

## THE FIDUCIARY OBLIGATION IN DELGAMUUKW

By Stuart Rush, Q.C.

March 12, 1998

**DRAFT**

### INTRODUCTION

The decision in *Delgamuukw*<sup>1</sup> has greatly expanded the fiduciary obligations of the governments. It has established the Federal Government as the protector of aboriginal title on off-reserve land. It has imposed a duty to accommodate aboriginal title if it is to be infringed upon. It has imposed a duty to consult with respect to infringement of aboriginal title by enactments and measures taken by the governments. It has imposed a duty to negotiate treaty settlements in good faith with Aboriginal Nations.

Why?

The Court concluded that in order to give effect to the title which the Aboriginal Nations possessed in their ancestral lands and to spur on settlements, mandatory obligations had to be declared. The Court saw the need to make it clear to the governments that they had to negotiate with aboriginal people on a fair basis, on a nation to nation footing, and to treat Aboriginal Nations as equal partners in the treaty settlement process.

The Supreme Court of Canada sought to remedy the inequities by broadly pronouncing principles of Aboriginal title. It articulated a test to prove Aboriginal title. It set out a broad reconciliation process which it mandated (through treaty negotiations) under s. 35(1) to accommodate governmental interference. It directed the Crowns to negotiate treaty settlements and to consult about infringements of Aboriginal title in good faith. The rationale for this is that "we are all here to stay" and accordingly a co-existence must be achieved.

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<sup>1</sup> Preferences are to the unreported decision of *Delgamuukw v. The Queen*, December 11, 1997, No. 23799 (S.C.C.)

Having set out the principles defining Aboriginal title and its content, the Court expanded the fiduciary obligations upon the federal and provincial governments in order to govern the process by which settlements can occur and to give a means of enforcing the principles which it declared.

## DUTY TO SAFEGUARD ABORIGINAL TITLE LAND

The Supreme Court of Canada imposed a new fiduciary duty on the Federal Government to safeguard Aboriginal title lands and resources in respect of off-reserve land. The Court found that s. 91(24) which provides for the exclusive federal power to legislate in relation to "Indians, and lands reserved for Indians" carries with it the jurisdiction to legislate in relation to Aboriginal title. That land includes reserve land and land outside of reserves. (para. 174)

Section 91(24) protects a "core" of Indianness from provincial intrusion, and that core encompasses Aboriginal rights and title which are recognized and affirmed by s. 35(1), including rights in relation to land. (para. 178)

The Court ruled that the Federal Government must safeguard Aboriginal title land. Chief Justice Lamer said:

The judges in the court below [BC Court of Appeal] noted that separating federal jurisdiction over Indians from jurisdiction over their land would have a most unfortunate result - the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interest - their interest in their lands. Emphasis added. (para. 176)

In this passage the Chief Justice adopted the majority view of the Court of Appeal in British Columbia that it was the duty of the Federal Government charged with the s. 91(24) constitutional obligations to secure the welfare of Aboriginal peoples to their lands.

The Court did not differentiate between Provincial and Federal Crown lands or the types of issues that might arise regarding the use to which those lands have been or might be put. Canada must therefore protect the aboriginal interest "burdening" provincial Crown land in British Columbia.

The question arises as to the scope of the Federal obligation with respect to off-reserve Provincial Crown land. It must include a federal duty to prevent diminishment, intrusion, waste, any infringement of Aboriginal title off-reserve land, just as it has that obligation in respect of reserve lands. Hence, if the Province or holders of tenures (of whatever kind) take action or legislate measures impacting off-reserve aboriginal title lands then the Federal Crown is under an affirmative duty to take steps to prevent, or to reconcile, that infringement.

The Federal fiduciary obligation in respect of off-reserve aboriginal lands does not just apply to federal lands or measures taken by the Federal Government in respect of lands under its jurisdiction, eg. Department of National Defence lands or railway belt lands, but it also extends to off-reserve lands anywhere in the Province.

Similarly, there is an obligation to advance the interests of Aboriginal Nations in British Columbia to off-reserve lands. Canada has an obligation to bring in legislative changes to further aboriginal title in British Columbia. This includes the obligation to provide fair and adequate compensation, and a legislative regime to provide for compensation where there is a provincial infringement of Aboriginal title.

While the scope of Federal jurisdiction over Aboriginal title lands was not defined by the Court, it is clear that the Federal Government has vastly more power in respect of provincial lands in British Columbia. This fact requires a change in federal policy in treaty talks, and in protecting aboriginal lands.

