SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Martin*, 2018 NSSC 141

Date: 2018-06-13
Docket: Syd. No. 450191
Registry: Sydney

Between:

Her Majesty the Queen

Appellant

v.

Joseph James Martin, Jr. and
Victor Benjamin Googoo

Respondents

Decision on Summary Conviction Appeal

Judge:	The Honourable Justice Robin C. Gogan
Heard:	May 29, 2017, in Sydney, Nova Scotia
Written Decision:	June 13, 2018
Counsel:	Gerald A. Grant, for the Appellant Douglas E. Brown, for the Respondents

By the Court:

Introduction

[1] On October 10, 2007, Joseph James Martin ("**Martin**") and Victor Benjamin Googoo ("**Googoo**") "jigged" and retained two salmon from the Twin Churches Pool, Middle River, Nova Scotia. Martin and Googoo are members of Waycobah First Nation ("**Waycobah**"). On August 6, 2008, the pair were charged with fishing in contravention of an Aboriginal Communal Fishing License.

[2] Martin and Googoo admitted to fishing in a manner that contravened the licence conditions. They defended the charges on the basis that they were exercising their aboriginal right to fish for food. It was their view that the communal licence conditions infringed their right to fish, without justification. A lengthy and protracted trial ensued. The central issue was whether the Crown had met the burden for justification of its infringement on Martin and Googoo's aboriginal right to fish for food.

[3] On March 8, 2016, The Honorable Judge Peter Ross rendered his decision and found that the Crown had established justification (as reported as ***R. v. Martin***, 2016 NSPC 14). Nevertheless, a stay of proceedings was entered on the basis that

the Crown had a duty of enforcement consultation that was not discharged. The Crown appeals.

Background

[4] This case involves the aboriginal right to fish and the point at which such a right is limited by the regulatory power of the Crown. It is a case that considers the scope of the honour of the Crown in its dealings with Aboriginal peoples. A review of the background to this case provides some helpful context to the decision under review.

[5] Although Martin and Googoo were charged with offences on August 6, 2008, the foundation for their defence arises from the Supreme Court of Canada decision in ***R. v. Sparrow***, [1990] 1 S.C.R. 1075, which considered the scope of s. 35(1) of the *Constitution Act, 1982*. Section 35(1) reads:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[6] In ***Sparrow***, the defendant was charged with an offence under the *Fisheries Act*, R.S.C. 1970, c. F-14. He admitted the acts constituting the offence but defended the charge on the basis that he had an aboriginal right to fish and that his

Band fishing license restrictions were inconsistent with his constitutional rights. The question before the court was whether Parliament's power to regulate fishing was limited by s. 35(1) of the *Constitution Act, 1982*.

[7] The Supreme Court of Canada answered the question posed in ***Sparrow*** by confirming an existing aboriginal right to a food, social, and ceremonial fishery. However, this right is not absolute. Legislation affecting the exercise of such a right will be valid if it meets the test for justification. In its seminal reasons, the court established the justification analysis to be applied, saying that its approach was consistent with the concept of holding the Crown to a high standard of honourable dealings with aboriginal peoples.

[8] More will be said about the ***Sparrow*** analysis later in these reasons. For now, it bears repeating that the central issue before the trial judge was whether the regulatory infringement upon Martin and Googoo's aboriginal right to fish was justified under the test set out in ***Sparrow***.

[9] In the wake of the ***Sparrow*** decision, the Department of Fisheries and Oceans ("**DFO**") developed an Aboriginal Fishing Strategy (the "**AFS**"), and a policy for the Management of Aboriginal Fishing (the "**Policy**"). The AFS and the policy were referred to by the trial judge as "a good faith response to ***Sparrow***".

The AFS program and its objectives have been the subject of judicial commentary to the effect that the program was intended to respond to the decision in ***Sparrow***, recognize the aboriginal right to a food, social and ceremonial fishery, and establish cooperative mechanisms for fisheries management in which Aboriginal peoples had enhanced participation.

[10] Against this background, beginning in 1994, and in each year thereafter, DFO and Waycobah entered into AFS Fisheries Agreements concerning the food, social, and ceremonial fishing allocation. Such an Agreement was in existence for 2007-2008 salmon fishing season. Under the terms of the Agreement, an Aboriginal Communal Fishing License was issued. The License described the allocations, places, times, and methods of fishing permitted for members of Waycobah. The Licence issued under the 2007-2008 AFS Agreement did not permit salmon fishing on Middle River.

[11] The annual Agreements between the parties and the corresponding licenses must be considered in the context of the overall regulatory framework. In ***R. v. Marshall (No. 2)***, [1999] 3 S.C.R. 533, at para. 33, the Supreme Court of Canada confirmed that the federal government has overriding responsibility for the fishery. The *Fisheries Act* "sets out the basis of a very broad regulatory authority over the

fisheries which may extend to the native fishery where justification is shown". The regulations used to manage the inland fisheries in Nova Scotia, New Brunswick and Prince Edward Island are the *Maritime Provinces Fishery Regulations*, SOR/93-55. As the trial judge explained at para. 3:

> … Subsection 4(1) requires that all fishers be licenced. The *Aboriginal Communal Fishing Licenses Regulations* authorize the issuance of licences to aboriginal groups. By such means the aboriginal right to fish is managed and reconciled with other interests. Section 7 of these *Regulations* provides as follows: "No person carrying on fishing or any related activity under the authority of a license shall contravene or fail to comply with any condition of the license." The Defendants are thus alleged to have breached this section which, if proven, would constitute offences under s. 78 of the *Fisheries Act*.

[12] And later at para. 40:

> … The *Maritime Provinces Fishery Regulations* in s. 4(1) set out a general prohibition against fishing unless, *inter alia*, the person is authorized to do so under the authority of a licence. The *Aboriginal Communal Fishing Licenses Regulations* provide for one such authorization in the form of a communal fishing license granted to a given aboriginal community. Such licenses are issued in recognition of the aboriginal right to fish, as a mechanism to give expression to that right, while also preserving the conservation ethic. Where the health of the fish stock allows for a certain capture, DFO is required by law to give priority to those who possess treaty and aboriginal fishing rights. Where fishing is restricted in a way which infringes an aboriginal right the Crown must be able to explain and justify the resulting infringement.

[13] It is not contested that conservation and sustainability have long been accepted as valid legislative objectives under the ***Sparrow*** analysis (see also: ***R. v.***

Badger, [1996] 1 S.C.R. 771; ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010; and ***R. v. Marshall***, [1999] 3 S.C.R. 533). Neither is it contested that conservation and sustainability of the salmon stock were the management objectives behind the limits placed upon the Aboriginal fishing rights under the 2007-2008 AFS Agreement with Waycobah.

