CHAPTER 1

Aboriginal Law

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I. ABORIGINAL LAW IN 2020 [§1.1]

While the Supreme Court of Canada in 2020 saw relatively little action on Aboriginal law matters, lower and appellate courts grappled with a wide range of issues. Courts of appeal across the country continued the process foreshadowed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 of fleshing out the details of the duty to consult. In doing so, these courts dealt with particularly thorny issues, including the role of consent in the asserted but not yet proven Aboriginal title claims, the treatment of overlapping claims, the relationship between established and asserted rights, and the evolution of the duty to consult in the face of changing science.

Looked at as a whole, the case law is beginning to show some of the tensions that are emerging within different themes in Aboriginal law. In particular, we see growing tension between the courts' oft-expressed desire for non-adjudicative resolution of disputes, the conflicting claims of different Indigenous people over the same lands or resources, and the apparent hierarchy emerging between declared or formally recognized rights and asserted rights. These tensions are

becoming particularly acute—and posing an increasing challenge to the rule of law—in the face of the delays and costs facing Indigenous people seeking to access the courts.

II. THE DUTY TO CONSULT [§1.2]

A. THE DUTY TO CONSULT AND ASSERTED ABORIGINAL TITLE [§1.3]

In a case that has received little notice in the wider community, the Yukon Court of Appeal addressed the interplay between the right to exclusive possession aspect of Aboriginal title, the Crown's obligations before and after a declaration, and the duty to consult. In *Ross River Dena Council v. Yukon*, 2020 YKCA 10, the RRDC argued the Crown, in issuing hunting licences in an area subject to Aboriginal title claims, had to address the fact that permitting persons to hunt on such land interfered with the Nation's right to exclusive possession. The trial judge (Veale C.J., in his last Aboriginal law judgment) held—following *Tsilqhot'in Nation v. British Columbia*, 2014 SCC 44—that until Aboriginal title was declared, the Nation did not have the right of exclusive possession, and therefore this did not constitute an adverse impact triggering the duty to consult.

The Court of Appeal upheld Veale J.'s ruling. Justice of Appeal Shaner contrasted this case (at para. 27) to the situation in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, where a lasting deprivation of the benefits of title was alleged:

> Here, no specific concerns have been articulated. There is only an argument that the issuance of hunting licences and seals interferes with RRDC's right to exclusive use and occupancy of the Ross River Area at the present time. As noted, however, this is a right that RRDC does not currently have. Without explaining how the presence of hunters on its claimed territory could potentially adversely affect its claimed title, the duty to consult as a means to preserve interests in the interim is not engaged [emphasis added].

Thus, the Court of Appeal contrasted the situation where the alleged interference with title potentially could extend into the post-declaration period with an interference rooted purely in the pre-proof periods. While the court held the former triggers the duty to consult, it concluded the latter does not.

This holding is difficult to reconcile with the decision of the British Columbia Court of Appeal in *Saik'uz First Nation and Stellat'en*

First Nation v. Rio Tinto Alcan Inc., 2015 BCCA 154, leave to appeal refused 2015 CanLII 66255 (SCC). In *Saik'uz*, the court held that a pre-declaration nuisance claim based on an asserted but not yet proven Aboriginal title claim could be maintained. The court rejected the Crown's argument in that case that such an action did not arise until after a declaration of Aboriginal title had been made saying (at para. 61):

> In my view, that would be justifiable only if Aboriginal title and other Aboriginal rights do not exist until they are so declared or recognized. However, the law is clear that they do exist prior to declaration or recognition. All that a court declaration or Crown acceptance does is to identify the exact nature and extent of the title or other rights [emphasis added].

These conflicting approaches to pre-declaration Aboriginal title will at some point have to be reconciled. Likely, the preferred approach will be to accept that while Aboriginal title exists before a declaration is made, the Crown's duties in respect of those rights are different before and after that declaration of title is made. Before a declaration, the Crown's duties are limited to the duty to consult; after a declaration of title, the fiduciary duty applies. In the context of the *Ross River* case, this would suggest—contrary to the Court of Appeal's holding—that the duty to consult arose but the same ultimate result would likely be reached. Permitting a transitory, limited purpose right to access the lands would on this approach trigger the duty to consult but at the lowest end of the spectrum rather than the deeper consultation Ross River sought. In order to trigger deeper consultation or accommodation, Ross River would have to show, as the Haida did in the *Haida* case, that the interference threatened more significant or lasting impacts.

B. THE DUTY TO CONSULT AND OVERLAPPING RIGHTS CLAIMS [§1.4]

Increasingly, issues related to conflicting claims of rights between different First Nations are arising in the context of the duty to consult. There is relatively little jurisprudence on how the courts are to assess these claims.

In *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215, the B.C. Court of Appeal considered the Minister's duty to consult the Gitanyow about management moose harvesting in territory that overlapped with the Nisga'a's harvesting area under the Nisga'a Treaty, the Nass Wildlife Area. The Gitanyow asserted Aboriginal title and rights in the region