Chapter 4

Environmental Deregulation and the Crown's Constitutional Obligations to First Nations

Jessica Clogg[*]

Introduction

Since 2001, virtually every environmental and natural resource law in British Columbia has been amended or repealed.[1] In particular, shifts in the scope and nature of statutory decision-making under new "results-based" regulation have had profound implications for First Nations.

Constitutional law principles suggest that trends such as reduced up-front assessment and planning before resource approvals are granted, and delegation of environmental decisions from the Crown to resource companies, may be inconsistent with the Crown's duty to consult and accommodate First Nations.

This chapter focuses on British Columbia forest practices legislation to exemplify and discuss these trends. Events in 2007 in this area have brought to a head the contradiction between environmental deregulation and the Crown's constitutional obligations to First Nations.

What Is the Crown's Duty to Consult and Accommodate?

> To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.
>
> . . . . .
>
> It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.[2]

[*] The author would like to thank Andrea Hilland, staff counsel, West Coast Environmental Law, for her assistance in the preparation of this paper.

1 West Coast Environmental Law Assn., *Cutting Up the Safety Net: Environmental Deregulation in British Columbia* (Vancouver, 2005), **on-line at http://www.wcel.org/wcelpub/2005/14181.pdf**.

2 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at paras. 27, 33.

In two 2004 cases, *Haida Nation v. British Columbia (Minister of Forests)*[3] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,[4] the Supreme Court of Canada enumerated a number of legal principles regarding the duties of the Crown that are relevant to legislative trends in British Columbia forestry law.

First, the Crown may not make unilateral decisions about the use and management of natural resources, even if Aboriginal Title has not been formally recognized by the Canadian courts or addressed in a treaty.

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances . . . the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim.[5]

Second, consultation must occur at higher, strategic levels of decision-making. In *Haida*, the Council of the Haida Nation challenged the replacement of Tree Farm Licence 39 and the transfer of this licence from MacMillan Bloedel Limited to Weyerhaeuser Company pursuant to procedures set out in the provincial *Forest Act*.[6] The province argued that although it did not consult with the Haida with respect to the allocation, replacement and transfer of the tenure, consultation with respect to operational planning and site-specific approvals was sufficient. In rejecting this argument, McLachlin C.J.C. held:

> I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. *The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal rights and title* . . . Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.[7]

[Emphasis added.]

Although this decision occurred in the context of the replacement and transfer of a timber tenure, the reasons of the Supreme Court of Canada in *Haida* indicate that this is a subset of a broader duty of consultation at the level of "strategic planning for utilization of the resource".

---

3 *Supra*.
4 [2004] 3 S.C.R. 550.
5 *Haida*, *supra*, footnote 2, at para. 27.
6 *Forest Act*, R.S.B.C. 1996, c. 157.
7 *Haida*, *supra*, footnote 2, at para. 76.

Third, it is the Crown who holds the duty to First Nations, not third party resource developers. In *Haida*, the court held that "the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated."[8] At the same time, any failure of the Crown to act honourably may make licences, approvals or permits held by resource companies vulnerable to legal challenge, thus creating uncertainty for them.

Fourth, the Crown is expected to use its legislative authority to uphold its honour to Aboriginal Peoples, and may not hide behind provincial statutes to circumvent its duties. "The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations."[9] Likewise, in *Taku River*, McLachlin C.J.C. held: "The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns."[10]

Fifth, the duty of consultation and accommodation is a constitutional one.[11] As Chief Justice Finch emphasized in a recent British Columbia Court of Appeal case:

> Counsel for the Attorney General vigorously contested the constitutional nature of the duty to consult. He conceded that the duty is a "legal duty" which has as its source "the honour of the Crown" but argued that ". . . it is not a constitutional right or obligation."
>
> I do not accept that as a sound proposition. The honour of the Crown speaks to the Crown's obligation to act honourably in all its dealings with aboriginal peoples. It may not lawfully act in a dishonourable way. That is a limitation on the powers of government, not to be found in any statute, that has a constitutional character because it helps define the relationship between government and the governed.[12]