[14] On August 6, 2008 Martin and Googoo were charged with the following offences:

> 1. … on or about October 10, 2007, at or near the Twin Churches Pool on the Middle River, in the County of Victoria, Province of Nova Scotia, while carrying on fishing or any related activity under the authority of a communal license, contravene or fail to comply with a condition of that licence, to wit: did catch and retain salmon from waters in which salmon were not permitted to be taken, contrary to s. 7 of the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-322, and did thereby commit an offence under s. 78 of the *Fisheries Act*, R.C.C. 1985, c. F-14;
>
> 2…and further … on or about October 10, 2007, at or near the Twin Churches Pool on the Middle River, in the County of Victoria, Province of Nova Scotia, while carrying on fishing or any related activity under the authority of a communal license, contravene or fail to comply with a condition of that licence, to wit: did fish or assist in fishing by jigging in inland waters, contrary to s. 7 of the *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, and did thereby commit and offence under s. 78 of the said *Fisheries Act*.

[15] Martin and Googoo admitted the facts which constituted the *actus reus* of the offences. At trial, they defended the charges on the basis that they were exercising an aboriginal right to fish that was infringed without justification.

[16] In response, the Crown admitted that the terms of the Aboriginal Communal Fishing License constituted a *prima facie* infringement of the Aboriginal food, social, and ceremonial fishing right. It contended that the existence of an AFS Agreement between DFO and Waycobah justified the infringement and displaced the need to apply the ***Sparrow*** analysis. In the alternative, the Crown took the position that the infringement was justified under the ***Sparrow*** test.

[17] On March 8, 2016, the trial judge ordered a stay of proceedings. Among other extensive reasons, it was his view that a duty existed in the circumstances to consult the Aboriginal authority before enforcement action was taken. He found that the Crown failed to fulfill its obligation to consult. This was a serious failure that justified the stay.

[18] The Crown now appeals. It asks that the stay be set aside and convictions entered against both Martin and Googoo.

[19] Before moving forward in the analysis, it bears repeating that the central issue at trial was justification of the infringement on the aboriginal right to fish. As will be discussed later in these reasons, the concept of enforcement consultation was not a developed concept nor was it a live issue. Neither party provided submissions at trial as to whether such a duty existed or offered evidence directed

at whether such a duty had been discharged. Nevertheless, it became the basis upon which the trial judge stayed the proceedings.

Issues

[20] The Crown's Notice of Summary Conviction Appeal lists six grounds of appeal. Having heard the appeal of the matter, these issues may be distilled further as follows:

(a) Did the trial judge err in finding that the Crown had a duty to consult with Waycobah First Nation prior to taking enforcement action?

(b) If not, was the duty discharged in the circumstances of this case?

Decision Under Review

[21] The decision of the trial judge is extensive and comprehensive. There were a multitude of issues in the original trial which are not contested on this appeal. It is convenient to reproduce a portion of the decision to set the stage for what follows:

> **Summary:**
>
> Beginning in 1994 and in each ensuing year the federal Department of Fisheries and Oceans entered into Agreements with the Waycobah First Nation concerning, among other things, a food, social and ceremonial fishing allocation to members of that

aboriginal community. These Agreements emanated from the Aboriginal Fishing Strategy created in 1993 by DFO in response to the Supreme Court of Canada decision in *R. v. Sparrow*.

Pursuant to the terms of the 2007-2008 Agreement members of the Waycobah Band were permitted a certain number of salmon. Certain rivers were open to the FSC fishery. Certain fishing methods were permitted. An Aboriginal Communal Fishing Licence was issued, according to the terms of the Agreement.

Salmon stocks in Middle River were below spawning requirements and conservation measures were needed. A limited recreational fishery was in place for "hook and release" only.

On October 10, 2007 the Defendants, members of Waycobah First Nation, jigged salmon from Middle River, in apparent contravention of the terms of the Licence and Agreement. They were charged with offences under the *Fisheries Act*.

At trial, the Crown acknowledged that the Licence, by restricting aboriginal fishing in Middle River, constituted *prima facie* infringement of the Defendants' aboriginal right to fish for food in that river.

…

Result:

Usual principles of construction and contract law should apply to a modern-day agreement between government and an aboriginal entity. Viewed through this lens, the Agreement binds the Defendants and applies to their actions on the date and place in question. It was validly executed by the Chief. There is no ambiguity in the terms of the Agreement or the ensuing Licence. The Defendants possessed no residual right to fish. DFO at no time represented that it would not lay charges for breach of terms.

In any case, where an agreement such as this has been achieved, whereby a limitation of an aboriginal right is effected, the Crown is not required to prove justification in accordance with the usual standards and criteria in *Sparrow*. The infringement of the right is presumptively justified by the agreement. There is, however, an enhanced duty of good faith upon the Crown (DFO) in its negotiation of an agreement which limits an aboriginal right. The presumption of justification may therefore be rebutted if the aboriginal defendant proves that the Crown acted in bad faith in the negotiation of terms. Here the evidence discloses no such breach, nor dishonorable dealings.

In the alternative, if it is necessary to prove justification according to the Sparrow paradigm, the Crown has done so. It consulted sufficiently and behaved honorably in all dealings leading up to the signing of the Agreement.

A 1993 Policy Statement, pertaining to the entire Aboriginal Fisheries Strategy program, includes an undertaking by DFO to consult with the aboriginal authority (Waycobah)

> prior to taking enforcement action. This representation, which concerns implementation of the AFS Agreements, and supports the co-management objectives of the AFS Program, applies to the subject Agreement. Crown did not prove that such consultation was undertaken. While DFO was not precluded from laying charges, it was honor bound to engage in a *bona fide* consultation before doing so. The apprehension of the Defendants and seizure of their gear had to be undertake (sic) without delay. The Defendants were not charged until months later; some form of enforcement consultation should have been undertaken in the interim.
>
> There was a flagrant breach of the terms of the Licence. The Defendants have no substantive defence. However, the failure to consult about enforcement is sufficiently serious to warrant a stay of proceedings.

[22] The most contentious aspect the trial judge's decision on this appeal was the introduction of the concept of enforcement consultation. The context for this concept was discussed at length in the decision beginning at para. 191. The trial judge concluded that the enforcement mechanisms available under the *Fisheries Act* and regulations were preserved under the AFS Agreement. There was nothing in the Agreement or the preceding negotiations which suggested that Aboriginal fishers would be immune to enforcement measures or exempt from penalties. However, a 1993 DFO policy statement contained an undertaking to consult with any relevant "aboriginal authority" whenever DFO took enforcement action.

[23] Judge Ross carefully considered the impact of the 1993 policy statement and specifically referenced Clause 14 of the policy dealing with enforcement. He cited two decisions of the Supreme Court of Canada for his conclusion that the honour of the Crown and the obligation of good faith continue throughout the

implementation of the Agreement (see: ***Mikisew Cree First Nation v. Canada (Minister of Canadian Hereitage),*** *infra,* and ***Haida Nation v. British Columbia (Minister of Forests)***, *infra*). On this foundation, he concluded that the 1993 DFO policy statement was a binding obligation on the Crown to consult before enforcement action was taken (unless it would compromise enforcement).