Failure by Canada to safeguard Aboriginal title may result in a breach of its fiduciary

obligation and the payment of substantial damages.<sup>2</sup> In this case a settlement was reached where Canada paid \$147 million to two Indian Bands which had their oil and gas rights stripped away from them by a breach of the Federal fiduciary duty.

## **DUTY TO ACCOMMODATE ABORIGINAL TITLE IN INFRINGEMENT**

The Court set out that the fiduciary duty with respect to the justification test is determined by the nature of the aboriginal title at stake. A duty is cast upon both governments to accommodate Aboriginal title where it is infringed upon and this duty operates in three ways. (para. 166)

First, the exclusivity of Aboriginal title means that government must scrutinize the infringing measure or action to determine whether it took into account the prior interest of Aboriginal Nations in the lands held by Aboriginal title. The Court gave an example of when this might be necessary: the participation of Aboriginal peoples in the development of resources and the making of fee simple grants. In scrutinizing such measures, governments would have to grant proper compensation. The Court said: "No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licenses given for its exploitation. These difficult economic considerations obviously cannot be solved here" (para. 167).

The Court said that economic considerations would be required in order to properly take into account the prior aboriginal interest in the land.

Second, there is a fiduciary duty on both governments to consult:

Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way the crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law:

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<sup>2</sup> **Blueberry River Indian Band v. Canada (1995) 4 SCR 344 (SCC)**

*Guerin*. (para. 168)

I will discuss the duty of consultation at greater length later in this paper.

Third, there is a duty to provide economic compensation. According to the Court:

In keeping with the duty of honour and good faith on the crown, fair compensation will ordinarily be required when aboriginal title is infringed.  
(para. 169)

There is an "inescapable economic aspect" of title which must be compensated for if the infringement is to be justified. The Court, however, did not give any clues as to the measurement of compensation or what quantification principles would be applied.

Mr. Justice La Forest stated that compensation will be greater depending on the nature and quality of the use of Aboriginal title land (para. 203). He based his reasons on the Royal Proclamation of 1763. Impliedly, he considered there would be compensation paid for pre-1982 infringements.

For example, based on these reasons the Arrow Lakes Nation in south central B.C. would be entitled to compensation for the flooding of the Arrow Lakes and the eradication of the salmon stocks in the Columbia River in Canada following the Columbia River Treaty and the building of the Grand Coulee Dam in Washington State.

The reconciliation of Aboriginal title with Crown title is now directed by the Supreme Court of Canada to occur in the justification process following the establishment of title. Whether and where the Governments can interfere with Aboriginal title within First Nations' territory, and how justification will occur, will undoubtedly be the subject matter of treaties. In the justification process, it will be crucial for Aboriginal Nations to clarify the points at which Federal and Provincial Legislation can interfere with Aboriginal title without the consent of aboriginal people.

## DUTY TO CONSULT

The Supreme Court has also laid down a duty on the Crown to consult in good faith. As Chief Justice Lamer said, (at para. 168) of the decision: "there is always a duty of consultation". That duty is activated where Aboriginal title is involved.

There have been several statements of the Supreme Court, most notably in *Sparrow*<sup>3</sup>, *Nikal*<sup>4</sup> and in *Van der Peet*<sup>5</sup>, setting out the duty to consult as a requirement of the Crown in discharging its fiduciary duties to Aboriginal Nations who are exercising Aboriginal Rights. When federal or provincial governments seek to infringe on Aboriginal rights, they must show that they consulted about the action or law which constitutes the infringement if they are to justify the infringement. (Affirmed in *R. v. Jack, John and John*<sup>6</sup> case in the B.C. Court of Appeal.)

Although there is considerable debate about what the cases say consultation means it minimally is said to require:

- the Aboriginal Nation be informed about the proposed infringing measure;
- full information on the effect of the proposed measure.

Most governmental consultation has been at a minimal level.

So far as Aboriginal title goes, the Supreme Court in *Delgamuukw* has directed a more stringent duty on the Province and Canada in order to be able to fulfill the obligation to consult. The one-way transfer of notice and information from Government to Aboriginal

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<sup>3</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075

<sup>4</sup> *R. v. Nikal*, [1966] 1 S.C.R.

<sup>5</sup> *R. v. Van Der Peet*, [1996] 2 S.C.R. 507

<sup>6</sup> *R. v. Jack, John & John* [1996] 2 C.N.L.E. 113 at pp. 133 and 135

Nations is no longer sufficient and active involvement, up to and including a veto, in the act or measure will now be required.

