

Citation: Paul v. Forest  
Appeals Commission

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2001 BCCA 411

Docket

CA026440/V03552

:

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COURT OF APPEAL FOR BRITISH COLUMBIA **In the Matter of the *Judicial Procedure Act*, R.S.B.C. 1996, Chap. 241, and in the Matter of the Decision of the Forest Appeals Commission dated April 24, 1998, made under the *Forest Practices Code*, R.S.B.C. 1996, Chap.**  
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BETWEEN:

**THOMAS PAUL**

PETITIONER (APPELLANT)

AND:

**THE FOREST APPEALS COMMISSION**

RESPONDENT (RESPONDENT)

AND:

**THE ATTORNEY GENERAL OF BRITISH COLUMBIA AND THE MINISTRY OF FORESTS**

RESPONDENT (APPELLANT)

AND:

**THE COUNCIL OF FOREST INDUSTRIES**

INTERVENOR

Before:

The Honourable Mr. Justice Lambert

The Honourable Mr. Justice Donald

The Honourable Madam Justice Huddart

H. Braker, Q.C. and A. Brown Counsel for the Appellant Thomas Paul

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C.F. Willms Counsel for The Council of Forest Industries, Intervenor

Place and Date of Hearing: Vancouver, British Columbia  
7-8 December, 2000

Place and Date of Judgment: Vancouver, British Columbia  
14 June, 2001

**Written Reasons by:** The Honourable Mr. Justice Lambert **Concurred in, with additional reasons:** (p.49, para.92) The Honourable Mr. Justice Donald **Dissenting Reasons by:** (p.56, para. 110) The Honourable Madam Justice Huddart

**Reasons for Judgment of the Honourable Mr. Justice Lambert:**

## I

[1] This appeal raises two questions.

[2] The first question is whether the Provincial Legislature has the constitutional capacity to confer on the Forest Appeals Commission the jurisdiction to decide questions of aboriginal rights and aboriginal title, including questions of entitlement, infringement and justification, and past extinguishment, in the context of deciding appeals about alleged violations of the **Forest Practices Code**. That is a constitutional question.

[3] The second question is whether, if the Provincial Legislature has that constitutional power, it has exercised it by conferring that jurisdiction on the Forest Appeals Commission. That is a statutory interpretation question.

## II

[4] Thomas Paul is an Indian, registered under the **Indian Act**. He is a member of the Ahousaht Band, part of the Nuuchah-Nulth people. He lives on an Indian reserve at Ahousaht on Flores Island. Flores Island is part of the traditional territory of the Ahousaht Band.

[5] In the Summer of 1994, Mr. Paul obtained permission from Chief Atleo of the Ahousaht Band, and from the Ahousaht Band Council, to cut down some red cedar trees to use in making a deck for Mr. Paul's house. He cut down two trees directly across from Atleo River. The following summer, Mr. Paul cut down a third red cedar and found a fourth windfall log. In late summer he towed the four logs to a small sawmill on Vargas Island and left them there to be sawn into lumber for use on his house. (The nearest lumber supply yard for Mr. Paul is in Tofino, one and a half hours, by boat, from Ahousaht.)

[6] The logs were discovered at the sawmill on Vargas Island by Forest Service Officers, who seized them. The logs were valued at \$2,329. The Forest Service Officers spoke to Mr. Paul. They arranged for an "Opportunity to be Heard" hearing for Mr. Paul before the District Manager. The hearing took place on 30 September 1996 and on 9 October 1996 the District Manager issued a "Notice of Determination" to the effect that the cutting of the trees was in contravention of s-s. 96(1) of the **Forest Practices Code of British Columbia** and that the removal of the timber without any timber marks being applied to it was in contravention of s-s. 65(3) of the **Forest Act**.

[7] Those two subsections read in this way:

### **Forest Practices Code of British Columbia Act**

#### **Unauthorized timber harvest operations**

**96** (1) A person must not cut, damage or destroy Crown timber unless authorized to do so

(a) under an agreement under the *Forest Act* or under a provision of the *Forest Act*,

(b) under a grant of Crown land made under the *Land Act*,  
(c) under the *Mineral Tenure Act* for the purpose of locating  
a claim or for other prescribed purposes,  
(d) under the *Park Act*,  
(e) by the regulations, in the course of carrying out duties  
as a land surveyor, or  
(f) by the regulations, in the course of fire control or  
suppression operations.

. . .

**Forest Act**

**Timber marks**

65.(3) No person shall remove timber from Crown land or from private land unless the timber has been conspicuously marked in the prescribed manner with a timber mark.

(my emphasis)

(Section 65(3) of the **Forest Act** is the version that was in effect at the relevant time. It has now been renumbered and amended and appears in the **Forest Act** as s.84(3).)

[8] Mr. Paul then appealed the District Manager's "Determination" to an Administrative Review Panel, comprised of three employees of the Ministry of Forests, under s.129 of the **Forest Practices Code**. The hearing took place on 14 February 1997. On 12 March 1997, the Administrative Review Panel released a decision to the effect that there had been a contravention of s-s. 65(3) of the **Forest Act** and s-s. 96(1) of the **Forest Practices Code**.

[9] Mr. Paul's next step was to appeal to the Forest Appeals Commission under s. 131 of the **Forest Practices Code**. The Forest Appeals Commission is established by the Lieutenant Governor in Council under authority conferred by the legislature of British Columbia under s. 194 of the **Code**. The Commission consists of a Chair, one or more Vice-Chairs and other members. Appointments "may be for a term of up to three years".

[10] After receiving written submissions, the Forest Appeals Commission, on 24 April 1998, decided what had been treated by the Commission as a preliminary matter of jurisdiction, namely, whether the Forest Appeals Commission had jurisdiction to hear Mr. Paul's appeal. The kernel of the Forest Appeals Commission decision, supported by reasons, is in this paragraph:

Although the Commission is prepared to hear and decide the aboriginal rights issues in this appeal, and is of the view that it has jurisdiction to do so, we are prepared to adjourn

these proceedings to enable the parties to bring an action in the B.C. Supreme Court to determine whether the Appellant has an aboriginal right to harvest timber for house construction, provided that the parties are in agreement to do so.

[11] At all stages of the process, Mr. Paul had asserted that he had cut the trees and that he had possessed the logs in the exercise of his aboriginal rights.

### III

[12] Mr. Paul appealed the Forest Appeals Commission's ruling on the preliminary point of jurisdiction to the Supreme Court of British Columbia under s-s. 141(1) of the **Forest Practices Code** "on a question of law or jurisdiction".

[13] The appeal came on for hearing in Supreme Court chambers. The chambers judge raised the question of whether there was any "decision" of the Forest Appeals Commission to appeal. After hearing submissions, and in the interests of expediting the matter, and by consent, the chambers judge permitted Mr. Paul to bring on a petition under the **Judicial Review Procedure Act** for an order in the nature of *certiorari* quashing the decision of the Forest Appeals Commission on the preliminary issue of its jurisdiction, and for a declaration, and for an order in the nature of prohibition, preventing the Forest Appeals Commission from considering and determining questions of Mr. Paul's aboriginal rights.

[14] The chambers judge decided that the Legislature had conferred on the Forest Appeals Commission, but not on a District Manager or an Administrative Review Panel, the power to decide questions of aboriginal title and aboriginal rights in the course of its judicial function in relation to contraventions of the **Forest Practices Code**, and that the Legislature had the constitutional capacity to do so.

[15] The chambers judge's decision is reported at (1999), 179 D.L.R. (4th) 351; (1999), 31 C.E.L.R. (N.S.) 141; and [2000] 1 C.N.L.R. 176.

[16] Mr. Paul has appealed to this Court from the chambers judge's decision on the two issues stated at the beginning of these reasons, a constitutional issue and a statutory interpretation issue. The Attorney General of British Columbia has also appealed, though his appeal is limited to the statutory interpretation issue. The Attorney seeks to uphold the decision of the chambers judge on the

constitutional issue. The Intervenor, the Council of Forest Industries, supported both appeals on the statutory interpretation issue but argued that the factual foundation for consideration of the constitutional question had not been laid in the evidence. No party other than the Forest Appeals Commission itself supported the decision of the chambers judge.

[17] Notice was served belatedly by the appellant on the Attorney General of Canada under the **Constitutional Questions Determination Act**. After deliberation, the Attorney General of Canada declined to intervene.

#### IV

[18] I propose to address the constitutional question a step at a time. As an aid to comprehensibility I will use a heading for each step.

##### **The Nature of the Constitutional Question**

[19] It is important to understand that the constitutional question is not a question about the capacity of the District Manager, the Administrative Review Panel, or the Forest Appeals Commission to exercise quasi-judicial functions which involve the application of laws relating to Indians and Indian Lands, a subject over which the Parliament of Canada has exclusive legislative power.

[20] Rather, the question is whether the Legislature of British Columbia has the legislative capacity to endow the District Manager, the Administrative Review Panel or the Forest Appeals Commission with the quasi-judicial capacity to decide questions of aboriginal title and aboriginal rights, when only the Parliament of Canada can make laws in relation to the class of subjects: "Indians, and Lands reserved for the Indians."

[21] In short, the constitutional question is a question about the application of ss. 91 and 92 of the **Constitution Act, 1867**, to reach a conclusion about the legislative capacity of the B.C. Legislature. It is not a question about the scope of the quasi-judicial powers of the Forest Appeals

Commission. That is the second question . So it is the capacity to legislate which is in issue, not the capacity to adjudicate. If the Legislature of British Columbia does not have the constitutional capacity to confer the quasi-judicial adjudicative power in question on the Forest Appeals Commission then the Forest Appeals Commission can not have any such power and any analysis of the scope of such a power, if it had been conferred, is pointless.

### **The Legislative Capacity of the British Columbia Legislature**

[22] The Provincial Legislature may exclusively make laws in relation to matters coming within the class of subjects described in head 92(14) of the **Constitution Act, 1867**:

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

[23] The Provincial Legislature also has the exclusive power to make laws in relation to the development, conservation and management of forestry resources in the Province under head 92A.(1)(b) of the **Constitution Act, 1867**.

**92A.** (1) In each province, the legislature may exclusively make laws in relation to

. . .  
(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom;

### **The Legislative Capacity of the Parliament of Canada**

[24] The legislative capacity in relation to Indians and Indian lands is the exclusive capacity of the Parliament of Canada under head 91(24) of the **Constitution Act, 1867** which confers the exclusive power to make laws in relation to matters coming within the class of subjects:

(24) Indians, and Lands reserved for the Indians.

### **One End of the Question**

[25] It seems to me that a legitimate first question might be: Can the Legislature of British Columbia establish a tribunal with a jurisdiction limited to matters coming within an exclusively federal class of subjects? (Of course, there are some complexities in relation to the occupied field and

paramountcy with respect to the jurisdiction of the Federal Court and federal tribunals.) But could the Provincial Legislature establish a tribunal with a jurisdiction limited to Banking matters, or a tribunal with a jurisdiction limited to Seacoast and Inland Fisheries, or a tribunal dealing only with Navigation and Shipping, or a tribunal dealing only with Bills of Exchange and Promissory Notes, or Bankruptcy and Insolvency? In my opinion the answer to all those questions is "No".

[26] The same is true with respect to Indians and Indian Lands. In my opinion the Legislature of British Columbia can not, in a specific law creating a specialist tribunal, and not as part of a general law creating a Court, establish a tribunal whose sole jurisdiction is to deal with Indians and Indian Lands.

