

Preparing an Aboriginal Rights Case — An Overview for Defence Counsel



Legal
Services
Society

British Columbia
www.lss.bc.ca

May 2011

Acknowledgements

© 2012 Legal Services Society

Writers: Anja P. Brown and Bruce Stadfeld Mclvor, PhD

Editor: Jay Istvanffy

Designer: Dan Daulby

Legal reviewers: Anja P. Brown; Pamela Shields; Bruce Stadfeld Mclvor, PhD

This booklet may not be commercially reproduced, but copying for other purposes, with credit, is encouraged.

Preparing an Aboriginal Rights Case: An Overview for Defence Counsel is a publication of the Legal Services Society (LSS), a non-government organization that provides legal aid to British Columbians. LSS is funded primarily by the provincial government and also receives grants from the Law Foundation and the Notary Foundation.

This booklet explains the law in general. It is not intended to give your clients legal advice on their particular problem. Because each person's case is different, he or she may need to get legal help. *Preparing an Aboriginal Rights Case — An Overview for Defence Counsel* is up to date as of May 2011.

How to get *Preparing an Aboriginal Rights Case — An Overview for Defence Counsel*

Read online at www.legalaid.bc.ca (under Lawyers, click Practice resources).



Contents

Introduction.....	1
Who this booklet is for.....	1
The purpose of section 35.....	2
Preliminary matters	3
Legal aid eligibility and other funding sources.....	3
Initial interview(s) and identifying issues	4
Developing a strategy	8
Gladue rights.....	8
Trial phases	9
Retaining an expert.....	10
The law.....	11
Rules of evidence	11
Proving an Aboriginal right	12
Infringement and justification	21
Treaty rights.....	25
Métis rights	27
Alternatives to trial	28
Restorative justice	28
Guilty plea and sentencing.....	29
Case studies.....	31
Aboriginal rights trial.....	31
Restorative justice approach	32
Appendix I: Aboriginal rights defence (flow chart)	37
Appendix 2: Harvesting rights — Court process (flow chart for clients)....	39
Table of cases and legislation	41
Jurisprudence.....	41
Legislation.....	42

Introduction

Aboriginal clients who have been charged with a harvesting offence (for example, illegal fishing or hunting) may be eligible for legal aid if their case affects their ability to follow a traditional livelihood of fishing, hunting, or gathering. The coverage of Aboriginal rights defences under the legal aid tariff is a fairly recent development. This is not surprising, given that from 1927 to 1951, provisions in the *Indian Act*, R.S.C. 1985, C. I-5 (*Indian Act*) made it extremely difficult for status Indians to hire lawyers to advance certain legal claims. Although there were a handful of rights cases before the courts in British Columbia during the 1960s, it was not until the seminal case of *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313 (*Calder*) in 1973 and the *Constitution Act*, 1982¹ that a new era of litigation was born. Since then, and particularly in British Columbia, the courts have decided and created an impressive catalogue of case law specific to Aboriginal issues.

For defence counsel who take on legal aid work, Aboriginal rights defences are very different from the usual family or criminal law referrals. Although Aboriginal rights defences typically arise in answer to quasi-criminal offences and are prosecuted in provincial court, their similarity to a criminal trial ends as soon as the Crown has proven the elements.

This booklet provides defence counsel who have an Aboriginal rights legal aid referral with an overview of the leading case law, as well as a general guide to the issues and the process — whether the matter is resolved through trial, by a restorative justice solution without a guilty plea, or through a guilty plea and sentencing. It is hoped that this booklet will encourage more lawyers to agree to take on these interesting and challenging cases on behalf of Aboriginal people who might otherwise have no viable means to defend their inherent right to engage in activities that fall within the protection of the highest law of the land.

Who this booklet is for

This booklet is for counsel assisting clients with legal proceedings where an Aboriginal right is raised as a defence. The booklet provides an overview of the law and a general practice guide intended for counsel. The information contained in this booklet is not intended to provide legal advice.

1 Being Schedule B to the *Canada Act* 1982 (U.K.), 1982 c.11 (*Constitution*)

The purpose of section 35

The Aboriginal rights affirmed under section 35(1) of the *Constitution* derive from the fact that indigenous nations occupied the land in present-day Canada at the time of the arrival of Europeans, and the need to reconcile this fact with the assertion of Crown sovereignty: *R. v. Van Van der Peet*, [1996] 2 S.C.R. 507 (*Van der Peet*) at para. 43; *R. v. Mitchell*, [2003] 2 S.C.R. 396 (*Mitchell*) at para. 9.

Aboriginal rights, including Aboriginal title, survived the assertion of Crown sovereignty, and were absorbed into the common law unless “(1) they were incompatible with the Crown’s assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them ...”: *Mitchell* at para. 10.

Importantly, section 35(1) did more than merely codify common law Aboriginal rights as of April 17, 1982: *R. v. Powley*, [2003] 2 S.C.R. 207 (*Powley*) at para. 45; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (*Delgamuukw*) at para. 136. The overarching interpretative principle when determining the existence and extent of constitutionalized Aboriginal rights is a purposive reading of section 35(1), based on a generous and liberal interpretation in favour of Aboriginal people: *Powley* at para. 13; *Van der Peet* at para. 23.

One of the central purposes of section 35 is to reconcile the existence of substantive rights with the assertion of Crown sovereignty. Lamer C.J. summarizes the governing interpretative principles for section 35(1) in *Van der Peet*. He states that any analysis of section 35(1) must adhere to “the general principles which apply to the legal relationship between the Crown and aboriginal peoples,” including fiduciary obligations and the honour of the Crown: *Van der Peet* at paras. 23–25. As part of a purposive approach, the court should identify the interests the constitutional provision is intended to protect and the reasons underlying the protection: *Van der Peet* at para. 27.

Preliminary matters

This section of the booklet breaks down each step of a typical Aboriginal rights matter, from the initial meeting with your client to developing a strategy.

Legal aid eligibility and other funding sources

An Aboriginal client asserting an Aboriginal rights defence and of limited financial circumstances should apply for legal aid. Sometimes even clients who are working may be eligible for legal aid depending on their salary and family situation, debts, and personal assets or lack thereof. If a client is denied legal aid and has a change of financial circumstances during the proceedings, he or she should be encouraged to reapply as his or her status may have changed enough to qualify.

The most common matters that give rise to an Aboriginal rights defence are regulatory offences charged under the applicable fisheries, forestry, or hunting legislation. These are prosecuted as quasi-criminal offences. Therefore, a legal aid referral for an Aboriginal rights case is essentially the same as a criminal case and billed according to the block tariff. Normally, criminal (or Aboriginal rights) referrals are not billed on an hourly basis like a family law referral, so the amount the referral will pay will probably have little bearing on the actual time spent on the file.

In cases where there is a legal aid referral, check if the distance between the office and the court location is more than 160 km; if so, ensure travel is authorized on the referral. In that way, you can bill for overnight accommodation if needed, and for blocks of travel or out-of-office time in accordance with the tariff.

Once it becomes clear that the matter will proceed to trial, counsel on an Aboriginal rights legal aid referral can apply for coverage under the Strategic Case Assessment Program (SCAP). SCAP applies to all criminal matters scheduled to last more than 20 half-days of trial and includes Aboriginal rights referrals. SCAP funding can also be requested for matters scheduled for less than 20 half-days where the issues are complex and the anticipated preparation time is expected to exceed 75 hours. For further information about SCAP and the application requirements, see the Legal Services Society (LSS) website at www.legalaid.bc.ca (click Lawyers; then, under I am looking for, click Case management information; then click Strategic Case Assessment Program (SCAP)).

If the client is not eligible for legal aid, he or she should consider whether his or her Aboriginal community might support a legal defence of the charge. Depending on the circumstances of the offence, as well as the circumstances of the Aboriginal community, this may be an option and is definitely something your client ought to explore.

If the client is not eligible for legal aid and his or her Aboriginal community cannot assist with the legal defence, then he or she will have to determine whether he or she is in a position to cover the cost of a legal defence. Since there is no such thing as a typical Aboriginal rights trial, it is very difficult to provide a client with even a general estimate of what the cost might be.

The circumstances of the offence and whether, for example, the Crown admits the right, will have a significant bearing on the cost. If the Crown does not admit the right, then it must be proven in court. The defence would have to retain an expert to write a report and usually also to testify in court. This would add to the costs substantially. Trial time could easily run in the range of 10 to 20 days, and it is highly unlikely that the days would be scheduled consecutively. Depending on how busy the court and the particular judge assigned to the case are, blocks of trial time may be spaced out over months over even years.

Initial interview(s) and identifying issues

Ask your client to bring the particulars and any other Crown disclosure to the first interview. Depending on your practice, you may wish to have this interview, or series of interviews, after your client has obtained legal aid or determined that he or she is not eligible and has made other payment arrangements.

As you review the particulars with your client, make note of the points outlined below.

Where is your client from?

What is his or her address? Which Aboriginal community is he or she connected to? If he or she is connected to a First Nation, is the First Nation under treaty? If your client does not know, then find out. Currently, there are limited parts of British Columbia subject to the historic treaties (Douglas Treaties on southern Vancouver Island and Treaty 8 in the northeast) and the modern Nisga'a and Tsawwassen treaties. As well, there are other areas of the province in various stages of concluding treaties and you should confirm the status of these if they potentially apply to your client.

Where did the offence take place?

Did the offence take place within your client's Aboriginal community's traditional territory? If not, what was he or she doing in the area? Was he or she invited by a family member or chief, or pursuant to another form of Aboriginal law or protocol?

The two cases that follow are illustrative of the importance of this point and provide examples of some of the issues to be aware of.

Aboriginal right by invitation

In *R. v. Jack*, [1996] 2 C.N.L.R. 113 (B.C.C.A.) (*Jack*), the three defendants were fishing together for Mr. Jack's son's wedding in the waters off the west coast of Vancouver Island. The British Columbia Court of Appeal noted that Mr. Jack was a chief and head of his family group and, as such, his Aboriginal right to fish included the right to invite his relatives to assist him. In *R. v. Victor*, 2005 BCPC 0366 (*Victor*), the Crown admitted all the defendants' Aboriginal right to fish. The defendants were mainly members of the Cheam First Nation, as well as two members from neighbouring First Nations with family ties to Cheam.