In turn, the honour of the Crown must not be given a narrow or technical interpretation, "but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)".[13]

While the duty to consult will vary with the circumstances, including proportionality with the strength of Aboriginal Title and Rights evidence, and the seriousness of potential impacts, the Crown's duty "always requires

---

8 *Supra*, at para. 53.
9 *Supra*, at para. 55.
10 *Taku River*, *supra*, footnote 4, at para. 25.
11 "It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate": *Haida*, *supra*, footnote 2, at para. 20.
12 *Tzeachten First Nation v. Canada (Attorney General)* (2007), 281 D.L.R. (4th) 752 (B.C.C.A.), at paras. 47-48.
13 *Taku River*, *supra*, footnote 4, at para. 24.

meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process".[14]

The British Columbia Forest and Range Practices Act: Deregulation and Its Impact on Consultation and Accommodation

In 2002, the Province of British Columbia enacted the *Forest and Range Practices Act*[15] (FRPA), a new legislative framework for forest planning and practices in British Columbia. The full impact of this framework on the ground was not, however, felt immediately. In particular, the legislative target for the approval of the first round of "Forest Stewardship Plans" (FSPs) pursuant to FRPA has been extended a number of times, and was finally extended to March 31, 2007.[16] Since this date, licensees have not been able to obtain new cutting permits unless they have an approved FSP. In the new FRPA framework, FSPs are the single operational plan that requires approval from the Crown before logging or road building is authorized.[17]

For this reason, the substantial impacts on Aboriginal Title and Rights arising from the new FRPA framework are playing out most directly through the development, approval and implementation of FSPs. In particular, the legal framework provided by FRPA and its regulations regarding FSPs creates obstacles to, and in some cases renders impossible, meaningful consultation and accommodation of First Nations peoples with respect to land use planning and forest practices. While this issue plays out factually in the circumstances of particular FSPs, the underlying issues lie in the FRPA legal framework.

Recent shifts in operational planning and forest practices legislation in British Columbia have been characterized as a move from a "planning-based" regime, which attempted to prevent environmental harm before the fact through more detailed planning requirements and approvals, to a more "results-based" approach that relies on enforcement after the fact to deter harmful practices. This approach presents structural barriers to meaningful consultation. These arise in several areas:

- the nature and effectiveness of the "results" or objectives established

---

14 *Supra*, at para. 29.

15 *Forest and Range Practices Act*, S.B.C. 2002, c. 69 ("FRPA").

16 *Transition Regulation*, B.C. Reg. 361/2006, substituting March 31, 2007 for December 31, 2006 in FRPA, s. 187. Licensees' tenure documents allow them to apply for cutting permits only if they are consistent with approved Forest Development Plans (and presumably Forest Stewardship Plans). FRPA, s. 187 created an extension for existing Forest Development Plans until that date.

17 Although cutting and road permits continue to be required.

- the extent to which planning requirements provide adequate information upon which meaningful consultation can occur
- the impact of reducing or eliminating the role of the Crown in approvals and planning on its duties to consult and accommodate

The Nature and Effectiveness of the "Results" in British Columbia's Results-Based Regime

Although the FRPA legal framework contains some default environmental rules (*e.g.*, streamside buffers), licensees are exempted from these if their approved FSP lays out alternative results and strategies which are consistent with "objectives set by government".[18]

FRPA defines "objectives set by government" as either those prescribed by regulation pursuant to s. 149(1) of FRPA, or objectives established under s. 93.4 of the *Land Act* by the minister responsible for the administration of the *Land Act*.[19] Section 5(1)(b)(ii) of FRPA also requires FSPs to specify intended results or strategies with respect to "other objectives that are established under this Act or the regulations and that pertain to all or part of the area subject to the plan".