### **The Other End of the Question**

[27] However, there is no doubt that the Supreme Court of British Columbia, a court of statutory and inherent jurisdiction continued by British Columbia legislative enactment, the Provincial Court of British Columbia, a statutory court established by the Provincial Legislature with criminal jurisdiction conferred by both the Parliament of Canada and the Provincial Legislature and civil jurisdiction conferred by the Provincial Legislature, and the Court of Appeal of British Columbia, a statutory court established by the Provincial Legislature, all have jurisdiction conferred on them by the Provincial Legislature, as part of their general jurisdiction, to decide questions of aboriginal title and aboriginal rights in the course of deciding proceedings properly brought before them.

### **The Narrower Question**

[28] So the question narrows down to whether the legislative conferral of a quasi-judicial capacity to decide questions of aboriginal title and aboriginal rights in a forest context on the District Manager, the Administrative Review Panel, and the Forest Appeals Commission, falls on the same side of the dividing line as establishing a tribunal with the sole capacity to decide questions of aboriginal title and aboriginal rights, on the one hand, or as establishing a court of general jurisdiction which deals with all relevant matters including, if called upon in appropriate proceedings, matters of aboriginal title and aboriginal rights, in the course of its general jurisdiction, on the other hand.

## The Reasons of the Trial Judge

[29] I propose to set out some paragraphs from the trial judge's reasons which I hope fairly set out the train of reasoning leading to his decision on the constitutional question:

[36] The essence of Mr. Paul's argument in relation to constitutional authority is that the legislation which empowers a tribunal to adjudicate in relation to the existence of aboriginal rights is, in substance, legislation in relation to Indians, or lands reserved for Indians, a subject which is within the exclusive legislative domain of the federal parliament.

[37] In my opinion, the argument fails because it incorrectly equates the capacity to adjudicate with the capacity to legislate.

. . .  
[39] Neither the province in constituting the Commission, nor the Commission in adjudicating in relation to the existence and exercise of an aboriginal right, is attempting to legislate in relation to the subject matter of Indians, and Lands reserved for Indians within the meaning of s.91(24) of the **Constitution Act, 1867**. The provincial legislature may lawfully constitute a tribunal for the purpose of dealing with matters within provincial legislative authority. Forest lands and the management and development thereof are matters within provincial jurisdiction as is a determination of the question whether a property right attaching to provincial Crown land has been violated.

. . .  
[41] I see no reason why the division of powers and the recognition and protection afforded aboriginal rights by the constitution of Canada prevents the provincial legislature from empowering the Commission to balance the competing rights of the Crown in relation to its constitutional authority and property and an individual who asserts a constitutional aboriginal right. In doing so, the province is not legislating in respect of aboriginal rights but providing a mechanism by which a trespass against Crown property will be adjudged.

[42] Section 96 of the **Code** purports to apply to all persons carrying out specified activities on provincial lands. By its terms, no one is to cut, remove, damage or destroy Crown timber unless authorized to do so under any of the mechanisms specified in paragraphs (a) through (f) of s.96(1). Nothing in s.96 purports to derogate from aboriginal title or aboriginal rights and no part of the provision appears

directed to Indians or the "core of Indianness", as the expression has been used by the Supreme Court of Canada, to the exclusion of other persons in the province (see **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 (S.C.C.)).

[43] In the process of adjudication, s. 96 of the **Code** must be construed and applied so as to take into account and respect aboriginal rights including aboriginal title (see **Stoney Creek Indian Band v. British Columbia**, [1999] 1 C.N.L.R. 192 (B.C.S.C.)). An empowered tribunal will have to determine whether a *prima facie* violation is spared by the existence and pursuit of an aboriginal right or not spared either because s.96 is a law of general application in the context of which aboriginal rights are not relevant, or because it constitutes a justifiable infringement of any right which does exist.

. . .

[46] If the legislation has no application to Mr. Paul, that is the result of a constraint on the applicability of s. 96 to Crown land encumbered by aboriginal title. It is not the result of any constitutional limitation upon the power of adjudication.  
(my emphasis)

### **Observations on the Reasons of the Trial Judge**

[30] I agree with many of the points made by the trial judge with respect to how the Forest Appeals Commission must be expected to discharge its quasi-judicial functions once one assumes that the British Columbia Legislature had the legislative capacity to confer jurisdiction on the Forest Appeals Commission to decide questions of aboriginal title and aboriginal rights in a forest context, and once one assumes that it has exercised that capacity by conferring that jurisdiction.

[31] But, with the greatest of respect, I do not agree with the focus of the trial judge on the capacity to adjudicate, rather on the capacity of the Legislature to legislate. In para. 37 of his reasons he states his focus and he returns to his conclusion on the basis of that focus in para. 46, where he says: "If the legislation has no application to Mr. Paul, ... that is not the result of any constitutional limitation upon the power of adjudication."

[32] My other point of respectful disagreement with the trial judge is that in para. 39 he treats the constitutional

question as being whether the Provincial Legislature has a legislative capacity to enact the **Forest Practices Code**, which, of course, it does, rather than whether the Provincial Legislature can establish a tribunal whose jurisdiction includes the jurisdiction to decide questions of aboriginal title and aboriginal rights.

### **The Pembina and Balfour Guthrie Cases**

[33] Counsel on this appeal prepared careful factums with extensive reference to authorities. But the question of whether guidance can be obtained on the constitutional question through an examination of the scope of the jurisdiction conferred on the Provincial Court by the B.C. Legislature in relation to provincial offences and in relation to civil matters within the Province was not confronted by counsel. However, I am indebted to the researches of my brother Donald on this question and to his reference to me of the decision of this Court in **Balfour Guthrie (Canada) Ltd. v. Far Eastern Steamship Co.** (1977), 5 B.C.L.R. 60, and the decision of the Supreme Court of Canada in **Ont. (A.G.) v. Pembina Exploration Canada Ltd.** (1989), 57 D.L.R. (4th) 710.

[34] In both of those cases the issue was whether a court whose statutory jurisdiction was entirely conferred by the Provincial Legislature could, in the course of its general civil jurisdiction, decide a matter, which, if it were to be legislatively categorized, would come within the class of subjects: "Navigation and Shipping" covered by head 91(10) of the **Constitution Act, 1867**. In both cases the answer was "Yes".

[35] In the **Balfour Guthrie** case, Chief Justice Farris, for a division of this Court, said this, at p.64:

I do not agree with the trial Judge's views for two reasons:

. . .

(2) The trial Judge equated legislative jurisdiction with judicial jurisdiction. This is contrary to the decisions of the Supreme Court of Canada in *Quebec North Shore Paper Co. et al v. Canadian Pacific Ltd. et al.* (1976), 71 D.L.R. (3d) 111, [1977] 2 S.C.R. 1054, 9 N.R. 471, and *McNamara Construction (Western) Ltd. et al. v. The Queen* (1977), 75 D.L.R. (3d) 273, [1977] 2 S.C.R. 654, 13 N.R. 181 *sub nom. Gov't of Canada v. McNamara Construction (Western) Ltd. et al.* At p. 277 D.L.R., p. 185 N.R., of the latter case the Chief Justice of Canada said:

"As this court indicated in the *Quebec North Shore Paper Co.*

case, judicial jurisdiction contemplated by s. 101 [the B.N.A. Act, 1867] is not co-extensive with federal legislative jurisdiction."  
(my emphasis)

[36] The two Supreme Court of Canada cases to which Chief Justice Farris referred, namely **Quebec North Shore Paper Co. v. Canadian Pacific** and **McNamara Construction v. The Queen** were cases which decided that the Supreme Court of a province did not lose the general jurisdiction to decide questions involving interprovincial works, and a contract for construction of a federal penitentiary, respectively, and the federal court did not attain exclusive jurisdiction to deal with those subject matters, simply because those subject matters come within the exclusive legislative capacity of Parliament.

[37] The Supreme Court of Canada in unanimous reasons delivered by Mr. Justice La Forest cited with approval the passage that I have quoted from **Balfour Guthrie** in its decision in **Ont. (A.G.) v. Pembina Exploration Canada Ltd.** in arriving at the same conclusion as that reached by this Court in **Balfour Guthrie**, namely that in a case involving damage to fishing nets in Lake Erie which became entangled with an unmarked natural gas well, the Ontario Small Claims Court did not lose jurisdiction simply because the case could be categorized as one involving navigation and shipping, a subject matter which, if it were being dealt with legislatively, would come within the exclusive competence of the Parliament of Canada.

[38] Mr. Justice La Forest put the point this way, at p.719:

In a word, judicial jurisdiction is not tied to provincial legislative jurisdiction in other areas. In the present case, the fact that the federal Parliament may legislate in relation to the matter does not, in the absence of legislation, affect the jurisdiction of these courts.

[39] The **Pembina** case is most helpful in explaining why the Small Claims Court of Ontario and other similar provincial statutory courts attain their judicial competence over matters that would be legislatively federal through the conferral on them of their competence by the provincial legislatures. It occurs because of the general unitary and hierarchical nature of the Canadian court system and the general and all-encompassing jurisdiction of genuine provincial courts within that system.

[40] At p. 717, Mr. Justice La Forest said this:

In assessing the constitutional issues, it is well to remember that the court system in Canada is, in general, a unitary one under which provincially constituted inferior and superior courts of original and appellate jurisdiction apply federal as well as provincial laws under a hierarchical arrangement culminating in the Supreme Court of Canada established by Parliament under s.101 of the **Constitution Act, 1867**. This goes back to the time of Confederation when previously constituted superior, county and small claims courts continued to be charged with the administration of justice in Canada.

(my emphasis)

And at p.721:

It seems to me, however, that such jurisdiction [marine insurance] is inherent in the essentially unitary character of the Canadian court system. If, as indicated by the divorce cases above cited, one accepts that jurisdiction in the provincial superior courts is not solely derived from the specific character of superior courts, but that s. 92(14) of the **Constitution Act, 1867** empowers the provinces to grant them general jurisdiction, whether originally or on appeal as in *Hellens v. Densmore, supra*, there is no reason why this should not apply to provincial courts of inferior jurisdiction as well.

(my emphasis)

And at p. 724:

I have already referred to my view that a province may, in the exercise of its powers under s. 92(14), confer general jurisdiction on its courts, and that I saw no reason why this power did not extend to courts of inferior jurisdiction. Indeed, it seems to me that the essentially unitary structure of the Canadian judicial system invites this conclusion. From Confederation to this day, the courts in the provinces, barring inconsistent federal laws, have decided every type of dispute imaginable. As *Hogg, supra*, p. 15, has put it: "It did not matter whether a dispute raised a question of constitutional law, federal law, provincial law, or a mixture of the three, the provincial courts still had jurisdiction." They may not, in strictness, be national courts, but they are the ordinary courts of the land to which the citizen customarily turns when he has need to resort to the administration of justice.

I have already mentioned the unfortunate practical results that would follow from limiting provincial authority in this

area. Disputes involving banking and commercial paper, to name a few, although governed by federal law, are routinely disposed of by provincial courts.

(my emphasis)

And at p. 725:

I have no difficulty, therefore, in concluding that, pursuant to s.92(14) of the **Constitution Act, 1867**, the provinces may confer to their inferior courts general jurisdiction including actions arising out of federal matters.