Entitlement to "shelter" under a treaty right

The Ontario Court of Appeal reached conclusions very similar to the British Columbia Court of Appeal in *Jack*, in relation to the treaty right to hunt and whether, under certain circumstances, this could include non-treaty members. In *R. v. Meshake*, 2007 ONCA 337 (*Meshake*), the court interpreted the language of Treaty 3 and applied it to the facts of Mr. Meshake, a member of Treaty 9, who argued that he had a treaty right to hunt on the basis of his marriage to a Treaty 3 member. The court referred to the established principles of treaty interpretation set out by the Supreme Court of Canada in *R. v. Marshall*, [1999] 3 S.C.R. 456 (*Marshall No. 1*).

Treaties must be interpreted in their historical, cultural, and political context in order to ascertain the common intentions of the parties and the interests that they intended to reconcile. Furthermore, in the interpretation of treaties, the integrity of the Crown is presumed, technical interpretations are to be avoided, and treaty rights ought not to be interpreted in a static way. The rights are not frozen in time at the date of signature and must be updated to provide for their modern exercise. The court in *Meshake* noted that the evidence demonstrated that Ojibway custom included sharing community harvests through family kinships (both within and across groups), that intermarriage between groups was common, and that Mr. Meshake was an accepted member of his spouse's community and had been welcomed to hunt with her family. The court concluded that Mr. Meshake was entitled to shelter under the Treaty 3.

In the companion case of *R. v. Shipman*, 2007 ONCA 338 (*Shipman*), the defendants argued that they had a treaty right to hunt based on invitation or consent. From the evidence, two of the defendants had previously obtained consent from the chief of the Michipicoten First Nation prior to hunting in the territory, but on this occasion the band office was closed and the defendants obtained consent after the hunt. The Chief testified that consent would have been given had the request been made prior to the hunt.

The court considered whether the Michipicoten treaty right to hunt included the ability to invite outsiders to hunt on their lands and share in the resource. Not surprisingly, the language of the treaty did not articulate concepts of family life, trading patterns, or cultural or religious practices.

Therefore, the court looked at the modern evidence of Ojibway culture and custom and applied this to the interpretation of the treaty. The court concluded that the evidence demonstrated a granting of permission and sharing of resources with others who were “passing through,” and that this practice survived as a modern treaty right. Even so, the court in *Shipman* ultimately upheld the convictions, finding that consent *after* the hunt was not truly informed consent.

The language found in the treaties at issue in the Ontario cases is fairly general and, in that sense, is similar to that found in Vancouver Island’s Douglas Treaties, which confirm that the signatories are at liberty to hunt over unoccupied lands and to carry on their fisheries as before. Thus, *Meshake* and *Shipman* may be of assistance with hunting or fishing cases relying on a similar defence pursuant to the Douglas Treaties.

Under what authority, if any, did the offence take place?

For example, does your client’s Aboriginal community manage its fisheries itself, and issue its own fishing openings that are not necessarily consistent with Department of Fisheries and Oceans’ (DFO) openings?

Does your client’s Aboriginal community support him or her?

Even if your client’s Aboriginal community cannot assist your client financially, does it support the defendant’s actions of engaging in the activity that lead to the charge(s)?

The two points of authority and support from your client’s Aboriginal community are critical to assessing the strength of your client’s case and advising him or her as to options and likely chances of success. For example, if your client’s Aboriginal community has a fishing agreement in place with DFO and takes the position that its members ought to abide by the agreement, then the Crown may try to rely on the community’s political leaders to support the prosecution.

Another reason a meeting with your client’s Aboriginal community is important early on is to determine what its relationship is with the relevant enforcing agency; this may affect the options you present to your client for dealing with the charges. To use a charge under the *Fisheries Act*, R.S.B.C. 1996, C.149 (*Fisheries Act*) as an example, some Aboriginal communities have a relatively good and cooperative working relationship with DFO, and engage collaboratively in co-management projects. Other Aboriginal communities have had the opposite experience and have been less successful in engaging in meaningful consultation with DFO on fisheries matters.

Although rights-related charges originate on the basis of alleged violations of a statute and are driven by the court process, an inescapable component of

how matters ultimately proceed is the human relationship, from enforcement to resolution. Prosecution may or may not be part of the equation. If there are pre-existing good relations between your client's Aboriginal community and the Crown and its agents, it is more likely that the matter can be resolved with minimal impact on the defendant.

Because these considerations arise within the unique circumstances that bring your client before the court, each must be taken into account within that specific context. The point is to be aware of the importance of raising these issues with your client, asking the questions, and moreover, finding out whom you can ask to provide answers on behalf of your client's Aboriginal community; for example:

- the elected chief and council;
- a hereditary chief or perhaps council of hereditary chiefs;
- elders;
- a representative from your client's Aboriginal community's fisheries, forestry, or natural resources department, if applicable; or
- if your client's Aboriginal community has a restorative justice program, the manager of the program.

Does your client have a record?

What is your client's record? Does he or she have a record for similar offences, or other regulatory offences? If he or she has a record for criminal offences, is it related or unrelated? For example, sometimes alleged regulatory offences may also attract criminal charges such as uttering threats, obstruction of justice, or assaulting a peace officer.

Discuss with your client the commitment required if the matter proceeds to an Aboriginal rights trial

As stated previously, depending on the court location, trials may take more than a year to conclude and there is always a potential for appeal by the Crown if your client is successful, or by your client if the Crown prevails.

Judges will agree to excuse defendants for limited amounts of time for specific reasons, but the importance of the optics of the defence cannot be ignored: your client's commitment to the case must be obvious to the court, and part of this is the need to be in court for virtually every scheduled day of trial, unless there are extenuating circumstances for which the court has been asked and allowed your client to be excused.

Discuss with your client his or her availability to attend court and ensure court dates do not conflict with cultural or food harvesting activities or any other critical commitments. Inform the Crown and the court in advance of potential scheduling conflicts and try as much as possible to work cooperatively and in conjunction with the judicial case manager to schedule appearances accordingly.

Developing a strategy

To develop a legal strategy and present realistic options to your client, it is important to do preliminary research to determine what, if any, cases have been decided in relation to the Aboriginal rights of his or her Aboriginal community and, in particular, whether there is any case law directly on point.

Once the issues raised in the previous section have been addressed and the case law researched, you will be in a position to provide your client with a legal opinion as to his or her options. It may take time to engage with your client's Aboriginal community and determine what its position is in relation to the charges. When you do get a response, you will need to discuss the response with your client and determine whether it affects how he or she wishes to proceed. If your client's Aboriginal community does not support your client's alleged actions and a potential Aboriginal rights defence, this has the potential to greatly affect the chance of success at trial. Although rights are exercised by the individual, they are collective rights, so at least as a practical matter, they are more difficult to prove without the support of the collective. Therefore, it is important to advise your client fully on this point so that he or she can make an informed decision before deciding how to proceed.

Your client may be unsure of how he or she wishes to proceed, or it may be that you require more time to advise him or her. As is true in criminal proceedings, your working relationship with the Crown will help determine the course of action. If there is a cooperative or at least collegial relationship, the Crown may agree that the matter ought to be adjourned for a longer period of time — perhaps six weeks — to allow discussions to continue. The court is usually amenable to such suggestions in the interest of trying to resolve matters without unnecessarily booking up court time. On the other hand, if the Crown is difficult to work with, or if it appears that you require a significantly longer period of time to determine whether an alternative or restorative justice approach is appropriate and acceptable to your client, trial dates should be scheduled. In this way, the matter is off the court list and there is less urgency to try to develop viable alternatives to trial.

Gladue rights

Clients who self-identify as Aboriginal have rights under section 718.2(e) of the *Criminal Code*, often called Gladue rights. Gladue refers to the special consideration judges must give Aboriginal people when setting bail or during sentencing. Gladue applies to all Aboriginal people: status or non-status Indians, First Nations, Métis, or Inuit, and to those who live on and off reserve.

In order to apply Gladue to your client's case, the judge needs to understand your client's circumstances. To help the judge, you can provide him or her with a Gladue report, which provides the court with

comprehensive information on your client, his or her community, and a plan that includes viable alternatives to prison. LSS is now funding the writing of Gladue reports as part of a pilot project, and tariff lawyers can request a Gladue report as an expert report disbursement. Once a disbursement has been approved, LSS will assign an LSS-certified writer from its roster. Report writers will usually require a minimum of eight weeks to complete the work. LSS will prioritize cases based on clients' situations.

More information on Gladue and Gladue reports is available on the LSS website at www.legalaid.bc.ca (click Aboriginal — Aboriginal Gladue rights). Details on how to request a Gladue report and the criteria for approval are also available on the LSS website (click Lawyers — Practice resources — Gladue report disbursement pilot).

Trial phases

Once you have instructions to proceed to trial, you will need to talk to the Crown about scheduling and then proceed to fix dates. Aboriginal rights trials are lengthy. In order to be able to even guess at approximate trial time, discuss early on with the Crown what admissions, if any, the Crown will make. The two primary admissions to discuss are in respect to the existence of the right and its *prima facie* infringement.

If you and the Crown agree to the admissions in principle, enumerate and particularize the admissions and try to get the Crown to agree. Once there is agreement, the admissions are filed with the court. At this time, a constitutional notice must also be filed with the court and served advising of the Aboriginal rights defence pursuant to section 5(1) of the *Constitution*.

If there are no admissions, then the court will need to make a ruling after each phase of trial. There are two phases of trial: in the first phase, the Crown must prove your client committed the offence; in the second phase, you must prove your client's Aboriginal right.

Phase 1

In the first phase, the onus of proof is on the Crown, just as it is in criminal proceedings, to prove all the elements of the offence beyond a reasonable doubt. If the court finds that the Crown has proved its case on the elements (i.e., the facts), the trial moves into the Aboriginal rights phase.

Phase 2

If the Crown does not admit the right, the burden of proof is on the defence to prove the right. If the defence proves the right, the burden of proof is again on the defence to prove the infringement of the right. If the defence proves the infringement of the right, the burden of proof is on the Crown to prove the justification of the infringement.

Rulings between each part can add significant time to the proceedings depending on the judge and the evidence. The trial judge's rulings cannot be appealed until the matter is concluded. In other words, if the trial judge rules against your client(s), any appeal of an interim ruling on the existence of the right, whether it was infringed, and if the Crown's actions were justified, cannot be filed until the completion of sentencing.

Appendix 1 on page 37 has a flow chart that outlines each of the steps involved in an Aboriginal rights trial. Appendix 2 on page 39 has a simplified flow chart that you can share with your client when explaining the processes involved in an Aboriginal rights trial.

Retaining an expert

If the Crown will not admit the right, then it will be necessary to retain at least one expert, typically an anthropologist, and sometimes also an ethno-historian. Depending on the case, you might also require other experts; for example, biologists, genealogists, or natural resource managers.

