BASIC PRINCIPLES OF DRAFTING OFF-RESERVE AGREEMENTS WITH FIRST NATIONS: WORKING WITH FIRST NATIONS' CUSTOMS AND THE DEVELOPING JURISPRUDENCE

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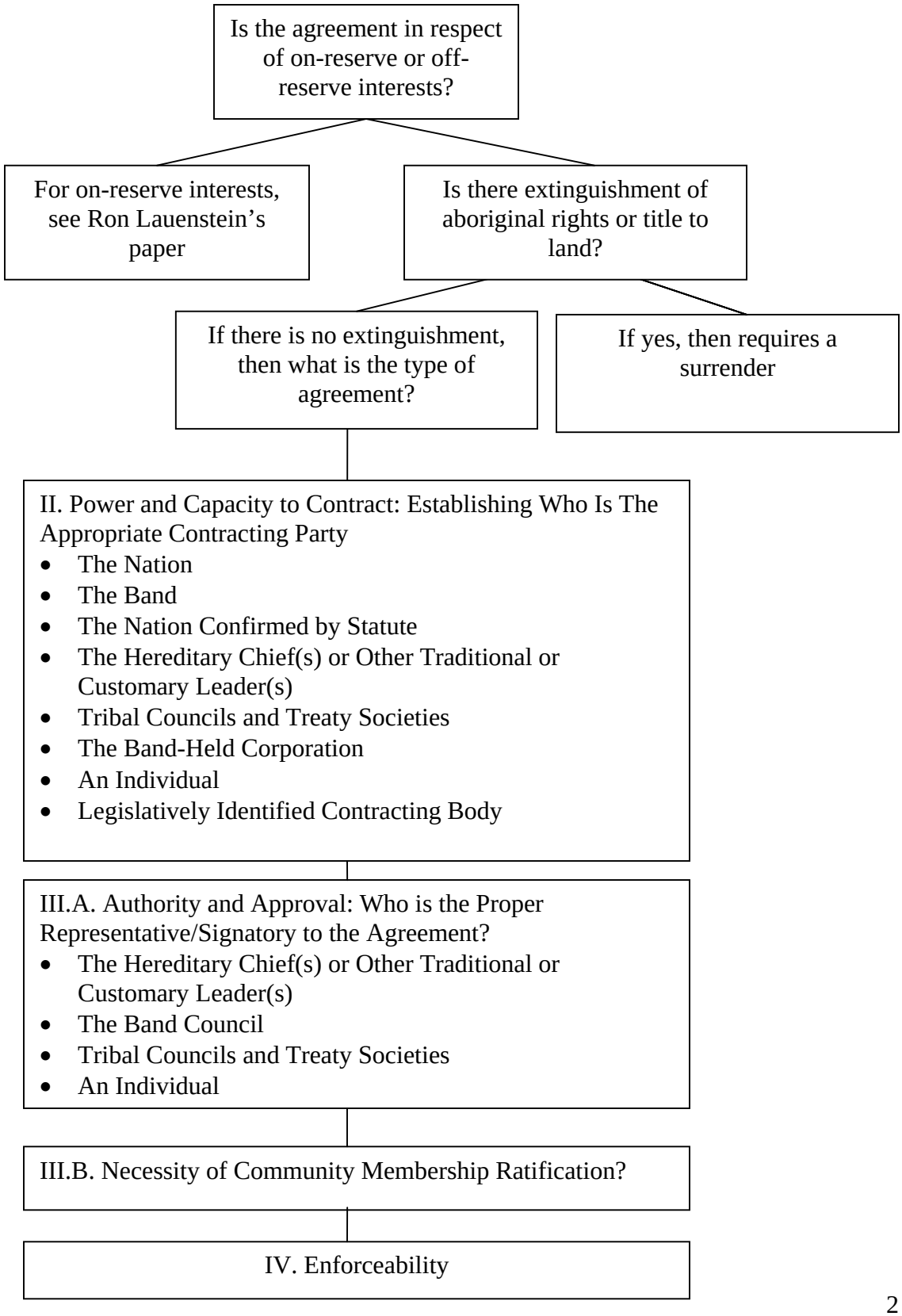
TABLE OF CONTENTS

Informal Decision Chart for First Nations Agreements



I. Introduction

This paper is primarily about agreements concerning First Nations' interests in off-reserve lands and resources.[1] Ronald H. Lauenstein's paper, also in this volume, addresses agreements about the use of reserve land and the application of the *Indian Act* and other relevant legislation.

II. Power and Capacity to Contract: Establishing Who Is The Appropriate Contracting Party

In this part, we outline the difficult issue under current Canadian law of the capacity of various First Nations entities, governing structures and representatives to enter into agreements in relation to the off-reserve "interests" of a First Nation. Often these "interests" are rooted in asserted or established s. 35 aboriginal or treaty rights. Examples of these types of agreements include:

- ❑ treaties and land claims settlements;[2]
- ❑ interim measures agreements to treaty;[3]
- ❑ accommodation agreements and agreements in relation to asserted or proven rights;[4]
- ❑ litigation settlement agreements;[5]

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[1] Please note that this paper does not deal with cultural and intellectual property agreements in respect of traditional ecological knowledge. For more information, see David Spratley's paper, "Protecting Aboriginal Knowledge, Culture and Art Under Canadian Intellectual Property Laws" (Presented to the Continuing Legal Education Society of British Columbia Aboriginal Law Conference, June 10, 2005).

[2] The modern-day treaties in BC are: the *Nisga'a Final Agreement* (online: http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html); *Tsawwassen First Nation Final Agreement* (government ratification pending) (online: http://www.bctreaty.net/nations/agreements/Tsawwassen_final_initial.pdf); *Maa-Nulth Final Agreement* (government ratification pending) (online: http://www.bctreaty.net/nations/agreements/Maanulth_final_intial_Dec06.pdf). There are two sets of historic treaties in BC: Treaty 8 (online: http://www.ainc-inac.gc.ca/pr/trts/trty8/trty_e.html); and the Douglas Treaties (online: http://www.ainc-inac.gc.ca/pr/trts/doug_e.html).

[3] E.g. Clayoquot Sound *Interim Measures Agreement*, 10 December 1993 (*Clayoquot Sound Interim Measures*) (online: http://www.woodwardandcompany.com/precedents/IMA.pdf); Gitxsan Short Term Forestry Agreement.

[4] E.g. Forest and Range Opportunity Agreements (available online: http://www.for.gov.bc.ca/haa/FN_Agreements.htm); Aboriginal Fisheries Strategy Agreements (available online: http://www.pac.dfo-mpo.gc.ca/tapd/afs_agrmt_e.htm#Comprehensive%20Fisheries%20Agreements); Upper Similkameen *Mining and Minerals Protocol Agreement*, 27 July 2006 (online: http://www.empr.gov.bc.ca/subwebs/AboriginalAffairs/USIBMEMPRMiningProtocolAgreementFinalJuly272006.pdf); Blueberry River First Nations Resource Agreements (available online: http://www.gov.bc.ca/arr/treaty/key/blueberry_river.html); Blueberry River First Nations Economic Benefits Agreement (online: http://www.gov.bc.ca/arr/treaty/key/down/blueberry_eba_a.pdf).