(my emphasis)

[41] In my view it is important to understand that the Legislative authority to confer jurisdiction on a provincial court to deal with, among other things, matters over which the Parliament of Canada has legislative competence, is derived either historically, in the sense of being pre-Confederation, or under head 92(14) of the **Constitution Act, 1867**.

[42] And it is equally important to understand that what is authorized by s.92(14) is the conferral of general jurisdiction over all matters, including matters within both provincial and federal legislative competence, on "Provincial Courts, both of Civil and Criminal Jurisdiction."

### **The Conclusion from the *Pembina* Case**

[43] In my opinion, the ***Pembina*** case is authority for the proposition that the Provincial Legislature may make laws under the powers contained in head 92(14) of the **Constitution Act, 1867** which confer jurisdiction on genuine courts of general jurisdiction, including a jurisdiction to decide, as a matter of their general jurisdiction questions which, if they were being legislatively categorized, would fall within one of the heads of s.91 of the **Constitution Act, 1867**.

[44] But, in my respectful opinion, head 92(14) does not authorize the Provincial Legislature to create judicial or quasi-judicial tribunals of specialist jurisdiction which encompasses matters within exclusive federal legislative competence. The specialist tribunals created by a Provincial Legislature must have a specialist jurisdiction which is, in its pith and substance, a jurisdiction over matters falling legislatively only within Provincial Legislative competence.

[45] So the provinces cannot establish specialist tribunals whose jurisdiction and field of specialization is over such

subject matters as Navigation, Banking, Bills of Exchange, Fisheries, or, in this case Indians and Indian Lands.

[46] In **Four B Manufacturing Ltd. v. United Garment Workers of America et al** (1979), 102 D.L.R. (3d) 385 (S.C.C.) it was held, per Mr. Justice Beetz for the majority, that the Ontario Labour Relations Board had jurisdiction to certify a union for employees of a business owned by Indians and operated on a reserve. The undertaking was not federal in nature. The Board did not purport to regulate Indians as Indians nor did the matter go to "Indianness". The clear implication of the decision is that if the undertaking were federal or if the matter went to "Indianness", the Ontario Board would not have had jurisdiction. In **Western Stevedoring Co. v. Pulp, Paper & Woodworkers** (1975), 61 D.L.R. (3d) 71 (B.C.C.A.), this Court held that the B. C. **Labour Code** could not apply to picketing that interrupted the loading of a ship because although the labour dispute was provincial in origin, the industrial action interfered with a federal business and a matter falling under head 29 of s.91, navigation and shipping, and consequently the province could not enact laws governing such matters.

[47] In short, there is no exception to the division of powers on legislative capacity by which a wider range of legislative capacity is given to Provincial Legislatures if they are exercising the power to endow a specialist tribunal with quasi-judicial capacity than if they are enacting other laws. The power to endow courts with judicial capacity to decide questions about Navigation, or Banking, or Fisheries, or Indians and Indian Lands, under head 92(14) is a power limited to granting to genuine Provincial courts an all inclusive general jurisdiction under our unitary and hierarchical court system.

### **The Power of the B.C. Legislature to Enact the *Forest Practices Code***

[48] There is no doubt in my mind that the **Forest Practices Code** was constitutionally enacted within the legislative powers of the British Columbia Legislature. The powers contained under heads 92(5), 92(13) and particularly 92A(1)(b) of the **Constitution Act, 1867** are ample to confirm the constitutionality of that enactment.

[49] I agree with the chambers judge when he says in para.39 of his reasons that: "The Provincial Legislature may lawfully constitute a tribunal for the purposes of dealing with matters within provincial legislative authority."

[50] My difficulty relates to the point dealt with by the chambers judge in para.42 of his reasons, when, in referring to s.96 of the **Forest Practices Code**, which is the section which prohibits cutting Crown timber unless authorized to do so, he says: "Nothing in s.96 purports to derogate from aboriginal title or aboriginal rights and no part of the provision appears directed to Indians or the 'core of Indianness' as those expressions have been used by the Supreme Court of Canada, to the exclusion of other person in the province ( see **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 (S.C.C.))."

[51] In my opinion, the focus for the constitutional inquiry about whether the conferral of jurisdiction on the District Manager, the Administrative Review Panel, or the Forest Appeals Commission to decide questions of aboriginal title and aboriginal rights should not be on s.96 or on the other offence sections of the **Forest Practices Code**, but should be on the sections dealing with the conferral of jurisdiction. It is to the constitutionality of that conferral as it relates to aboriginal title and aboriginal rights to which I will now turn.

### **The Terms of the Conferral of Jurisdiction**

[52] There is nothing in the **Forest Practices Code** which expressly confers jurisdiction on the District Manager, the Administrative Review Panel, or the Forest Appeals Commission, to decide questions of aboriginal title and aboriginal rights in the course of deciding questions about compliance with the overall forest practices instituted by the **Code**. That jurisdiction, if it were to be regarded as conferred, must be inferred from the wide jurisdiction which is conferred and from the implication that if aboriginal title and aboriginal rights issues arise in the exercise of that wide jurisdiction, and if that specific jurisdiction is not expressly excluded, then it must be regarded as granted.

[53] The process starts with the District Manager, who may make a determination about a forest practice under ss. 82, 95(2), 99(2), 101(2), 102(3), 106(1), 117-120 and 123(1). One of those sections is s.119, which provides that if a senior officer (the District Manager in this case) determines that a person has cut Crown timber in contravention of s.96, the senior officer may levy a penalty. Under s.127 a person subject to a determination under s.96 may make a written request for a review of that determination. Such a review by the Administrative Review Panel must precede an appeal.

Section 131 sets out the procedure for an appeal through the Forest Appeals Commission. Section 131(8) reads:

- (8) a party may
- (a) ...
- (b) ...
- (c) ...
- (d) make submissions as to facts, law and jurisdiction.  
(my emphasis)

[54] If the Forest Appeals Commission has jurisdiction to decide questions of aboriginal title and aboriginal rights that jurisdiction must be regarded as conferred by the generality of s.131(8)(d). There is no similar provision with respect to the District Manager or the Administrative Review Panel, the former being authorized to make determinations about occurrences, and the latter to review them. But since the Forest Appeals Commission is not authorized to conduct hearings *de novo* on the very points which the District Manager was required to determine, but only to hear an appeal, the better assumption must be that the implication of jurisdiction to decide questions of aboriginal title and aboriginal rights, if it is to be made with respect to the Forest Appeals Commission, must also be made with respect to the District Manager and the Administrative Review Panel.

### **Interjurisdictional Immunity**

[55] If, as I consider to be the case, it is unconstitutional for the British Columbia Legislature to confer on the District Manager, the Administrative Review Panel or the Forest Appeals Commission, the quasi-judicial capacity to consider and decide questions of aboriginal title and aboriginal rights in a forest infringement context, the principle which underlies the lack of constitutionality is buttressed by the principle now referred to as the principle of interjurisdictional immunity.

[56] I propose to adopt Professor Hogg's treatment of the judicial scope of the principle of interjurisdictional immunity as set out in these passages from Hogg: Constitutional Law of Canada, 4th ed. (Carswell, Scarborough), (1997).at p.401:

The term interjurisdictional immunity does not have a precise meaning. A law that purports to apply to a matter outside the

jurisdiction of the enacting legislative body may be attacked in three different ways. The attack may go to (1) the validity of the law, or (2) the applicability of the law, or (3) the operability of the law.

. . .

A second way of attacking a law that purports to apply to a matter outside the jurisdiction of the enacting body is to acknowledge that the law is valid in most of its applications, but to argue that the law should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body. If this argument succeeds, the law is not held to be invalid, but simply *inapplicable* to the extra-jurisdictional matter. The technique for limiting the application of the law to matters within jurisdiction is the reading down doctrine, which was discussed in the previous section of this chapter. The occasions when it is appropriate to use the technique will be discussed in this section of the chapter. It is this issue that I treat as interjurisdictional immunity.

(Professor Hogg's emphasis)

[57] A recent adoption of the phraseology "interjurisdictional immunity", and a clear exposition of its application, is found in the decision of the Supreme Court of Canada in **Ordon Estate v. Grail**, [1998] 3 S.C.R. 437, where, in the judgment of Mr. Justice Iacobucci and Mr. Justice Major, this appears at para.81:

As a general matter within the Canadian federal system, it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament. The principal question in any case involving exclusive federal jurisdiction is whether the provincial statute trenches, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power. Where a provincial statute trenches upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to apply those situations. This principle of statutory interpretation is known perhaps most commonly as the doctrine of "interjurisdictional immunity".

(my emphasis)

[58] So we are concerned, not with the validity of the **Forest Practices Code** or any of its provisions, but rather with the applicability of some of those provisions in a way which trenches on the exclusive federal legislative power over "Indians, and Lands reserved for the Indians" and so

constitutes an invalid application of a valid provision.

### **The Impugned Jurisdiction**

[59] So it is important to understand that it is not the generality of the sections of the **Forest Practices Code** that relate to determination of breaches of the **Code** which is in issue. It is only the conferral by the Legislature of an applicability of the quasi-judicial sections to permit decisions to be made about aboriginal title and aboriginal rights in the context of those breach and offence sections which is in issue.

### **Delgamuukw and Kitkatla: Interjurisdictional Immunity with respect to Indians and Indian Lands**

[60] The judgment of Mr. Justice Iacobucci and Mr. Major in **Ordon Estate v. Grail** refers to the decision in **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 as an example of the principle of interjurisdictional immunity in the context of the federal head of power over "Indians, and Lands reserved for the Indians". This is the passage at para. 83 in **Ordon**:

The principle that each head of federal power possesses an essential core which the provinces are not permitted to regulate indirectly was recently restated by Lamer C.J. in **Delgamuukw**, *supra*, at para. 181, in the context of the federal power over Indians and lands reserved for Indians. Speaking for the majority of the Court, Lamer C.J. stated that s.91(24) of the **Constitution Act, 1867**, protects a "core of federal jurisdiction" over Indians and lands reserved for Indians even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity.

[61] So the principle of interjurisdictional immunity works in that way with respect to provincial legislation affecting Indians.

[62] Another example of the application of the principle of interjurisdictional immunity to Indians and Indian lands may be found in **Derrickson v. Derrickson**, [1986] 1 S.C.R. 285, where Mr. Justice Chouinard, for the Court, said this, at p.296:

The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s.91(24) of the **Constitution Act, 1867**. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands.

[Emphasis added]

[63] If the provincial law is properly categorized as being in pith and substance a law in relation to a matter coming within the class of subjects "Indians, and land reserved for the Indians" then that provincial law is *ultra vires* and that ends the inquiry.

[64] But if the provincial law is a law of general application whose pith and substance is properly categorized as being within one of the heads of s.92, then that law will apply to Indians as part of its general application as long as it does not apply differently to Indians than it does to non-Indians and does not affect the core of Indianness (e.g. the **Motor Vehicle Act**).

[65] Even if the provincial law, as a law of general application, affects the core of Indianness or has a special impact on Indians that it does not have with non-Indians, the law may still apply to Indians through being constitutionally invigorated under s.88 of the **Indian Act**, which reads in this way:

**88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

[66] For an example of constitutional invigoration through s.88, see the **Wildlife Act** and the discussion in **Dick v. The Queen**, [1985] 2 S.C.R. 309. I will come to the topic of constitutional invigoration through s.88 shortly, under the heading "This Case: Second Approach".