Unlike lay witnesses, experts are entitled to draw inferences from the facts. The expert's inferences, which take the form of opinions, are admissible and can be accorded weight by the court. It is important to properly instruct an expert to ensure he or she understands that he or she is expected to do more than simply recite the facts. Experts are to give their opinions, but they are not to opine on questions of law or the "ultimate question," which is for the sole determination of the court.

For Aboriginal rights litigation, experts may be required to provide their opinions on one or more of the following issues:

- the scope and importance of the pre-contact Aboriginal practice,
- the custom or tradition that underpins the claimed right and its continuation to the present-day,
- the existence and organization of the pre-contact Aboriginal society,
- the extent of the Aboriginal society's territory, and
- the existence and effect of the alleged infringement.

With regard to a retainer, the expert may agree to a daily rate, a flat fee, or a combination of the two. One option is to agree on a flat rate with a provision for a daily rate should additional work be required. Since you will likely require copies of all the documents the expert relied on in preparing his or her opinion, include a provision in the retainer stipulating that the expert will produce copies of the documents as part of his or her report.

The law

The following sections deal with the detailed legal analysis that you must take on to prove the existence of the right and its infringement. Once this is done, it is up to the Crown to call evidence to demonstrate that its legislation — which resulted in infringement of the right — was justified.

Rules of evidence

The courts have recognized that, in the context of Aboriginal rights trials, the rules of evidence must be applied flexibly, that consideration must be given to the inherent difficulty in proving rights based on pre-contact activities, and that the ultimate objective of reconciliation must not be lost: *Mitchell* at para. 29. Because claimants are required to adduce evidence of pre-contact societies without written records, they face considerable evidentiary challenges. “Recognizing these difficulties, this Court has cautioned that the rights protected under section 5(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection ...”: *Mitchell* at para. 27; see also *Van der Peet* at para. 68.

The courts’ flexible approach to evidence applies to both the admissibility and weight to give to oral history: *Mitchell* at para. 28. “Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge”: *Mitchell* at para. 31. Oral histories may be useful because they may offer evidence of ancestral practices otherwise unavailable, and they may provide the Aboriginal perspective on the claimed right: *Mitchell* at para. 32. The test for usefulness with regard to oral history evidence was set out by the court in *Mitchell* at para. 30: “the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case.”

In assessing the reliability of oral history, the court will consider whether the witness represents:

... a reasonably reliable source of the particular people’s history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness’s ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

Mitchell at para. 33.

The court will also draw necessary inferences:

Flexibility is important when engaging in the Van der Peet analysis because the object is to provide cultural security and continuity for the particular aboriginal society. This object gives context to the analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available.

R. v. Sappier; R. v. Gray, [2006] 2 S.C.R. 686 (*Gray; Sappier*) at para. 33.

But, the Supreme Court of Canada has cautioned against an overly generous approach to claimant evidence:

... a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law

Mitchell at para. 38

Similarly, “‘Generous’ rules of interpretation should not be confused with a vague sense of after-the-fact largesse”: *Marshall No. 1* at para. 14.

Proving an Aboriginal right

In the writers’ view, the Crown ought to make the necessary admissions in relation to the right to relieve the defendant(s) of the burden of proving it. Such an approach is in keeping with the honour of the Crown, and consistent with the principles that have been articulated in the Supreme Court of Canada’s jurisprudence. Moreover, the case law and DFO’s policies and programs, including the Aboriginal Fisheries Strategy, and fishing agreements with Aboriginal communities (which are extremely common), all are premised on the existence of Aboriginal rights to fish for food, social, and ceremonial purposes. For the Crown to say otherwise in court and require Aboriginal defendants to go to great expense to prove their rights is inconsistent with the principle of reconciliation that is the central purpose of section 5.

The proper rights-holder group

Powley is the Supreme Court of Canada’s most recent statement of the criteria for identifying a section 5 claimant. While the decision establishes the specific criteria for identifying Métis claimants, it does so in the wider context of interpreting section 5(1). Therefore, its general principles are applicable to other Aboriginal cultures.²

² See, for example, *Ahousaht Indian Band v. Canada (Attorney General)*, 2009 BCSC 1494 at paras. 287–90.

In *Powley*, the court took a purposive approach to identifying individuals entitled to claim Aboriginal rights. The goal of section 5(1) is to protect historically important practices that persist in the present. Identifying the specific claimant group is a necessary instrumental and functional step, but is not the end itself. The court will take an inclusive approach and will not readily disentitle claimants: *Powley* at paras. 13, 18.

The criteria for identifying the historic Aboriginal society include demographic evidence, shared customs and traditions, and collective identity. Importantly, a lack of political structure, or shifts in self-identification, is no basis for disentitling present-day Aboriginal claimants. The Aboriginal community may have been an “invisible entity” for an extended period, but that does not mean that it disappeared entirely. The community may have gone underground but continued to exist. The emphasis is on the continuing practices of members — not on the visibility of the community: *Powley* at paras. 23, 24, 27.

The current successor group must have distinctive customs, a distinctive way of life, and a recognizable group identity: *Powley* at para. 10. For the Métis, the court required that they be “a distinctive collective identity, living together in the same geographic area and sharing a common way of life”: *Powley* at para. 12. The claimant must belong to “an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific Aboriginal right”: *Powley* at para. 12. The court did not deem it necessary to decide whether the Sault Ste. Marie Métis community was part of a larger Métis community. The important fact was that they were obviously Métis and the Métis are entitled to section 5 rights: *Powley* at para. 12.

Difficulty with determining precise membership is no basis for disentitling Aboriginal people of their constitutionally protected rights: *Powley* at para. 29. The primary issue is a direct relationship and continuity of customs and traditions with their ancestors, not the precise and unchanging Aboriginal community. Also, the court will allow for a case-by-case analysis: *Powley* at para. 29.

Defining the rights-holder group through Aboriginal laws

When defining the proper rights-holder group, one possible approach is to rely on the presence of traditional Aboriginal political institutions and legal systems.

In Canadian jurisprudence, the identification of pre-existing Aboriginal political institutions and legal systems has often been described as an inquiry into the presence of an “organized society.” The term derived from Judson J.’s now famous statement in *Calder* at p. 12: “the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.” Importantly, Judson J.’s comments were made in the context of the debate over whether Aboriginal

title was limited to a personal or usufructuary right (see *St. Catherine's Milling and Lumber Company v. The Queen* (1889), 14 App. Cas. 46). Judson J. concluded that this was a sterile debate. What was important was that the Aboriginal claimants were asserting “a right to continue to live on their lands as their forefathers had lived ...”: *Calder* at p. 12. In other words, they claimed a communal right based on using the land for the same purposes as their ancestors.

When Mahoney J. of the federal court was later called upon to decide on an Aboriginal title claim by Inuit of northern Canada, he seized Judson J.'s description of the underlying principle for Aboriginal title and sought to explicate the characteristics of an “organized society”: *Baker Lake (Hamlet of) v. Canada (M.I.A.N.D.)* (1979), [1980] 1 F.C. 518 (*Baker Lake*). The indicia Mahoney J. relied on for identifying an “organized society” were separate, independent nations with their own institutions and laws: *Baker Lake* at para. 81.

Since *Baker Lake*, courts in Canada have interpreted “organized society” as referring to pre-contact Aboriginal political institutions and legal systems. For example, *Hunt v. Halcan Log Services Ltd.*, (1987), 15 B.C.L.R. (2d) 165 (*Hunt*), Trainor J., relying on *Baker Lake*, concluded that the Kwakiutl Band on Vancouver Island was an “organized society.” Trainor J. relied on evidence of elected leaders with responsibility for the care and protection of their land. In other words, the Kwakiutl's organized society was identified by the presence of a political and legal system.

Sarich P.C.J. also applied the “organized society” test from *Baker Lake* at the trial level in *R. v. Dick* (1988), [1989] 1 C.N.L.R. 132. He referred to evidence of a political and legal system. Importantly, he also concluded (at p. 5) that the fact that the present-day claimant had been two separate organized societies at the time of contact did not invalidate the claim.

Based on the above case law, the court should identify the proper Aboriginal claimant group based on Aboriginal political institutions and traditional laws.

Date of contact

Modern-day Aboriginal rights are intended to protect and perpetuate practices, customs, and traditions integral to the distinctive cultures of Canada's Aboriginal communities. Consequently, in *Van der Peet*, Chief Justice Lamer for the majority, held that the claimant must prove that the practice, custom, or tradition relied upon as the basis of the Aboriginal right has its origins prior to contact with Europeans: *Van der Peet* at paras. 60–67. In subsequent decisions, the courts have tended to emphasize the importance of identifying a specific date of contact with Europeans, and often treated this date as a definitive watershed between pre- and post-contact activities.³

3 For a recent example that turned on the issue of the introduction of horses by Europeans as the defining moment between pre- and post-contact activities, see *R. v. Denault*, [2007] B.C.J. No. 2104 (Prov. Ct).

But, as McLachlin J., as she then was, observed in her dissenting judgement in *Van der Peet*, “Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question”: *Van der Peet* at para. 247.

Arguably, following the *Van der Peet* decision, the courts have too often pursued a formulaic and overly narrow approach to identifying the date of contact. In doing so, they have failed to give due weight to the more important issue of identifying European influences. As Chief Justice Lamer in *Van der Peet* explained, the question is whether the practice, custom, or tradition arose solely due to European influence: *Van der Peet* at para. 73. Identifying the date of contact can assist in determining this issue, but it is not determinative.

Characterizing the right

The proper characterization of the right is crucial to a successful Aboriginal rights defence. The right should not be characterized either too broadly or too narrowly. “The right claimed must be characterized in context and not distorted to fit the desired result. It must be neither artificially broadened nor narrowed”: *Mitchell* at para. 15.

If the court finds that the claimant has characterized the right too generally, it may narrow the characterization. For example in *R. v. Pamajewon*, [1996] 2 S.C.R. 821 (*Pamajewon*), the claimants’ characterization was the right to manage the use of reserve lands. The Supreme Court of Canada re-characterized the right as the right to participate in and regulate gambling on reserve lands: *Pamajewon* at paras. 26–27.

The court may also find that the claimant has characterized the right too narrowly. In *Mitchell*, the claimant characterized the right as the right to enter Canada with personal and community goods without paying customs or duties, and the right to trade these goods with other First Nations. The court re-characterized the right as the right to bring goods across the international boundary at the St. Lawrence River for the purposes of trade: *Mitchell* at paras. 16, 19.

Factors to be considered in characterizing the right include:

- the nature of the action that the claimant asserts was done pursuant to an Aboriginal right;
- the nature of the impugned government regulation, statute, or action; and the traditional practice, custom, or tradition relied upon to establish the right.