[24] On the evidence before him, the trial judge was of the view that the Crown had not complied with their duty to consult prior to enforcement. The impugned activity took place on October 10, 2007, and although the fishing gear was seized immediately, no charges were laid against Martin and Googoo until August 6, 2008. While the gear seizure was appropriate and timely, the Crown had months to carry out consultation prior to the charges being laid and did not do so. In the view of the trial judge, this was a serious failure which warranted a stay of proceedings.

Position of the Parties

Her Majesty the Queen

[25] The Crown makes four main points on appeal: (1) that there is no common law duty to consult prior to enforcement action; (2) enforcement consultation is not

a component of the ***Sparrow*** justification test; (3) the Crown did not adduce evidence of enforcement consultation because it was not relevant to the issues at trial; and (4) the finding of a duty of enforcement consultation based upon the 1993 DFO policy is inconsistent with long standing jurisprudence to the effect that expressions of policy have no force in law.

[26] The Crown submits that the duty of enforcement consultation is not a concept that exists in law, or called for in the facts of this case. In its oral argument, the Crown advanced its argument in three prongs: (1) the 1993 DFO policy was an internal policy statement that was not binding on the Crown; (2) it was not reasonable on the evidence for the trial judge to conclude that the 1993 policy was inextricably linked to the subsequent AFS Agreements with Waycobah; and (3) the Crown fulfilled its duty to act honourably in its dealings and consulted with Waycobah in a manner consistent with this obligation.

[27] The Crown argued that the trial judge's contrary findings on each prong constituted an error with serious practical consequences for enforcement.

Martin and Googoo

[28] Martin and Googoo seek dismissal of the appeal. It is their submission that nothing in the trial judge's decision merits intervention.

[29] On the issue of enforcement consultation, it is submitted that the honour of the Crown may, in varying circumstances, encompass this requirement. In their view, the trial judge was entitled to find that the honour of the Crown included such a duty in the circumstances of this case. The Crown cannot contract out of its duty of honourable dealing with Aboriginal people. It is a doctrine that applies independently of the expressed or implied intention of the parties. Reliance was placed upon the decision of the Supreme Court of Canada in ***Beckman v. Little Salmon/Carmacks First Nation***, 2010 SCC 53.

Analysis

[30] This appeal must determine whether a duty of enforcement consultation exists in law and arises in the circumstances of this case. Before proceeding to this question, the standard of review must be confirmed.

Standard of Review

[31] This is an appeal under s. 813 of the ***Criminal Code***.

[32] The Crown submits that the appropriate standard of review for this appeal was set out in ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511. In that case, at paras. 60-63, the Supreme Court of Canada addressed the standard of review in duty to consult cases. Questions of law such as the existence, scope and content of a duty to consult are assessed on a correctness standard, while the consultation process is assessed on a standard of reasonableness. (See also ***Beckman v. Little Salmon/Carmacks First Nation***, 2010 SCC 53, at para. 48)

[33] Martin and Googoo adopted this standard of review in their submissions.

[34] This appeal shall proceed in accordance with the foregoing standard of review.

Issue 1 – The Duty to Consult – Enforcement Consultation

[35] The most fundamental aspect of this appeal is whether a duty of enforcement consultation exists in law and in the circumstances of this case. The Crown contends that it does not. It says that the concept of enforcement consultation does not fit within the line of authority that defines the general duty to consult. In stark

contrast, Martin and Googoo say that a principled basis exists to find such a duty arises in the present circumstances.

[36] The parties to this appeal have divergent views of the authorities. The Crown's view is a static one, while Martin and Googoo advocate a more dynamic interpretation. The trial judge in this case acknowledged no clear precedent on the point (para. 197 of the decision). Given this significant difference in approach, it is prudent to begin with a review of the basic principles emerging from the authorities and an assessment as to whether the duty to consult is a concrete and complete concept or an evolving one.

The Basic Concepts – The Honour of the Crown and Duty to Consult

[37] The requirement to consult Aboriginal peoples first emerged as a constitutional obligation in ***Guerin v. The Queen***, [1984] 2 S.C.R. 335). At its inception, it was a factor going to the determination of whether an Aboriginal right was infringed.

[38] ***Guerin*** involved the broad issue of aboriginal title and the allegation that the Crown was in breach of its trust obligations. The Supreme Court of Canada held that Aboriginal title was an independent legal right and that the Crown had a

"distinctive fiduciary obligation" to Aboriginal peoples (see p. 387). The nature of the relationship required consultation. In its majority reasons, the Court referred to the *sui generis* relationship and the Crown's role as fiduciary at pp. 384-385:

> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fidicuary Obligation (1975)*, 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependant on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this discretion is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the power thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

[39] Several years later came the seminal decision of the Supreme Court of Canada in ***Sparrow***, *supra*. As noted earlier, in ***Sparrow***, the Court formulated the approach to justifying infringement of an Aboriginal right. ***Sparrow*** held that laws affecting the exercise of Aboriginal rights remain valid if the interference with a right recognized and affirmed under s. 35(1) is justified.

[40] It must be said that the facts in ***Sparrow*** bear some similarity to those in the decision under appeal. ***Sparrow*** confirmed the Aboriginal right to a food, social, and ceremonial fishery. Such a right was not contested in the present case. Both cases dealt with legislative constraints on the Aboriginal right to fish and the application of the justification analysis to governmental infringements. In both cases, the defendants admitted the prohibited acts and defended the charges on the basis of the unjustified infringement of their Aboriginal rights. In the case under appeal, the exclusive focus of the trial was the issue of justification, including the issue of whether such an analysis was relevant given the AFS Agreements.

[41] It must also be said that there are significant differences between the two cases. The decision in ***Sparrow*** was the first opportunity for the Supreme Court of Canada to explore the strength and scope of s. 35(1). The circumstances in the present case involve consideration of the response to the ***Sparrow*** decision, the consequential development of the AFS, the existence and interpretation of the 1993 policy, and subsequent years of AFS Agreements and corollary communal fishing licenses.

[42] In the present case, the trial judge distinguished ***Sparrow*** and proposed a pragmatic approach to cases involving AFS Agreements (see: para. 145). In the

alternative, using the ***Sparrow*** analysis, the trial judge found the infringements (or as he preferred, "limitations") justified. In his view however, ***Sparrow*** provided no direction as to the duty to consult during the term of the Agreement (see: para. 153 and the analysis beginning at para. 194). Such an issue did not arise on the facts in ***Sparrow***.

[43] While the justification analysis in ***Sparrow*** does not directly assist us in the present circumstances, it is nevertheless important to consider as a point along the roadway of legal reconciliation with Aboriginal peoples. The concept of justification developed by the Supreme Court of Canada recognized not only the promise incorporated into s. 35(1) but also the evolving principles from earlier decisions. Referencing the decisions in ***Guerin***, ***R. v. Taylor and Williams*** (1981), 34 O.R. (2d) 360, and ***Nowegijick v. The Queen***, [1983] 1 S.C.R. 29, the test enunciated was intended to recognize the special and unique fiduciary relationship between the Crown and Aboriginal peoples and reflect that the honour of the Crown was always at stake. It was in this context that the justification analysis required restraint, fairness, and consultation.