[67] The process for examining provincial laws which are said to affect Indians, as I have described it, was recently discussed and applied by a division of this Court in **Kitkatla Band v. British Columbia (Small Business, Tourism & Culture)** (2000), 72 B.C.L.R. (3d) 247.

### **This Case: First Approach**

[68] There are two ways of approaching the final steps of the constitutional analysis in this case. The first is to regard the law in question as a law conferring a particular jurisdiction on the District Manager, the Administrative Review Panel, or the Forest Appeals Commission to decide

questions of aboriginal title and aboriginal rights. There is no reason to say that for purposes of the division of powers a law must be considered in the totality of the package in which it was wrapped by the Legislature, in this case, the totality of the **Forest Practices Code**. The proper course, in my opinion, is to regard each statute as being capable of comprising one matter or more than one matter for legislative purposes. Of course, the pith and substance of each matter is given colour by the statute as a whole. But if the matter is legislatively distinct as a legislative concept within the Act then it is proper to consider that legislatively distinct part of the enactment as a separate matter for constitutional purposes in relation to the division of powers.

[69] When one considers, in this case, the suggested legislative grant by the Legislature of quasi-judicial jurisdiction to the three forest tribunals in question here, or any of them, to determine questions of aboriginal title and aboriginal rights in the forest context, as a separate legislative matter, then that legislative matter falls squarely within the federal head of power: "Indians, and Lands reserved for the Indians". As such it is unconstitutional. And it cannot be invigorated by s.88 of the **Indian Act**. It is dead from the outset because, on that view of the question of quasi-judicial jurisdiction as a separate legislative matter, there is no law of general application which s.88 could invigorate.

### **This Case: Second Approach**

[70] The second way of approaching the final steps of constitutional analysis in this case is to regard all of the provisions of the **Forest Practices Code** which confer jurisdiction, express or implied, on the three forest tribunals in question here, or any of them, as a single legislative matter for the purposes of constitutional analysis.

[71] On that approach, the conferral of quasi-judicial jurisdiction on the three tribunals must be regarded as a law of general application for the purposes of s.88 of the **Indian Act** because it applies in relation to any determination made by the District Manager, and any review of that determination by the Administrative Review Panel, or the Forest Appeals Commission.

[72] It is on this second approach that the principle of interjurisdictional immunity comes into effect. The existence and extent of aboriginal title and aboriginal rights has been

held in *Delgamuukw* to come within the essential core of Indianness. That being so, I cannot imagine that a law granting quasi-judicial jurisdiction to determine matters of aboriginal title and aboriginal rights could be anything other than equally and co-extensively within the core of Indianness. As such it fulfils the conditions for application of the principle of interjurisdictional immunity and, were it not for a consideration of s.88 of the *Indian Act*, that principle would itself prevent the overall conferral of jurisdiction on the three tribunals from operating to confer specific jurisdiction to determine questions of aboriginal title and aboriginal rights.

[73] So that brings me to s.88 of the *Indian Act*. For convenience of reference I will repeat it:

**88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

[74] When s.88 was first passed, its purpose, in my opinion, was to confirm what was not then widely understood, namely that provincial laws of truly general application, like the *Motor Vehicle Act*, apply to Indians, on or off reserves. That principle came to prevail and, after a time, came to be seen as so independent from s.88 of the *Indian Act* that a different purpose came to be attributed to s.88. Since s.88 was not required in order to confirm the principle that provincial laws of general application apply to Indians, the purpose of s.88 came to be taken to be that not only laws of general application which affect Indians in the same way as they affect everyone else, but also laws of general application which affect Indians quite differently from everyone else, because in the case of Indians, the law strikes at the core values of the Indian society, would be made constitutional by the exercise of the legislative powers of Parliament invigorating what would otherwise be a provincial law which the principle of interjurisdictional immunity would prevent from applying to Indians. See *Dick v. The Queen*, [1985] 2 S.C.R. 309.

[75] In short, s.88 has, since the *Dick* case, come to be seen as a federal enactment specifically directed at overriding

the constitutional principle of interjurisdictional immunity and, to the extent to which it applies, casting the core values of Indians out of the protection of Parliament. Having regard to the fiduciary obligations of the Crown and the legislative assumption that Parliament cannot have intended to suppress those fiduciary obligations more than it can clearly be seen to have done, it is my opinion that s.88 must benefit from the principle of construction which asserts that the essential core values of Indians and Indian society should not be adversely affected by legislation unless the legislation is free from ambiguity in expressing and carrying out that adverse effect.

[76] That principle brings me back to the wording of s.88. It makes provincial laws of general application "applicable to and in respect of Indians". It says nothing about Indian lands. This omission is conspicuous because of the wording of head 91(24) of the **Constitution Act, 1867**: "Indians, and Lands reserved for the Indians", which separates the concept of Indians from the concept of Indian lands (and, of course, "lands reserved for the Indians" in head 91(24) cannot mean simply Indian reservations because it must surely encompass the legislative subject matter of aboriginal title and the main body of aboriginal rights which are intimately related to the use of land.)

[77] The train of reasoning I have set out follows the reasons of Chief Justice Lamer, for the majority in **Delgamuukw**, where he says, at paras. 174 and 176:

Lands reserved for the Indians

I consider the second part of this provision first, which confers jurisdiction to the federal government over "Lands reserved for the Indians". The debate between the parties centred on whether that part of s. 91(24) confers jurisdiction to legislate with respect to aboriginal title. The province's principal submission is that "Lands reserved for the Indians" are lands which have been specifically set aside or designated for Indian occupation, such as reserves. However, I must reject that submission, because it flies in the face of the judgment of the Privy Council in **St. Catherine's Milling**. One of the issues in that appeal was the federal jurisdiction to accept the surrender of lands held pursuant to aboriginal title. It was argued that the federal government, at most, had jurisdiction over "Indian Reserves". Lord Watson, speaking for the Privy Council, rejected this argument, stating that had the intention been to restrict s.91(24) in this way, specific language to this effect would

have been used. He accordingly held that (at p.59):

... the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation.

Lord Watson's reference to "all lands" encompasses not only reserve lands, but lands held pursuant to aboriginal title as well. Section 91(24), in other words, carries with it the jurisdiction to legislate in relation to aboriginal title. It follows, by implication, that it also confers the jurisdiction to extinguish that title.

. . .

I conclude with two remarks. First, even if the point were not settled, I would have come to the same conclusion. The judges in the court below noted that separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result - the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests - their interest in their lands. Second, although the submissions of the parties and my analysis have focussed on the question of jurisdiction over aboriginal title, in my opinion, the same reasoning applies to jurisdiction over any aboriginal right which relates to land. As I explained earlier, **Adams** clearly establishes that aboriginal rights may be tied to land but nevertheless fall short of title. Those relationships with the land, however, may be equally fundamental to aboriginal peoples and, for the same reason that jurisdiction over aboriginal title must vest with the federal government, so too must the power to legislate in relation to other aboriginal rights in relation to land.

[78] So my conclusion on the second approach, which regards the matter of the law in question under the **Forest Practices Code** as being the total conferral of jurisdiction on the District Manger, the Administrative Review Panel and the Forest Appeals Commission, is that any conferral of jurisdiction on any of the three tribunals to decide questions of aboriginal title and aboriginal rights in a forest context would be unconstitutional under the principle of interjurisdictional immunity, which would not be prevented from applying by s.88 of the **Indian Act** because aboriginal title and aboriginal rights are rights in relation to land, in this case forest land, to which s.88 does not extend.

[79] I should add that the reasoning in the second approach with its application of the principle of interjurisdictional

immunity and its limitation on the applicability of s.88 applies with entirely the same effect no matter how much of the **Forest Act** and the **Forest Practices Code** are thought to be included in the "matter" in question.

### **Conclusion on the Two Approaches**

[80] So, in my opinion, it does not affect the result to decide to take one approach rather than the other. Which approach should be taken depends on how narrow or wide a view is taken of the "matter" of the law, for the purposes of this case. I think that more rigorous constitutional analysis is produced if the "matter" of the law is taken to be as limited as is necessary to isolate the issues of legislative capacity. The narrower the "matter" the less need to apply the principle of interjurisdictional immunity. So I prefer the first approach to the second approach in this case. But, as I have said, both lead to the same result on the constitutional question: any conferral of quasi-judicial adjudicative jurisdiction on the District Manager, the Administrative Review Panel, or the Forest Appeals Commission over questions of aboriginal title and aboriginal rights by the British Columbia Legislature would be unconstitutional.

### **Practical Considerations and the Constitutional Question**

[81] I have dealt with the constitutional question on the basis of what I understand to be the applicable constitutional principles, but pragmatic results are an important element in constitutional analysis.

[82] I think that the continuing viability of our constitution from decade to decade requires a flexible approach. That flexible approach has been given by the Supreme Court of Canada and has provided a large measure of legislative clarity. In our time the necessity for Canada-wide consistency in constitutional interpretation, in harmony with the fiduciary obligations of the Crown, reinforces the importance of making "Indians, and lands reserved for the Indians" a matter for Parliament and not for provincial legislatures.

[83] If there were legislative competence in the Legislature of British Columbia to confer on the three forest tribunals a quasi-judicial adjudicative jurisdiction over questions of aboriginal title and aboriginal rights, then the Legislature might do for those questions what it has done in the **Forest**

**Practices Code** for other matters of forest regulation, and establish a three-stage system of tribunals, only the third of which, the Forest Appeals Tribunal, is given the power to hear submissions on facts, law and jurisdiction, and the first two of which are staffed by civil servants who cannot be expected to exercise independent judgment on aboriginal matters, no matter what their expertise and independence of judgment may be on forest matters, and the third and final one of which, the Forest Appeals Commission, is comprised of members whose institutional independence is set by a term of office "of up to three years". What is more, the determinations of all three of the tribunals may be made at a time when the very same questions of aboriginal title and aboriginal rights are being contested in the true court system comprised of genuine courts of general jurisdiction.

[84] I think those matters of practical and pragmatic relevance to which I have just referred support the constitutional analysis which has led me to the conclusion that the legislative conferral of quasi-judicial adjudicative jurisdiction over aboriginal title and aboriginal rights cannot be constitutionally conferred on the three forest tribunals.

### **A Word in Conclusion**

[85] The chambers judge decided that the Legislature of British Columbia had legislative capacity to establish, as part of the quasi-judicial jurisdiction of the Forest Appeals Commission, a capability of deciding questions of aboriginal title and aboriginal rights in a forest context.

[86] If that decision were correct, and I have explained why I do not think it is, then what would prevent the British Columbia Legislature from establishing a specialist tribunal whose sole jurisdiction was to decide all question of aboriginal title, aboriginal rights and aboriginal sovereignty for Indian people in British Columbia. Perhaps the power to decide that question could, to the extent that it had then been conferred on such a specialist tribunal by the British Columbia Legislature, be withdrawn from all the courts established by the province. I do not believe that result would be constitutionally possible and I do not think that head 92(14), the power to establish courts, could possibly justify it.

## V

[87] The first question in this appeal is whether a conferral of jurisdiction on a District Manager, an Administrative Review Panel, or the Forest Appeals Commission to decide questions of aboriginal title and aboriginal rights would be constitutional as being within the competence of the provincial legislature. I have decided that it would not.

[88] In reaching my conclusion on this constitutional question I have not found it necessary to consider s.96 of the **Constitution Act, 1867** which was, in any case, not dealt with in argument.