In addition, existing higher level plans in place when s. 93.4 of the *Land Act* came into effect (*e.g.*, resource management zone objectives or landscape unit objectives established under the *Forest Practices Code of British Columbia Act*[20]) are continued as objectives under that section.[21]

A hierarchy is established between objectives, so that higher level objectives established by the Ministry of Agriculture and Lands pursuant to the *Land Act* trump those found in the FRPA regulations, to the extent of any conflict between them.[22]

Section 27 of the *Forest Planning and Practices Regulation*[23] creates a discretionary power for the Minister of Forests to "balance established objectives, results, strategies or other plan content" in the approval of FSPs or amendments. The legal impact of this section is not clear. Such a

---

18 *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004, ss. 12.1-12.5.

19 *Land Act*, R.S.B.C. 1996, c. 245, s. 93.4. Under other provisions enacted but not yet in force **(ss. 93.1 to 93.8 enacted 2003, c. 74, s. 1; ss. 93.4 to 93.8 brought into force February 1, 2006 by B.C. Reg. 357/05; ss. 93.1 to 93.3 not yet in force),** objectives may also be established for areas of land designated under s. 93.1 by order of the Lieutenant Governor in Council. These objectives may apply to industries other than forestry, and may apply to the granting of all authorizations (approvals, licences, permits, etc.). In the event of a conflict between objectives under s. 93.4 and designations/objectives under s. 93.1, the latter prevail, *per* s. 93.5.

20 *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

21 *Land Act*, s. 93.8. See text accompanying footnote 28, *infra*, for further detail regarding policy about higher level plans.

22 FRPA, s. 149(2).

23 B.C. Reg. 14/2004.

balancing may occur at the request of the person submitting the plan, and on the face of it, could undermine the legislative hierarchy of objectives set out above.

Inadequate Forest and Range Practices Act objectives

Pursuant to s. 149 of FRPA, objectives may be prescribed by regulation for a list of named values, such as soils, timber, wildlife, biodiversity, and cultural heritage resources. These objectives are set out in Part 2, Division 1 of the *Forest Planning and Practices Regulation*.

There are two principal concerns arising from the nature of these FRPA objectives. First, that the priority given to timber over other forest values in the language of the objectives presents potential barriers to accommodating Aboriginal Title and Rights. Second, that the language of the objectives is vague and unenforceable.

Most notably, with respect to the first concern, all of the ecological objectives specified in the *Forest Planning and Practices Regulation* apply only to the extent that they can be met "without unduly reducing the supply of timber from British Columbia's forests".[24] In this manner, the Crown has purported to prioritize protecting timber supply over measures that might be taken to accommodate First Nations with respect to ecological protections for the lands and waters of their territories, regardless of the actual rights and needs of the First Nations.

The *Forest Planning and Practices Regulation* does not include the same qualifying language in its cultural heritage objective; however, the latter has been interpreted by Ministry staff to apply only to specific sites or artefacts rather than to more holistic cultural interconnections between people and the land (*e.g.*, to include particular Culturally Modified Trees, but not the overall amount and distribution of old growth cedar in a nation's territory; or to include particular hunting trails, but not the habitat needs of the species that make these trails culturally relevant). The latter matters are considered to be addressed under various ecological objectives, which in turn, as noted above, prioritize the protection of timber supply.

Second, the "without unduly reducing the supply of timber" caveat introduces a discretionary element to the objectives that make them vague and difficult to enforce. The Ministry of Forests' own *Guide to Writing Resource Objectives and Strategies*[25] indicates that objectives should, among other things, outline end results that will achieve broader goals;

---

[24] *Forest Planning and Practices Regulation*, ss. 5-9.2. Communications from Ministry staff indicate that this language is generally interpreted to incorporate a cap on timber supply held over from the early analysis of anticipated *Forest Practices Code* impacts on timber supply, namely 6%; however, the legislation is not explicit in this regard.

[25] British Columbia, Ministry of Forests, *Guide to Writing Resource Objectives and Strategies* (Victoria, B.C., 1998), p. 5.

describe desired future conditions for individual resources or resource uses; and be measurable and time specific. Current s. 149 objectives fall short in this regard. The balancing prescribed by these objectives is also silent with respect to Aboriginal Title and Rights, providing no guidance as to how impacts on Aboriginal Title and Rights are to be weighed, while appearing to prioritize timber interests.