[44] Subsequent cases have further considered the honour of the Crown and the scope of the duty to consult.

[45] In ***R. v. Badger***, [1996] 1 S.C.R. 771, the Supreme Court of Canada dealt with a treaty right to hunt for food. At para. 41 of the majority reasons, Cory, J. reviewed the relevant principles of interpretation, confirmed that the honour of the Crown is always at stake, and that interpretation of treaties and statutes which impact treaty or Aboriginal rights, "must be approached in a manner which maintains the integrity of the Crown". The Court then went on to adopt the ***Sparrow*** test as the correct path to examine whether legislative infringement on the treaty right to hunt for food was justified. There was no expansion to the duty to consult called for or considered on the facts in ***Badger***.

[46] Similarly, in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, the concept of justification was examined in the context of Aboriginal land title. In his reasons, Lamer, C.J. referred to the Court's "nascent jurisprudence" on justification and explained its application to infringements of Aboriginal title. The scope and duty of consultation was variable, required good faith, and the "intention of substantially addressing the concerns of aboriginal peoples". Significantly, the requirement for consultation was once again limited to the justification analysis.

[47] After a period of jurisprudential calm, the Supreme Court of Canada rendered several important decisions in swift succession: ***Wewaykum Indian Band***

v. Canada, 2002 SCC 79; ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73; ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, 2004 SCC 74; and ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69.

[48] In ***Wewaykum***, an issue arose involving competing claims for reserve land unrelated to any entitlement under s. 35(1) of the *Constitution Act, 1982*. Each band claimed an interest in the reserve lands of the other and alleged that the Crown had breached its fiduciary obligations around the creation of the reserves. In resolving these claims, the Supreme Court considered the scope of the fiduciary duty of the Crown. Binnie, J., writing for the Court, had this to say about the nature of the fiduciary relationship:

> 79 The "historic powers and responsibility assumed by the Crown" in relation to Indian rights, although spoken of in *Sparrow*, at p. 1108 as a "general guiding principle for s. 35(1)", is of broader importance. All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*). The fiduciary duty, where it exists, is called into existence to facilitate the supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.
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> 80 …Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the "honour of the Crown": *R. v. Taylor* (1981), 34 O.R. (2d) 360 (C.A.), *per* MacKinnon A.C.J.O. at p. 367, leave to appeal refused, [1981] 2 S.C.R. xi; *Van der Peet*, *supra*, *per* Lamer C.J., at para. 24; *Marshall*, *supra*, at paras. 49-51.

[49] However, the reasoning of Binnie, J. in ***Wewaykum*** is perhaps most often referred to on the basis of the qualifications placed on the scope of the fiduciary responsibility:

> 81 But there are limits. The appellants seemed at times to invoke the 'fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests…
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> …
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> 83 …I think it is desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals*, *supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary then to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether of not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.
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> …
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> 92 … Moreover, as pointed out by LaForest J. in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, not all fiduciary relationships and not all fiduciary obligations are the same: "[T]hese are shaped by the demands of the situation." 9p. 149).
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> …
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> 96 … the Crown was (and is) obligated to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.) …

[50] Ultimately, the Court concluded that the Crown had a fiduciary obligation to the bands at the "reserve-creation" stage requiring loyalty, good faith, full disclosure, and ordinary diligence exercised in the best interests of the beneficiaries. The Crown had discharged those responsibilities.

[51] Much can be said about the trio of decisions from the Supreme Court of Canada that followed ***Wewaykum***. ***Haida Nation*** and ***Taku River Tlingit First Nation*** dealt with the duty to consult in the context of unproven Aboriginal rights and title claims and held that consultation was corollary to the "honourable process of reconciliation", a concept that must be understood generously (see: ***Haida Nation***, at paras. 16- 25) and not subject to technical interpretations. ***Mikisew Cree First Nation*** dealt with the "taking up" of treaty lands and held that a duty to consult existed, that it flowed from the honour of the Crown, and was not discharged by pre-treaty negotiations.

[52] As to the synthesis and cumulative impact of the foregoing decisions, Phelan, J. had this to say in ***Dene Tha' First Nation v. Canada (Minister of Environment)***, 2006 FC 1354:

> [76] The concept and recognition of the fiduciary duty owed by the Crown toward Aboriginal peoples was first recognized in *Guerin v. Canada*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321. The duty to consult,

originally, was held by the Courts to arise from this fiduciary duty (see: *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075).

[76] The Supreme Court of Canada in three recent cases – *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (CanLII); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74 (canLII); and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. no. 71, 2005 SCC 69 (CanLII) – has described a more general duty arising out of the honor of the Crown. This includes the duty to consult.

[77] In *Guerin*, the Supreme Court of Canada held that a fiduciary obligation on behalf of the Crown arose when the Crown exercises its discretion in dealing with land on a First Nations behalf. In *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, the Court expanded this duty to encompass protection of Aboriginal and treaty rights. Even with this duty, however, the fiduciary duty did not fit many circumstances. For example, the duty did not make sense in the context of negotiations between the Crown and First Nations with respect to land claims agreements, as the Crown cannot be seen as acting as a fiduciary and the band a beneficiary in a relationship that is essentially contractual. The duty also encountered problems in conjunction with the Crown's obligations to the public as a whole. It is hard to justify the Crown acting only in the best interests of one group especially when this might conflict with its overarching duty to the public at large.

[79] In *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 220 D.L.R. (4th) 1, 2002 SCC 79 (CanLII), Justice Binnie of the SCC noted that the fiduciary duty does not exist in every case but rather is limited to situations where a specific First Nation's interest arises…

[80] In light of the duty in *Wewaykum*, in order for the purpose of reconciliation which underpins s. 35 of the *Constitution Act, 1982* to have meaning, there must be a broader duty on the Crown with respect to Aboriginal relations than that imposed by a fiduciary relationship. Hence, in *Haida Nation*, the Court first identified the honour of the Crown as the source of the Crown's duty to consult in good faith with First Nations, and where reasonable and necessary, make the required accommodation. As such, the Crown must consult where its honour is engaged and its honour does not require a specific Aboriginal interest to trigger a fiduciary relationship for it to be so engaged. Another way of formulating this difference is that a specific infringement of an Aboriginal right is no longer necessary for the Government's duty to consult to be engaged.