[89] I am content to rest my decision on the constitutional issue. Accordingly, it is not necessary for me to address the statutory interpretation issue. Indeed, since I consider that the Provincial Legislature does not have the legislative competence to confer a jurisdiction on the three forest tribunals to decide questions of aboriginal title and aboriginal rights in a forest context, the statutory interpretation issue would involve, for me, a search for a legislative intention that I have already decided cannot properly be there.

## VI

[90] I would allow the appeal of Thomas Paul on the basis of my answer to the constitutional question. Though the Attorney General of British Columbia has defended the constitutionality of a conferral of jurisdiction by provincial legislation on the Forest Appeals Commission to decide questions of aboriginal title and aboriginal rights, but has said that, properly interpreted, no such jurisdiction has been conferred, I would also allow the appeal of the Attorney General of British Columbia, though not on the ground which was argued on his behalf.

[91] I would award the costs of the appeal and the costs of the Supreme Court hearing to Mr. Paul, payable by the Forest Appeals Commission. I think that the Forest Appeals Commission should bear the costs of the Attorney General, both in this Court and in the Supreme Court of British Columbia, but, since both of those parties are funded from the public purse, I would make no order to that effect unless

an order is requested by the Attorney General.

"The Honourable Mr. Justice Lambert"

**Reasons for Judgment of The Honourable Mr. Justice Donald:**

[92] I agree with Mr. Justice Lambert's opinion on the division of powers question and I too would allow the appeal. I would also allow the appeal on the alternative ground that properly interpreted the legislation does not give the Commission the power to decide the aboriginal rights issue in this case.

[93] Any jurisdiction to decide aboriginal rights under the legislation would have to be implied. The intention of the Legislature supporting such an implication must be gleaned from the legislative context and must be supported by the "practical considerations" favoring the conferral of such an implied jurisdiction. See ***Cooper v. Canada (Human Rights Commission)***, [1996] 3 S.C.R. 845. Before addressing the practicalities, I wish to make some preliminary observations.

[94] Aboriginal rights are *sui generis* and, if disputed, they are inchoate until defined by competent authority or by treaty.\* Furthermore, the rights are collective in nature so that in the present case when Mr. Paul asserted an aboriginal right to take timber from Crown land for his house he involved his people and their right to engage in similar activity. If he loses the aboriginal rights issue, his people lose also. Just as the individual nature of this dispute altered with the assertion of aboriginal rights, so also did it expand to implicate the interests of similarly situated aboriginal groups concerned about a legal precedent and any forest companies holding tenure on Crown lands affected by the asserted rights. It is apparent to me that the matter is about much more than the adjudication of a dispute over the taking of four logs by an individual for his house.

[95] I am concerned about the institutional implications arising from the argument by the Commission that the legislation should be read as conferring the jurisdiction in question. Without intending to cast any doubt on the independence and integrity of the persons constituting the present Commission, I observe that they are subject to appointment for a three year term by order in council. Like all administrative tribunals the Commission is an emanation of the executive branch of government charged with the

responsibility of carrying out government policy as expressed in the legislation. I worry about the appearance of a tribunal so closely connected to the government deciding cases of aboriginal rights when that same government may be an adversary in the dispute.

[96] There is as well the hugely difficult task of fitting together two very different legal regimes. On the one hand there is the forestry scheme consisting of a highly detailed and sophisticated set of rules; and on the other hand there is the field of aboriginal law which is not as yet fully developed and which contemplates a series of rights that stand above and apart from conventional legal arrangements. I can well understand the reluctance of First Nations entrusting their claims for recognition of aboriginal rights to a tribunal formed to operate within a non-aboriginal scheme.

[97] I do not see this as an issue of skill or expertise of the adjudicators or even of resources - the government could, if it wished, commit large sums of money to equip the Commission to deal with the big cases - it is a matter of the appearance of justice.

[98] It is well to remember that most of the Province is subject to treaty claims and that the Provincial government will be asked to give up money, land and power to First Nations in that process. Tactical litigation will no doubt play a role in the overall strategy towards achieving goals in treaty negotiations. That litigation must in my view be conducted in forums whose independence from government is beyond question.

[99] In my judgment, these considerations militate against the interpretation for which the Commission argues.

[100] As Mr. Justice Lambert has observed, the Commission finds itself in what I would say is the most remarkable position of asserting a jurisdiction which no one involved wants it to have.

[101] The case must be considered in the broader legal setting where aboriginal law is at an early developmental stage. The courts have repeatedly said that aboriginal rights are better resolved by treaty than through litigation, reflecting a view that the legal process is a less suitable course to follow.

[102] How are the three forest tribunals to cope with the

weight and scope of these considerations? How can the tribunals get on with their regularly assigned tasks if burdened with cases of first impression and wide-ranging importance in the aboriginal law field? I think the answer to these questions is that the tribunals are not equipped to deal with cases like this and the Province never intended that they should have to deal with them.

[103] Some of the practical considerations that led the Supreme Court of Canada to find that a tribunal appointed by the Canadian Human Rights Commission did not have authority to address the constitutional validity of its enabling statute would also apply to the present case. In giving the majority reasons for the Court, La Forest J. said in **Cooper v. Canada (Human Rights Commission)**, *supra*:

I would add a practical note of caution with respect to a tribunal's jurisdiction to consider **Charter** arguments. First, as already noted, a tribunal does not have any special expertise except in the area of factual determinations in the human rights context. Second, any efficiencies that are *prima facie* gained by avoiding the court system will be lost when the inevitable judicial review proceeding is brought in the Federal Court. Third, the unfettered ability of a tribunal to accept any evidence it sees fit is well suited to a human rights complaint determination but is inappropriate when addressing the constitutionality of a legislative provision. Finally, and perhaps most decisively, the added complexity, cost, and time that would be involved when a tribunal is to hear a constitutional question would erode to a large degree the primary goal sought in creating the tribunals, i.e., the efficient and timely adjudication of human rights complaints. [Emphasis added]

[104] I regard the second and fourth factors as particularly apposite here. It is pointless, in my view, to tie up forest tribunals with complex aboriginal rights cases when they are destined for court anyway.

[105] The law and the treaty process may one day evolve to the stage where aboriginal rights in relation to the forest resource are clearly enough defined that a forest tribunal could conveniently adjudicate such disputes.\* But, in my opinion, it would place an unreasonable interpretation on the legislation to infer that the Province intended in the present context that tribunals have the power to define aboriginal rights in the first instance.

[106] I do not find persuasive the argument advanced by the Commission that since statutory tribunals have the power to decide **Charter** issues as an implicit part of their authority to determine questions of law, so also should they have the power to decide aboriginal rights: **Douglas/Kwantlen Faculty Assn. v. Douglas College**, [1990] 3 S.C.R. 5; **Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)**, [1991] 2 S.C.R. 5; **Tétraault-Gadoury v. Canada (Employment and Immigration Commission)**, [1991] 2 S.C.R. 22. The analogy between the two different kinds of constitutional issues is, in my opinion, inapt because it does not recognize that the rights in the **Charter** are written down, unlike non-treaty aboriginal rights asserted for the first time. They must be discerned from history which in many instances is unrecorded. While the **Charter** provisions give ample scope for creative interpretation and application, the determination of aboriginal rights will likely involve a large measure of law making (hence the exhortation to negotiate rather than litigate), for which there is no parallel in **Charter** cases.

[107] A final point of distinction is that **Charter** rights have largely been defined in Supreme Court of Canada and lower court decisions and a tribunal's application of those rights is guided by those decisions. Much less jurisprudence is available to assist a tribunal in a case involving aboriginal rights.

[108] I conclude my discussion of the statutory interpretation issue by adopting the remarks of Mr. Justice Lambert regarding the practical considerations supporting his disposition of the first issue at paras. [81 to [84] of his reasons.

[109] For these reasons I would accede to the position of the government, the aboriginal parties, and industry and rule that the legislation does not confer the jurisdiction to decide aboriginal rights.

"The Honourable Mr. Justice Donald"

**Reasons for Judgment of the Honourable Madam Justice Huddart:**

[110] Since time immemorial, people living in what we know today as British Columbia have used the forests to sustain life. Undoubtedly these people cut down trees for shelter, transportation, and tools for themselves, and perhaps for others. Thus, a right to use timber on traditional lands may

be found to be an existing aboriginal right of a First Nation capable of being "recognized and affirmed" by s. 35(1) of the **Constitution Act, 1982**. If so, any such right will collide with the absolute prohibition on unauthorized cutting of trees on Crown land mandated by s. 96 of the **Forest Practices Code**.

[111] The appellant, Thomas Paul, is a registered Indian, a member of the Ahousaht Band, and of the Nuu-chah-nulth First Nation. He neither asserts aboriginal title nor concedes Crown title to the land from which the trees were removed. Rather he claims he has an aboriginal right to cut trees to modify his house, on the traditional territory of the Ahousaht with the permission of the Ahousaht Band Council, and Chief Atleo.

[112] The difficulty at the root of this appeal is that no such right to use timber on traditional lands located within British Columbia has yet been defined. Nevertheless, existing aboriginal rights are to be recognized and affirmed by federal and provincial decision makers carrying out their statutory mandates. It has yet to be decided whether such a decision maker can define an aboriginal right.

[113] The only issue the appellant raises is whether the Forest Appeals Commission (the "Commission") has jurisdiction to adjudicate aboriginal rights in the course of carrying out its mandate. I have difficulty in segregating that issue from the larger problem of which it is a part -- how to define an aboriginal right for the purposes of an administrative decision. Mr. Paul has asserted throughout this rather protracted process that no provincially appointed administrative decision maker may be given the jurisdiction to adjudicate in any way upon questions of aboriginal rights. In his view, by reason of s. 91(24) of the **Constitution Act, 1867** that right is limited to those whose mandate emanates from the federal government. My colleagues have accepted that proposition. With the greatest respect for their opinions which I have had an opportunity to read in draft form, I do not. I do not accept that the grant of power to determine questions of law incidental to the management of the forest resource is legislation relating to Indians or Indian lands.

#### **FACTUAL BACKGROUND**

[114] The issue comes to us because on 15 August 1995 an official in the Ministry of Forestry seized four logs to which Mr. Paul asserted he was entitled by aboriginal right. Mr. Paul took the position that his *prima facie* violation of

the **Forest Practices Code** was spared by virtue of s. 52(1) of the **Constitution Act, 1982** because s. 96 of the **Forest Practices Code** unjustifiably infringed his right to cut timber for house modification.

[115] The official seized the logs in the exercise of a discretion given to him by the **Forest Practices Code**. By s. 115(1) an official may seize Crown timber he has "reasonable grounds to believe was cut or removed in contravention of section 96." By s. 115(2) a regional manager may sell that timber. By ss. 117(1) and 119 a "senior official" may levy a penalty for contravention of s. 96. While statutory guidelines are provided for the exercise of discretion given by s. 117, none are provided for the discretion granted by ss. 115 or 119. Discretion under those provisions is governed by ministerial guidelines established under s. 122.

[116] Mr. Paul's request for the return of his logs was refused. This accords with the Ministry's post-**Delgamuukw** policy, now found in Policy 15.1 - *Aboriginal Rights and Title* (the "Policy") (effective 03 June 1999) that no official should purport to confirm or deny the existence of an aboriginal right in the course of "operational planning and approval processes" because:

Ministry of Forests staff are not the proper authority to explicitly or implicitly confirm (or deny) the existence of aboriginal rights and/or title. The question before decision makers is to identify the potential for aboriginal rights and/or title in the area in question. This will serve to inform subsequent levels of consultation and possible adjustments to planning processes in response to aboriginal interests identified during consultation.