Van der Peet at para. 53; *Gray*; *Sappier* at para. 20.

The focus should be on the importance of the practice to the particular Aboriginal community, *not* the importance of the harvested resource: *Gray; Sappier* at para. 21.

It is critically important that the Court be able to identify a practice that helps to define the distinctive way of life of the community as an Aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated.

Gray; Sappier at para. 22

The correct level of specificity in characterizing the right is determined by linking the traditional practice with the Aboriginal community's distinctive way of life:

... it is critical that the Court identify a practice that helps to define the way of life or distinctiveness of the particular Aboriginal community. The claimed right should then be delineated in accordance with that practice: see *Van der Peet*, at para. 52.

Gray; Sappier at para. 24

For example, in *Gray; Sappier* the court concluded that in the pre-contact period the Maliseet and Mi'kmaq were:

... a migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation. Thus, the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life. The record shows that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel. I would therefore characterize the respondents' claim as a right to harvest wood for domestic uses as a member of the Aboriginal community.

Gray; Sappier at para. 24

Practices undertaken merely for survival purposes may qualify as Aboriginal rights: *Gray; Sappier* at para. 38.

While Aboriginal rights are often based on a relationship to a specific tract of land, certain rights may be identified and defined independent from an Aboriginal relationship to the land: *Van der Peet* at para. 74; *R. v. Adams*, [1996] 3 S.C.R. 101 (*Adams*) at para. 29; concurring reasons of L'Heureux-Dubé in *Adams* at paras. 64–65.

A claim of an Aboriginal right based on self-government will, like any other Aboriginal right, be subject to the *Van der Peet* test: *Pamajewon* at para. 24.

Characterizing a commercial Aboriginal right presents a unique challenge. In *R. v. Gladstone*, [1996] 2 S.C.R. 723 (*Gladstone*), the court first considered whether the appellants could demonstrate a right to exchange herring spawn on kelp for money or goods, and second, whether they had a right to sell herring spawn on kelp on the commercial market: *Gladstone* at para. 24.

While the court associated “commercial” activity with European influence, it held that based on the “extent and scope” of the Heiltsuk’s trading in herring spawn on kelp, it was best described as commercial: *Gladstone* at para. 28. In contrast to *Van der Peet* and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672 (*N.T.C. Smokehouse*) where the court held that any commercial component of the fishing right was incidental to the social and ceremonial basis of the right, in *Gladstone* the court held that the commercial aspect of the right was “a central and defining feature of Heiltsuk society”: *Gladstone* at para. 29.

Integral to the distinctive society

Aboriginal rights are not universal — they are dependent on the specific rights-holder group. The traditional activity that underlies the right must be part of a practice, custom, or tradition integral to the distinctive culture of the claimant rights-holder group. The claimant must prove that the practice was integral to the distinctive culture of the historical Aboriginal society.

The “integral to the distinctive culture” test first articulated in *Van der Peet* has been criticized because it appeared to be based on an essentialized, external, and artificial evaluation of historical Aboriginal societies.⁴ Consequently, the Supreme Court of Canada significantly clarified the test in *Gray; Sappier*.

The inquiry is meant to go to the nature of the pre-contact society’s occupation and use of the land:

The focus of the Court should therefore be on the nature of this prior occupation. What is meant by “culture” is really an inquiry into the pre-contact way of life of a particular Aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word “distinctive” as a qualifier is meant to incorporate an element of Aboriginal specificity. However, “distinctive” does not mean “distinct,” and the notion of Aboriginality must not be reduced to “racialized stereotypes of Aboriginal peoples.”

Gray; Sappier at para. 45

Although in earlier decisions the Supreme Court of Canada indicated a necessity for the claimant to prove that the pre-contact activity was “a central or significant feature” of his or her distinctive culture (*R. v. Côté*, [1996] 3 S.C.R. 139 (*Côté*) at para. 60) or “a central, significant or defining feature of the distinctive culture” (*Adams* at para. 38), in *Gray; Sappier*, the court moved away from this requirement. The pre-contact practice does not have to have been the core identity of the historic rights-holder group: *Gray; Sappier* at para. 40. Nor does it have to have been a “defining feature” of the society to such a degree that the society would have been fundamentally altered without it: *Gray; Sappier* at para. 41.

4 See, for example, Russell Lawrence Barsh and James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Native Imperialism and Ropes of Sand” (1997), 42 McGill L.J. 993 and Chilwin Chienhan, “Touring the Museum: A Comment on *R. v. Van der Peet*” (1997), 55 U.T. Fac. L. Rev. 419.

Continuity

Aboriginal rights are modern rights, with modern expressions. By requiring continuity between the pre-contact practice that underpins the modern expression of the right, the court has sought to avoid a “frozen rights” approach to section 5(1): *Van der Peet* at paras. 63–64.

In essence, the claimant must establish that the pre-contact activity continued post-contact.

If the exercise of such practices, customs and traditions effectively continued following contact in the absence of specific extinguishment, such practices, customs and traditions are entitled to constitutional recognition subject to the infringement and justification test outlined in *Sparrow, supra*, and more recently, in *Gladstone, supra*.

Adams at para. 33

Importantly, there is no requirement for an unbroken chain of continuity: *Van der Peet* at para. 65.

Site specificity

Aboriginal rights may be site-specific in the sense that they will be demarcated by the boundaries of the area in which the activity occurred:

An aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land.

Côté at para. 39

For example, in *Côté*, the appellants were charged with entering a controlled wilderness zone without paying the motor-vehicle entrance fee, and one of the appellants, *Côté*, was also charged with fishing without a licence in the controlled zone. Consequently, the Aboriginal right was characterized as fishing for food within the controlled wilderness zone, not fishing for food on the specific lake where they were fishing: *Côté* at para. 56. In *Adams*, while fishing on Lake Francis, the appellant was charged with fishing without a licence. Subsequently, the right was characterized as fishing for food on Lake Francis.

The Crown often requires “site-specific” evidence of the ancestral practice, by which the Crown often means evidence that the claimant fished, hunted, trapped, or gathered resources at the specific location where the alleged offence occurred. The case law does not require this level of specificity.

Rather than “site-specific,” it may be more accurate to speak of “tract-specific” rights:

The recognition that aboriginal title is simply one manifestation of the doctrine of aboriginal rights should not, however, create the impression that the fact that some aboriginal rights are linked to land use or occupation is unimportant. Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question.

Adams at para. 30

Similarly, “(t)he aboriginal right to fish claimed in this instance relates to a tract of territory, specifically Lake St. Francis, which falls within the boundaries of New France prior to 1763”: *Adams* at para. 31.

For hunting, fishing, and gathering rights, the questions the courts will ask include:

- Was the reliance on the area as a source of food a significant part of the life of the historic rights-holder group prior to contact (*Côté* at para. 59)?
- Did the historic rights-holder group frequent the territory in question at the relevant time (*Côté* at paras. 60, 67)?

Consequently, rather than being required to deduce evidence of pre-contact hunting or fishing at the exact spot where the alleged offence occurred, an Aboriginal claimant should be able to identify a larger area (a part or all of his or her Aboriginal community’s territory, or perhaps an area defined by government regulation) that was frequented and relied upon as a significant part of the way of life of the pre-contact rights-holder group. The claimant would then confirm that the activity that precipitated the charge occurred within this area.

Finally, claims of rights to exchange or trade may not necessitate the same geographical specificity; for example, *Van der Peet, N.T.C., Smokehouse, R. v. Gladstone*. “Consequently, trading rights will seldom attract geographical restrictions”: *Mitchell* at para. 56.⁵

⁵ But, the facts were different in *Mitchell* and so the court concluded that, as with *Adams* and *Côté*, there was a necessary geographical element and how integral it is to the Mohawk culture had to be assessed: *Mitchell* at paras. 58–59. Consequently, the court addressed the question of whether the right to trade across the St. Lawrence was integral to the Mohawks: *Mitchell* at para. 60.

Incidental rights

Aboriginal people may be required to rely upon an Aboriginal right to support an activity undertaken in order to exercise the right. In this situation, it is important to appreciate that the courts have recognized that Aboriginal rights include incidental rights. For example:

- Building cabins or shelters on off-reserve land to pursue hunting (*R. v. Sundown*, [1999] 1 S.C.R. 393 (*Sundown*))
- Accessing unoccupied land for hunting (*R. v. Bartleman*, [1984] 55 B.C.L.R. 78 (*Bartleman*); *R. v. Badger* [1996] 1 S.C.R. 771 (*Badger*))
- Carrying firearms for hunting (*R. v. Simon*, [1985] 2 S.C.R. 387 (*Simon*))
- Teaching others how to fish as part of an Aboriginal fishing right: *Côté* at para. 56
- Establishing a trading right may also confirm a mobility right: *Mitchell* at para. 22
- Accessing a fishing location⁶: *Côté* at para. 31

Modern evolution

While Aboriginal rights are based on pre-contact activities, they are not limited or restricted to their historical precedents. An Aboriginal right encompasses the logical evolution of the practice so that it can be exercised as part of the modern economy and through modern means: *Marshall No. 1* at para. 25; see also *Van der Peet* at para. 64. For example:

- Hunting with a bow and arrows has evolved into a right to hunt with rifle and ammunition: *Simon*,
- Erecting a mossy lean-shelter to hunt has evolved into a right to build a cabin: *Sundown*, and
- Hunting at night with a torch has evolved into a treaty right to hunt at night with high-powered lights: *R. v. Morris*, [2006] S.C.J. No. 59 (*Morris*).

Extinguishment

Section 35(1) recognizes and affirms *existing* Aboriginal and treaty rights. While the provincial Crown cannot extinguish Aboriginal rights (*Delgamuukw* at paras. 172–183), extinguishment may have occurred through a “clear and plain intention” to extinguish the right prior to the coming into effect of the

⁶ A right to access a fishing location is of particular importance to many British Columbia First Nations facing reduced access to their traditional fishing sites due to the conversion of Crown land to fee-simple lands. Aboriginal people with reduced access to their fishing sites may be able to argue that the right to fish for food, social, and ceremonial purposes includes an incidental right to access their fishing locations.

Constitution on April 17, 1982: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (*Sparrow*) at para. 37; *Gray; Sappier* at para. 57. In determining the question of extinguishment, the court is to analyse the purpose of the legislation: *Gladstone* at paras. 35–37.