Government Actions Regulation objectives

In the current legal framework, "other objectives" referenced in s. 5(1)(b)(ii) of FRPA are established pursuant to the FRPA *Government Actions Regulation*[26] (GAR). This regulation consolidates a range of different designations and related ecological protections for matters such as endangered species, community watersheds, and sensitive fish habitat.

Such measures are frequently the subject of accommodation negotiations between First Nations and the Crown, as First Nations seek to address impacts on Aboriginal Title and Rights arising from planned logging and road building.

Many of these designations, such as wildlife habitat areas, existed under the former *Forest Practices Code*. The principal innovation of FRPA is to introduce new regulatory hurdles that must be addressed before such measures can be implemented. More specifically, even if the Crown and a First Nation have negotiated protections for wildlife or water through land use planning agreements, if GAR designations are to be used to legally implement these, provincial regulation specifies that the Minister may only do so if he or she is satisfied that, among other things, "the order would not unduly reduce the supply of timber from British Columbia's forests", and

> (c) the benefits to the public derived from the order would outweigh any
> (i) material adverse impact of the order on the delivered wood costs of a holder of an agreement under the *Forest Act* that would be affected by the order, and
> (ii) undue constraint on the ability of a holder of an agreement under the *Forest Act* or the *Range Act* that would be affected by the order to exercise the holder's rights under the agreement.[27]

On their face, these statutory provisions appear to place the economic interests of licensees ahead of the Crown's constitutional obligations to First Nations.

---

[26] *Government Actions Regulation*, B.C. Reg. 582/2004 ("GAR").
[27] GAR, s. 2(1)(b), (c).

Ineffective higher-level objectives

The Supreme Court of Canada in the *Haida* decision made it clear that consultation at higher, strategic levels of planning is essential, and acknowledged that without it, consultation at the operational level may be without meaningful effect. Strategic level negotiations with respect to matters such as tenure, land use planning and the level/rate of cut are ongoing with many First Nations in British Columbia.

In effect, the FRPA framework reverses the imperative set out by the Supreme Court of Canada. More specifically, a number of its elements are explicitly designed to limit the impact of strategic level planning on operational decision-making.

It is provincial policy in British Columbia that third party resource users and statutory decision-makers are required to follow only those portions of strategic land use plans that have been legalized under provincial law, and only to the extent provided for in provincial law, even if a strategic land use agreement has been reached and ratified by Cabinet.[28] Outside of protected areas, this previously occurred through the establishment of higher level plans under the **old** *Forest Practices Code*, which in the context of strategic land use planning were typically objectives for resource management zones. As noted above, in the new legal framework, the legal authority to establish higher level objectives has been shifted to the Ministry of Agriculture and Lands pursuant to the *Land Act*.

In theory, once legal objectives are established, both the old *Forest Practices Code* and the new FRPA framework require that operational plans (*i.e.*, FSPs) be consistent with those portions of strategic level plans that have been legalized. However, the new FRPA framework contains a number of provisions that directly undermine this outcome. This has the effect of limiting or rendering meaningless some outcomes of consultation/negotiations at the strategic level. The main examples of this are the following:

(a) Once FSPs are approved, licensees can unilaterally create a new designation called a "declared area"[29] which is insulated from

---

[28] See, *e.g.*, British Columbia, Integrated Resources Planning Committee, *Land and Resource Management Planning: A Statement of Principles and Policies* (Victoria, B.C., 1993), **online at http://www.for.gov.bc.ca/hfd/library/documents/bib20047.pdf**. The policy has not been revised in light of Aboriginal law court decisions.

[29] A "declared area" is defined as an area identified under s. 14(4) of the *Forest Planning and Practices Regulation*, which reads:

> (4) A person who prepares a forest stewardship plan may identify an area as a declared area if, on the date that the area is identified,
>
> (a) the area is in a forest development unit in effect, and
>
> (b) all activities and evaluations that are necessary in relation to inclusion of cutblocks and roads in the area have been completed.