Why is consultation different for Aboriginal title? The Court said that underlying Aboriginal title is the "right to choose to what ends a piece of land can be put". That means, when the Province elects to issue a tree farm licence for the harvesting of timber on land, it makes a choice about the use of the land and this choice will run up against other choices an Aboriginal Nation may have for the same tract of land. Because there is a discretion about how land will be used, and because there is a fiduciary duty on the Crown, especially on the Federal Government, that the Aboriginal interest in land will be protected, Aboriginal people must be involved in decisions about their land. This involvement can no longer be passive but it requires affirmative engagement in the decision itself.

It is the active involvement in decision-making which differentiates the nature of consultation when Aboriginal title is involved from rights cases.

The Court set up a range of types of consultation depending on the seriousness of the interfering measure. The less interference with Aboriginal title, the less stringent will be the consultation. The greater or more intrusive the measure is on Aboriginal title, the more strenuous must the consultation be, such that, in some cases consent of the Aboriginal Nation for the act or measure will be necessary.

At the lower end of this scale, the Court said:

"In occasional cases, when the breach is less serious or relatively minor [consultation] will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. [Emphasis added] (para. 168)

For minor infringement, there must be discussion, which is based on notice, information,

disclosure, and interaction. Discussion implies face-to-face meeting. This type of minimal level of "consultation-discussion" is viewed by the Court as "rare". Most cases will require more... much more!

Even where the minimum acceptable standard of consultation operates, consultation must be "in good faith", and its purpose is to "substantially address the concerns of the Aboriginal peoples whose lands are in issue. This standard is much higher than the most extensive consultation employed by the Province to date.

I suggest that the good faith requirement for consultation will trigger principles which have been developed in the labour law context. These principles can be used to measure the adequacy of consultation:

- no procedural pre-conditions;
- no cursory efforts to convey or exchange information;
- no unreasonable timelines;
- no unexplained positions;
- no failure to disclose and provide full and relevant information;
- no misrepresentations and no sharp dealing;
- no threats;
- no failure to meet and discuss; and,
- no manipulation of the process to achieve an ulterior objective.

Added to these procedural injunctions is the requirement that the consultation must be aimed at "substantially addressing" the concern. The Government must respond to Aboriginal concerns about the measures by meaningfully accommodating these concerns. This goes beyond notice, information, discussion, but necessarily means adjusting the measure to deal with the concerns. It implies a more flexible approach from the Government to deal with the objections.



The next level of consultation is what the Court considers to be the norm: what happens in "most cases" "... It will be significantly deeper than mere consultation". (para. 169)

What is "mere consultation"? What does "significantly deeper mean"?

Courts sometimes do not like to define language too precisely because it tends to foreclose possible future interpretations. In the case of consultation, Courts seem to prefer to say what it is not: *R. v. Sampson*.<sup>7</sup>

Also, in the recent decision of the *Cheslatta Band v. Huckleberry Mines*,<sup>8</sup> Chief Justice Williams of the B.C. Supreme Court found that there had not been proper consultation with the Aboriginal Nations because wildlife habitat maps had not been provided to the Nations by the mine and the Province, thus preventing an opportunity to assess the impact of the mine on the wildlife, their lives and the land.

However, there is one case that comes close to what I suggest the Supreme Court is talking about when it refers to "mere consultation". In a 1986 English case arising in the Queen's Bench Division, *Regina v. Secretary of State for Social Services*,<sup>9</sup> that Court was called upon to rule on whether a legislative obligation of consultation had been fulfilled. In that case, the Secretary of State for Social Services was required by statute to consult with certain interested organizations before making regulations under the Social Security and Housing Benefits Act 1982. The Court held that the Secretary of State had failed to fulfil this obligation. In the course of its reasons, the Court stated that:

There is no general principle to be extracted from the case law as to what

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<sup>7</sup> *R. v. Sampson* [1996] 2 CNLR 184 (BCCA)

<sup>8</sup> *Cheslatta Carrier Nation v. British Columbia (Project Assessment Director) and Huckleberry Mines Ltd.*, Quicklaw [1998] BCS 178; January 29, 1998, Vancouver Registry No: A954336 (BCSC)

<sup>9</sup> *Regina v. Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*, [1986] 1 All E.R. 164

kind of amount of consultation is required before delegated legislation, of which consultation is precondition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer.<sup>10</sup>

To those comments should be added that of the Court in *Fletcher*, that "consultation may often be a somewhat continuous process, and the happenings at one meeting may form the background of a later one".<sup>11</sup>

If these case define what the Supreme Court means by "mere consultation", then consultation which is "significantly deeper" must mean even greater involvement in the process and in the decision-making. For example, in a land use situation, such as the development of a gravel pit, the Government would have to involve the Aboriginal Nation in the process of making the decision. This may require funding support to assess the impact from the aboriginal point of view. It may require complete involvement in Provincial decision-making bodies.