[5] For example, the Dene Tha' First Nation recently reached an agreement with the Federal Government which included compensation of $25 million in settlement of Dene Tha' First Nation claims following the Federal Court

- agreements with third parties (impact benefit agreements, participation agreements, socio-economic agreements, etc);[6]

- boundary agreements among First Nations;[7]

- co-management agreements;[8] and

- agreements concerning participation in project reviews (e.g., environmental assessments).[9]

Such agreements, whether entered into between the Crown and a First Nation, a third party and a First Nation, or two or more First Nations are not governed by the *Indian Act*, and most often are not guided by any other statute.[10] Jurisprudence concerning enforcement of them is limited.

It has been a principle since early North American and then Canadian law that a settler (or the Province or other third party) could not acquire the interest of an Indian in land through a private agreement, but that the Indian interest had to first be extinguished through an agreement with the Federal Crown.[11] This principle is reflected in the *Indian Act* prohibition against any alienation – either temporary or permanent – of reserve land without the consent of the Minister.[12] Supreme Court of Canada authority since the

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Trial Division's decision that the Federal Government breached their duty to consult regarding the Mackenzie Gas Project (*Canada-Dene Tha' Mackenzie Valley Gas Project and Connecting Facilities Settlement Agreement*, signed by Canada on 28 June 2007 and by the Dene Tha' First Nation on 24 April 2007). See also the agreements between the Province of British Columbia, BC Hydro and the Tsay Keh Dene Band and the Kwadacha Nation that address the impacts of flooding from the Williston Reservoir (online: http://www.gov.bc.ca/arr/treaty/key/williston.html).

[6] Generally speaking, the terms of these agreements require confidentiality. For drafting tips see Rosanne Kyle and Amin Lalji's papers in this volume; Wendy A. Baker, "Aboriginal Law – Mining" (Paper presented to the Continuing Legal Education Society of British Columbia Aboriginal Law and Natural Resource Use Conference, October 2005); Anne E. Giardini, "Best Practices in Achieving Effective Agreements – An Industry Perspective" (Paper presented to the Continuing Legal Education Society of British Columbia Aboriginal Law and Natural Resource Use Conference, October 2005); Michael J. McDonald, "Economic Development on Traditional Lands (First Nations Perspective)" (Paper presented to the Continuing Legal Education Society of British Columbia Aboriginal Law and Natural Resource Use Conference, October 2005).

[7] See *Tseshaht First Nation v. Huu-ay-aht First Nation*, 2007 BCSC 1141; see also agreements signed between the Homalco First Nation and the Tshilhqot'in First Nation, and the Esketemc First Nation and the Tsilhqot'in First Nation, filed in *William v. AGBC et. al.*, BC Supreme Court, Victoria Registry, Action No. 90 0913. Decision of Mr. Justice Vickers pending.

[8] See INAC's website for a summary of a number of such agreements (online: http://www.ainc-inac.gc.ca/ch/rcap/sg/sha4b_e.html).

[9] See for example, the *Memorandum of Understanding on Environment Assessment of the Proposed Voisey's Bay Mining Development*, 31 January 1997, (online: http://www.ceaa-acee.gc.ca/010/0001/0001/0011/0004/mou_e.htm); *Agreement for an Environmental Impact Review of the Mackenzie Gas Project*, 18 August 2004 (online: http://www.jointreviewpanel.ca/jrpa_final_e.html).

[10] A notable exception is the *Agreement Between the Inuit of the Nunavut Settlement Area And Her Majesty the Queen in Right of Canada*, 25 May 1993 (*Nunavut Land Claims Agreement*) (available online: http://www.ainc-inac.gc.ca/pr/agr/pdf/nunav_e.pdf), where Article 26 sets out some procedures for creating IBAs within Inuit lands and includes suggestions for appropriate benefits.

[11] See *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *St. Catharines Milling & Lumber Co. v. R.* (1887), 13 S.C.R. 577, affirmed (1888), LR 14 App. Cas. 46, 4 Cart. B.N.A. 107, 58 L.J.P.C. 54, 6 L.T. 197, C.R. [10] A.C. 13 (Canada P.C.).

[12] R.S.C. 1985, c.I-5, ss. 28, 29, 53, 58.

enactment of s. 35 of the *Constitution Act, 1982* confirms that while aboriginal and treaty rights can be justifiably infringed, it remains the case that they are inalienable except to the Crown.[13] Nonetheless, First Nations today frequently negotiate directly with third parties in respect of their off-reserve interests in lands and resources - interests that are grounded fundamentally in their s. 35 constitutional rights. Furthermore, as stated by Mr. Justice Binnie in *Mikisew*, "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[14]

First Nations today (and their legal advisors) are often faced with the possibility that it may be advantageous to a First Nation to reach a deal with a third party, particularly where governments are anxious to approve development but slow to recognize rights and/or to provide appropriate compensation and accommodation in respect of a project or activity. In the case of large resource development projects, the First Nation (and its legal counsel) is often left with only two options: either fight the project (in court, and/or through an environmental assessment process), or try to ensure that as many benefits as possible flow to the First Nation. Faced with instructions for the latter, the First Nation's solicitor has the task of negotiating and crafting accommodation agreements with the Crown, as well as benefits agreements with third parties.

A. Possible First Nation Parties

The BC Supreme Court in the *Campbell* case held that the rights of aboriginal people to govern themselves were not extinguished by s. 91 and 92 of the *Constitution Act, 1867*, and there remains a limited inherent right to self-government.[15] The Royal Commission on Aboriginal Peoples found that self determination refers to the right of an aboriginal people to choose how it will be governed and entitles aboriginal peoples to negotiate the terms of their relationship with Canada and to establish appropriate governance structures.[16] As is observed by Brian Slattery, aboriginal peoples also have the right to maintain and develop their systems of customary law.[17]

That said, what little jurisprudence exists concerning who is the correct representative when dealing with the off-reserve interests of a First Nation does little to clarify the issue.[18]

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[13] See e.g. *R. v. Vanderpeet*, [1996] 2 SCR 507, *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 17; *R. v. Badger*, [1996] 1 SCR 771.

[14] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388 (S.C.C), at para. 1.

[15] *Campbell v. British Columbia (Attorney General)*, 79 B.C.L.R. (3d) 122, [2000] 8 W.W.R. 600, 189 D.L.R. (4th), 2000 BCSC 1123 at paras. 179-80.

[16] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Canada Communication Group, 1996) at 173, 175.