The activities and evaluations referenced in s. 14(4)(b) are not legally prescribed.

compliance with legal objectives that are subsequently established to implement agreements with First Nations.[30]

(b) FRPA allows logging to continue until strategic land use plan agreements with First Nations have been implemented in provincial law, and allows delays of up to two years or more before FSPs have to be amended to comply with legal objectives once they are established.[31]

(c) FSPs only have to be consistent with established legal objectives "to the extent practicable", a test which brings into play economic issues as well as other discretionary factors.[32]

(d) Other provisions of the FRPA framework insulate already approved cutting permits from compliance with the outcomes of strategic level planning consultation/negotiations.[33] In many cases, this can mean up to four years of further unconstrained logging that is inconsistent with the implementation of strategic level consultation/negotiations.

The situation is particularly egregious when the Crown approves FSPs that are inconsistent with strategic land use negotiations that are at advanced stages (*e.g.*, agreement in principle) or may even be the subject of agreements that have been ratified but not yet implemented in provincial law.

Inadequate Information from Licensees Negates Meaningful Consultation

In general, results-based regimes, with their reduced emphasis on planning and risk assessment (and concomitant increased reliance on punishment after the fact to deter harmful activities), present challenges to the duty to consult and accommodate with respect to potential impacts on Aboriginal Title and Rights.

---

[30] *Forest Planning and Practices Regulation* ss. 23(1), 32.1. Section 23(1) insulates "declared areas" and cutblocks and roads previously shown in a Forest Development Plan (as set out in FRPA, s. 196(1)) from legal objectives with respect to any *new* FSPs submitted for approval. **Section 32.1** insulates "declared areas" and cutblocks and roads previously shown in a Forest Development Plan (as set out in FRPA, s. 196(1)) from new legal objectives *with respect to mandatory amendments to already approved FSPs*. But for s. 32.1 of the *Forest Planning and Practices Regulation*, the establishment of new legal objectives would trigger mandatory amendments to FSP results and strategies pertaining in these areas *per* FRPA, s. 8.

[31] FRPA, s. 8(1.1).

[32] *Forest Planning and Practices Regulation*, s. 25.1.

[33] FRPA, s. 7(1)(a) provides that any part of an FSP that pertains to a cutting permit, road permit, or timber sale licence (if the permit or licence is in effect on the date of the submission of the FSP to the Minister) "must be considered to have received the minister's approval". *Forest Planning and Practices Regulation*, s. 23(1) also extends this exemption to permits or Timber Sale Licences that are not in effect but that have a term commencing after the FSP is submitted to the Minister.

It is well established that the Crown's duty of consultation and accommodation encompasses a duty to provide information sufficient for First Nations to make an informed assessment about the impact of the proposed activity on their Aboriginal Title and Rights. To do so, the Crown must have adequate, complete, specific and relevant information in the planning stages to provide to the First Nation.[34]

There are two primary ways in which FRPA information requirements for FSPs present legal obstacles to meaningful consultation.

First, the required content of FSPs, set out in FRPA, s. 5, is very minimal.[35] There are no mandatory inventory or assessment requirements that have to be taken into account or included in plan documents. For example, licensees are no longer required to assess the risk of landslides or the presence of fish in streams, or provide even basic information about the ecological condition of the area under the plan. The new regime assumes that the threat of future enforcement action, and the need to demonstrate due diligence, will indirectly provide an incentive to licensees to do good planning. However, even if licensees were to appropriately assess risks to environmental and cultural values, the statutory framework does not require them to provide this information to the Crown or to First Nations. Without this information, First Nations' ability to evaluate potential impacts on the lands and waters that sustain their cultures is significantly limited.

Second, licensees are no longer required to provide even the approximate locations of planned cutblocks and roads, merely the boundaries of very large "forest development units" in which logging or

[34] *R. v. Jack* (1995), 131 D.L.R. (4th) 165 (B.C.C.A.); *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 (B.C.C.A.); *Ryan v. British Columbia (Fort St. James Forest District, Manager)* (1994), 65 W.A.C. 91 (B.C.C.A.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388; *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, [2005] 2 C.N.L.R. 75 (B.C.S.C.).