The governments must enable the Aboriginal Nation to investigate and to develop the information which would help properly assess the impact on the aboriginal title of the nation.

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<sup>10</sup> *Ibid.*, p. 167

<sup>11</sup> *Fletcher v. Minister of Town & Country Planning*, [1997] 2 All E.R. 496 at p. 500

In the mid-range circumstances, I suggest, consultation requires that the Aboriginal Nation must be part of the co-management of the resources and uses of the land. In the gravel pit example, co-management would mean participation in the decision on whether, and where, the pit should be developed, the way the pit affects the land, the resources on the land and the aboriginal uses of the land.

How does the "good faith" requirement affect this expanded consultation duty? Although labour law principles developed around bargaining can be adopted and applied to the duty to consult in good faith, it is not a perfect fit. Consultation is not bargaining, though consultation about a specific project or measure may quickly turn into bargaining, especially if the parties are otherwise engaged in Treaty talks. Where they do fit, good faith principles will ensure that the procedure and process used are fair, balanced and effective.

In Secretary of State for Social Services, one of the elements of consultation mentioned by the Court was the requirement that the government give "genuine consideration of the advice". Good faith by the government is essential to the way the government gives effect to the advice, or the involvement, which is offered. Surface consultation will not meet the good faith standard. Sending a letter describing a measure to be taken, soliciting a point of view and then going ahead will not be good enough.

The third category of consultation, referred to by the Court, involves those cases where consent of the Aboriginal Nation before the interference can occur. The Court gave as examples, provincial hunting and fishing regulations affecting aboriginal lands. Consent must be required where there is any direct sustenance engagement by an Aboriginal Nation.

The Court seems to be saying that Aboriginal Nations will have a veto over regulations which impact on uses of the land by aboriginal people which are central to their culture. Hunting, fishing, berry harvesting, ceremonial, spiritual and village occupation would likely

fall into this category.

This is an important addition to the understanding of the governments' duty to consult. It identifies some regulations and measures as being of such significance to the Aboriginal title of the Aboriginal Nation that its consent is needed before the measure can proceed. We can only speculate what cases would be subject to the consent requirement, but it is fair to suggest that the closer the measure or law is to affecting the essential character or quality of the Nation's title, then the more likely it is that consent is required.

When does the duty to consult arise?

This is a critical question because a measure which affects land over which there is Aboriginal title, will only be justified if the consultation contemplated, at the appropriate level, occurs. If it does not occur the measure is in jeopardy, cannot be justified, and, under the present direction of the Supreme Court, ought to be struck down.

Strictly speaking, the duty to consult is in respect to lands held pursuant to aboriginal title. That is to say, regarding lands over which Aboriginal title has been established or is acknowledged. At this juncture, no Nation in B.C. has proved aboriginal title to their lands, except perhaps those Nations in the Treaty talks, including the Nishga, where negotiations have reached such a point that title has been demonstrated to the satisfaction of the parties (and prima facie meet the tests set out in *Delgamuukw*).

The fact of unproved title should not matter, however, nor does it matter to the governments in terms of their practice in the treaty process to date. Given that aboriginal title is a pre-existing unique interest in land held by Aboriginal Nations, the title to the Nation's traditional territory ought to be presumed. For the purposes of consultation (and Treaty talks) aboriginal title is presumptive. It must be so acknowledged by the governments for the process of reconciliation and settlement to occur.

This makes practical sense because there could be no negotiations unless the government accepted, as the Court is telling them to do, that title exists over all of the lands in B.C. and there is something to negotiate about. If the governments did otherwise it would risk a subsequent judgment in which their refusal to acknowledge title was challenged, their Act, regulation or measure reversed and compensation awarded against them. Furthermore, without an acceptance of presumptive title, there would be a flood of law suits in the Province by Aboriginal Nations seeking to establish title, and to obtain injunctions against the proposed measures.