[117] This Policy makes good sense insofar as it addresses claims to aboriginal title in the context of operational processes. In some cases now before British Columbia's courts First Nations are asserting aboriginal title to challenge the provisions of the forest legislation with a view to large-scale economic development by their members. However, Mr. Paul's case is narrower. He asserts an aboriginal right to use the forest for traditional house modification that can be accommodated within the context of the **Forest Practices Code**.

[118] Implicit in this Ministerial Policy is the assumption that the only aboriginal right government officials need recognize and affirm is one that has been defined by a court.

This assumption accords with the approach Justice Sigurdson took in ***Westbank v. B.C. (Minister of Forests) and Wenger*** (2000), 191 D.L.R. (4th) 180 (B.C.S.C.) where he considered an argument that s. 35 of the ***Constitution Act, 1982***, and s. 109 of the ***Constitution Act, 1867***, imposed a burden on Crown title sufficient to prevent a District Manager from making a decision affecting land in the face of an asserted aboriginal title. He decided that the burden under s. 109 would not operate until the First Nation established specific aboriginal title to the block in question. To some extent the decisions in ***Haida Nation v. British Columbia (Minister of Forests)*** [2000] B.C.J. No. 2427 (S.C.) and ***Cheslatta Carrier Nation v. B.C.*** (2000), 193 D.L.R. (4th) 344 (B.C.C.A.) confirm this approach. For instance, Justice Halfyard, in ***Haida, supra***, noted at para. 17 that:

... the law does not presume the existence of Aboriginal rights, merely from proof that such rights have been asserted, and that there has been no surrender or extinguishment of the rights. Aboriginal rights are site-specific and group-specific, and proof of Aboriginal title requires proof of exclusive occupation of the lands in question as at 1846.

[119] We know from ***R. v. Sparrow***, [1990] 1 S.C.R. 1075 and ***R. v. Gladstone***, [1996] 2 S.C.R. 723, that this assumption is flawed. In those seminal cases, infringements or potential infringements of aboriginal rights were found to have occurred at times when the rights in questions had not been proven. Legal duties arise from legal rights. Proof of the right is required in the process of establishing a breach that gives rise to a remedy. Lack of proof does not mean the right and the duty do not exist. Legal proceedings simply enforce the duty and give a remedy for a breached right. An illustration Joanne Lysyk used in her recent paper entitled "Judicial Relief in Relation to Aboriginal Rights: Recent Developments" (Vancouver, Continuing Legal Education Society of British Columbia, March 2001) is particularly cogent on this point. She notes that, in order to object to my neighbour's trespass, I need not prove to him that I have title, nor do I require a prior judicial determination or other formal recognition in my favour. If I have and assert title, and my neighbour nevertheless proceeds to trespass on my land, she does so at the risk that in subsequent judicial proceedings I will prove both my title and her trespass, with the result that she is liable to compensate me, as well as to remove herself (and all of her appurtenances) from my land.

[120] Despite this policy, Mr. Paul continued to pursue his asserted right to the logs along the administrative path and accepted the Opportunity to be Heard afforded to him by virtue of the Ministry of Forests Policy 16.10 - *Determinations*. That Determinations Policy states "[t]he senior official should ensure that the person responsible for the non-compliance is offered an opportunity to present any evidence prior to the senior official making the determination." At the informal meeting that constituted his Opportunity to be Heard, the District Manager found Mr. Paul had contravened the prohibition in s. 96 of the **Forest Practices Code** on cutting trees on Crown land and the prohibition in s. 65(3) [now s. 84(3)] of the **Forest Act** on removing a windfall tree from Crown land. He confirmed the seizure under s. 115(1), but did not levy a penalty under either s. 117 or s. 119.

[121] The District Manager wrote to Mr. Paul's counsel that his determination was not influenced by his awareness that the appellant was claiming an aboriginal right and that his role was confined to "carrying out my responsibilities as a Senior official under the **Forest Practices Code of British Columbia** (FPC). This included considering how the Ministry of Forests' Aboriginal Rights Policy relates to Mr. Paul's case."

[122] Counsel agree no Ministry of Forests policy addresses what a District Manager is to do when faced with a contravener's claim of an aboriginal right to timber, nor was there any such policy at the time of the seizure of the logs in question. Seizure under s. 115(1) is covered by Policy 16.15 of the *Ministry Policy Manual* (effective 15 June 1995, updated 15 October 1997) where "forfeiture" is described as "one of several enforcement actions available to deal with contraventions." The Crown's loss of possession of, or revenue from, the timber are the considerations to be taken into account in deciding whether seizure is an appropriate enforcement option. Sale under s. 115(2) is covered by *Forfeiture and the Sale of Seized Timber Procedures*.

[123] Mr. Paul does not suggest that statutory guidelines are required to control the delegated discretion. He challenges the capacity of the Legislature to delegate discretion, the exercise of which might infringe or extinguish his claimed aboriginal right. On his approach, statutory guidelines that purport to determine how an official might exercise his discretion under the forest legislation are to be seen as infringing the exclusive federal legislative jurisdiction

under s. 91(24), as would every administrative decision made under the provisions of the **Forest Practices Code** in relation to aboriginal rights.

[124] Mr. Paul sought a review of the District Manager's "determination" by the Administrative Review Panel under ss. 127 and 129 of the **Forest Practices Code**. Before the Panel, he took the position an administrative determination of his claimed aboriginal right was not possible. When the Panel rejected his position as a ground for refusing to proceed with its review and confirmed the District Manager's determination, he appealed its "decision" to the Forest Appeals Commission under s. 131 of the **Forest Practices Code**.

[125] Before the Commission, Mr. Paul took the position that none of the decision makers (the District Manager, the Administrative Review Panel, and the Commission itself), was empowered to adjudicate in relation to his claim to an aboriginal right. Consequently, he argued, the Commission should declare it did not have jurisdiction to adjudicate upon questions involving aboriginal rights and order the seized logs returned to him, or that the Crown pay compensation in lieu of their return. The Crown agreed the Commission did not have the jurisdiction to make a finding as to aboriginal rights nor the jurisdiction to apply s. 52(1) of the **Constitution Act, 1982**, but maintained the Commission did have jurisdiction over the appeal as set out in the **Forest Practices Code**.

[126] The Commission concluded the existence of the claimed aboriginal right had to be determined before it could set aside the seizure and return the logs and that it had jurisdiction to make that determination. Nevertheless, the Commission offered Mr. Paul and the Ministry an adjournment to bring an action in the Supreme Court to determine whether the claimed right existed and its scope, if they preferred a judicial process. Instead, both appealed to the Supreme Court on the ground the Commission did not have the jurisdiction required to define an aboriginal right.

[127] Had the official or the District Manager laid an information under s. 142 of the **Forest Practices Code**, the alleged offences could have been prosecuted as quasi-criminal offences. In that event, Mr. Paul could have asserted his aboriginal right as a defence in the Provincial Court and put forward evidence to support it. That court would have determined whether he had proved the existence of the right and defined its nature and scope. That court's decision could

have been appealed to the Supreme Court, with leave on a question of law to this Court, and with leave to the Supreme Court of Canada. That was the 12-year course followed in **R. v. Adams**, [1996] 3 S.C.R. 101. In **Gladstone**, *supra* and **R. v. Van der Peet**, [1996] 2 S.C.R. 507, it was six years before that path led to an ultimate resolution by the Supreme Court of Canada. Because no information was laid in this case that path was not open to Mr. Paul.

[128] Alternatively, Mr. Paul could have commenced an action in the Supreme Court for an order defining his threatened aboriginal right as a first step. This course would be somewhat like the one Madam Justice Southin recommended in **Halfway River First Nation v. British Columbia (Ministry of Forests)** (1999), 178 D.L.R. (4th) 666, with regard to a treaty right, at para. 24:

In my opinion the issue is not whether there is an infringement and justification within the **Sparrow** test, but whether the Crown has so conducted itself since 1990 as to be in breach of the Treaty. The proper parties to a proceeding to determine that issue are in my opinion the Halfway River First Nation and the Attorney General for British Columbia, or, if monetary compensation is sought, Her Majesty the Queen in right of British Columbia, and the proper means of proceeding is an action.

[129] The preference of British Columbia courts for an adversary trial of aboriginal rights issues can also be seen in **British Columbia (Minister of Forests) v. Okanagan Indian Band** [2000] B.C.J. No. 560 (Q.L.) (S.C.). There Justice Sigurdson exercised his discretion not to set down as a point of law for determination, the constitutionality of ss. 96 and 123 of the **Forest Practices Code**. He decided that evidence was needed to resolve that issue. An appeal from his decision is set for hearing by this Court in September 2001. For the same reason, chambers judges referred summary applications about aboriginal rights to the trial list in **Stoney Creek Indian Band v. Alcan Aluminum Ltd.** (1999), 69 B.C.L.R. (3d) 1 (C.A.) and **Taku River Tlingit First Nation v. Tulsequah Chief Mine Project** [1999] B.C.J. No. 984 (Q.L.) (S.C.).

[130] Arguably, Mr. Paul might also have applied to the Supreme Court for a remedy under s. 24 of the **Constitution Act, 1982**, perhaps damages for failure to recognize and affirm his right. That course remains open to him after he has come to the end of the administrative path.

## DISCUSSION

[131] It cannot be forgotten that aboriginal rights are part of the common law. Their entrenchment in s. 35(1) of the **Constitution Act, 1982**, as Justice Binnie reminded us recently in his concurring reasons in **Mitchell v. Canada (Minister of National Revenue)** 2001 S.C.C. 33 at para. 115, "did not start a new book," although it may have "ushered in a new chapter." The essential question remains that framed by Chief Justice McLachlin, in **Mitchell, supra**, at para. 13:

The question is whether the impugned act represents the modern exercise of an ancestral practice, custom or tradition.

Constitutional entrenchment of an existing right does not change the right. It changes the rules for infringing or extinguishing the right.

[132] I do not accept the proposition said to be derived from **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010, that any right or title protected by s. 35 is a part of the core content of s. 91(24), off-limits to provincial legislatures and excepted from underlying provincial title by s. 109. This reading of **Delgamuukw** appears to me to conflate unnecessarily the specific problem of extinguishment with the problem of infringement of aboriginal rights by provincial laws of general application. Moreover, it appears at odds with the recognition by Chief Justice Lamer in **Delgamuukw, supra**, that *both* federal and provincial governments may be justified in infringing aboriginal rights at para. 160:

The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., **Sparrow**) and provincial (e.g., **Côté**) governments. However, s. 35(1) requires that those infringements satisfy the test of justification. In this section, I will review the Court's nascent jurisprudence on justification and explain how that test will apply in the context of infringements of aboriginal title.

[133] It is inconsistent to say that a province can impair a s. 35 right if that right forms part of the core or primary jurisdiction of Parliament under s. 91(24). I suggest the Supreme Court of Canada in **Delgamuukw** limited its analysis to the inability of the provinces to extinguish aboriginal

rights by laws of general application. Support for this proposition can be found in *Delgamuukw, supra*, at paras. 165 and 168:

[165] The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

[168] Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with

respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

[emphasis added]

[134] In my view, the proper inquiry of the matter is as suggested by Mr. Justice Braidwood in ***Kitkatla v. British Columbia (Small Business, Tourism and Culture)*** (2000), 183 D.L.R. (4th) 103 (B.C.C.A.) at para. 40:

The constitutional analysis must involve determining the true character or "pith and substance" of the sections in question. To put it another way, are the sections unlawful because they are legislation in the matter of Indians or lands reserved for Indians?