[35] The FRPA provides:

> 5(1) A forest stewardship plan must
>
> (a) include a map that
>
> (i) uses a scale and format satisfactory to the minister, and
>
> (ii) shows the boundaries of all forest development units,
>
> (b) specify intended results or strategies, each in relation to
>
> (i) objectives set by government, and
>
> (ii) other objectives that are established under this Act or the regulations and that pertain to all or part of the area subject to the plan, and
>
> (c) conform to prescribed requirements.
>
> (1.1) The results and strategies referred to in subsection (1)(b) must be consistent to the prescribed extent with objectives set by government and with the other objectives referred to in section 5(1)(b).

The *Forest Planning and Practices Regulation* provides:

> 25.1(1) For the purpose of section 5(1.1) of the Act, each intended result or strategy in a forest stewardship plan must be consistent with the established objectives to the extent practicable, to take into account the circumstances or conditions applicable to that area or that part.

road building may occur over half a decade. Without this information, it is virtually impossible to assess potential impacts on Aboriginal Title and Rights in particular locations, or for First Nations to provide information about potential impacts in a cogent manner. The FRPA approach forces First Nations to guess where to use limited resources for field work or to record traditional ecological knowledge relevant to potential impacts on Aboriginal Title and Rights over vast areas of their territory. Too often, any gaps are used against the First Nation to question the nature of their rights or the existence of potential impacts.

Finally, s. 16 of FRPA requires decision-makers to approve FSPs if the minimum content requirements are met,[36] without any statutory provision for accommodation measures arising from consultation between the Crown and First Nations.

Reducing or Eliminating the Role of the Crown in Approvals and Planning Impacts on Its Duties to Consult and Accommodate

As noted above, the Supreme Court of Canada has held that the Crown's duty of consultation and accommodation may not be delegated to third parties. However, one of the overall trends in forestry law amendments has been a reduced role for the Crown, and enhanced decision-making control for licensees. Two FRPA examples are of particular note.

First, site-level operational plans no longer require Crown approval. Except in prescribed circumstances, licensees must still prepare site plans that specify the approximate location of cutblocks and roads, are consistent with the FSP, the FRPA and regulations, and identify how the FSP's intended results and strategies apply to the site.[37] Site plans are to be made publicly available, on request, at the holder's place of business nearest to the area under the site plan, but only after they are completed.[38] Plans must be retained for a prescribed period of time, but are not submitted to government for approval or otherwise.

On this basis, the Crown takes the position that it no longer has a duty to consult with respect to planning at the site level. In other words, through the FRPA framework the Crown claims to have legislated itself out of the duty to consult at this more detailed level. This would appear to be at odds with the continuing nature of the duty to consult.[39]

---

[36] FRPA, s. 16(1) provides: "The minister must approve a forest stewardship plan or an amendment to a forest stewardship plan if it conforms to section 5."

[37] FRPA, s. 10, although site plans, formerly known as silviculture prescriptions, no longer have any mandatory requirements for inventories and assessments of environmental and cultural values upon which the plan is to be based.

[38] FRPA, s. 11.

[39] "The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the

Second, with respect to some matters covered in FSPs, the Crown has legislatively required the Minister and delegated decision-makers to accept the opinion of resource professionals retained by timber companies, who are under no legal obligation to consult with First Nations. FRPA, s. 16 provides that the Minister must approve an FSP if "a person with prescribed qualifications certifies that it conforms to section 5 in relation to prescribed subject matter".[40]

In addition, the Crown relies heavily on licensee engagement with First Nations in consultation on operational plans, and has not brought its consultation guidelines into accord with its common law duties.[41]

Vulnerability of British Columbia Forestry Legislation to Constitutional Challenge

The constitutional nature of the duty to consult and accommodate is not in question, but the issue remains whether the courts will strike down provincial natural resource legislation that is inconsistent with the duty.