While the intent to extinguish must be clear and plain, it is arguable that it may not need to be express: *Gray; Sappier* at para. 57; *Gladstone* at 34.⁷ An example of a finding of extinguishment is the commercial hunting right under Treaty 8, which the Supreme Court of Canada has held, was extinguished by the *Natural Resources Transfer Agreement, 1930*, a constitutional instrument: *R. v. Horseman*, [1990] 1 S.C.R. 901 (*Horseman*). Regulating a right, even in great detail and including licensing, does not equal extinguishment: *Sparrow* at paras. 34 and 36; *Gray; Sappier* at para 60. While surrendering lands may extinguish Aboriginal title, it does not necessarily extinguish an Aboriginal right to fish on the surrendered lands: *Adams* at paras. 48–49.

Infringement and justification

Aboriginal rights are not absolute — they may be infringed by a competent legislative authority if the infringement can be justified.

If the court confirms the existence of an unextinguished Aboriginal right, the trial moves into a second stage based on the two-step infringement/justification analysis set out in *Sparrow*. As a general rule, the infringement and justification analysis is the same for Aboriginal rights and for treaty rights: *Côté* at para. 33.

Infringement

The first step is to determine whether there has been a *prima facie* infringement of the Aboriginal right. Factors to be considered include:

- whether the limitation is unreasonable,
- whether the regulation imposes undue hardship, and
- whether the regulation denies the right-holders their preferred means of exercising the right (*Sparrow* at para. 70).

A negative answer to any of these questions does not necessarily prohibit a finding of a *prima facie* infringement: *Gladstone* at para. 43.

The infringement analysis begins with determining the nature and scope of the particular Aboriginal right at issue. Therefore, if the Crown has admitted the right, it is critical that you adduce evidence in relation to the right to set the foundation for the infringement analysis.

⁷ Note that in *Gladstone*, relied upon by the court in *Gray; Sappier*, the court suggested that “perhaps” Aboriginal rights could be extinguished implicitly.

When considering the issue of infringement, the court must separately examine the effect of the impugned legislation. Applying the *Sparrow* analysis for infringement may be varied based on the factual context; for example, in *Sparrow* the challenge was to the net length restriction, while in *Gladstone* the challenge was to Canada's broader fisheries management scheme: *Gladstone* at para. 40. Consequently, in *Gladstone* the court considered whether the entire regulatory scheme, not simply the section under which the charge was laid, infringed the appellants' rights: *Gladstone* at para. 42.

When analyzing a regulatory scheme, the courts are to consider whether the cumulative effect of the scheme leads to a *prima facie* infringement, not each constituent part of the scheme: *Gladstone* at para. 52; *Adams* at para. 50. The question is whether there has been "meaningful diminution of the right": *Gladstone* at para. 43.

Examples of government regulations that may constitute a *prima facie* infringement include:

- limiting the method, timing, or extent: *Badger* at para. 90; *Marshall No. 1* at para. 65;
- imposing a user fee: *Côté* at para. 78;
- failing to recognize the right, plus applying a law regulating the right: *Powley* at para. 47;
- limiting the amount harvested through the exercise of a commercial right: *Gladstone* paras. 52–53; and
- a blanket prohibition: *Côté* and *Morris*.

While a licence requirement is not in itself a *prima facie* infringement, mandatory conditions that are part of a licence may constitute a *prima facie* infringement: *R. v. Nikal*, [1996] 1 S.C.R. 1013 (*Nikal*) at paras. 99–103.

A blanket prohibition along with a government decision-maker's unstructured discretion to permit the exercising of the right will likely constitute a *prima facie* infringement:

The provision [under the fishery regulations] enacts a blanket prohibition on fishing in the absence of licence. Under ss. 5(3) and 5(9) of the *Regulations*, the Minister, at his or her discretion, may issue a special permit to an aboriginal person authorizing them to fish for their own subsistence. But the regulations do not prescribe any criteria to guide or structure the exercise of this discretion. *Such a regulatory scheme must, in the very least, structure the exercise of a discretionary power to ensure that the power is exercised in a manner consistent with the Crown's special fiduciary duties towards aboriginal peoples.*

Côté at para. 76 (emphasis added)

Similarly, in *Adams*, the companion case to *Côté*, the court stated:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some

explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the Sparrow test.

Adams at para. 54

To avoid unstructured discretion, there must be sufficient directives provided to Crown officials to ensure Aboriginal rights are respected: *R. v. Marshall*, [1999] S.C.R. 456 (*Marshall No. 2*) at para. 64.

The infringement analysis may be different when provincial legislation infringes rather than federal, because of the effect of section 88 of *Indian Act*: *Côté* at para. 33.

Finally, on the understanding that the infringement test for Aboriginal rights and treaty rights is the same based on *Morris*, the test has been much simplified. A *prima facie* infringement may be any interference that is more than insignificant: *Morris* at para. 50. If there is “meaningful diminution” of the right, it is *prima facie* interference: *Morris* at para. 53.

Justification

Following a finding of a *prima facie* infringement, the onus falls on the Crown to prove the infringement is justified.

The Crown must first demonstrate a “compelling and substantial” legislative objective for infringing the right: *Sparrow* at para. 71. For an objective to be compelling and substantial, it must be informed by the fundamental purposes of section 5(1); in other words, recognition and reconciliation: *Sparrow* at para. 72; *Adams* at para. 57. If the court finds that there is no valid legislative objective, the infringement cannot be justified.

Limitations on Aboriginal rights that have objectives sufficiently important to the broader community as a whole are a necessary part of reconciliation and, therefore, may be justified: *Gladstone* at para. 73; for example, conservation objectives.

The pursuit of regional and economic fairness and the recognition of the historical reliance on and participation in the fishery of non-Aboriginal groups may also be justified objectives in certain circumstances: *Gladstone* at para. 75. Without evidence of economic importance, legislation that facilitates a sports fishery to the detriment of an Aboriginal right likely will not be justified: *Côté* at para. 82; *Adams* at para. 58.

If a valid legislative objective is identified, the Crown must also demonstrate that the government's actions are consistent with the Crown's special trust relationship and responsibility toward Aboriginal people; in other words, does achieving the objective uphold the honour of the Crown?: *Sparrow* para. 75. In the case of allocating fisheries, this aspect of the justification analysis translates into a priority for the Aboriginal fishery after valid conservation measures: *Sparrow* at para. 78.

Depending on the circumstances, the courts may also ask whether:

- there has been as minimal infringement as possible to effect the desired result (minimal infringement does not necessarily mean the least possible infringement); to be justified, the infringement must be reasonable: *Nikal* at para. 110;
- whether, if expropriation has occurred, fair compensation is available: *Sparrow* at para. 82; and
- whether the appellants have been consulted: *Sparrow* at para. 82.⁸

This list of factors is not exhaustive: *Sparrow* at para. 83.

In the case of commercial rights, priority does not mean exclusivity: *Gladstone* at para. 61. On a case-by-case analysis, government must demonstrate that the process of the actual allocation of the resource “reflect the prior interest of aboriginal rights holders in the fishery”: *Gladstone* at para. 62. The question is whether the government “has truly taken into account the existence of aboriginal rights.” The court must determine whether the government has taken into account the existence and importance of the right: *Gladstone* at para. 63. For a non-exhaustive list of factors, see para. 64 of *Sparrow*.

Finally, the courts apply a liberal and purposive interpretation to legislation that affects Aboriginal people. Any doubts or ambiguities are resolved in favour of Aboriginal people: *R. v. Nowegijick*, [1983] 1 S.C.R. 29 (*Nowegijick*). Consequently, there is a presumption that the legislature does not intend to limit or abrogate Aboriginal rights. This principle was summarized by LaForest J. in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 (*Peguis Indian Band*) at p. 64:

As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them.

8 For a recent application of law on consultation and priority factors, see *R. v. Douglas*, 2007 BCCA 265.

Treaty rights

While most of British Columbia is not covered by treaty, First Nations on southern Vancouver Island and in northeastern British Columbia do have historic treaty rights based on the Douglas Treaties and Treaty 8, respectively.

Proving the existence of a treaty right

The principles of treaty interpretation were summarized by McLachlin J., as she then was, in *Marshall No. 1* at para. 78 [citations have been removed]:

- Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
- Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories.
- The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
- In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.
- In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
- The words of the treaty must be given the sense that they would naturally have held for the parties at the time.
- A technical or contractual interpretation of treaty wording should be avoided.

While construing the language generously, courts cannot alter the terms of the treaty by exceeding what “is possible in the language” or realistic. Treaty rights must not be interpreted in a static or rigid way; they are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.

For differing lower court examples of the application of the above principles, see *R. v. Polches*, 2008 NBCA 1⁹ and *Chingee v. Canada (Attorney General)*, 2005 BCCA 446.¹⁰

⁹ Leave to appeal dismissed, *R. v. Polches*, [2006] S.C.C.A. No. 230.

¹⁰ Leave to appeal dismissed, *Chingee v. Canada (Attorney General)*, [2005] S.C.C.A. No. 515.

Core of the treaty right

In *Marshall No. 1*, McLachlin J., as she then was, developed a test for treaty rights based on “determining what modern practices are reasonably incidental to the core treaty right in its modern context ...”: *Marshall No. 1*, supra at para. 78. According to McLachlin J., the core treaty right derived from the parties’ objectives and their resulting common intention: *Marshall No. 1* at para. 96.¹¹

Treaty rights incidental to a core treaty right are not necessarily restricted to specific rights or practices contemplated by the parties at the time of the treaty. Justice McLachlin acknowledged that there could be modern incidental treaty rights: *Marshall No. 1* at paras. 83, 113. Similarly, in *Marshall No. 2*, the court described the identification of the modern counterpart to a treaty right as the “logical evolution of treaty rights ...” at para. 20.

The Supreme Court of Canada’s reasons in *Marshall No. 1* and *Marshall No. 2* were later applied by the New Brunswick Court of Appeal in *R. v. Bernard*, [2003] 4 C.N.L.R. 48 (*Bernard*). In separate opinions, Justice Robertson and Justice Daigle agreed that the Supreme Court had formulated a “logical evolution” test for treaty rights: *Bernard* at paras. 201, 333. The Supreme Court eventually confirmed applicability of the “logical evolution” test, but disagreed with its application in the specific circumstances: *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 (*Marshall; Bernard*) at paras. 13–36.

Prima facie infringement of a treaty right by provincial legislation

When provincial regulation allegedly infringes a treaty right, the first step is to characterize the treaty right and delineate any limit on the right; for example, there is no treaty right to hunt dangerously: *Morris* at para. 14.

Second, the court must determine whether the impugned statutory provision is valid and applicable under the division of powers (section 91(24)) and under section 88 of the *Indian Act*: *Morris* at para. 15.

If the provision interferes in only an insignificant way, it does not amount to infringement: *Morris* at para. 50. If there is “meaningful diminution” of the right, it is *prima facie* infringement: *Morris* at para. 53.