[17] Brian Slattery, "The Generative Structure of Aboriginal Rights" Draft 9e, July 22, 2007, *Supreme Court Law Review*, forthcoming, (online: http://osgoode.yorku.ca/osgmedia.nsf/research/slattery_brian), citing *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.); *Casimel v. Insurance Corp. of British Columbia* (1993), 106 D.L.R. (4th) 720 (B.C.C.A.); *Van der Peet*, *supra*, note 3, at paras. 38-40; *Delgamuukw*, *supra*, note 14, at paras. 146-48; *Campbell v. British Columbia (Attorney General)* (2000), 189 D.L.R. (4th) 333 (B.C.S.C.), at paras. 83-136; *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911 (S.C.C.), at paras. 9-10, 61-64, 141-54.

[18] For example, in *Gitxsan v. BC (Ministry of Forests)*, 2002 BCSC 1701, the court found that the Province had a duty to consult the "*First Nation*" in respect of the transfer of Skeena Cellulose Inc; however the claim was brought by eight house chiefs "on behalf of all members of the *Gitxsan Houses*." In *Gitga'at Development Corp. v. Hill*, 2007 BCCA 158 the Band Council and the hereditary chiefs had competing claims to represent the "Hartley Bay

With this in mind, below we review possible First Nations parties to off-reserve agreements.

1. The Nation

In *Wewayakum Indian Band v. Canada,* Addy D.J. of the Federal Court, Trial Division apparently took judicial notice of the "fact" of a First Nation's capacity to contract:

> One need not possess any special knowledge or expertise nor be guided by any particular evidence to be fully aware of the fact that from the time of the first contacts between Indians and Europeans the latter have recognized the rights of Indian social or racial organizations, be they Bands, Tribes, or Nations, to enter into Treaties, contracts and obligations, acquire certain rights and renounce and abandon other previously enjoyed ones.[19]

It is this concept of Nation or Tribe that is referred to, and given legal status and recognition, in the *Royal Proclamation of 1763*:

> the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.[20]

The Royal Commission on Aboriginal Peoples defined an Aboriginal Nation as "a sizable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories."[21] They estimated that there are currently between 60 and 80 historic-based Nations.[22] By contrast, there are over 600 *Indian Act* Bands in Canada.

Within Nations there may be sub-groups, with different names and structures, depending on the customs of the Nation. For example, in *Delgamuukw*, the Supreme Court of Canada noted that the Gitksan and the Wet'suwet'en people are each divided into 4 clans, which are further divided into houses. Lineage is

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Band" for the purpose of a trust agreement. Stating that the "Band" has no other meaning than the *Indian Act* meaning, where a trust agreement identified the "Hartley Bay Band" as the beneficiary, the B.C. Court of Appeal held that it could only be the *Indian Act* Band that is the beneficiary, and that the Band Council has the legal authority to represent the Band in respect of its collective right in the shares. In *R v. Seward*, [2001] 4 C.N.L.R. 274, the Provincial Court of British Columbia affirmed the validity of a fisheries agreement with the Federal Government signed by the Chief, on behalf of the Band, the result of which was to suspend collective treaty rights to harvest shellfish.[18] Conversely, the trial judge in *Lac La Ronge Indian Band v. Canada*, (1999), [2000] 1 C.N.L.R. 245 (Sask. Q.B.); varied, but not on this point, [2001] 4 C.N.L.R. 120 (Sask C.A.), held that the Band Council did not have the authority to settle or compromise a treaty 6 land entitlement claim.

[19] *Wewayakum Indian Band v. Canada (sub nom. Roberts v. R.)* (1991), [1992] 2 C.N.L.R. 177, 42 F.T.R. 40 (T.D.) at 46; reversed in part by (1999), 27 R.P.R. (3d) 157 (Fed. C.A.), aff'd 2002 SCC 79.

[20] *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1, at pp 4-5.

[21] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Canada Communication Group, 1996) at 182.

[22] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Canada Communication Group, 1996) at 182.

determined matrilineally, with each child taking his or her mother's house and clan. Each house has one or more hereditary chiefs, but there is no head chief for the clan. Within communities and villages, there is a ranking order of houses and clans.[23]

Depending on a number of factors including patterns of pre-contact (or pre-sovereignty) land use, governance, and territorial defence, aboriginal and treaty rights may held by the members of the Nation or sub-group, which may or may not be synonymous with an *Indian Act* "Band." For example, the Tsilhqot'in Nation is made up of six communities, which are organized into Bands; aboriginal title is held by the Tsilhqot'in Nation as a whole, while certain rights are held by the Bands.[24] The Ahousaht is the successor group to a number of independent groups that have since amalgamated, including the Kelsemat, Manhousat, Quatsweat and Oinimitisat.[25] Conversely, Toquaht is an example of an *Indian Act* Band that mirrors the pre-existing aboriginal group.[26]

Where two or more groups have amalgamated, the Crown and third parties are likely entitled to rely on consultation and accommodation with the group as amalgamated, and similarly agreements with the group as amalgamated are likely to withstand a subsequent challenge by dissatisfied members of one of the original groups.[27]

While it is possible that rights may be held by a sub-group such as a house, clan or family, solicitors acting for government, third parties or the aboriginal group should exercise caution before entering into an agreement with a subgroup to ensure that it is in fact the appropriate party. Where the sub-group represents a "dissident minority" within a larger rights-holding group, the sub-group will not be an appropriate party to an agreement.[28]

In a speech given to the CBA Vancouver Aboriginal Law Section, Paul Yearwood gave an example of the difficulty in sorting out the complicated issue of who should sign an agreement in respect of the interests of the Nation and its subgroups.[29] In a judgment in relation to claims brought on behalf of all members of the "Gitxsan Houses" and three other First Nations, Justice Tysoe of the Supreme Court of British Columbia held that the Minister had a duty to consult with "each of the petitioning First Nations" in respect of a transfer of control of Skeena Cellulose Inc. [30] The Minister of Forests subsequently entered into an Interim Forestry Agreement, signed on behalf of "The Gitxsan" by two house chiefs, Delgamuukw, and Tenimgyet. Some of the other house chiefs then initiated new proceedings challenging

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[23] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 12.
[24] *William v. AGBC et. al.* Amended Statement of Claim filed June 16, 2003, BC Supreme Court, Victoria Registry, Action No. 90 0913. Decision of Mr. Justice Vickers pending.
[25] Barbara Lane, *Ethnographic and Ethnohistoric Background of the Native People of Meares Island, Clayoquot Sound* (expert report commissioned by the Plaintiff in the *MacMillan Bloedel Ltd. v. Mullin* "*Meares Island* case") British Columbia Supreme Court, Vancouver Registry, Action Nos. C845874 and C845874) at 115, 118.
[26] Philip Drucker, *The Northern and Central Nootkan Tribes*, Smithsonian Institution Bureau of American Ethnology Bulletin 144 (Washington: United States Government Printing Office, 1951) at 7.
[27] In this regard see *Komoyue Heritage Society v British Columbia (Attorney General)* 2006 BCSC 1517, especially para. 70.
[28] For examples of cases dealing with the duty to consult dissident members, see *Red Chris Development Co. v. Quock*, 2006 BCSC 1472; *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517; see also oral reasons in *Fortune Coal Limited & Fortune Minerals v. Dennis, et.al*, 2005 BCSC unreported.
[29] Paul Yearwood, "Who speaks for the Nation?: Challenges in Consultations with First Nations" (Presentation to the CBA-BC – Aboriginal (Vancouver) Subsection, April 4, 2007).
[30] *Gitxsan Houses v. B.C. (Ministry of Forests*), 2002 BCSC 1701.