A recent *Canadian Charter of Rights and Freedoms* case with respect to consultation and good faith negotiation in the labour law context suggests that the courts may be willing to do so. This could have profound implications for a number of areas of environmental and natural resource law where the Crown has purported to have limited, or legislated itself out of, its duties to First Nations through deregulatory initiatives.

In *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*,[42] the court considered a constitutional challenge to a piece of provincial legislation, the *Health and Social Services Delivery Improvement Act*,[43] which was passed in an expedited manner in 2002. Through this legislation, the provincial Crown purported to invalidate important provisions of negotiated collective agreements already in force, and to place certain topics off-limits in future labour negotiations.

The Supreme Court of Canada held that a process of collective bargaining was an integral part of the Charter's s. 2(*d*) guarantee of freedom of association.[44] While s. 2(*d*) does not guarantee the particular objectives sought by the union through negotiations, the court held that it did guarantee "the process through which those goals are pursued".[45] This

---

assertion of sovereignty and continues beyond formal claims resolution": *Haida*, *supra*, footnote 2, at para. 32.

40 See *Forest Planning and Practices Regulation*, s. 22.1.

41 British Columbia, Ministry of Forests, Aboriginal Affairs Branch, *Ministry of Forests Consultation Guidelines* (Victoria, B.C., 2003), on-line at http://www.for.gov.bc.ca/haa/Docs/MOF_Consultation_guidelines_final.pdf.

42 (2007), 283 D.L.R. (4th) 40 (S.C.C.).

43 S.B.C. 2002, c. 2.

44 *Health Services*, *supra*, footnote 42, at para. 69.

45 *Supra*, at para. 89.

constitutional duty was held to place constraints on the province's exercise of legislative powers, where "the ***effect*** of the state law or action is to ***substantially interfere***" with the protected right **(emphasis in original)**.[46]

> First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method . . . Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial — so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.[47]

The court went on to find:

> Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements.[48]

In the result, the court held that several sections of the Act were unjustifiable infringements of the appellant's s. 2(*d*) Charter rights; however, it suspended the declaration for one year to allow the Crown to address the repercussions of this decision.

This case presents some striking parallels to the legal context surrounding Aboriginal Title and Rights and forestry law in British Columbia.

Health Services clarifies that legislation may be struck down if it interferes with a constitutionally protected *process* of meaningful consultation and good faith negotiation, even if the duty does not extend to the achievement of particular outcomes. Three aspects of FRPA stand out in terms of substantial interference with consultation and good faith negotiation: (1) legislative provisions that purport to prevent or delay the Crown from implementing strategic land use agreements with First Nations in some or all of the area covered by the agreement;[49] (2) legislative provisions that require mandatory approval of plans that fail to provide an adequate information basis for meaningful consultation; and (3) the repeal of approval requirements for site-level plans.

Furthermore, the Supreme Court of Canada in *Health Services* considered the failure of the Crown to consult with affected parties regarding the legislation relevant to its justification analysis. In particular,

---

46 *Supra*, at para. 90.
47 *Supra*, at para. 91.
48 *Supra*, at para. 96.
49 In *Health Services*, *supra*, at para. 92, McLachlin C.J.C. and LeBel J. found: "Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process".

the court considered the absence of meaningful consultation prior to passing the Act as evidence going to the question of minimal impairment and whether other options were considered:

> This was an important and significant piece of labour legislation. It had the potential to affect the rights of employees dramatically and unusually. Yet it was adopted with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices.[50]

Again a parallel may be drawn to the failure to consult First Nations prior to sweeping forestry law amendments in British Columbia[51]

Parallel Trends in Other Areas

FRPA is only the tip of the legislative iceberg in terms of British Columbia legislation that may be vulnerable to legal challenge. For example, the British Columbia provincial government recently undertook the most sweeping amendments to the *Forest Act*[52] in over 50 years. These changes had the result of making timber tenures held by resource companies more like private property and increasing decision-making control of timber companies. In general, trends in this area are similar to those affecting forest practices legislation, in that the province has purported to remove legal "triggers" for its duties to consult and accommodate, through legislative changes that reduce or eliminate statutory decisions about forest tenure, planning and practices.[53]

---

50 *Supra*, at para. 160.