#### What is the Remedy for a Failure to Consult

- in *Klahoose*,<sup>12</sup> a judicial review to set aside the decision of the Minister of Forests approving a transfer of a tree farm licence; an action had to be started and the Aboriginal Nation had to assert and prove title; it proved to be unsuccessful (pre-*Delgamuukw*);
- the remedies involve setting aside the measure which was taken without proper consultation; an injunction or a direction to rectify the way in which the consultation was deficient;
- damages will be a more important claim after *Delgamuukw*;
- in the *Huckleberry*<sup>13</sup> case, the Court refused to set aside the permit authorizing the mine to go ahead (probably because \$60 million had already been spent and the mine was fully operational), but ordered the Province to produce the wildlife maps so the consultation requirement could be met. This was the least intrusive

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<sup>12</sup> *Noble (Klahoose First Nation) v. B.C. (Minister of Forests)*, (1995) B.C.L.R. (3d) 59 (SCBC), affirmed (1996), 18 B.C.L.R. (3d) 194 (CA), leave to appeal to SCC dismissed October 10, 1996

<sup>13</sup> *Cheslatta Carrier Nation v. British Columbia (Project Assessment Director) and Huckleberry Mines Ltd.*, *supra*.

remedy and the least effective from the Aboriginal Nation's point of view;

The issue of remedy confronts the issue of the value of the consultation duty.

- The Supreme Court has said, to give more meaning to the duty because it is a major step in reconciling interests;
- Greater weight must be given to consultation even though the loss involved is intangible - it is difficult to assess a lost opportunity;
- It is a lost opportunity of the Aboriginal Nations not to be able to influence or to play a decision-making role in the way aboriginal lands are to be used;
- the difficulty is, that, until *Delgamuukw*, the economic impact to the Province and third parties have taken precedence over the loss of opportunity;
- these priorities must now change as a result of *Delgamuukw*.

This tension between the loss of opportunity in failing to consult and the supremacy of economic development poses the additional problem of how to bring together the consultation process with the on-going treaty process. The two are inextricably linked. Consultation is at the root of the treaty talks. The measures that demand consultation are the same measures which need to be reconciled at treaty. Good faith applies to both. Give and take applies to both. Otherwise, the Aboriginal Nations are faced to litigate every breach of the duty to consult and every failure to bargain in good faith.

What is the enforcement mechanism? New mechanisms are needed to oversee the consultation process.

## DUTY TO BARGAIN IN GOOD FAITH

The Court in *Delgamuukw* has directed that the Crown must negotiate with Aboriginal Nations and that those negotiations must be conducted in good faith.

Chief Justice Lamer, at para. 186 of the judgment, said:

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s.35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other Aboriginal Nations which have a stake in the territory claimed. **Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, supra, at para. 31, to be a basic purpose of s.35(1) - "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay. [Emphasis added]**

What is new in this statement is:

- a. a legal duty on the Crown to enter into and conduct negotiations;
- b. negotiations must be conducted in good faith;
- c. the purpose of negotiations is to reach settlements;
- d. there must be give and take; and,
- e. the Courts will superintend these negotiations when the issue comes before them.

There is a body of law which has been developed in the labour jurisdictions of Canada which provides considerable guidance on the duty to bargain in good faith. It is to this law and jurisprudence that I would see Aboriginal Nations and the Governments turning to find standards and principles to apply in order to enforce the good faith bargaining

requirement now established by the Supreme Court of Canada.

Why look to this body of law? Only in the labour law context do we have a fully developed treatment of the law governing the duty to bargain in good faith.

There are important parallels between bargaining in a labour context and bargaining a negotiated settlement between Aboriginal Nations and the Governments. Aboriginal title is a s.35 right held by the Nation as a whole (*Delgamuukw*, para. 115), and therefore the duty to negotiate is to negotiate a collective settlement for the members of the Nation as a whole. This incorporates the collective bargaining obligation. The purpose of collective negotiations is to reach a negotiated collective settlement and thus to reconcile the pre-existing rights of aboriginal societies with the sovereignty of the Crown.

As in labour relations, the collective interests are part of an on-going relationship. There is a long term and interconnected relationship between Aboriginal Nations and the Governments which must be settled in order for the aboriginal and non-aboriginal communities to co-exist.

There are also differences between labour bargaining and treaty negotiations which have to be acknowledged. In labour negotiations, for example, the focus is primarily on economic issues and the employer has to cost out every demand. In treaty negotiations, the issues are social, cultural and jurisdictional as well as economic. How would the duty to bargain in good faith apply to power sharing, devolution of programs relating to health and education and to land issues?

The underlying principle in labour law is that the parties must act with the intent to conclude an agreement to bargain in good faith and make every reasonable effort to do so.

Chief Justice Lamer was deliberate in directing a good faith bargaining duty which



parallels the requirements in labour law:

1. there is a duty on the Crown to **enter into** and **conduct** negotiations in good faith;
2. the negotiations are for the purposes of reaching negotiated settlements;
3. there must be give and take on all sides.