the forestry agreement on the basis that it lacked proper authorization.[31] While these claims did not go ahead, when a new Short Term Forestry Agreement was signed three years later, it provided signature lines for 59 House Chiefs, though the 52 signing chiefs signed "on behalf of: Gitxsan."[32]

Much as the authority for officers of a corporation to execute documents on behalf of the corporation is set out in legislation, the articles, or the bylaws of the corporation as the case may be, the authority of certain individuals to make agreements that bind the Nation or a sub-group in relation to its territory or rights must, in our view, be sourced to the customary laws of the Nation itself. As is observed by Brian Slattery, "the…right to customary law arises at the time of sovereignty, however the particular bodies of customary law protected by the right are not static, but continue to evolve and adapt to keep pace with societal changes. It follows that the relevant date for determining the existence of a particular rule of customary law is not the date of sovereignty but the date of the activity or transaction whose legality is in question."[33] Certainly one can find many examples of agreements entered into by hereditary or customary leaders on behalf of Nations. The Forest and Range Opportunity Agreements offer several examples.[34]

2. The Band

Under the *Indian Act*, a Band is defined as "a body of Indians" that either has reserve lands or government trust funds, or is the subject of a Cabinet declaration.[35] Increasingly, the bodies that have been identified as "Bands" are choosing to identify as "First Nations". In many cases, these terms are legally synonymous, however, the BC Court of Appeal in the *Gitga'at* decision has recently held that "Band" has "no ordinary meaning other than the *Indian Act* meaning"…"because the Hartley Bay Band has no existence other than under the *Indian Act*, and that…[t]he only mechanism on Canadian law by which collective property rights may be held and enforced is the Band structure established by the *Indian Act*. [36]

Notwithstanding this recent decision of the BC Court of Appeal, it is our view that a "Band" can usually trace its legal existence to one of the original self-governing Nations or Tribes mentioned in the *Royal Proclamation of 1763*. The *Indian Act* recognizes and regulates Bands, but in our opinion the Band is more than just a "creature of statute." Support for this proposition can be found in the original *Indian Act, 1876*, SC 1876, c.18:

> 3(1) The term "band" means any tribe, band, or body of Indians who own or are interested in a reserve or in Indian Lands in common of which legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the government of Canada is responsible…

[31] See *Gitxsan Houses v. British Columbia (Minister of Forests)*, 2005 BCSC 994.
[32] Paul Yearwood, "Who speaks for the Nation?: Challenges in Consultations with First Nations" (Presentation to the CBA-BC – Aboriginal (Vancouver) Subsection, April 4, 2007).
[33] Brian Slattery, "The Generative Structure of Aboriginal Rights" Draft 9e, July 22, 2007, *Supreme Court Law Review*, forthcoming, (online: http://osgoode.yorku.ca/osgmedia.nsf/research/slattery_brian).
[34] These agreements are available online at http://www.for.gov.bc.ca/haa/FN_Agreements.htm.
[35] R.S.C. 1985, c.I-5, s. 2(1).
[36] *Gitga'at Development Corporation v. Hill*, 2007 BCCA 158 at paras. 17, 18, and 21.

> 3(2) The term "irregular band" means any tribe, band, or body of persons of Indian blood who own no interest in any reserve or lands of which the legal title is vested in the Crown, who possess no common fund managed by the Government of Canada, or who have not had any treaty relations with the Crown (emphasis added).

The circularity of these definitions suggests that "Bands" pre-existed the enactment of the *Indian Act, 1876.*

Certainly there will be many examples where the *Indian Act* Band is in fact the successor to the rights-holding group. It is our opinion that on a principled basis, the ability of an *Indian Act* Band to enter into agreements in relation to off-reserve interests (treaty rights, or established or asserted aboriginal rights, including title) should depend entirely on whether the Band is the successor to the pre-existing rights-holding group. On this basis, the signatories should normally be those authorized under traditional governance systems. However, the courts appear increasingly willing to accept the authority of the Band Council to represent the Nation in a wide range of areas that fall outside of the scope of their *Indian Act* powers.[37]

As a practical consideration there is case law affirming that a Band has the capacity to contract and to enter into commercial agreements.[38]

3. The Nation Confirmed By Statute

Some First Nations have self-government agreements implemented by statute under which they are deemed to be legal entities with all the rights, privileges and responsibilities of a natural person, which include the ability to contract and to sue and be sued.[39] The main example from British Columbia is the Westbank First Nation.

The Nisga'a Nation signed the first modern-day BC treaty, two treaties have been ratified under the BC Treaty Process, and there are other Nations that are still in various stages of the BC treaty process. It is beyond the scope of this paper to deal with the powers of modern-day treaty governments to enter into contracts following treaty settlement, but the reader is directed to the text of the those treaties referred to in footnote 2 above for language affirming the power to contract.

4. The Hereditary Chief(s) or Other Traditional or Customary Leader(s)

There are many varieties of custom government amongst the First Nations of British Columbia. Section 74 of the *Indian Act* is the authority for Canada to replace these customary councils and chiefs with

[37] See for example, *Gitga'at Development Corp. v. Hill*, 2007 BCCA 158; *Telecom Leasing Canada (TLC) Limited v. Enoch Indian Band*, [1993] 1 W.W.R. 373; *R. v. Seward*, [2001] 4 C.L.N.R. 274; *Red Chris Development Co. v. Quock*, 2006 BCSC 1472.
[38] *Telecom Leasing Canada v. Enoch Indian Band of Stony Plain Indian Reserve*, [1993] 1 W.W.R. 373 at para. 8.
[39] *Westbank First Nation Self-Government Agreement*, at s. 19 (online: http://wfn.ca/pdf/sga_final.pdf).

elected councils. About one third of the Bands in Canada still have their original custom councils, unaltered by section 74. Of the section 74 Bands, a large number have "reverted" to custom, but in those cases the new custom is usually an elected council similar to a section 74 council.

Where there is no section 74 order under the *Indian Act* the customary leader or leaders will still be the lawful government. Hereditary chiefs are a common form of customary government in British Columbia. A prominent example is the Toquaht First Nation. Other First Nations may have section 74 councils, but nevertheless, their hereditary (or other customary) chiefs continue to hold such powers as have not been explicitly removed by the Indian Act.