If there has been a *prima facie* infringement of a treaty right by a provincial law, the law is inapplicable due to exclusive federal jurisdiction under s. 91(24) and is not saved by section 88 of the *Indian Act*.

¹¹ While Justice Binnie, writing for the majority, disagreed with McLachlin J.’s specific limitation of the treaty right, he did not disagree with her basic analysis for identifying the core treaty right: *Marshall No. 1* at para. 54. The federal court later explored the characteristics of a core treaty right in *Beattie v. Canada*, [2001] 2 C.N.L.R. 26 (affirmed; *Beattie v. Canada*, [2002] 3 C.N.L.R. 1); see especially paras. 33, 34, 48.

Importantly, the enactment of section 5(1) did not alter the division of powers — “Indians and lands reserved for the Indians” remain under exclusive federal jurisdiction. Consequently, a provincial law that infringes a treaty right cannot be justified through the *Sparrow* analysis: *Morris* at para. 55.

Métis rights

A modified *Van der Peet* analysis is employed for the proof of an Aboriginal right of the Métis people. The modification consists of a change to the relevant time period for the “integral to the distinctive culture” test. For Métis rights, the customs and traditions that form the basis of the right are those that were important features of Métis society prior to the time of effective European control and persist in the present day: *Powley* at para. 18. Effective control may mean the government’s encouragement to settle in the area: *Powley* at para. 40.

Identifying the proper rights-holder group will be based on “demographic evidence, proof of shared customs, traditions, and a collective identity ...”: *Powley* at para. 23. An individual must demonstrate “ancestrally based membership in the present community”: *Powley* at para. 24. He or she must self-identify (cannot be of recent vintage), have an ancestral connection, and be accepted by the modern community.

As with any other case based on an Aboriginal right claim, it is important to carefully assess your client’s commitment and the support of the larger community on whose behalf the right is asserted. For recent examples of both success and failure in proving a Métis hunting right see *R. v. Goodon*, 2008 MBPC 59 and *R. v. Willison*, 2006 BCSC 985.

Alternatives to trial

If your client does not wish to have a trial or is financially unable to do so, it is critical that he or she understands that in order to plead guilty or to engage in restorative justice or alternative measures, the basic requirement is that he or she is willing to take responsibility for his or her actions. If unable to do so, the court cannot accept your client's plea, nor will he or she be accepted into an alternative program to deal with the charge(s). Alternatives to trial cannot be simply a way to deal with the charge(s) quickly or to make a matter disappear.

Restorative justice

Some Aboriginal communities have restorative justice programs that, with your client's consent, you should contact to discuss possible acceptance. Once this is done, or even at the same time, you should also have "without prejudice" discussions with the Crown to determine whether they would agree to having the matter dealt with in a forum outside the court process. Without the Crown's consent, it is not possible to proceed in an alternative fashion.

Even if your client's Aboriginal community does not have a restorative justice program, you and your client should come up with a proposal to put to Crown as an option for dealing with the matter in some alternative fashion. Depending on where your client is from and the location of the alleged offence, it may be appropriate to contact a restorative justice program from another Aboriginal community to see if they can assist. For example, Sto:lo Nation's Qwi:qwelstom program states in its materials that it accepts referrals from Aboriginal communities from outside the nation's cultural area, including from other provinces.

Each restorative justice program operates differently in its process for accepting referrals and dealing with clients. Continuing with Qwi:qwelstom as an example, its brochure explains that the program is based on traditional Sto:lo forms of dispute resolution, where the affected community and family members gather to discuss the charge(s) and to reach consensus on how best to address the harm and restore balance and harmony. The Heiltsuk Restorative Justice Program of Bella Bella applies a similar approach. The Heiltsuk program relies on a restorative justice committee, made up of hereditary chiefs and community resource people, which meets with the defendant and his or her family and other interested parties. Like Qwi:qwelstom, the goal is to address the harm and develop an appropriate response by way of consensus.

Guilty plea and sentencing

There may be occasions where your client's instructions are that he or she wishes to deal with the matter sooner than later and to proceed directly to a guilty plea and sentencing. The usual sanction is a fine, but as with criminal charges in crafting the sentence, the court takes into account the circumstances of the offence, the offender's personal circumstances, and his or her record of similar offences. The sentence may also include forfeiture of items seized, if any. In the case of a fisheries charge, this might include fish, proceeds from the sale of fish, a boat,¹² or net.¹³ Depending on the length of time from seizure to sentencing, your client may or may not be interested in seeking the return of frozen fish.

Advise the court if your client requires time to pay a fine. If your client has no ability to pay a fine, present the court with other viable sanctions that your client would be prepared to engage in, such as community work service as part of a probation order. The probation order could be non-reporting with simply a term of work service hours. If your client lives on or near his or her reserve, engaging with the First Nation would be helpful to determine what type of community work service for which there may be a need and would be relevant to your client and the charges he or she faces.

There may be instances where, because of your client's previous record, or perhaps non-payment of fines or non-compliance with probation orders, the Crown will seek a more serious sanction, such as jail or a conditional sentence order. You should first satisfy yourself that these sentences are available under the enabling legislation (they are under the *Fisheries Act*). Then develop your client's case as to why the court should not impose jail, either real time or to be served in the community. Sentencing a person to jail for pursuing his or her Aboriginal right — perhaps to hunt or fish and provide for his or her family, an act that is not inherently criminal — is inconsistent with the sentencing principles of proportionality and parity.

Even at the sentencing stage, do not overlook the value of consulting with your client's Aboriginal community's restorative justice program, if there is one, or with an appropriate representative of the Aboriginal community. Of course, it is always important to first ensure this is consistent with your client's wishes.

¹² Note that there is no interest payable on proceeds of the sale of fish where there is ultimately an acquittal *R. v. Gladstone*, [2005] 1 SCR 325.

¹³ It is worth noting that a defendant can apply to the court for return of items seized before a matter is concluded, especially if the items are needed to engage in traditional food harvesting.

First Nations Court

Clients who self-identify as Aboriginal and are going to plead guilty to their charges may be able to have their case transferred to First Nations Court in New Westminster. The court handles bail and sentencing hearings and related child protection matters.

First Nations Court takes a holistic, restorative, and healing approach to sentencing that may be more culturally appropriate and meaningful to your client. The judge, Crown counsel, Aboriginal community members, and your client's family will work with you and your client to come up with a healing plan that is appropriate for him or her.

More information about the First Nations Court is available on the LSS website at www.legalaid.bc.ca (click Aboriginal — Aboriginal Gladue rights; then on the left-hand navigation panel, click First Nations Court). For information about applying to transfer your client's case to First Nations Court, call the First Nations Court duty counsel at 1-877-601-6066 (no charge from anywhere in BC).

Case studies

The following examples illustrate the application of some of the issues, case law, and practice points discussed in this booklet.

Aboriginal rights trial

R. v. Victor et al. (2005) 2005 BCPC 0366; 2007 BCSC 802

This matter, originally involving 21 accused people primarily from the Cheam First Nation (the “Cheam”), was before the court for 12 days of trial in 2003 and 2004. The Crown admitted the Aboriginal right to fish as alleged in the Information, and following the first phase of the trial on the facts and a finding by the trial judge that the Crown had met its burden of proof on the facts, the trial moved to the infringement stage. The burden shifted to defence to provide evidence in relation to the nature and scope of the affected right and to show that there had been *prima facie* infringement of the right.

The trial judge found that the defendants had not established infringement because they “... failed to sufficiently articulate their collective Aboriginal right ... and have not adduced sufficient evidence for this Court to conclude there was an infringement”: at para. 21. At para 22, the court went on to conclude that it was the position of the Cheam Band that was to be analysed, and not that of the individual defendants. The court described the evidence of the various defendants as conflicting, and found that it was impossible to determine the collective position: para. 31. The court also noted that there was no anthropological, ethno-historic, or cultural evidence to develop the “Cheam Aboriginal Right”: para. 24. In reaching this conclusion, the court said that all that had been demonstrated was an inconvenience to the defendants’ personal fishing practices, which did not amount to infringement.

The appeal judge found that the trial judge had erred. He described the considerable evidence that had been adduced at trial on the defendants’ fishing practices and preferences, and their understanding of their right to fish.

Stated simply, the court said at para. 4 that there was ample evidence of the right involved, which included the right to choose the time to fish, and that DFO closures amounted to a *prima facie* infringement of the right for all the defendants, except those who had given evidence that they were engaged in a specific ceremonial fishery.

The appeal judge found that the trial judge erred by “placing any particular significance on the various positions taken by Aboriginal groups participating in the fishery. The bands did not adopt these positions as a definition of what they see as their Aboriginal right”: para. 24. Further, the judge concluded what certain witnesses knew or did not know of the various bands’ positions was irrelevant to their Aboriginal right to fish for Early Stuart salmon.

On appeal, the appeal judge described the Aboriginal right in the same terms as was done in *Nikal*: the right to choose when to fish the river. He noted that recognition of the right in this form, unfettered by time constraints, is consistent with the principles articulated in *Sparrow*, particularly for a fishery that had been historically unrestrained. The court said the third part of the *Sparrow* infringement analysis was especially relevant and should have been applied by the trial judge and was not: were the defendants denied their preferred means in exercising the right? It was pointed out that fishing in and around DFO closures was properly a matter for the Crown to justify. The court also noted that there was “no controversy around the fact the defendants were entitled to participate in the Aboriginal fishery on the Fraser and ... anthropological evidence is not necessary to establish that the restriction on the right by way of closures is the invention of government regulation”: para. 16.

Also of note are the appeal judge’s comments in relation to the Aboriginal fishing right of the two non-Cheam members. Although the Crown had admitted their right to fish with their relatives, the appeal judge noted that distinguishing between members of Indian bands introduces artificial elements into the identification of the collective to which Aboriginal rights attach. This is because bands are creations of the *Indian Act*, which at times serves to separate people with family connections who engage together in traditional activities.

After the appeal, dates were set for the justification stage of the trial. The defendants then applied for a judicial stay of proceedings on the basis of unreasonable delay pursuant to section 11 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.) [Charter]. On January 18, 2008, all outstanding charges were stayed by the court.

Restorative justice approach

A Fraser River First Nation

Two individuals of a First Nation were charged with fishing without a licence and unlawful possession of fish. The individuals had allegedly fished on the Fraser River, within their traditional territory, during a time that DFO considered to be closed. Under the *Fisheries Act* and its regulations, Aboriginal food fishing on the Fraser River is closed at all times unless opened pursuant to an Aboriginal Communal Fishing Licence (ACFL). ACFLs issued for food, social, and ceremonial purposes on the Fraser River contain terms such as the targeted species, geographical boundaries, type of gear, dates, and times when DFO considers the fishery to be open.