[81] The major difference between the fiduciary duty and the honour of the Crown is that the latter can be triggered even where the Aboriginal interest is

> insufficiently specific to require that the Crown act in the Aboriginal group's best interest (that is, as a fiduciary). In sum, where an Aboriginal group has no fiduciary protection, the honour of the Crown fills in to ensure the Crown fulfills the section 35 goal of reconciliation of "the pre-existence of aboriginal societies with the sovereignty of the Crown."
>
> [82] In assessing whether the Crown has fulfilled its duty of consultation, the goal of consultation – which is reconciliation – must be firmly kept in mind. The goal of consultation is not to be narrowly interpreted as the mitigation of adverse effects on Aboriginal rights and/or title. Rather, it is to receive a broad interpretation in light of the context of Aboriginal-Crown relationships: the facilitation of reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown. The goal of consultation does not indicate a specific result in any particular case. It does not mean that the Crown must accept any particular position put forward by a First Nations people.

[53] The cumulative impact of these decisions and the principles set out within them have been watershed in nature. In the aftermath, courts at various levels grappled with the application of the duty to consult in various contexts. By way of example, the parties each relied on more recent decisions in support of their respective views on this appeal.

[54] Martin and Googoo rely upon the decision of the Supreme Court of Canada in ***Beckman v. Little Salmon/Carmacks First Nation***, 2010 SCC 53. That case dealt with a 1997 land claims treaty between the Little Salmon/Carmacks First Nation and the federal and provincial governments. The treaty was a final agreement contemplating that surrendered land would be "taken up" from time to

time for various purposes. Until such taking up, band members had a right of access to traditional territory for hunting and fishing.

[55] As contemplated by the Agreement, an application was made for an agricultural land grant. The band was given notice and opposed the request in writing, but did not attend the meeting where the request was considered. The application was approved. The band unsuccessfully appealed. On judicial review, the decision was quashed. Further appeals followed on the adequacy of consultation and eventually came before the Supreme Court.

[56] Before discussing the reasons in ***Beckman***, some context is important. ***Beckman*** involved an examination of the duty to consult under the provisions of a modern, comprehensive, and final land claims treaty following decades of negotiation between "well-resourced and sophisticated parties". Binnie, J., writing for the majority commented on the broader context:

> 10 The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building

> relationships as it is about settlement of ancient grievances. The future is more important than the past…
>
> 11 Equally, however, the LSCFN is bound to recognize that the $34 million and other treaty benefits it received in exchange for the surrender has earned the territorial government a measure of flexibility in taking up surrendered lands for other purposes.
>
> 12 The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties… and the post-Confederation treaties… The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as honour of the Crown) to fill the gaps and achieve a fair outcome. Modern, comprehensive land claim agreements, on the other hand, … while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of ad hoc remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests…

[57] The parties in ***Beckman*** were completely at odds on the issue of consultation. Consultation was a defined term in the treaty and specifically required in certain instances. The treaty was silent as to consultation in the matter of land grant approval. The territorial government advanced an "complete code" approach to interpretation while the First Nations took a "starting point" approach. Justice Binnie concluded neither was correct. The honour of the Crown required consultation not to re-open terms or renegotiate the surrender of lands but to "help

manage the important ongoing relationship…in a way that upheld the honour of the Crown and promoted the objective of reconciliation."

[58] As to the root of the duty to consult in the context of a modern agreement, Justice Binnie applied existing principles:

> 61 … The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by the agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.
>
> 62 … The treaty sets out the rights and obligations of the parties, but the treaty is part of a special relationship: "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably" (*Haida Nation*, at para. 17). (Emphasis added)

[59] In his analysis, Justice Binnie recognized that the treaty conferred discretionary authority to make land grants without specifying the basis upon which that discretion was to be exercised. It was clear that the land grant application had the potential to have an adverse impact on the First Nation's treaty right to fish and hunt. The honour of the Crown required the decision maker to consult and be informed about the nature and severity of the impact and determine whether accommodation was necessary or appropriate. Consultation was not a means to renegotiate terms. In that case, adequate consultation had taken place.

[60] In some contrast, the Crown relied upon the more recent decision in ***Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)***, 2016 FCA 311 (leave to appeal granted by Supreme Court of Canada on May 18, 2017). In that case, the Federal Court of Appeal found no duty to consult existed at any stage of the legislative process notwithstanding that the legislation may adversely impact treaty rights.

[61] A detailed review of the reasons in the foregoing decision reveals that the dominant point of context was the legislative process. At issue was the alleged failure of various federal Ministers to consult the Mikisew First Nation on the development and introduction of two omnibus bills that reduced regulatory oversight on works and projects that might impact treaty rights to hunt, fish, and trap. The majority reasons recognized the "clear tension" in the caselaw between the doctrine of separation of powers and the duty to consult but found no place for a legal requirement to consult before legislation is enacted. The concurring minority reasons noted that the Mikisew First Nation had been careful to argue that the duty to consult arose at the policy development stage, asserting that this was a separate and distinct part of the legislative process. In finding that the duty to consult was not triggered by legislation of general application, the rationale was explained at para. 92:

> 92 The duty to consult cannot be conceived in such a way as to render effective government impossible. Imposing a duty to consult with all Aboriginal peoples over legislation of general application would severely hamper the ability of government to act in the interests of all Canadians, both Aboriginal and non-Aboriginal. Consultation takes time and the more groups there are to be consulted, the more complex and time consuming the consultations. At some point the ability to govern in the public interest can be overwhelmed by the need to take into account special interests.

[62] Without necessarily endorsing the rationale, the general point being made has resonance - the scope of the duty to consult cannot be so broad as to prevent workable governance.

[63] The foregoing review of basic principles is not exhaustive. What it does illustrate in a rudimentary way is the evolution of the duty to consult. In its origin, it was tied to a fiduciary obligation. It has since evolved to a broader concept rooted in the honor of the Crown and the goal of reconciliation with Aboriginal peoples. The duty to consult is not restricted to an element of the justification analysis. Rather, the duty arises whenever the honor and integrity of the Crown are invoked and the ongoing relationship of the Crown and Aboriginal peoples is at stake.

[64] The present state of the law has not evolved to recognize a specific duty of enforcement consultation. In this respect, I agree with the Crown and the trial judge. However, there exists no authority to the effect that consultation at the

enforcement stage of an agreement is inappropriate or contrary to law. Simply put, the issue has not been previously considered. In my view, the answer lies in the broad principles emerging from the cases underscored by a constitutional imperative to foster reconciliation with Aboriginal peoples. And, clearly, the honor of the Crown is at stake always, including throughout the claims resolution and treaty implementation process (see: ***Haida Nation***, at para. 17 and ***Beckman***, at para 62, and ***Mikisew*** generally).

[65] To be clear, before moving further into the analysis of the present case, I disagree with the Crown submission on the limits of the duty to consult. It was the Crown's contention that the common law duty only exists in two circumstances: (1) as part of the justification of Crown conduct or infringement under the ***Sparrow*** test; or (2) when the Crown has knowledge of an aboriginal right and contemplates conduct that may adversely impact it (***Haida*** and ***Mikisew***). Rather, it is my view that the duty to consult is an evolving concept which requires consideration any time the honour of the Crown is at stake in its ongoing relationship with Aboriginal peoples.