While it is common to see hereditary chiefs sign agreements *on behalf of* their Nation, there are also agreements that are signed by the hereditary chiefs, apparently as the rightful owners of the resource under traditional law. As an example, in the Clayoquot Sound Interim Measures Agreement and the subsequent Clayoquot Sound Interim Measures Extension Agreement, the agreement is made between the Crown and the Ha'wiih (hereditary chiefs) of each of the Nations involved. Interestingly, in these agreements, the Ha'wiih agree to be represented by the Nation.[40]

5. Tribal Councils and Treaty Societies

Tribal Councils and Treaty Societies, since they are usually incorporated under provincial or sometimes federal legislation, are at first glance a convenient option as a contracting party, particularly where they represent more than one affected group. However, based on the principle that aboriginal and treaty rights are inalienable and cannot be transferred or assigned,[41] it is probably most appropriate that a Tribal Council enter into the agreement on behalf of the true parties, which are the rights holding groups (i.e., the Nations, as represented by their Tribal Council), and that at a minimum the agreement be ratified by the leadership of the rights-holding groups involved (the Bands or Nations).

That said, according to the Newfoundland and Labrador Trial Division, an aboriginal group may put forward a representative body to act as its agent in making its claim for Section 35 rights,[42] and by analogy can likely represent the group for the purposes of an accommodation or impact benefits agreement.

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[40] Clayoquot Sound *Interim Measures Agreement*, 10 December 1993 (*Clayoquot Sound Interim Measures*) (online: http://www.woodwardandcompany.com/precedents/IMA.pdf); *Clayoquot Sound Interim Measures Extension Agreement: A Bridge to Treaty*, 26 May 2006 (online: http://www.gov.bc.ca/arr/treaty/key/down/clayoquot_sound.pdf).

[41] See *Komoyue Heritage Society v British Columbia (Attorney General)*, 2006 BCSC 1517 at para. 54; *R. v. Vanderpeet*, 1996 2 SCR 507, *Delgamuukw v. British Columbia*, 1997 3 SCR 1010; *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 17; *R. v. Badger*, 1996 1 SCR 771.

[42] *Labrador Metis Nation v. Her Majesty in Right of Newfoundland and Labrador* (2006), 149 A.C.W.S. (3d) 925 (NLTD) at para. 60.

6. The Band-Held Corporation

A Band-held corporation will typically be the appropriate party to carry out certain functions under a variety of economic development agreements, such as joint venture agreements and service agreements for Band-owned off-reserve businesses. However, they are clearly not the appropriate party to enter into agreements concerning the impact of activities on aboriginal or treaty rights. This is because aboriginal and treaty rights are collective rights vesting in the aboriginal community that holds them, and cannot be assigned or transferred.[43]

While a Band itself may hold assets located off-reserve and could conceivably conduct business in its own right,[44] more typically off-reserve business is conducted through a corporate entity. Often the First Nation's interest in the corporate entity includes representation on the Board of Directors and an ownership model wherein shares are held in trust on behalf of the Band or the members of the Band.[45]

There are a variety of considerations when setting up a Band-owned or partially Band-owned corporation, but such matters are beyond the scope of this paper to address. Once a corporation is up and running, the choice of party and signatories is straightforward.

7. An Individual

In *Red Chris Development v. Quock*, the B.C. Supreme Court confirmed that consultation is to be carried out with elected representatives, and that to afford a right of consultation to individuals or families would be unworkable.[46] Similarly, due to the collective nature of aboriginal and treaty rights, it will be a rare situation where an individual may enter into a contract in respect of rights, assets or entitlements of the Nation, except in cases where they do so on behalf of the Nation as an authorized representative.

One such rare example was the *Jack* case, in which the Court of Appeal held that "Mr. Jack, as head of a family group, possesses a hereditary compendium of rights, assets and responsibilities known as his "hahuuhli." His aboriginal right to fish included the right to invite kinsmen to assist him in fishing" (emphasis added).[47]

Another exception may be agreements to settle litigation in respect of treaty or aboriginal rights and/or title. It may be appropriate that the representative litigant sign any such agreement, and it will be important he or she receives authority to do so by the group he or she represents.

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[43] By way of analogy, see *Komoyue Heritage Society v. British Columbia (Attorney General),* 2006 BCSC 1517, at para. 54, wherein the BC Supreme Court held that an incorporated Society lacked the capacity to act as a representative petitioner in a case involving the duty to consult the aboriginal group.
[44] See *Klahoose First Nation v Cortes Ecoforestry Society*, [2003] 3 C.N.L.R. 130 (B.C.S.C.).
[45] Note that such a trust agreement was recently considered by the BC Court of Appeal in *Gitga'at Development Corporation v. Hill,* 2007 BCCA 158.
[46] 2006 BCSC 1472.
[47] *R. v. Jack*, [1996] 2 C.N.L.R. 113.

This is not to say that individual members cannot be successful in protecting aboriginal rights without acting through the Band or Nation. One such example is *Relentless Energy Corp. v. Davis,*[48] in which the defendants, who were beneficiaries under Treaty 8, successfully defended against an injunction brought by an Oil and Gas Commission (OGC) permittee who was proposing to build a road though the area in which they exercised their Treaty 8 rights. They were successful in doing so in spite of the fact that the Band was not categorically opposed to development and was in a consultation process with the OCG. The B.C. Supreme Court's reasoning was that "it is no longer realistic to simply tell the defendants to go elsewhere under Treaty 8 to exercise their rights." However, had the Band actively denounced the actions of the trappers, it is unlikely that the result would have been the same.

8. Legislatively Identified Contracting Body

In some cases there is legislation or regulation that identify the contracting body or that require a certain process for determining who is to be the contracting body. An example of this is the BC Treaty process, which requires that First Nations select their governing body, which may be a traditional government, Band, tribal council or a combination of the previous. That governing body must be given a clear mandate by its people to enter into the treaty making process with the governments of Canada and BC.[49] In addition, the *Indian Act* and a variety of statutes mandate a particular First Nations party for agreements made under that legislation.

B. Identifying the Appropriate First Nation Party

Fundamentally, the vast majority of agreements with First Nations concerning the First Nation's interest in off-reserve lands and resources have at their root the objective of reconciling the s. 35 constitutional rights of aboriginal peoples with the interests of the broader society. Whether the agreement does this directly, as in accommodation agreements with the Crown, or indirectly, as in an impact benefits agreement with a third party, these agreements are ultimately part of what the Crown must take into account when determining whether its duty to meaningfully consult with, and accommodate the interests of, the First Nation is fulfilled.