The individuals and their First Nation contacted legal counsel, and the First Nation confirmed that it would cover the costs of their defence. The parameters of the retainer were confirmed with the two defendants and the First Nation to clarify that legal counsel could assist only so long as everyone's instructions remained consistent with respect to how the matter ought to proceed.

The First Nation had a good working relationship with DFO, and the two individuals had no previous fisheries record. The amount of fish alleged to have been illegally caught was relatively small, and DFO did not seize any gear or fish at the time of its investigation.

Defence counsel had an initial meeting with both individuals and a representative of the First Nation at the band administration office. They reviewed the Crown's particulars and discussed options for how the matter could proceed and be dealt with. They decided that counsel should speak with the Crown about the matter being one that was appropriate for a restorative justice approach. The Crown agreed to consider a proposal and the matter was adjourned for two months to provide the defendants with time to do so.

The defendants and the same representative of the First Nation held another meeting at the band office and they developed a proposal in which the defendants would fish and then smoke and freeze the catch for the community's deep freezers. The defendants would distribute some of the prepared catch to elders, the disabled, and widows, and the community would use the remaining catch for feasts and ceremonies. Also as part of the proposal, the defendants would assist with clean-up and maintenance of the community's wharf. The defendants and the First Nation's representative also developed a timeframe in which the defendants would complete the plan.

The Crown accepted the proposed plan and the court adjourned the matter once more. Both defendants carried out the plan as agreed. The First Nation representative confirmed in writing that the plan had been completed, a copy was provided to the Crown, and the charges were stayed.

A coastal First Nation

The client was charged with illegal possession of abalone. The abalone was discovered during a search incidental to an investigation in relation to a serious criminal offence. Abalone is an important traditional food for the First Nation and, due to over-harvesting by commercial operators, it has been subject to an absolute harvesting prohibition since 1990, including the Aboriginal harvest. Despite the decade-long harvesting prohibition, the stocks are slow in recovering and abalone remains protected under the *Species at Risk Act*, S.C. 2002, c. 29. Fines for conviction of illegal harvesting have been substantial against Aboriginal fishers, and even more so for commercial poachers who do the most damage to the stocks.

In this case, the matter was confirmed to proceed by way of an Aboriginal rights defence. Further, there was also a *Charter* issue in relation to the lawfulness of the search. The client obtained a legal aid referral. Because this community is part of a circuit court, the scheduling of trial time posed an unusual challenge.

The client instructed counsel to speak with the director of the First Nation's restorative justice program to determine whether the case might be accepted. Once counsel confirmed with the First Nation that the case would be accepted, counsel approached the Crown, and the Crown agreed in principle to give consideration to dealing with the matter through the program. During the time this case was before the court, there had been a fairly recently reported sentencing decision from northern BC, also involving abalone, that resulted in guilty pleas and the subsequent inclusion of restorative justice as a component of the probationary period.

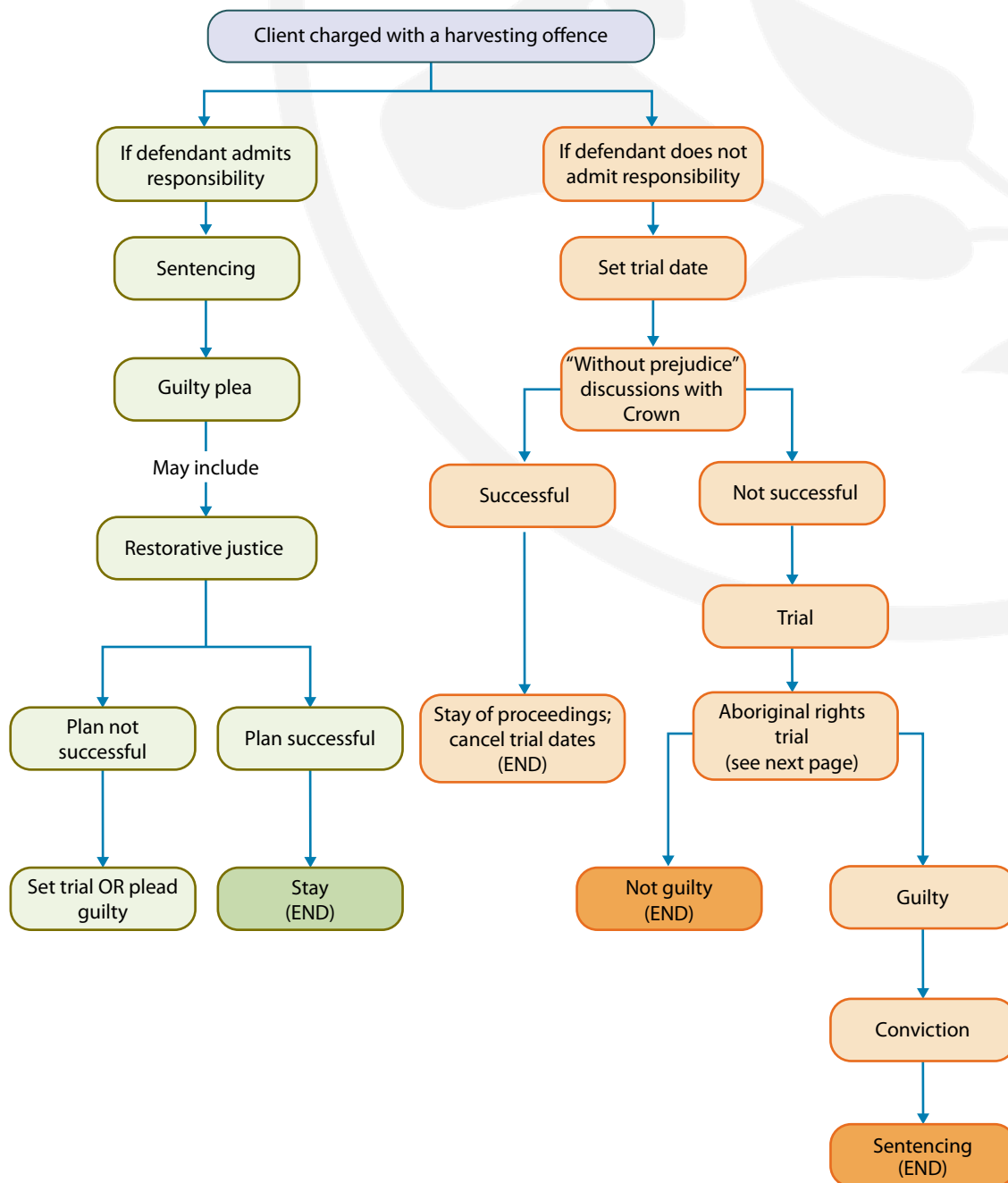
During the planning phase, counsel met with program staff, members of the council of hereditary chiefs, the First Nation's fisheries co-management department, the client and her family, and Crown. Frustration was expressed because of the criminalization of members of the First Nation who engage in the harvesting of a valued traditional food that has been decimated not by their methods, but those of commercial interests. Knowing that the Crown takes the offence seriously, the group discussed the monetary penalty that the client potentially faced. The First Nation discussed its position in relation to an Aboriginal rights trial and the logistics of such a trial on the circuit outside the presence of the Crown.

At this first meeting, it was agreed by consensus that the matter should be dealt with outside of court and that the program would work with the client to develop a plan that would satisfy its objectives and those of the Crown in terms of accountability. Above all, the client confirmed that she wished to take responsibility, and provided her instructions to proceed in this manner.

Defence counsel communicated with members of the restorative justice program and, after the necessary planning was undertaken, they organized a circle to develop the restorative justice plan. The circle involved the same parties as had met previously, although by agreement defence and Crown counsel participated solely as witnesses to the process. After the circle, participants mutually agreed upon a plan, it was written up, and defence counsel presented the plan to Crown who agreed. During this time, the matter was before the court and adjourned a number of times. The court was informed that the parties were in discussion and that the matter would be dealt with through the restorative justice program.

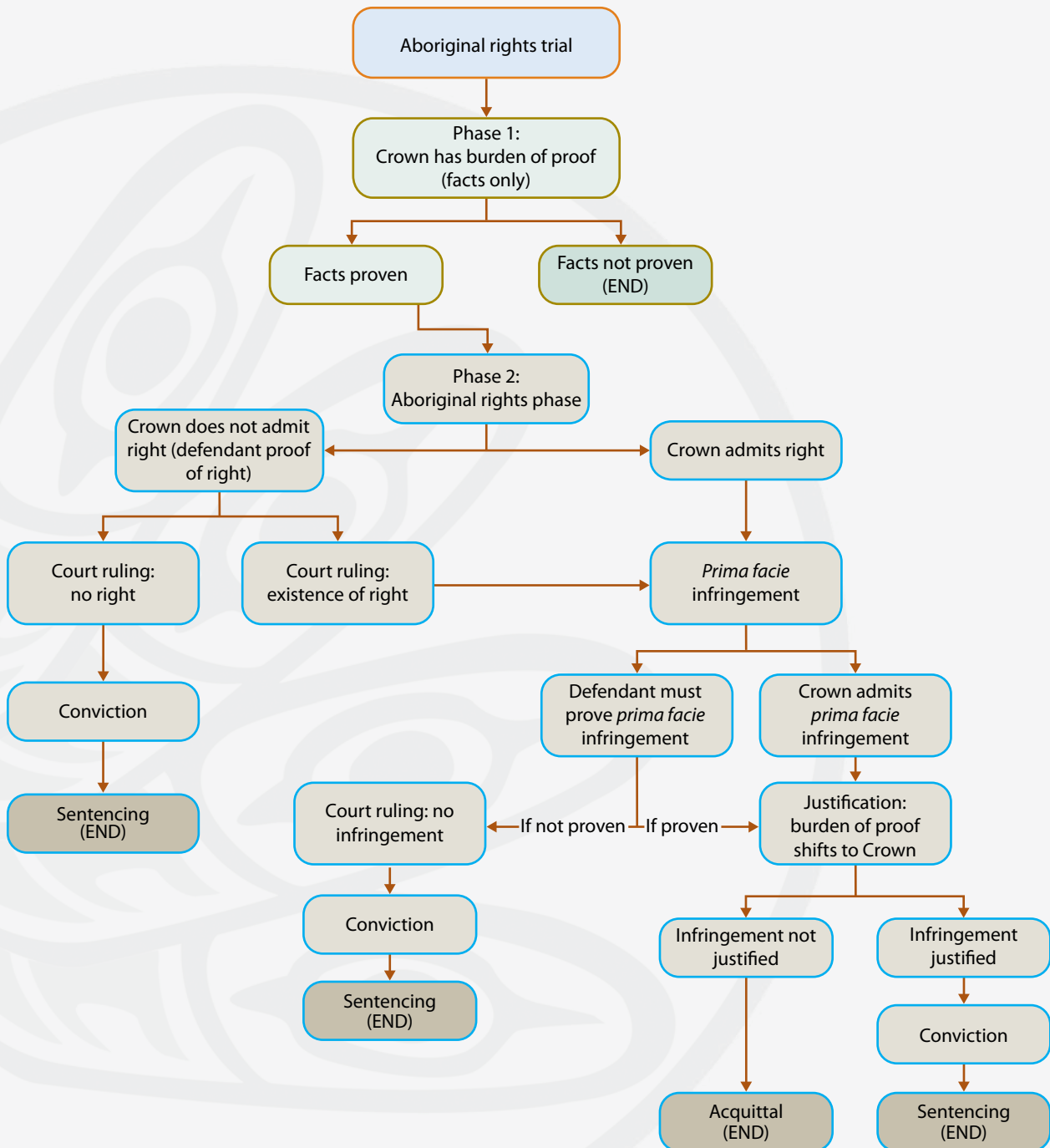
The plan involved the client doing research on abalone and, in particular, the reasons why the stocks were not replenishing despite the long closure. Part of the problem has to do with the way in which abalone reproduce such that even an apparently small harvest can significantly impact a recovering colony. The client prepared an informational pamphlet for distribution in the community and did a presentation on abalone to the school. She also assisted the fisheries co-management staff by participating with abalone survey work on the water. In this way, the client informed herself, her family, and her community about the nature of abalone and DFO's reasons for the closure. She also provided community service in a way with which she was comfortable and thereby took responsibility for her actions. The Crown was satisfied with the outcome and the charges were stayed in court.