The requirement for give and take imports the reasonable efforts standard required in labour legislation. I cannot imagine that the parties to land claim negotiations would not be required to negotiate with any thing less than a reasonable efforts obligation.

The content of the duty depends on the circumstances but it generally prohibits the following:

1. Outright refusal to negotiate or meet.<sup>14</sup>
  - Cursory attendance will be insufficient to meet the duty: *Kaycee Enterprise and IWA of Canada* (1986) BCLRB No. B91/96.
  - The Federal Government must establish a treaty process which is in keeping with the principles of justification articulated by the Court in *Delgamuukw*.
  - Neither Government cannot unilaterally withdraw from negotiations.
2. Refusal to meet unless procedural preconditions are met.<sup>15</sup>

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<sup>14</sup> *Re Phillips and NABET* [1979] 1 Can.L.R.B.R. 180;  
*Austin Airways Ltd.* [1980] 3 Can.L.R.B.R. 393;  
*ATU, Local 1374*, 83 C.L.L.C. 16,026 (Alta.L.R.B.);  
*Northern Telecom* [1981] 1 Can.L.R.B.R. 306;  
*Allan Martin* [1979] 3 Can.L.R.B.R. 184;  
*AUPE, Local 127* [1986] Alta.L.R.B.R. 117, supplementary reasons [1986] Alt.L.R.B.R. 280

<sup>15</sup> Canadian Labour Law, page 10-100 to 10-101.  
*School District No. 44 and North Vancouver Teachers Assn.*, 92 C.L.L.C. 16,067 (B.C.L.R.C.);  
*B.C. Rail Ltd. and CUTE*, 93 C.L.L.C. 16,072 (B.C.L.R.B.);  
*Northwood Pulp and Timber Ltd. and CEP*, 95 C.L.L.C. 220-001 (B.C.L.R.B.).

- The Governments cannot require that the negotiations will only go on under the auspices of the B.C. Treaty Commission.
3. "Surface" bargaining with no true intent of concluding an agreement.<sup>16</sup>
    - Surface bargaining is going through the motions or preserving the surface indications of bargaining without any real intent to conclude a collective agreement: *The Daily Times*.
  4. Refusal to discuss a term which is basic and standard in similar agreements.<sup>17</sup>
  5. Seeking a provision which is illegal or contrary to public policy.<sup>18</sup>
    - The Government could not require a condition that it would extinguish the Federal fiduciary duty.
  6. Deliberately inflammatory proposals.<sup>19</sup>
  7. Unexplained and sudden changes in position.<sup>20</sup>
  8. Refusing to meet unless specific concessions are agreed to.<sup>21</sup>
    - It would be a breach of the duty to demand that specific progress must be met or there is no deal.

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<sup>16</sup> *Royal Oak Mines* (1996), 133 D.L.R. (4th) 129 (S.C.C.);  
*The Daily Times* [1978] 2 Can. L.R.B.R. 446 (Ont);  
*Radio Shack*, 80 C.L.L.C. 16,003 (O.L.R.B.).

<sup>17</sup> *Royal Oak Mines, supra*.

<sup>18</sup> *Brewster Transport Co.* (1986), 66 di 1, 13 C.L.R.B.R. (N.S.) 339, CLRB 574.

<sup>19</sup> *Royal Oak Mines, supra*.  
*Tan Jay Co. and ILGW*, (1986) 16 C.L.R.B.R. (N.S.) 350 (Man.);  
*ATU, Local 1374 and Brewster Transport*, 86 C.L.L.C. 16,040 (Can.L.R.B.).

<sup>20</sup> *Kaycee Enterprise and IWA of Canada* (1986) BCLRB No. B91/96.

<sup>21</sup> *Elevateurs de Sorel Ltee* (1985), 61 di 18, 85 C.L.L.C. 16,032.

9. Failure to commit time and preparation required.<sup>22</sup>
10. Failure to explain positions taken.<sup>23</sup>
  - The most basic duty on parties is to state their position on the matters at issue and explain that position.
  - Bargaining must be informed; there must be rational discussion.
11. Failure to disclose relevant information.<sup>24</sup>
  - There must be sufficient information to support the party's position and there must be full disclosure of that information to allow Aboriginal Nations to make informed decisions.
12. Misrepresentations.<sup>25</sup>
13. Offering less than would exist without the agreement.<sup>26</sup>
14. Refusing to follow through on matters already agreed to.<sup>27</sup>

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<sup>22</sup> Canadian Labour Law, page 10-106;  
*CUPE, Local 8 and Travois Holdings Ltd.* (1987) Alta.L.R.B.R. 413;  
*Kaycee Enterprise and IWA of Canada, supra.*

<sup>23</sup> Canadian Labour Law, page 10-95, 10-107;  
*Radio Shack*, 80 C.L.L.C. 16,003 (O.L.R.B.);  
*Kaycee Enterprise and IWA of Canada* (1986) BCLRB No. B91/96.