Where the agreement concerns or touches on established or asserted aboriginal or treaty rights protected by s. 35 of the *Constitution Act, 1982*, it is essential to consider the nature of these rights. Importantly, treaty rights and aboriginal rights including aboriginal title, are held collectively by all members of the group, [50]and are "exercised by the authority of the local community."[51]

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[48] 2004 BCSC 1492 (S.C.).

[49] BC Treaty Commission, "Six-stages: Policies and Procedures, Stage 1: Statement of Intent to Negotiate, Criteria for Stage 1", (online: http://www.bctreaty.net/files/sixstages-2.php).

[50] See for example *R. v. Sparrow*, [1990] S.C.R. 1075 at 1112; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1082-1083; *Oregon Jack Creek Indian Band v. Canadian National Railway* (*sub nom. Pasco v. Canadian National Railway*) , [1990] 2 C.L.N.R. 85 at 88; *Twinn v. Canada* (1986), [1987] 6 F.T.R. 138 at 145 (T.D.) (Strayer J.); *Ontario (Attorney General) v. Bear Island Foundation*, [1985] 1 C.L.N.R. 1; *Nemiah Valley Indian Band v. Riverside Forest Products* (1999), 37 C.P.C. (4th) 101 (B.C.S.C.) (Vickers J.); *Blueberry River Indian Band v.*

Another important feature of s. 35 rights is that they "are [held by] the descendants of the members of a society who in common held such rights" [52] (at sovereignty or contact, as the case may be). This successor group may be the same as the *Indian Act* Band, but this will not always be the case.

Therefore, where the interests of the First Nation in land and resources are sourced to their s. 35 rights, the customary legal and governance structures of the First Nation will be relevant to identifying the appropriate party in agreements concerning these interests. Examples of such agreements may include boundary agreements between First Nations, accommodation or interim measures agreements with the Crown, impact benefit agreements with industry, and litigation settlement agreements.

There is no one group that can be identified from the list above that will be the appropriate party in all cases. Instead, it is necessary to look at the customary legal tradition of the particular First Nation in question. Some (particularly coastal) First Nations will have a system of hereditary leadership and customary laws that entitle hereditary chiefs to make agreements with third party interests. Other First Nations may have customary laws that assign decision-making authority based on merit. In other cases, the Band Council may itself have the authority to represent the rights-holding aboriginal group. Within a First Nation itself, different types of agreements may require different decision making processes, for example, some agreements may have to be subjected to a community consensus, and in the case of others, a chief or leader may have the requisite authority.

Part of the due diligence of a solicitor in crafting or advising a client on such an agreement will therefore involve making reasonable inquiries to identify the successor rights-holding group, and the customary governance structure of that group that is in operation when the agreement is negotiated and executed.[53]

III. Authority and Approval of Agreements

A. Who Is The Proper Representative/Signatory To The Agreement?

In *Wewayakum Indian Band v. Canada,* Addy D.J. of the Federal Court Trial Division held that:

> I…find that [Indian Bands] do possess a special status enabling them to institute, prosecute, and defend a court action. It follows that those claiming to sue in the name of a Band must be prepared to establish their authority to do so when and if that authority is challenged. Any such authorization of course need not be subject to any special rules,

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Canada (Department of Indian Affairs & Northern Development) (*sub nom. Apsassin v. The Queen*), [2001] 4 F.C. 451 (C.A.) at paras. 15-27; *R. v. Marshall*, [1999] 3 S.C.R. 533.

[51] *R. v. Marshall*, [1999] 3 S.C.R. 533.

[52] *Oregon Jack Creek Indian Band v. Canadian National Railway Company* (1989), 34 B.C.L.R. (2d) 344 at 352 (C.A.) aff'd [1989] 2 S.C.R. 1069.

[53] See Brian Slattery, "The Generative Structure of Aboriginal Rights" Draft 9e, July 22, 2007, *Supreme Court Law Review*, forthcoming, (online: http://osgoode.yorku.ca/osgmedia.nsf/research/slattery_brian), who argues, at 18, that the right to maintain and develop customary laws is not static, and the relevant date for the inquiry as to the existence of a customary rule is the date of the activity or transaction whose legality is in question.

> laws or procedures other than those prescribed by the traditions, customs and government of the particular band.[54]

We would argue that similarly, those purporting to make agreements on behalf of a First Nation outside the scope of statutory frameworks that dictate the appropriate parties and signatories must generally source their authority to the "traditions, customs and government" of the First Nation in question.

Bearing this in mind, we review possible signatories to off-reserve agreements below.

1. The Hereditary Chief(s) or Other Traditional or Customary Leader(s)

As discussed above, where the Nation is the party, the signatories to the agreement should be those authorized under customary law to exercise such authority[55] (unless, of course the right to exercise customary laws has been extinguished by clear and plain legislative intent prior to 1982). The relevant customs will be those that have evolved and that are in operation at the effective date of the agreement.[56] Depending on the nature of the agreement and the customs of the community in question, consultation with the community at large, or even a ratification vote, may be required.

2. The Band Council

Band councils are the elected representatives of the Band. They can be elected either under the provisions of s. 74 of the *Indian Act* or by the custom of the Band as per the definition in s. 2(1) of "council of the band".[57]

Although off-reserve agreements are usually not within the scope of a Band Council's powers under the *Indian Act* or other statute, this does not mean that the Band Council can never be an appropriate signatory. In addition to the point raised above, which is that as a practical matter, courts appear to be increasingly willing to recognize the authority of a Band Council in a wide range of areas, there will also be many cases in which the Band is the successor to the rights-holding group, and where the Band Council exercises customary authority to act on behalf of the Band. Please note that there is an important

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[54] *Wewayakum Indian Band v. Canada (sub nom. Roberts v. R.)* (1991), [1992] 2 C.N.L.R. 177, 42 F.T.R. 40 (T.D.) at para. 46; reversed in part by (1999), 27 R.P.R. (3d) 157 (Fed. C.A.), aff'd 2002 SCC 79.

[55] In addition, see *Mabo v. Queensland* (1992), 107 A.L.R. 1 at 51.

[56] See Brian Slattery, "The Generative Structure of Aboriginal Rights" Draft 9e, July 22, 2007, *Supreme Court Law Review*, forthcoming, (online: http://osgoode.yorku.ca/osgmedia.nsf/research/slattery_brian), who argues, at 18, that the right to maintain and develop customary laws is not static, and the relevant date for the inquiry as to the existence of a customary rule is the date of the activity or transaction whose legality is in question.