[135] Thus, the inquiry is whether the impugned sections of the ***Forest Practices Code*** are valid provincial law passed under s. 92 of the ***Constitution Act, 1867***. If so, then the inquiry shifts to a consideration of whether the provisions apply to First Nations *ex proprio vigore* (by their own force) and if not, whether the legislation is saved by s. 88 of the ***Indian Act***. Section 88 operates as a federal adoption, or incorporation by reference, of a provincial law of general application. There is nothing in the provisions conferring power on the Forest Appeals Commission to suggest the extinguishment of an aboriginal right or the singling out of aboriginal rights for special treatment. Rather, in my view, it is a valid law of general application with the potential for touching upon the core of "Indianess" and thus applies to the First Nations of this province by virtue of s. 88 of the ***Indian Act***.

[136] I agree with Justice Pitfield that the doctrine of interjurisdictional immunity does not operate to preclude the provincial government from granting authority to a provincial decision maker to make decisions about aboriginal rights in the course of applying forest legislation. I do not translate the interjurisdictional immunity doctrine into an inability of the provincial government and its agencies to define rights for the limited purposes of administering the general

law of the province.

[137] Section 88 of the **Indian Act** enables provincial laws of general application to apply to and in respect of Indians, including those laws that impair the status or capacity of Indians, subject to treaty provisions and other federal legislation (**Dick, supra**, and **Côté, supra**). If status Indians are subject to provincial Crown resource management regimes, including forestry, it must follow that decision makers operating within the confines of such provincial resource management schemes must have the power necessary to recognize and affirm aboriginal rights in administering government policy.

[138] I recognize, nevertheless, the doctrine may operate to require an administrative decision maker or a court to read down the forest legislation and policies promulgated under it so as to ensure the administrative action in question recognizes and affirms aboriginal rights.

## **ABORIGINAL RIGHTS AND ADMINISTRATIVE DECISION MAKERS**

[139] I share the concerns that Chief Justice Lamer expressed in **Cooper v. Canada (Human Rights Commission)**, [1996] 3 S.C.R. 854 about the desirability of reserving for courts the power to determine the constitutionality of a statutory provision under s. 52(1) of the **Constitution Act, 1982**. My concern arises primarily from the lack of institutional independence. Most of the so-called practical considerations are at their base questions of the adequacy of institutional resources.

[140] My concern is strongest when the question to be adjudicated is about aboriginal title, where the implications for resource management go far beyond the reach of an administrative decision about an internally limited use claim like Mr. Paul is asserting. There may be good reason for Parliament and the Legislature to explore procedures that distinguish between an internally limited right such as that Mr. Paul asserts and a claim to exclusive use of timber for large-scale economic development on traditional land.

[141] Despite these misgivings and pending guidance from

treaties or legislation, it is my view an administrative decision maker must be able to decide such questions of aboriginal right as are necessary to an exercise of whatever statutory authority is being asserted. A governmental official cannot ignore and thus offend Canada's Constitution. I recognize that a statutory regime may do no more than enable a decision maker to interpret and apply its enabling statute. This is the basis of Justice La Forest's comment, in **Cooper, supra**, at para. 57, that a particular regime may not empower a statutory decision-maker with the jurisdiction to address general questions of law:

Every administrative body, to one degree or another, must have the power to interpret and apply its own enabling statute. Determining jurisdiction over a given complaint through reference to the provisions of the Act is conceptually different from its subjecting the same provisions to **Charter** scrutiny. The former represents an application of Parliament's intent as reflected in the Act while the latter involves ignoring that intent.

[142] However, that comment does not detract from the general duty to interpret statutes in light of **Charter** values or with respect for s. 35 and the rights it protects. As suggested by the Court in **Stoney Creek Indian Band v. British Columbia** (1998), 61 B.C.L.R. (3d) 131 (S.C.), a government decision maker must scrutinize the impact of his decision to ensure the recognition and affirmation of existing aboriginal rights, whether or not defined in a treaty or by judicial precedent. To hold otherwise is to derogate from the constitutional duty of a decision maker to respect aboriginal rights. In other words, the ground for the Crown's obligation is found, not only in s. 52(1) of the **Constitution Act, 1982**, but also in s. 35.

[143] The Crown may also be under a fiduciary duty by reason of s. 35 and **Sparrow, supra**. I need not address that question in this case because the Commission is concerned only with adjudication. Thus, no fiduciary obligation may be imputed to that body. Counsel did not fully address the issue of whether the District Manager or the Administrative Review Panel may have been under a fiduciary obligation to Mr. Paul and this question too must be left for another day.

[144] It follows I do not accept that distinctions between a challenge to the applicability of a statutory provision based on a **Charter** right and one based on an aboriginal right can found the denial of jurisdiction in an administrative decision-maker to consider aboriginal rights as part of an

administrative action. The fundamental question for me is not whether a decision maker must recognize and affirm an aboriginal right but rather how he may do so in the context of his mandate. The answer may vary not only with the statutory mandate but also with the nature of the right claimed.

[145] I agree with Justice Pitfield that the Legislature cannot ignore or override aboriginal rights or authorize others to do so, and that ss. 96 and 115 of the **Forest Practices Code** must be construed and applied with respect for aboriginal rights. Nothing has changed since Justice Dickson stated in **R. v. Big M Drug Mart Ltd.**, [1985] 1 S.C.R. 295 at para. 143, that a court or tribunal has the duty to regard a statute inconsistent with the Constitution as being no longer of force and effect to the extent of the inconsistency.

[146] Moreover, I share Justice Pitfield's view that practical considerations do not weigh generally against a tribunal receiving authority to define aboriginal rights for its administrative purposes. It is important to note that an aboriginal right is never determined in the abstract. An aboriginal right may be understood best, as Justice Donald suggests in his concurring reasons, as an inchoate right that crystallizes in specific factual situations. It is nevertheless a right that pre-existed European settlement of British Columbia whose nature and incidents are to be ascertained from evidence as a matter of fact. There is no reason in principle why an administrative decision-maker cannot ascertain facts as well as a court. The process is always subject to review by a court for fairness, as **Halfway River**, *supra*, illustrates. To the extent the existence and scope of a right is a question of law, any definition of it is subject to review for correctness (See: **Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)**, [1991] 2 S.C.R. 5).

[147] As the Supreme Court of Canada suggested in **Van der Peet**, *supra*, at para. 44, we must build the principles for the reconciliation of aboriginal rights with European settlement and Crown sovereignty, by recognizing and affirming them. In my view, the community will benefit from the capacity of administrative agencies, with their polycentric focus and relaxed rules of evidence, to investigate facts unavailable to parties in adversarial litigation. While decisions about extinguishment, infringement, and justification are to be informed by the need for reconciliation and made with a deep commitment to the solemn promise in s. 35(1) articulated by Chief Justice

Dickson in *Sparrow, supra*, at 1106-7, I do not see them as difficult legal issues requiring experience and a deep knowledge of the common law. If a legal error is made in the course of a decision, a court can correct it.

[148] Common law reasoning methods are not confined to members of the judiciary. Administrative decision makers performing an executive function should have rational minds, capable of determining whether an aboriginal right has been extinguished or infringed. At least since ***Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*** [1947] All E.R. (Vol. 2) 680, courts have recognized that when a legislature confers broad choices on administrative agencies, courts should give considerable respect to the decision maker when reviewing the manner in which discretion was exercised. However, this doctrine does not prevent a court from applying a standard of reasonableness in appropriate cases, as is apparent from this comment by Justice L'Heureux Dubé in ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 at para. 53:

However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (***Roncarelli v. Duplessis***, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the Charter (***Slight Communications Inc. v. Davidson***, [1989] 1 S.C.R. 1038).

I would add that the exercise of a decision maker's discretion must be consistent with s. 35.

[149] In some ways, administrative decision-makers may be better equipped than a court to consider and decide whether an executive action has infringed a right to use a natural resource. That is a question of fact about the use of natural resources about which reasonable persons can disagree. Experience in the shared use of natural resources will be particularly helpful. As Justice Bauman noted in ***International Forest Products v. Forest Appeals Commission*** (1998), 12 Admin. L.R. (3d) 45 at para. 33, the Commission is staffed with "highly trained" persons with years of experience relevant to their responsibilities under the ***Forest Practices Code***. Members of the Commission include university professors who teach environmental studies and forestry, forestry consultants, professional foresters, and lawyers who have specialized in natural resources and

aboriginal issues. It is also of note that the present Commission includes a First Nations Chief, who is a professional forester.

[150] The acknowledged expertise of the Commission in forestry matters would also be valuable in assessing whether potential infringements of aboriginal rights can be justified in light of the objectives underlying the **Forest Practices Code**. Justice La Forest in **Cuddy Chicks**, *supra*, at 16-17, noted that an experienced decision maker's ability to analyze competing policy concerns is critical to a s. 1 analysis. This is equally true of the justification analysis in relation to s. 35(1). The majority in **Van der Peet**, *supra*, saw justification as primarily an issue of policy. As we have seen, in **Delgamuukw**, *supra*, at para. 165, Lamer C.J. considered the first part of the test for justification (the determination whether the objective of the impugned measure is compelling and substantial) as "ultimately a question of fact that will have to be examined on a case-by-case basis." In its second part (whether the infringement is consistent with the fiduciary relationship between Crown and aboriginal peoples), the questions of minimal infringement, fair compensation, and consultation procedures are to be considered. Administrative tribunals are not necessarily inferior to courts in undertaking that task.

[151] The adversarial trial offers little, if any, advantage for the definition of aboriginal rights. The advantage of pleadings and discovery may be over-rated. To date, most aboriginal rights have been defined in proceedings where the factual record has been laid in a criminal matter in a provincial court where pleadings are non-existent and there is no requirement for defence disclosure. In any event, as Professor Hogg writes in **Constitutional Law of Canada** (3<sup>rd</sup> ed.) (Toronto: Carswell, 1992) (looseleaf) at 37-33:

...It must be remembered that any statutory tribunal, whether or not it has an express power to decide questions of law, must decide all questions of law or fact that are necessary to determine a dispute that is properly before it. A tribunal cannot fold its hands and refuse to determine a dispute just because the dispute raises a question of law. In effect, all tribunals with power to decide anything have an implied power to decide all related questions of law. Their decisions on questions of law may be subject to appeal, or to judicial review, or both, but the power (and duty) of the tribunal to render them cannot be doubted.

[152] An administrative decision about a **Charter** issue receives no curial deference (**Cuddy Chicks**, *supra*, at 17). Nor would a decision about an aboriginal right. An administrative determination of an aboriginal right will be case specific. At its highest, it would be a determination that a particular statutory provision could not affect the person claiming the right, regardless of the practical effect it might have on discretion to be exercised subsequently. Additionally, a new hearing may always be ordered.

[153] Because no party appealed the decision of Justice Pitfield that the District Manager and the Administrative Review Panel do not have the power to determine questions of aboriginal rights, the issue of their power and obligations in this regard was argued only incidentally to the main issue, whether the Commission had the power to do so. It follows, however, from what I have said above that I am tentatively of the view the District Manager and the Administrative Review Panel are obliged to observe the Constitution by recognizing and affirming aboriginal rights. This would require them to use the powers they have with due regard for assertions of aboriginal right, not only in allocating forest resources, but also in enforcing the statutory prohibition on unauthorized cutting.