The Trial Judge's Reasoning

[66] Having reviewed the current state of the law, I return to the decision under review.

[67] The trial judge's reasoning on the issue of enforcement consultation begins at para. 191 of his decision. He begins with a finding that there was no basis for a finding that Aboriginal fishers were immune from enforcement:

> [191] For the reasons given in Parts 3 and 4 I have determined that there was adequate justification for the infringement of the aboriginal right to fish contained in the subject AFS agreement and ensuing Licence. As of October 10, 2007, the date when the defendants jigged the salmon on Middle River, the Crown had consulted fully and acted honourably. The AFS Agreement for that year contemplated a food, social and ceremonial fishery for members of Waycobah First Nation but Middle River was not open for harvest, the salmon staock being in a precarious state. And jigging was a prohibited fishing method on any river.
>
> [192] The subject Agreement was achieved in the context of a well established and judicially approved regulatory authority of DFO. If not explicitly invoked it is surely implicit in this Agreement that the enforcement mechanisms available to fisheries officers by virtue of the *Fisheries Act* and regulations were preserved. For instance, there had been discussions about whether the native fishery guardians should have the power to lay charges (it was determined that at least for the time being they would not). There is nothing in the Agreements nor in any discussion or negotiation to suggest that aboriginal fishers would be immune to enforcement measures or exempt from penalty.

[68] The trial judge then went on to address the defence submission that the parties were operating under a "co-management conservation protocol" which should have resulted in a report of the incident giving rise to the charges to

Waycobah to "encourage compliance with mutual conservation concerns" (para. 194). In response, the trial judge framed the issue to be resolved:

> [195] The identified deficiency is not one that affects justification *per se*. It does not go to consultations which preceded the AFS Agreement. It goes to consultation about the enforcement of the already agreed upon (and justified) limitation. To my mind this does not concern infringement or justification as such, but does involve issues of performance and fulfillment of terms, of representation, of the charging discretion of the fisheries officers and the honour of the Crown.
>
> [196] The Defence argument is grounded in a policy statement made by DFO in 1993, at the inception of the Aboriginal Fishing Strategy. A detailed account of this policy follows, below. It suffices here to say that the policy contained an undertaking to consult with any relevant "aboriginal fishing authority" whenever DFO took enforcement action.

[69] Recognizing the absence of clear authority on the issue of enforcement consultation, the trial judge concluded that such a duty existed, in law and in fact. Relying on ***Mikisew*** and ***Haida Nation***, he concluded that the honour of the Crown informed every treaty obligation and gave rise to both procedural and substantive rights that continued through implementation of terms. By extension, the enforcement of agreed terms in the present case invoked the honour of the Crown and the duty to act in good faith. It was noted that the analogy between implementation of a Treaty and implementation of the AFS Agreement was "a rough one".

[70] Context was cited as an important consideration in the analysis. The circumstances in the present case were distinguishable from existing authorities for various reasons. This case involves criminal charges against Aboriginal fishers. The criminal charges flow from breach of a license issued pursuant to an Agreement. This matter involves a modern-day agreement of short duration as opposed to a traditional treaty of long standing effect. Perhaps dominantly, it involves consideration of a 1993 DFO policy, not incorporated into the AFS Agreements, but part of the DFO Aboriginal Fishing Strategy developed in response to the decision in ***Sparrow***.

[71] Judge Ross considered the policy in detail beginning at para. 208. He concluded:

> [217] … There is a direct "line" of agreements, traceable from 2007 back to 1994 … One cannot say that the 1993 policy does not matter simply because it was somewhat dated. In the 1993 Policy Statement DFO represented to aboriginal interests that it would consult whenever enforcement action was taken (unless to do so compromised enforcement). I think this representation survives the Agreements and imposes a binding obligation on the Crown.

[72] Flowing from this conclusion, the trial judge found that the 1993 policy qualified the charging discretion of the fisheries officers. The officers were entitled to lay charges, but honour bound to consult in a *bona fide* manner

consistent with the policy. He went on to find no evidence of enforcement consultation and entered a stay of proceedings.

Response to the Crown Position on Appeal – Enforcement Consultation

[73] The Crown contests the trial judge's reasoning on three points, and it is my intention to address each of these arguments.

[74] Before dealing with the Crown submissions, it is necessary to focus briefly on the 1993 DFO policy as it is relevant to all three points to some degree. The document in its entirety is found in Exhibit 4, Tab 92, of the trial exhibits. The trial judge's summary of the policy is found at Appendix C, p. 92, and it is addressed in some detail beginning at para. 208 of the decision.

[75] As noted by the trial judge in his summary, the policy is referenced in ***R. v. MacDonald***, 2003 NSPC 28, [2003] N.S.J. No. 359, and described in the following terms:

> 13 Effective the 6th of August 1993 a new policy for the management of aboriginal fishing was published as a Bulletin (V-1, Tab 5). It provides "principles and procedural guidelines for DFO's management of aboriginal fishing reflecting the Department of Fisheries and Oceans (DFO) Aboriginal Fishing Strategy (AFS) and the current state of the law on aboriginal fishing rights, particularly the decision of the Supreme Court of Canada in the Sparrow case. This policy applies to all species of fish.

[76] Although the policy was introduced at trial as an exhibit, it was uncontested that only one witness spoke to it during the evidence. Kathi Stewart, Director of Aboriginal Fisheries from 2003-2009, testified that the policy was intended as a guideline for DFO regional offices, as a basis for discussions and consultations with First Nations communities. There was no evidence at trial that the policy was given to anyone outside DFO in the context of the AFS Agreement negotiations, that it was relied upon by the parties during those negotiations, or that it was at any time incorporated directly or indirectly into the AFS Agreements.

[77] The trial judge found Clause 14 of the policy significant, with the second bullet being particularly germane:

> 14. **Enforcement**
>
> • Subject to the terms of the Aboriginal Fishing Agreements, normal enforcement procedures apply.
>
> • Where delay will not compromise the effectiveness of enforcement, DFO personnel will shall consult with the relevant Aboriginal Fishing Authority before taking any enforcement action.
>
> • Informal protocols on enforcement may be struck with Aboriginal Fishing Authorities, in accordance with this policy, to clarify consultation procedures.
>
> • In all cases, DFO personnel will inform and consult with the Aboriginal Fishing Authority after taking enforcement action.

[78] The trial judge referred to Clause 14 of the policy as an "undertaking to consult" (see para. 196).

[79] With this background, I move on to the specific allegations of error in the trial judge's decision.

(a) Is the 1993 Policy Binding on the Crown?

[80] The first point relates to the nature of the 1993 DFO policy. The trial judge held that this policy "survived" the series of AFS Agreements and qualified the charging discretion of the Crown. On this point, the Crown argues that the trial judge erred and says that the 1993 policy was an internal policy statement, not binding on the Crown, and that the trial judge's finding was inconsistent with long standing jurisprudence that expressions of policy have no force in law.

