Mr. Lowes, counsel for three intervenors, who reviewed the relevant authorities of the Supreme Court of Canada to show that in each instance, the Court's delineation of the Aboriginal right was "contextual" and that the Court has "not categorically excluded species specificity in the definition of an aboriginal right, but has left it (as in the case of other factors, such as site- or purpose-specificity), a matter of relevance and context in particular cases.[34]

The court refused to interfere with the distinction between trade in prestige goods and the kinship exchange of subsistence goods such as salmon.[35] The court further affirmed that trade in eulachon grease was not merely "trade in fish" and could not therefore provide the basis for a modern right to sell commercially *all species* of fish.[36] Leave to appeal this decision to the Supreme Court of Canada has been granted.

One could point to the different factual records to explain the divergent outcomes in *Lax Kw'alaams* and *Ahousaht*. One might also note that although Garson J. appears to have accepted the rule against species-specific rights definition, the decisions in *Lax Kw'alaams* did not. Garson J. cited the Supreme Court of Canada's decision in *Sappier; Gray* as an affirmation of the New Brunswick Court of Appeal's finding that species-specific rights definition is impermissible.[37] Although the finding in *Ahousaht* does not depend on a prohibition against

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[32] *Ahousaht,* para. 383.
[33] *Lax Kw'alaams Indian Band v. Canada (Attorney General)* 2009 BCCA 593 ("*Lax Kw'alaams II*").
[34] *Lax Kw'alaams II,* para. 37.
[35] *Lax Kw'alaams II,* para. 41.
[36] *Lax Kw'alaams II,* paras 38-40. The court held further that Satanove J. had not erred by refusing to consider whether the evidence established some "lesser right", such as sale to sustain the community, in light of the pleadings before her and the course the trial had taken (*Lax Kw'alaams II,* paras. 58-65).
[37] *Ahousaht,* para. 371.

species-specific definitions, to the extent that *Ahousaht* affirmed the prohibition against species-specific rights-definition, that decision appears to be in error.

For the following reasons, the appeal judgment in *Lax Kw'alaams* appears to reflect the correct principle with regard to species or resource-specific characterizations of s. 35 rights.[38] First, the underlying concern of the Supreme Court of Canada in *Sappier; Gray* was that Aboriginal rights are *activities,* not *merely* property rights. As long as the Aboriginal right in question is defined as an activity in relation to particular resources (e.g. as trade in herring spawn on kelp), then that characterization does not violate the letter of the law set down in *Sappier; Gray.* Second, the prohibition against species-specificity could not apply to all Aboriginal rights. Aboriginal title, which is an Aboriginal right, does entail proprietary interests – it is a right "to the land itself". Third, as found in *Tsilhqot'in,* courts are *reluctant* to impose species-specific definitions because it will be inconsistent with the goal of preserving the meaningful exercise of Aboriginal rights. The particular species harvested by the First Nation may not persist over time within the relevant region. The extirpation of the species would then effectively extinguish the right. But as noted in *Lax Kw'alaams,* despite this reluctance, there is no categorical rule against defining Aboriginal rights in relation to particular resources or species.

Defining Treaty Rights

For the reasons that follow, there is in my view no prohibition against species-specific Treaty rights either. The first step to analyze Treaty rights is to examine the specific words of the text.[39] A Treaty must be interpreted in light of the historical context and its underlying purpose. Extrinsic evidence relating to the parties respective understandings of the Treaty is relevant even where there is no ambiguity on the face of the text.[40] Because the text of the Treaty records an agreement made orally with the Indian signatories, the oral promises made by the Crown in relation to Treaties are of great significance to their meaning:

> . . when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement.[41]

The contextual nature of treaty interpretation means that it would be "unconscionable for the Crown to ignore the oral terms" of a Treaty.[42] Ultimately, the court must choose, from among the possible interpretations of a Treaty, the one which best reconciles the respective intentions and interests of both the First Nation and the Crown signatories.[43]

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[38] In my view, the different outcomes in the Fisheries Cases are the product not of different approaches to species-specific limitations, but to differing historic focal points in the process of rights definition. The strict approach adopted in *Lax Kw'alaams* focused more on the pre-contact nature of the practice to define its modern scope. The approach adopted by Garson J. on the other hand defined the right more broadly to allow for greater flexibility in its modern and future expression
[39] *R. v. Marshall*, [1999] 3 S.C.R. 456 (QL) ("*Marshall"),* para. 5
[40] *Marshall,* para. 11.
[41] *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.) (QL), para. 52
[42] *Marshall,* para. 12, per Binnie J. for the majority.
[43] *Marshall,* para. 14.

Because the meaning of Treaty rights is derived not from activities, but from particular promises made by the Crown, there is no reason why Treaty rights could not grant interests in particular resources or species. Treaty No. 8, for example, provided beneficiaries with fungible goods such as ammunition and twine to reassure them of the Crown's intention to safeguard the exercise of their traditional harvesting practices. These provisions did not reduce Treaty No. 8 rights to mere property rights.

Second, as held in *Mikisew,* the oral promises in relation to Treaties provided assurances of continuity of traditional harvesting practices. Where there is evidence that a particular species or resource was of special significance to a First Nation's traditional harvesting practices, the protection under the Treaty may apply to those resources as well. A finding of species- or resource-specific rights under a Treaty does not negative the breadth of those rights. This was the case in *Mikisew,* whether the First Nation's Treaty rights extended to all 840,000 kms^2 of the Treaty territory, but the "meaningful right to hunt" was characterized in terms of their local hunting grounds. Similarly, in *West Moberly,* the court recognized that Treaty No. 8 protected the "usual vocations of hunting, fishing, and trapping", but went on to hold that the right impacted by the approved mining activity was the right to hunt caribou according to the traditional seasonal round in the affected region.[44]

Is the Duty to Conserve Species Dependent on Species-Specific Rights?