[57] The *Indian Act* definition of "council of the band" is as follows:

"council of the band" means

(a) in the case of a band to which section 74 applies, the council established pursuant to that section,

(b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band.

distinction between a band that has reverted to a "custom band council" (e.g., where a Band has enacted a "custom" election code to provide for a different way of electing the Band council) and a leadership structure under customary law. The Gitga'at Nation is an example of this: while the membership is not precisely the same, the Gitga'at Nation and the Hartley Bay Indian Band share many members. The Hartley Bay Indian Band has a "custom" band council, but there is also a clan council of hereditary chiefs of the Gitga'at Nation that has authority over certain decisions.[58]

In those cases where, after research, it is determined that the Band is the appropriate contracting body, the legal power and capacity of a Band Council to represent the Band and to enter into contracts on the Band's behalf has received judicial approval in a number of cases.[59] Contracts must be approved or authorized by a duly passed resolution of the Band Council before a Band can be contractually bound.[60] When assets of the Band are in issue, the Chief and Council may in some cases have a fiduciary obligation to conduct "meaningful consultation with band membership at large".[61]

The law is unclear as to the elected Band Council's authority to make agreements which expressly limit or suspend the constitutional rights of the members of the Band. In *R. v. Seward*, the Provincial Court of British Columbia appeared to recognize the authority of the Band Council to suspend the treaty rights of its members through signing a Fisheries Agreement with the Federal Government.[62] However, in *Lac La Ronge Indian Band v. Canada*, the trial judge held that a Band Council did not have the authority to settle or compromise any treaty land entitlement under Treaty 6 on behalf of its members, and that the *Indian Act* does not confer the authority to compromise or settle treaty land entitlements.[63]

3. Tribal Councils and Treaty Societies

As noted above, Tribal Councils likely have the capacity to represent a First Nation for the purpose of an off-reserve agreement, but in such cases the Tribal Council is not the true party, and it is advisable to be very clear that the agreement is between the First Nation or Band, as represented by the Tribal Council, and to seek an appropriate form of ratification from the Nations or Bands whose interests are affected.

4. An Individual

As noted above, it will be a very unusual case in which it will be appropriate for an individual to enter into an agreement in relation to the collective aboriginal rights of the group. Possible exceptions may be

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[58] The distinction between these was reviewed in *Clifton v Hartley Bay Indian Band*, 2005 FC 1030 (T.D.).
[59] See, for example, *Telecom Leasing Canada v. Enoch Indian Band of Stony Plain Indian Reserve*, [1993] 1 W.W.R. 373 at para 8; *Gitga'at Development Corp. et al v. Hill et al.*, 2007 BCCA 158.
[60] *Heron Seismic Services Ltd. v. Peepeekisis Indian Band* (sub nom. *Heron Seismic Services Ltd. v. Muscowpetung Indian Band*), [1991] 2 C.N.L.R. 52 (Sask. Q.B.), aff'd by (1992) 4 C.L.N.R. 32 (Sask. C.A.), at paras. 22-23, 26.
[61] *Klahoose First Nation v. Cortes Ecoforestry Society*, [2003] 3 C.N.L.R. 130.
[62] *R. v. Seward*, [2001] 4 C.N.L.R. 274 (B.C. Prov. Ct.).
[63] *Lac La Ronge Indian Band v. Canada* (1999), [2000] 1 C.N.L.R. 245 (Sask Q.B.); varied but not on this point [2001] 4 C.N.L.R. 120 (Sask. C.A.).

litigation settlement agreements where there is a representative litigant, and those rare cases where the right can be characterized as belonging to an individual, such as the *Jack* case, noted above.

B. Necessity of Community Membership Ratification: When Is It Necessary?

The need for a community vote will depend on a number of factors: the impact on the specific right or interest at issue; Band or Nation custom; and whether there is a legislative requirement. Historic treaties required a meeting of chiefs and headmen and the current BC Treaty process requires ratification by members.

The Supreme Court of Canada in *Guerin* held that the Indian interest in reserve land and aboriginal title lands is the same.[64] In respect of the interests of members of the Band in reserve land, the Supreme Court of Canada's decision *Corbiere*[65] that all members of the Band – including off-reserve members – are entitled to vote in Band elections, has been interpreted to entitle non-resident Band members to vote on surrenders and designations of reserve land.[66] On the basis of this Supreme Court of Canada authority, we would argue that just as the *Indian Act* requires a community vote in respect of surrenders and designations of reserve land, agreements which alienate an aboriginal group's aboriginal title interest or which might restrict the enjoyment of aboriginal rights for a very long time, likely requires not only the Crown's involvement, but a community vote as well.

Customary law may also point to a requirement for a community vote. For example, in *Klahoose First Nation v Cortes Ecoforestry Society*, the BC Supreme Court found that partly on the basis of a "continuing customary relationship" between the chief and council and the members, and an established custom of consultation with the community, there was an obligation on the Chief and Council to consult with community members in respect of amendments to a development plan for a band-owned woodlot.[67] This decision suggests that there may also be a legally enforceable duty on the part of the representatives of the Band or Nation to obtain the community's approval of an agreement in respect of the group's off-reserve s. 35 interests.

As a practical matter, a ratification vote by the community provides important evidence that may be useful in the event of a challenge by dissident members, as it did in *Komoyue Heritage Society v British Columbia (Attorney General).*[68]

A community vote may be required by policy or legislation external to the First Nation, for example, where required by the government in the case of specific claims settlements[69] and treaties.

[64] *Guerin v. R.*, [1984] 6 W.W.R. 481 at 497 (S.C.C.).
[65] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
[66] Jack Woodward, *Native Law* (Carswell, 1994 looseleaf), at 9.5(c).
[67] [2003] 3 C.N.L.R. 130, at paras. 34-35; 47-48.
[68] 2006 BCSC 1517 at paras. 17, 41, 44 and 47.
[69] See Ron Lauenstein's paper from this conference for more on this topic.

IV. Enforceability of Agreements

A. Inalienability of Indian Interest in Land Except to the Crown, and the Ability of a First Nation to Contract Out of Constitutional Rights

Perhaps the most acute issue with respect to the enforceability of contracts about the off-reserve interests of First Nations remains the legal principle that First Nations' interests in land are inalienable except to the Federal Crown.[70] The Supreme Court of Canada has held that s 35(1) has two main purposes: *recognition* and *reconciliation*.[71] Reconciliation is concerned with the legal effect of aboriginal rights in the contemporary world, taking into account a range of factors including contemporary needs of the aboriginal group, condition of the lands and resources, and interests of third parties and society at large.[72] First Nations are regularly approached by governments and third parties to negotiate how their off-reserve constitutionally-protected interests may be reconciled with the interests of government, industry, and society at large. As a practical matter, reconciliation probably requires the engagement of these actors at some level. However, the jurisprudence has not yet evolved to define the role of these other actors in the process of reconciliation.

While the geographical reach of the *Royal Proclamation of 1763* remains a matter of academic and judicial debate, courts have recognized that this dispute may be of little practical import, since the Proclamation states more fundamental principles of common law that apply across the country.[73] The *Royal Proclamation of 1763* expresses the fundamental legal principle of inalienability except to the Crown:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said

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[70] See e.g. *R. v. Vanderpeet*, [1996] 2 SCR 507, *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 17; *R. v. Badger*, [1996] 1 SCR 771. See also for basic principles *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *St. Catharines Milling & Lumber Co. v. R.* (1887), 13 S.C.R. 577, affirmed (1888), LR 14 App. Cas. 46, 4 Cart. B.N.A. 107, 58 L.J.P.C. 54, 6 L.T. 197, C.R. [10] A.C. 13 (Canada P.C.).