<sup>24</sup> *Pine Ridge District Health Unit* [1977] O.L.R.B.R. Feb.65;  
*DeVilbiss (Canada) Ltd.* [1976] 2 Can.L.R.B.R. 101 (Ont.) at 114-115;  
*Byers Transport Ltd.* (1988), 75 di 164, CLRB 715.

<sup>25</sup> *Inglis Ltd.* [1977] 1 Can.L.R.B.R. 408 (Ont.) at 415.

<sup>26</sup> *Iberia Aeriennes d'Espagne* (Unreported) May 17, 1990, CLRB 796.

<sup>27</sup> *Nolisair International Inc.* (Unreported) September 29, 1992, CLRB 960.

15. Changing conditions throughout the negotiation process.<sup>28</sup>
  - The parties cannot move the goal posts in negotiations.
16. Threats during the negotiation process.<sup>29</sup>
17. Contradictory offers and gross misstatements, especially when given publicly.<sup>30</sup>
18. Failure to participate in bargaining sessions and failure to submit written or oral proposals.<sup>31</sup>
19. Refusal to bargain with particular people or objecting to the composition of a bargaining committee.<sup>32</sup>
20. Pressing certain matters fundamental to a settlement to an impasse.<sup>33</sup>
  - The parties cannot take a "take it or leave it" position and walk away on fundamental issues to the negotiations.
21. Using the negotiation process to resolve or address a distinct dispute.<sup>34</sup>

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<sup>28</sup> *DeVilbiss (Canada) Ltd.* [1976] 2 Can.L.R.B.R. 101 (Ont.) at 114-115.

<sup>29</sup> *Voyageur Inc.* (1989), 77 di 14, 90 C.L.L.C. 16,021, CLRB 732.

<sup>30</sup> *Eastern Provincial Airways Ltd.* (1983), 54 di 172, 5 C.L.R.B.R. (N.S.) 368, reversed in part on other grounds [1984] 1 F.C. 732.

<sup>31</sup> *Kaycee Enterprise and IWA of Canada, supra.*  
*DeVilbiss (Canada) Ltd., supra.*

<sup>32</sup> *Marshall-Wells Co. Ltd.* 55 C.L.L.C. 18,002 (Sask.L.R.B.) application for judicial review dismissed [1995] 4 D.L.R. 591 (C.A.), affd 2 D.L.R. (2d) S.C.C.

<sup>33</sup> *Elevateurs de Sorel Ltee* (1985), 61 di 18, 85 C.L.L.C. 16,032.

<sup>34</sup> *Otis Elevator v. International Union of Elevator Constructors*, (1973) 35 D.L.R. (3d) 566 (B.C.C.A.)

22. The duty to bargain is a continuous one until agreement is reached.
- Even though there is litigation, the parties must still bargain;
  - The Federal Government must scrap its "where litigation, no negotiation" strategy.

A Labour Board will not usually intervene, to control hard bargaining, that is, where tough positions are being advanced. The theory is that the principal parties should be left to freely negotiate with the give and take in the bargaining process. Nor will a Labour Board review the fairness or reasonableness of proposals put forward in negotiations. The "reasonable efforts" requirement is directed at procedure only, not substance.

This latter position has given way recently where there are serious and exceptional circumstances. These circumstances existed in the facts before the Supreme Court of Canada in *Royal Oak Mines*.<sup>35</sup> This case arose out of the strike at the Giant Yellowknife Mine where the company replaced its entire work force with replacement workers. There was a long strike and bitter negotiations which seriously split the community. The Supreme Court upheld the Canada Labour Board's decision that several of the employer's bargaining positions violated the duty to bargain in good faith. The company's refusal to bargain an arbitration provision for strikers discharged for picket line misconduct was seen as the most serious of these positions. The employer's refusal to negotiate any sort of due process by which employees could challenge their discharge was to deny the good faith standard and was a term no union could be expected to agree to. In the circumstances of a long and bitter strike, and where the employer fails to bargain so no agreement can be reached, the Court will approve of a Labour Board imposing terms on the bargaining process.