[154] I have sympathy for the forestry officials. The conundrum they faced is somewhat of Mr. Paul's making. While he was asserting an aboriginal right, he was at the same time taking the position that neither the District Manager nor the Administrative Review Panel could determine its validity. He further argued that neither could determine whether the seizure was justified, either because the Legislature could not, or chose not to, grant them that authority. Moreover, Mr. Paul put forth no proof of the right he was asserting at either level.

[155] It is also of the Legislature's making. The forest legislation does not provide a process by which the District Manager might exercise his discretion in such a way as to recognize and affirm aboriginal rights.

[156] Mr. Paul did not argue by analogy from **Adams**, *supra*, that the Legislature's failure to provide guidelines rendered s. 115 of the **Forest Practices Code** ineffective to justify the seizure of his four logs. He preferred to make the point that the absence of guidelines was an indicator the Legislature did not intend the Commission to adjudicate on aboriginal rights. That is a different question. If an

aboriginal right were found to exist, the Commission, empowered to decide questions of law, could determine that s. 96 infringed Mr. Paul's aboriginal right and order the logs returned to him as his property. The District Manager in the same circumstance could exercise his discretion not to affirm the seizure of the logs and in that way respect the aboriginal right.

[157] It may be that the greatest duty that can be placed upon statutory decision makers, like the District Manager and the Administrative Review Panel, is the duty to consult before making a decision. The **Consultation Guidelines** issued by the government of British Columbia in September 1998 for the use of administrative personnel who find themselves dealing with an asserted aboriginal claim may satisfy this duty to consult as Madam Justice Newbury noted in **Cheslatta**, *supra*, at para. 20.

These Guidelines were referred to at para. 94 in the Reasons of Sigurdson J. in **Westbank**, *supra*, and require government officials to deal in good faith in addressing aboriginal "concerns relating to infringement." The Guidelines state that the Province must assess the likelihood of aboriginal rights and title "prior to land resource decisions concerning Crown land activities", and they instruct statutory decision-makers to "take steps to ensure consultation activities contain proper representation from all potentially affected aboriginal groups." If these Guidelines are being complied with, they constitute a substantial answer to the concerns voiced by Mr. Janes. If they are not being complied with, the answer is not to distort the law of civil procedure but to raise the issue in a specific case. At the very least, rules of procedural fairness may be invoked, as occurred recently in **Halfway River First Nation v. British Columbia (Minister of Forests)** (1999), 64 B.C.L.R. (3d) 206 (B.C.C.A.).

[158] Moreover, recent amendments to forest legislation by the **Forest Statutes Amendment Act**, 1997, S.B.C. 1997 c.48, may improve the process Mr. Paul encountered when he asserted his aboriginal rights in the face of a s. 96 violation. The amendments allow a "reference" on a question of law by a review official directly to the Commission, when authorized by regulation. Such a regulation could permit an expedited route to the Commission for the determination of aboriginal rights issues under s. 35.

[159] Be that as it may, the question on this appeal is whether the Legislature empowered the Commission to permit

Mr. Paul to prove the aboriginal right he was asserting, so that it might assess the impact on that right of the District Manager's affirmation of the seizure order. The question is not about aboriginal title or about aboriginal rights in general. It is about the scope of a specific right in specific circumstances. In *Van der Peet, supra*, Chief Justice Lamer noted the importance of specificity at para. 53:

To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right. In this case, therefore, the court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the customs, practices and traditions she invokes in support of her claim.

[160] The Commission understood its task. It framed the issue this way:

The Appellant, Mr. Paul, has claimed that the logs at issue in this appeal should not have been seized from him as he has an aboriginal right to harvest timber for house construction, that his right to do so has been infringed without justification, and the provisions of the Code (section 96(1)) which infringe on [sic] this right, are pursuant to section 35(1) and 52(1) of the *Constitution Act, 1982* of no force and effect.

[161] I agree generally with the Commission and Justice Pitfield the resolution of that issue required the Commission to determine first whether Mr. Paul has established a *prima facie* aboriginal right to cut trees, and then to determine whether that right has been infringed. The obligation to establish a *prima facie* aboriginal right is on the person claiming it. Mr. Paul did not attempt to do that before the District Manager or the Administrative Review Panel, and no one has suggested he will attempt to do so before the Commission. In these circumstances, and having regard to the opinions of my colleagues about the power of the Commission, the decision of the District Manager will stand. Mr. Paul will have to look to the Supreme Court for the return of the logs upon proof of an unjustifiable infringement of an existing aboriginal right. The process may take years given the preference of the Supreme Court for a trial with pleadings and discovery to determine the existence of an

aboriginal right.

[162] In these circumstances, it may be futile to discuss whether the Commission has the power to define Mr. Paul's aboriginal right. However, at the heart of this appeal is the issue of legal policy, whether the analysis to determine if an administrative tribunal can adjudicate in relation to **Charter** rights should be applied to aboriginal rights under s. 35. As must be obvious from my earlier comments, the policy argument for an administrative decision maker having the authority to determine a site-specific and case-specific "aboriginal-use" right is compelling. Nevertheless, whether a particular administrative tribunal has the authority to define an aboriginal right for the purpose of the case before it is ultimately a question for the Legislature who created the tribunal.

[163] In the present case, in order for the Commission to address the question whether s. 96 of the **Forest Practices Code** is inconsistent with a claimed aboriginal right, the tribunal would be required to determine if the claimed activities constituted an aboriginal right that is protected by s. 35. I agree, in general, with Justice Pitfield and the Commission that the analysis developed by the Supreme Court of Canada in the trilogy (**Douglas/Kwantlen Faculty Association v. Douglas College**, [1990] 3 S.C.R. 570, **Cuddy Chicks Ltd., supra**, **Tétreault-Gadoury v. Canada (Employment and Immigration Commission)**, [1991] 2 S.C.R. 22) and **Cooper, supra**, should apply to the determination of whether an administrative tribunal is empowered to decide questions about s. 35 rights.

#### **THE STATUTORY MANDATE OF THE FOREST APPEALS COMMISSION**

[164] With respect to the views of Justice Donald, I prefer the opinion of the Commission and Justice Pitfield that the Commission has jurisdiction to define aboriginal rights for the purpose of making decisions within its statutory mandate. This jurisdiction includes whether an Administrative Review Panel's decision to confirm a District Manager's affirmation of a seizure order should be set aside as infringing an aboriginal right. I have reached that conclusion by following the path laid down in **Cooper, supra**, as informed by the trilogy. No party to this appeal suggested any other approach.

[165] Thus, the path begins at the intention of the Legislature as realized through the statutory mandate of the

Commission.

[166] The forest legislation is an all-encompassing scheme for the management of the timber resource on Crown lands. It begins with a prohibition on all cutting, then moves to a system of granting permission so that the Province may earn revenue from the sale of timber, while ensuring that the forest resource is protected for future generations. The permit system seeks to respect all potential users of the forest and its resources, present and future, including members of First Nations. As we have seen, the Crown has not yet put in place a system for respecting First Nations' use of the forest resource beyond the boundaries of reserve lands.

[167] The subject of this appeal is not the permit system. Our only concern is the system for the enforcement of the prohibition on cutting and removal. It is a quite straightforward inquiry.

[168] When a senior official finds logs without the required mark, his first task is to determine whether they are from trees that were cut on or removed from Crown land. In each case this fact-finding is also the first task of the District Manager, the Administrative Review Panel, and the Commission. The second task is to determine whether such logs should be seized. The third task is to determine whether they should be sold. These are exercises of discretion guided by government policy. The fourth task is to determine who cut or removed them, another question of fact. The fifth is to determine whether any penalty beyond seizure and sale should be meted out, another exercise of discretion, again guided by government policy.

[169] The enforcement actions with the potential to infringe an aboriginal right are seizure, sale, and penalty. All are discretionary executive acts done under a statutory mandate and the policy guidelines of the Ministry of Forests.

[170] When a decision of a Administrative Review Panel, and thus a determination of a District Manager, come before the Commission, interested parties may be represented by counsel, present evidence, ask questions if there is an oral hearing, and make submissions as to facts, law and jurisdiction. The Commission may invite or permit any person to take part in the hearing as an intervenor. Any hearing must be open to the public. The Commission has the same power as the Supreme Court in civil actions to summon and enforce the attendance of witnesses, compel witnesses to give evidence on oath or in

any other manner and to produce records. The Commission may retain, call and hear an expert witness.

[171] Section 138(1) of the **Forest Practices Code** provides the powers of decision of the Commission:

138 (1) On considering an appeal, the commission may  
(a) confirm, vary or rescind the decision appealed from,  
(b) make any decision that the person whose decision is appealed could have made, or  
(c) refer the matter back to the person who made the determination with or without directions.

The Commission's orders are enforceable as an order of the Supreme Court and may be appealed to that court under s. 141 of the **Forest Practices Code** "on a question of law or jurisdiction."

[172] Section 138(1)(b) incorporates into the Commission's powers those granted to the Administrative Review Panel by s. 129(5):

129(5) The employee who conducts the review, or a majority of the employees conducting the review if more than one, may make a decision

(a) confirming, varying or rescinding the determination or making a determination,  
(b) referring a determination or failure to make a determination back to the person who made it or failed to make it, with or without directions, or  
(c) making a determination, if the review concerns the failure to make a determination.

[173] I agree with Justice Pitfield these provisions compel the conclusion that the Commission has jurisdiction to define an aboriginal right asserted as a defence to a contravention enforced by a seizure order. Accordingly, the Commission must assess the asserted aboriginal right in the context of the District Manager's seizure order to determine whether the District Manager should have recognized Mr. Paul's right by refusing to affirm the seizure order. Again, I agree generally with the trial judge's reasons for reaching that conclusion.

[174] The Commission's task is adjudicative. It is not limited in its fact-finding ability. Otherwise, it would not have been given the power to hear evidence, including oral testimony, and to retain, call and hear experts. That evidence could lead to a different result than that determined by the District Manager. The Commission is

entitled to hear submissions of law and thus to determine questions of law. Also, the Commission is entitled to reconsider the District Manager's exercise of discretion based on its findings of fact and its understanding of the law. It can include parties who may be affected by its decision at the hearing. This ensures the process is fair not only to the contravener and the Crown, but to other affected parties, including other First Nations and other users of the forest resource. It may hold oral hearings and it must give written reasons for its decision upon request. Additionally, the Commission's decisions may be enforced by the Supreme Court and are subject to appeal with leave on a question of law or jurisdiction. These provisions ensure the process of decision is not only fair, but transparent.

[175] The grant of these tools, together with the composition and structure of the Commission, belie any reason for finding that the Legislature chose to ignore the Constitution by failing to give this adjudicative tribunal the capacity to require respect for aboriginal rights by administrative decision-makers whose discretionary actions have the potential to infringe those rights.

## **CONCLUSION**

[176] The allocation of forest resources for the benefit of all British Columbians is a complex process involving multiple stakeholders. The needs and rights of all parties, including British Columbia's First Nations, must be considered if the interests of all are to be fairly reconciled. Realizing the jurisdiction of the Commission to recognize and affirm asserted aboriginal rights can only be a positive step towards certainty in the regulation of resource use in British Columbia.

[177] I would dismiss the appeal.

"The Honourable Madam Justice Huddart"