51 For example, in 2002, noting the failure of the provincial government to consult its member nations in relation to actual and anticipated forestry legislative and policy changes, the Union of British Columbia Indian Chiefs (UBCIC) passed a resolution stating that:

- "the Chiefs in Assembly reject the forestry legislative and policy changes because they violate the province's Constitutional duties to protect Aboriginal Title, Rights and Treaty Rights, including seriously compromising the ability of the provincial Crown to meet its fiduciary obligations to Aboriginal Peoples and to reconcile Crown and Aboriginal Title"; and
- the assembled Chiefs would "explore all available options for defending their Title and Rights" in the face of these anticipated infringements.

UBCIC, Resolution 2002-11, *Re: Provincial Forest Policy Infringements of Aboriginal Title and Rights*.

52 *Forest Act*, R.S.B.C. 1996, c. 157. The *Forest Act* addresses matters such as allocation of timber harvesting rights through various licences and timber pricing.

53 See *Forest and Range Practices Act*, S.B.C. 2002, c. 69; *Forest Statutes Amendment Act (No. 2), 2002*, S.B.C 2002, c. 76; *Forest (Revitalization) Amendment Act, 2003*, S.B.C. 2003, c. 30; *Forest (Revitalization) Amendment Act (No. 2), 2003*, S.B.C. 2003, c. 31; *Forest Statutes Amendment Act, 2003*, S.B.C. 2003, c. 32. For detailed analysis of these changes see J. Clogg, *Provincial Forestry Revitalization Plan: Impacts and Implications for British Columbia First Nations* (Vancouver: West Coast Environmental Law Research Foundation Occasional Paper, 2003), on-line at http://www.wcel.org/wcelpub/2003/14073.html.

For example, after repealing *Forest Act* provisions that required ministerial consent to tenure transfers,[54] the Ministry of Forests has taken the position that the fundamental issue of who controls indigenous lands is now merely a "business transaction", which gives rise to no Crown duty to consult and accommodate. Licensees can now consolidate, or subdivide up and sell off, timber tenures over First Nations' territories with little oversight;[55] and the power of the Minister to insert conditions in a licence on tenure transfer has been repealed.[56] These changes were also made unilaterally without consultation or accommodation of Aboriginal Peoples.[57]

Other statutory regimes that have undergone substantial revision include those related to environmental assessment, waste management and contaminated sites, pesticide use, mining, and oil and gas development.[58]

Conclusion

While all citizens are impacted by deregulation of environmental protections that safeguard their quality of life, the unique and substantial impacts of deregulation on Aboriginal Title and Rights are constitutionally impermissible. This may be the factor that ultimately counters recent trends towards environmental deregulation in British Columbia and elsewhere in Canada.

Indeed, some corporations are already attempting to reduce the legal uncertainty associated with their provincial licences and approvals (and meet market demand for responsibly produced forest products) by pursuing Forest Stewardship Council (FSC) certification. This international system requires that forest managers have First Nations' consent for their management plans, and that they meet stringent, regionally specific planning, environmental and social requirements. The FSC British Columbia Regional Forest Management Standards[59] may provide a cogent model for substantive reform to British Columbia forestry laws that addresses the legal defects outlined in this chapter.

---

54 *Forest Act*, **s. 54 rep. & sub. and s. 55 repealed by** S.B.C. 2003, c. 30, s. 9.
55 *Forest Act*, ss. 19, 39, 43 **rep. & sub. by** S.B.C. 2003, c. 30, ss. 3-5.
56 ***Forest Act*, s. 56 repealed by** S.B.C. 2003, c. 30, s. 9.
57 UBCIC Resolution 2002-11, *op. cit.*, footnote 51; First Nations Summit, Resolution 0303.05, *Call for Minister of Forests to Postpone Amendments to the Forest Act*, 2003.
58 See *Cutting Up the Safety Net*, *op. cit.*, footnote 1, for a summary of these amendments.
59 On-line at http://www.fsccanada.org/ForestManagementStd.htm.