[71] See *R. v. Vanderpeet* (sub nom. *R. v. Van der Peet*), [1996] 2 S.C.R. 507 at para. 50; R. v. Gladstone, [1996] 2 S.C.R. 723 at para. 72-73; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 161; *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388 at para 1; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para 32.

[72] Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255 at 285, (online: http://osgoode.yorku.ca/osgmedia.nsf/0/87623F8CA93FDCBA85257315006C80D7/$FILE/SLATTERY%20-%20METAMORPHOSIS%20OF%20ABORIGINAL%20TITLE%202006%20CBR.pdf).

[73] *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2001] 1 C.L.N.R. (O.C.A.) at paras. 19, 182-285; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 200 (*per* La Forest J.); Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at 740. For cases refusing direct application in BC, see also *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 at para. 14; *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A) at para. 212. For affirmation of the principles of the Royal Proclamation, see also the Marshall Trilogy [*Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)], aff'd in Canada by *R. v. Vanderpeet*, 1996 2 SCR 507 at paras. 35-37. The principle of the inalienability of aboriginal title, except to the Crown, is set out in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 113.

> Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie.[74]

There remains a plausible legal argument that under present Canadian law, at least in respect of land and resource transactions fundamentally affecting aboriginal and treaty rights, a First Nation (i.e., one of the several Nations and tribes) has *no capacity* to enter into agreements with third parties. While it is certainly the case that agreements that purport to *extinguish* the Indian interest in the land require a surrender to the Crown, the status of third party and Provincial Crown agreements that purport to reconcile the enjoyment of aboriginal rights with other competing interests is much less certain in the wake of the enactment of s. 35.

In the context of adjudicating the competing interests between aboriginal peoples and the broader society under s. 35 of the *Constitution Act, 1982*, courts have laid great emphasis on the dual purposes of s. 35. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),*[75] Justice Binnie stated that "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests, and ambitions".[76] The constitutional rights of aboriginal peoples are not absolute – they may be justifiably infringed (subject possibly to interjurisdictional immunity).[77] However, as noted by Justice Binnie in *Mikisew,* the management of the relationship between aboriginal and non-aboriginal peoples is taking place "in the shadow of a long history of grievances and misunderstanding."[78] Proper recognition of the rights of the First Nation is the necessary foundation on which reconciliation occurs.[79]

In the context where rights have yet to be determined, the Honour of the Crown is invoked when contemplating acts that may interfere with aboriginal rights,[80] and a fiduciary duty is invoked where the Crown has assumed discretionary control over specific rights.[81] These duties obligate the Crown to consult and accommodate the First Nation's interest. The Crown cannot delegate this duty, but it can actively oversee it.

On the basis that First Nations are not actually surrendering their interests through agreements with third parties (and most such agreements provide for non-derogation of constitutional rights), but rather are reconciling their enjoyment of those rights with the needs of the larger society, such agreements are likely to be upheld as creating contractually binding obligations on the parties, particularly where the First

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[74] *Royal Proclamation of 1763.* R.S.C. 1985, App. II, No. 1.
[75] [2005] 3 S.C.R. 388 at para 1.
[76] 2005 SCC 69 at para. 1.
[77] See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 60. See also *R. v. Morris*, 2006 SCC 59. The right of the province to infringe aboriginal rights is not yet settled, and may depend on the effect of interjurisdictional immunity and the application of s. 88, which is at issue in *William v. AGBC et. al.*, BC Supreme Court, Victoria Registry, Action No. 90 0913. Decision of Mr. Justice Vickers pending.
[78] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 1.
[79] Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 *Can. Bar Rev.* 255 at 282-84, (online: http://osgoode.yorku.ca/osgmedia.nsf/0/87623F8CA93FDCBA85257315006C80D7/$FILE/SLATTERY%20-%20METAMORPHOSIS%20OF%20ABORIGINAL%20TITLE%202006%20CBR.pdf).
[80] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 at paras. 16, 27.
[81] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 at para. 18.

Nation received legal advice, where the agreement was properly executed, where it was a part of an accommodation process driven and overseen by the Crown, and where there is evidence that the community supported the agreement.

B. Correct Parties and Signatories

As discussed above, the law in this area is uncertain, and where signatories derive their authority from customary law, the evidence regarding their authority may be problematic to sort out.

One way to deal with this legal and/or evidentiary uncertainty is through representations and warranties, i.e., the party has the authority to represent all rights-holding groups for the purposes of the agreement and that the signatory is authorized to sign the agreement on behalf of the party.

However, as such representations and warranties are circular, it is advisable to consider getting further confirmation in the form of a Band Council Resolution, community ratification vote, or a consensus decision of the customary leaders, as necessary and appropriate. Such measures are likely useful evidence in the event of a challenge to the authority of the signatories by members of the First Nation.

Third parties dealing with a particular aboriginal group should be aware of the potential for overlapping claims, and need to be aware that an agreement with one First Nation will not bind another First Nation with a competing or overlapping claim area.

C. Aboriginal Title, and the Inherent Limit

It is questionable whether a First Nation with aboriginal title may enter into an agreement in which they agree to allow an activity within their territory that would violate the inherent limit.[82] It is incumbent on a solicitor acting for a First Nation who wishes to enter into an agreement to allow such an activity to advise their client of the potential consequences of doing so, and if possible to limit the activity such that does not cross the inherent limit threshold.

V. Conclusion

The power and capacity of First Nations to enter into off-reserve agreements is an uncertain area of law, and these agreements are driven as much by the practical realities confronted by First Nations when faced with the prospect of rapid resource exploitation in their Territories, as they are by the emerging law of consultation, accommodation, and reconciliation. The legal basis of agreements with non-First Nation parties other than the Federal Crown is particularly uncertain; however, it is likely that if properly drafted and executed, these agreements will be enforced by the courts.

[82] See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 125-32.

Having received instructions to draft an agreement in respect of a First Nation's interest in its off-reserve resources, the solicitor must do due diligence to ensure that the proper party is identified, and the signatories are authorized to execute the agreement on its behalf. While the courts appear increasingly willing to accept the authority of the Band Council in a broad range of areas beyond their *Indian Act* powers, it remains our view that agreements touching on the s. 35 interests of First Nations are most appropriately executed in accordance with the traditional and customary governance regime of the First Nation itself. In some, but by no means all, cases this will in fact be the Band Council. As a practical matter, where an agreement is signed by or on behalf of customary leaders, it is prudent to obtain a Band Council Resolution if possible, and for larger projects where rights are significantly affected, or where there is likely to be challenges to the authority of the signatories, to obtain a ratification vote by the community.