Whether an Aboriginal or Treaty right is defining in relation to particular species will depend on the contextual factors particular to that right. However, the Crown's duty to conserve certain harvested species is not necessarily dependent on the existence of a species-specific Aboriginal or Treaty right. Courts have held that global or general harvesting rights give rise to species-specific obligations. In *Sparrow,* the Crown's fisheries management regime imposed limitations on the Musqueam Indian Band's ability to fish for salmon. Yet, the right was characterized as a right to fish for food, social, and ceremonial purposes. There is no reason therefore why the Crown would not have species-specific obligations to justify (in the infringement analysis) or accommodate (in the consultation context) impacts to particular species even where the s. 35 harvesting right at issue is defined broadly without reference to that species. If the Crown has a duty to protect the continuity of harvesting rights, and if certain species are necessary or at least give meaning to these rights, the Crown's duty to conserve would extend to those species as well.

The Duty to Conserve: Accommodations for Impacts to Species at Risk

In general terms, the measure of consultation or accommodation required in a given instance depends on the strength of claim and the seriousness of the potential impact.[45] Where the claim

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[44] *West Moberly,* para. 63.

[45] ***Haida Nation v. British Columbia (Minister of Forests)*** [2004] 3 S.C.R. 511 ("*Haida*"), para. 39. In Treaty contexts, the court will also look to contextual factors such as the history of dealings between the parties. *Mikisew,* para. 34; 63.

is strong and the impacts significant, the Crown must seek to accommodate the impacts to that right.[46] Although the accommodations provided are not assessed according to the justification factors in *Sparrow,* courts have examined not only the process according to which accommodations were reached, but the substantive sufficiency of accommodations proposed by the Crown—that is, the *outcome* of consultation.[47] Accommodations proposed by the Crown must strike a reasonable balance between the various interests at stake in order to reflect the goal of s. 35: reconciliation of Aboriginal peoples and the Crown.[48]

The decision in *West Moberly* confirms the principle that the Crown's duty to protect s. 35 harvesting rights may entail an obligation to preserve species at risk. West Moberly had not, for several years, been able to hunt caribou due to the cumulative impacts of development in the area. The particular herd impacted by the authorized mining activity numbered only 11. The mining company had, at the instigation of the Crown, introduced a plan to monitor and mitigate some of the anticipated impacts, but there was no plan to protect or rehabilitate the herd. In light of these facts, the court stated:

> I conclude that a balancing of the treaty rights of Native peoples with the rights of the public generally, including the development of resources for the benefit of the community as a whole, is not achieved if caribou herds in the affected territories are extirpated.[49]

Had there been 11,000 caribou, instead of 11, the court likely would not have found the accommodation unreasonable. It was the *extirpation of the species* which, in the circumstances, was not reasonably accommodated. This suggests that *the scope of the Crown's Duty to Conserve increases the scarcer a harvested species becomes.* Or, in the nomenclature of the consultation jurisprudence: the seriousness of the anticipated impacts (and therefore, of the consultation/accommodation required) is directly related to the *scarcity* of the harvesting resources impacted.

It could also be argued that as species grow scarcer, so too does the content of the accommodation required become *clearer.* The court's finding that the accommodation was unreasonable appears to have been based in part on the Crown's failure in previous years to implement caribou protections under the *Species at Risk Act.*[50] Perhaps for this reason, the court did not merely order declaratory relief pertaining to the nature of the breached duty. It further

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[46] *Haida,* para. 47.
[47] *Klahoose First Nation v. Sunshine Coast Forest District (District Manager),* (2008) B.C.J. No. 2333 (S.C.), "*Klahoose")* para. 34; *Wii'litswx v. British Columbia (Minister of Forests)* (2008)B.C.J. No. 1599 (S.C.) (QL) ("*Wii'litswx*) para. 15-17; *Gitxsan First Nation v. British Columbia (Minister of Forests)* (2004) B.C.J. No. 2714 (S.C.) (QL) para. 63.
[48] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74, 3 S.C.R. 550 para. 2.
[49] *West Moberly,* para. 53.
[50] The court cited a report presented by the First Nation which observed that a *Species At Risk Act* recovery strategy for the relevant caribou population was two years overdue and that this planning had been disbanded by the Province. Then, in referring to the accommodation proposed by the Crown, the court reasoned that it was not reasonable because of the fact that there was no extant plan to recover the caribou in the region. (*West Moberly,* paras. 24; 51).

directed that the accommodation take the form of a plan to "protect and augment" the affected herd.

The Crown has appealed this decision to the BC Court of Appeal. What will come of this case's interpenetration of species-protection legislation and consultation jurisprudence? Species-protection legislation may become a key source of *evidence* in consultation cases. The listing of a species under the *Species at Risk Act* as "threatened" demonstrates not only its scarcity but the Crown's stated commitment (in the form of a legislative objective) to taking urgent action. Where a court finds that accommodation is not reasonable, it may turn to published recovery strategies or other policy documents to structure the nature of the subsequent accommodations. This would enhance the court's ability to supervise consultation. Furthermore, it may provide a new incentive to initiate provincial recovery planning processes which, by and large, have stagnated in British Columbia.[51]

[51] British Columbia is the only province with no specific endangered species legislation. Implementation under the *Species at Risk Act* is provided under non-binding protocol agreements with the federal government. But to date, there has not been a single action plan completed for a species at risk on provincial land in BC.