Appendix 1: Aboriginal rights defence

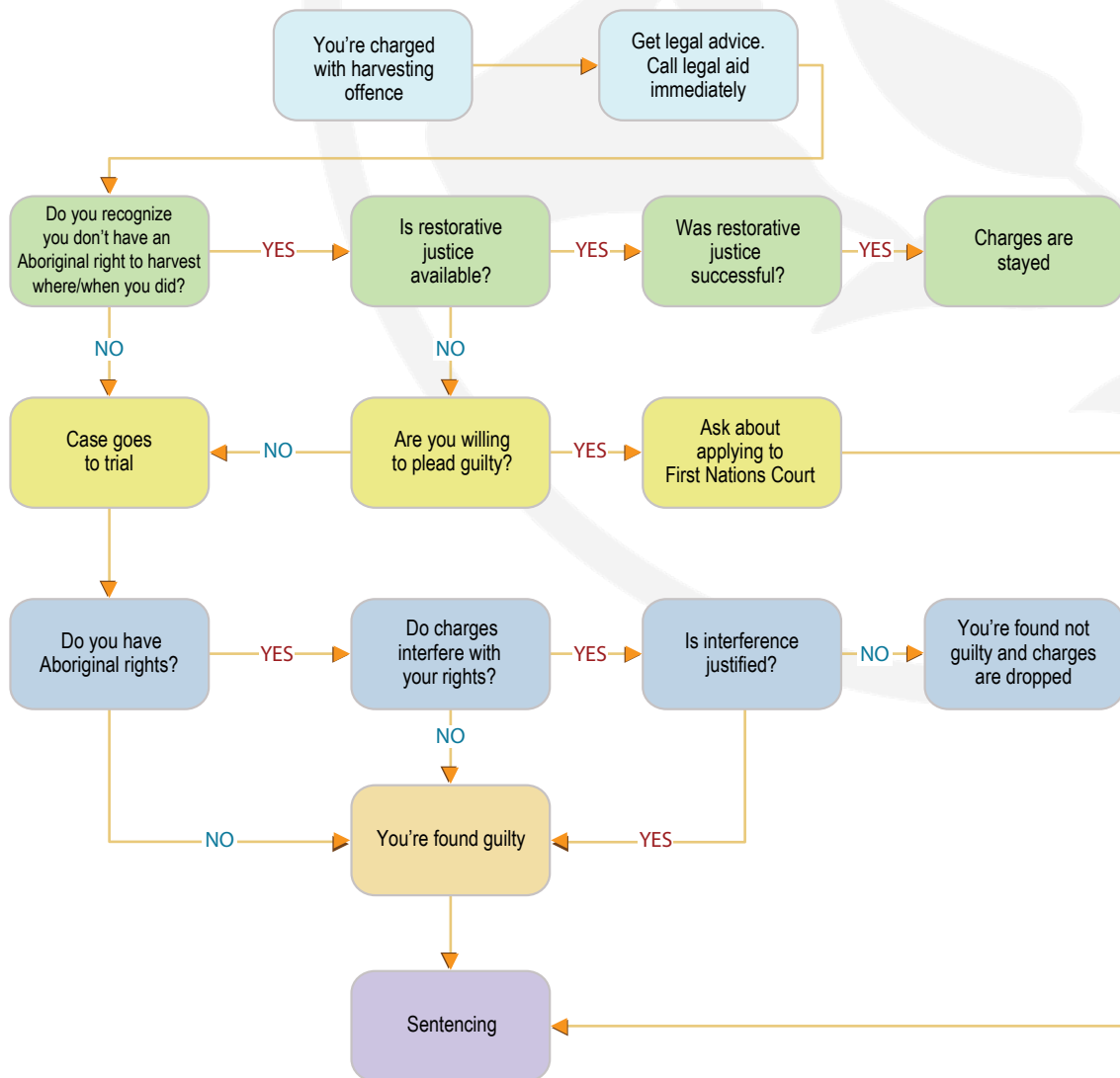


Continued over →

Appendix 1: Aboriginal rights defence (continued)



Appendix 2: Harvesting rights — Court process (for clients)



Legal aid

604-408-2172 (Greater Vancouver)
1-866-577-2525 (call no charge, elsewhere in BC)

First Nations Court duty counsel 1-877-601-6066 (call no charge from anywhere in BC to apply to have your matter heard in First Nations Court)

Table of cases and legislation

Jurisprudence

1. *Baker Lake (Hamlet of) v. Canada* (Minister of Indian Affairs & Northern Development), [1980] 1 F.C. 518
2. *Beattie v. Canada*, [2001] 2 C.N.L.R. 26 (F.C.)
3. *Beattie v. Canada*, [2002] 3 C.N.L.R. 1 (F.C.A.)
4. *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313
5. *Chingee v. Canada (Attorney General)*, 2005 BCCA 446
6. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010
7. *Gladstone v. Canada*, [2005] 1 SCR 325
8. *Guerin v. The Queen*, [1984] 2 S.C.R. 335
9. *Hunt v. Halcan Log Services Ltd.*, [1987] C.N.L.R. 63 (B.C.S.C.)
10. *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R.
11. *R. v. Adams*, [1996] 3 S.C.R. 101
12. *R. v. Badger*, [1996] 1 S.C.R. 771
13. *R. v. Bartleman*, [1984] 55 B.C.L.R. 78
14. *R. v. Bernard*, (2003) 4 C.N.L.R. 48 (N.B.C.A.)
15. *R. v. Côté*, [1996] 3 S.C.R. 139
16. *R. v. Denault*, [2007] B.C.J. No. 2104, (B.C.P.C.)
17. *R. v. Dick*, [1989] 1 C.N.L.R. 132, (B.C.P.C.)
18. *R. v. Jack*, [1996] 2 C.N.L.R. 113 (B.C.C.A.)
19. *R. v. Gladstone*, [1996] 2 S.C.R. 723
20. *R. v. Goodon*, 2008 MBPC 59
21. *R. v. Horseman*, [1990] 1 S.C.R. 901
22. *R. v. Marshall*, [1999] 3 S.C.R. 456
23. *R. v. Marshall*, [1999] 3 S.C.R. 533
24. *R. v. Marshall; R v. Bernard*, [2005] 2 S.C.R. 220
25. *R. v. Meshake*, 2007 ONCA 337
26. *R. v. Mitchell*, [2003] 2 S.C.R. 396, 2003 SCC 49
27. *R. v. Morris*, [2006] S.C.J. No. 59
28. *R. v. Nikal*, [1996] 1 S.C.R. 1013
29. *R. v. Nowegijick*, [1983] 1 S.C.R. 29
30. *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672
31. *R. v. Pamajewon*, [1996] 2 S.C.R. 821
32. *R. v. Polches*, 2008 NBCA 1
33. *R. v. Powley*, [2003] 2 S.C.R. 207
34. *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686

-
35. *R. v. Shipman*, 2007 ONCA 338
 36. *R. v. Simon*, [1985] 2 S.C.R. 387
 37. *R. v. Sparrow*, [1990] 1 S.C.R. 1075
 38. *R. v. Sundown*, [1999] 1 S.C.R. 393
 39. *R. v. Van der Peet*, [1996] 2 S.C.R. 507
 40. *R. v. Victor et al.*, 2005 BCPC 0366
 41. *R. v. Victor*, 2007 BCSC 802
 42. *R. v. Willison*, 2006 BCSC 985
 43. *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46

Legislation

1. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.)
2. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11
3. *Fisheries Act*, R.S.B.C. 1996, C. 149
4. *Hunting Licensing Regulation*, B.C. Reg. 8/99
5. *Indian Act*, R.S.C. 1985, C. I-5
6. *Species at Risk Act*, S.C. 2002, C. 29

Additional Resources

Get more information



The Legal Services Society (LSS) website has information and resources for Aboriginal people, including information on Gladue, Aboriginal legal issues, and who can help. Go to www.legalaid.bc.ca and click Aboriginal to find out more.

The LSS website also has resources and publications for lawyers. Go to www.legalaid.bc.ca and, under Lawyers, click Practice resources.



How to get free copies of LSS Aboriginal publications



LSS offers many free publications on Aboriginal issues, including a fact sheet and booklet for clients about Aboriginal harvesting rights (fishing, hunting, and gathering), as well as materials on Gladue rights, the *Indian Residential Schools Settlement Agreement*, and social assistance on reserve.

Read online: www.legalaid.bc.ca (under Aboriginal, click Aboriginal publications)

Order online: www.crownpub.bc.ca (under Quick Links to Publications, click Legal Services Society)

Stay connected



facebook.com/legalaidbc



twitter.com/legalaidbc



elan.lss.bc.ca



legalaid.bc.ca/rss



youtube.com/legalaidbc