[81] The Crown provided numerous authorities in support of this position that the policy was not binding and that the trial judge's finding was an error of law (see: ***Canada (Attorney General) v. Arsenault***, 2009 FCA 300; ***Malcolm v. Canada***, 2014 FCA 130; ***Carpenter Fishing Corp. v. Canada***, [1998] 2 FCR 548 (FCA); ***Maple Lodge Farms v. Government of Canada***, [1981] 1 FCR 500 (FCA), appeal to SCC dismissed: [1982] 2 S.C.R. 2; ***Comeau's Sea Foods Ltd v. Canada***

(Minister of Fisheries and Oceans), [1997] 1 S.C.R. 12; and ***Mainville v. Canada (Attorney General)***, 2009 FC 720). It is significant to note that none of the authorities cited by the Crown involved consideration of an Aboriginal right or the honour of the Crown as a competing, overriding, or corollary consideration. However, they remain relevant on the narrow question of whether a policy document is enforceable against the Crown.

[82] The authorities provided establish that statements of policy do not bind a Minister of the Crown. The 1993 DFO policy was clearly a policy statement released by the Minister as part of a comprehensive and good faith response to the ***Sparrow*** decision. Although it was not before the trial judge, I note the following passage from ***R. v Huovinen***, 2000 BCCA 427, dealing with a pacific region enforcement policy:

> 12 Mr. Martinolich has been the Chief Enforcement Officer for the Pacific Region before taking up his job as Acting Director of Conservation and Protection. In the latter capacity, he co-authored the National Procedural Guidelines for Enforcement within the Aboriginal People's Food Fishery with the staff at national headquarters. He testified the purpose of the policy expressed in those Guidelines was to ensure that any enforcement actions taken against aboriginal persons would meet the test outlines in *R. v. Sparrow*, [1990] 1S.C.R. 1075 (S.C.C.) and explained their application. …
>
> …
>
> 31 … Mr. Martinolich as clear that it was DFO policy to enforce the law as set out in the *Fisheries Act* and the *Regulations* with respect to both aboriginal and non-aboriginal people. Aboriginal people who are not authorized to fish

> under licenses or do not adhere to the terms of their licenses or other statutory requirements are prosecuted. The DFO enforcement policy impugned by the appellants was therefore nothing more than a policy to implement and enforce a licensing regime established under the *Fisheries Act* by the *Pacific Fishery Regulations, 1993*, the *Fishery (General) Regulations* and the *ACFLR*. (Emphasis added)

[83] The decision in ***Huovinen*** did not consider a duty to consult but rather involved a challenge to the pacific coast enforcement regime by non-Aboriginal fishers. However, the enforcement policy was characterized as a policy designed to "implement and enforce" the licensing regime created in the wake of the ***Sparrow*** decision. The characterization of the enforcement policy in the present case is surely analogous.

[84] At the outset, it must be said that the nature and effect of the 1993 policy was not the focus of the trial and the position now advanced by the Crown was not before the trial judge. It is an issue on appeal given the trial judge's conclusion at para. 217 that the representations in the 1993 policy statement imposed a "binding obligation on the Crown," and further at para. 222:

> [222] The Fisheries Officers were entitled to lay charges, but honour bound to follow certain procedure. The Policy and the subject Agreement combined to require what I will term "enforcement consultation" where practicable. (Emphasis added)

[85] The trial judge's written reasons on this point leave it somewhat unclear as to the basis upon which he found the 1993 policy was "binding". If, as the Crown contends, the conclusion was based upon a finding that Crown was bound by a statement of policy, then I would agree that this is an error of law.

[86] However, the trial judge refers to the Fisheries Officers being "honour bound" to consult (para. 222) and that the "enforcement protocol in the 1993 policy statement is something which the Crown is honour-bound to observe" (para. 247). Enforcement consultation was also referred to as an obligation arising "in the context of the good faith requirement which informs all dealings between governments and aboriginal peoples" (para. 234). In my view, the trial judge's language implies that a different type of constraint was at play.

[87] Given the trial judge's reference to ***Mikisew*** and ***Haida Nation*** as the legal basis for his analysis, it is my impression that the reasoning here incorporates the concept of Crown honour, integrity, and good faith as opposed to a narrower finding that the 1993 policy was binding in a contractual or administrative sense.

[88] More will be said about the role of the honour of the Crown later in these reasons. Before moving to consideration of that issue, I will address the Crown's

second point – whether DFO and Waycobah agreed to some form of enforcement consultation.

(b) Did the parties agree to enforcement consultation?

[89] The Crown's submission on this point relates to its first in that it considers the role of the 1993 DFO policy. On this point, the Crown submits that there was no agreement between the parties which incorporated the concept of enforcement consultation and any such finding is a misinterpretation of the evidence and a palpable and overriding error.

[90] It was uncontested on appeal that the AFS Agreement did not contain a provision requiring enforcement consultation, nor did it incorporate directly or indirectly any provision of the 1993 policy. This was acknowledged by the trial judge at para. 217. Notwithstanding this, it was the trial judge's conclusion that the enforcement measures were "inextricably linked" to the performance of the AFS Agreement (at para.200).

[91] Further, as already referenced above, there was no evidence at trial of any other agreement, written or oral, that incorporated Clause 14 of the 1993 policy.

There was not even evidence that the existence or content of the policy was known to Waycobah representatives.

[92] If the trial judge's conclusions on enforcement consultation were based upon a finding that such an agreement existed, then again, I would agree with the Crown and find error. However, I am not persuaded that the existence of any such agreement was the basis of the trial judge's conclusion that there was an obligation to consult prior to enforcement.

[93] Having found that the 1993 policy was not binding on the Crown, incorporated into the AFS Agreement, or the subject of any other agreement between the parties, it remains to be considered whether there existed a duty to consult independent of the 1993 policy statement. It is my view that such a duty arises in this case and the trial judge was correct to so find.

(c) The Common Law Duty to Consult

[94] I now move to consideration of the Crown's main argument – that no duty to consult exists prior to enforcement action.

[95] The trial judge acknowledged that there was no clear precedent on this point at para. 197. He then went on to refer to ***Mikisew*** and ***Haida Nation*** as authority

for the principle that implementation of treaties invokes the honour of the Crown and the duty to act in good faith. By extension, and in the context of the 1993 DFO policy, enforcement consultation was required.

[96] As I have already noted, it is the Crown's submission that no duty of enforcement consultation exists at common law. If such a duty existed, it would have serious and practical implications on the Crown's ability to enforce its AFS Agreements.

[97] In response to the Crown position, I refer to the reasons in ***Mikisew.*** There, a treaty existed in which the Mikisew Cree First Nation had surrendered land but reserved the right to hunt, fish, and trap. That land was subsequently "taken up" by the federal government without consultation, interfering with the reserved rights. It was the Crown's view that the duty to consult was discharged by pre-treaty negotiations and no further consultation was required, notwithstanding the impact on the First Nation's reserved rights. As in the present case, there were complaints about the practicality of any ongoing duty to consult.