In this case, the Supreme Court approved of the Labour Board reviewing the reasonableness of the company's bargaining positions and it upheld the remedies used

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<sup>35</sup> *Royal Oak Mines*, (1996) 133 DLR (4th) 129 (SCC)

by the Board to force a settlement of the strike and the contract.

What this case tells us is that in certain extreme situations a third party charged with scrutinizing good faith bargaining will have jurisdiction to evaluate the reasonableness of bargaining positions and, if found unreasonable, the Court will approve of remedies which are designed to overcome bad faith bargaining in the positions advanced.

As a result of the decision in *Royal Oak Mines*, the positions of the parties in treaty talks may be subject to scrutiny for reasonableness. This will permit greater latitude for Court intervention to compel negotiations, to ensure that negotiations occur fairly and around principles established by the Courts and to fashion remedies and, if necessary, to require terms be placed in settlements.

How will these principles apply to the Governments' positions in the treaty negotiations to date? I would suggest that it is not bargaining in good faith to require the surrender of rights and title as a pre-condition to entering into treaty negotiations.

It is not negotiating in good faith to take intractable positions such as fixing the amount of land available for settlement (the 5% rule), or that no compensation will be paid for past alienation, before the parties can negotiate and reach agreement on other terms. The Governments cannot refuse to bargain these issues.

It cannot be good faith bargaining to continue to grant interests in land over which Aboriginal title is claimed and at the same time to negotiate the status of those same lands.

The remedies for procedural violations of the good faith bargaining duty are compliance orders and restraining orders. Labour Boards have issued compliance orders forcing the parties to do things such as disclose information, explain positions and provide times for meetings. Labour Boards have issued injunctions preventing a party from relying on fixed

positions, from surface bargaining and for mis-representing facts.

In one case, at the Labour Board of British Columbia,<sup>36</sup> the Board directed the parties to meet the company and to provide dates for meetings. It directed a mediator to participate in negotiations and to set dates for meetings. It directed that particulars be given of the positions of the parties. It directed that the company pay for wasted negotiation costs.

But, in *Royal Oak Mines*, the Supreme Court went further and ordered the company to table a last offer minus certain issues it had previously put forward. The Court approved of the Board's order imposing a back to work protocol which included an arbitration procedure for dismissed employees. The parties were given a further thirty days to bargain and, if no agreement, the matter was to be referred to mediation/arbitration. The Board was broadly interventionist in determining the content of the agreement. I can see similar orders being required in the treaty process to ensure a fair settlement.

There is no enforcement mechanism suggested by Chief Justice Lamer nor is one part of the existing treaty negotiation framework. The role of the British Columbia Treaty Commission does not lend itself to making enforceable orders against the parties in negotiations.

There are two possible enforcement mechanisms that could be established to control the negotiating process. First, the Chief Justice of the Supreme Court of British Columbia could establish a special panel of judges to hear expedited applications in Chambers to control the negotiation process. A complaint of a breach of the duty to bargain in good faith could be brought quickly before a judge of this panel, decided on an expedited basis and the issue resolved through compliance or injunctive orders. The Court could also invoke the mediation procedures, which it has established, in order to assist the parties to get through an impasse.

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<sup>36</sup> *Comox District Free Press and Graphic Communication International*, 1995 BCLRB

The process of negotiation calls out for scrutiny by a third party with the legal clout to make a binding decision. This may well be the only way, short of litigation on the substantive issues, to check abuses of the process and to compel the parties to reach negotiated settlements in a timely way. The labour law standards which have evolved over many years would be applicable to the issues that needed to be resolved to keep the negotiation process for Aboriginal Nations on track and productive.

Second, the Federal Government could pass legislation to establish an enforcement board to monitor the negotiation process and to require compliance with good faith standards. In *Delgamuukw*, the Court said that s.91(24) embraced off-reserve interests and the Federal Government is duty bound to protect aboriginal title involving those interests. The Federal Government could enact legislation to discharge this obligation, in part, by establishing a Treaty Negotiations Board to adjudicate disputes arising out of the process.

These two mechanisms would provide the means to ensure that the parties respect the process and their duty to bargain in good faith and hopefully this would lead to more timely settlements. These mechanisms can also be used to provide remedies for a failure to properly consult.

Enforcing the legal obligation to bargain in good faith and the duty to bargain in good faith as required by Chief Justice Lamer is an achievable goal which would greatly enhance the reconciliation process and improve the place of Aboriginal Nations in that process.

We have to make the consultation and negotiation process work for all Aboriginal Nations. I think we can do so if we make some radical changes to the process and to the institutions governing it.