[98] The Supreme Court of Canada rejected the Crown's position in strident terms, calling it the "antithesis of reconciliation and mutual respect" (para. 49) and rejecting the "defence of administrative inconvenience" with reliance on ***Haida***

Nation and ***Taku River*** (para. 50). Notwithstanding the Crown's right to take up surrendered land, it was evident that there would be an adverse impact and this triggered the duty to consult. The particulars of the duty are shaped by the circumstances. Binnie, J. noted at para. 33:

> B. The Process of Treaty Implementation
>
> Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which the lands may be transferred from one category (where the First Nations retain rights to hunt fish and trap) to the other category (where they do not). The content of the process is dictated by the duty to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras 19 and 35:
>
> > The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity…

[99] Justice Binnie went on to pen the decision in ***Beckman***, a decision not before the trial judge. ***Beckman*** was an opportunity to address the issue of consultation in the context of a modern agreement. Although the agreement in ***Beckman*** was a final agreement, the broader ongoing relationship required "thoughtful administration" with a view to the future.

[100] Moreover, the decision in ***Beckman*** reinforced that the honour of the Crown is an overriding backdrop to government conduct involving Aboriginal peoples, notwithstanding the express or implied terms of a treaty or agreement. The duty to

consult remains available to uphold the honour of the Crown if required to further the goal of reconciliation. What is required is dictated by the circumstances. In ***Mikisew*** and ***Beckman***, a consultation process was required. However, the circumstances dictated a form of consultation at the lower end of the spectrum.

[101] In the end, it seems clear that a duty to consult prior to enforcement may exist depending upon the circumstances of each case. On this point, I find the reasoning of ***Mikisew*** and ***Beckman*** particularly relevant and persuasive. In coming to this conclusion, I disagree with the Crown submissions on this point and agree with the trial judge, albeit perhaps for somewhat different reasons, and with the benefit of additional authorities.

[102] Which brings me to the circumstances in the present case. In my view, there are several important considerations. First, Martin and Googoo were charged for breaching a communal license issued under an annual AFS Agreement. This annual agreement was one of a series of annual agreements intended to bridge the gap to a permanent resolution of competing rights and interests in the Atlantic Canadian fishery. Clearly, the ongoing relationship between the Crown and Waycobah was at stake throughout the term of each agreement with a view to future agreements and perhaps, at some point in the future, a final agreement.

[103] Second, the right to a food, social, and ceremonial fishery is a communal right. The parties agreed to limit the exercise of this communal right given a mutual interest in conservation. For this single reason, the parties were able to come to terms annually for the benefit of the species at risk, and the maintenance of the ability, and the right, to fish into the future. Together, they instituted what has been referred to as a co-management regime which reflected a mutual interest in conservation and a prospective view of the broader relationship. And, while the infringement in this case was readily acknowledged, justification was established. Significantly, the Crown was found to have acted honourably throughout the justification analysis.

[104] Third, the AFS Agreements were modern agreements that had existed in annual increments for many years and were part of the overall Crown response to the ***Sparrow*** decision. The Aboriginal Fishing Strategy, the AFS Agreements, and Aboriginal Communal Fishing licenses were part and parcel of a comprehensive regulatory response. The 1993 policy was a guideline for those charged with implementation of this framework. It was an important statement of Crown intent. It represented a DFO standard of compliance with its legal obligations. But it was not binding on anyone or incorporated into an agreement, explicitly or implicitly.

[105] Fourth, the AFS Agreement contemplated enforcement of terms and prosecution for contravention of the communal licence. This was uncontested on appeal. However, the charges against Martin and Googoo, and the evidence around this issue at trial, revealed uncertainties or misconceptions around this part of the Agreement. Quite clearly, enforcement had not been the focus of the contractual or broader relationship up to that point in time. In my view, this exemplifies the need for ongoing consultation. One would expect that consultation could signal intentions, clear misunderstandings, bring expectations into alignment, and benefit the ongoing relationship of the parties. Any over riding or persisting issues could be resolved in the ongoing annual negotiations.

[106] Fifth, I agree with the trial judge that the legal analogy between the present case and the "taking up" or implementation cases remains a rough one. Executing the terms of a long standing and well understood treaty is not the same as prosecution for non-compliance with the terms of a communal license. It seems to me the difference relates to issue of discretion. The decision to charge may involve considerable discretion, while the delayed execution of a contractual term may not.

[107] There is some comfort in the reasons in ***Huovinen*** which characterized similar enforcement mechanisms as designed to "implement … a licensing regime established under the *Fisheries Act*" (see para. 31). There is no question that the interim nature of the AFS Agreements underscores the fact that the parties remained in an ongoing and evolving relationship. Perhaps the common thread between the "taking up" cases and the present one is that the relationships at stake in both instances remain in need of constitutional support until the parties have reached the goal of full reconciliation.

[108] The impugned Crown conduct in this case is the decision to charge Martin and Googoo. Such enforcement measures were contemplated in the AFS Agreement. The substantive limitations imposed in the Agreements were fully justified. Both Martin and Googoo admitted the *actus reus* of the offences. In this context, it cannot be said that the exercise of discretion to charge had a great impact on the greater and communal rights at stake.

[109] However, as noted in ***Beckman***, Lamer, C.J. observed in ***R. v. Van der Peet***, [1996] 2 S.C.R. 507, "aboriginal rights exist within the general legal system in Canada" (at para. 49). Criminal proceedings are conducted under the umbrella of

constitutional protections. In this case, those protections include the honour of the Crown and its supporting doctrine of consultation.

[110] In all the circumstances, I find the decision to charge Martin and Googoo, after considerable delay, attracted the supervision of the honour of the Crown and triggered the duty to consult. I consider that the AFS Agreement contemplated enforcement measures but was silent on enforcement consultation. In the midst of all this, the 1993 policy existed as a standard guiding DFO's AFS implementation, enforcement and consultation. Much distance was put between a once exuberant and good faith standard when it was ultimately called upon in this case. I find such a technical defence troubling in the context of the goal of reconciliation.

[111] Finally, I conclude that the consultation required was minimal. It was not intended to change the substantive agreements of the parties or re-open justified terms. As an imported and overriding process, it required notice and a *bona fide* interest in the impact of the charges. But there was no immunity from enforcement. Rather, a process of consultation was required to inform and support the ongoing relationship. And, there was a reciprocal duty on Waycobah's part to respond in a timely way with its concerns on the issue of enforcement.

Issue 2 – Discharging the Duty to Consult

[112] It is the Crown position on this appeal that if a duty to consult exists, then it discharged its duty to the required standard. In support of this position, the Crown moved for the admission of fresh evidence.

(a) *Motion to Adduce Fresh Evidence on Appeal*

[113] The authority to admit fresh evidence on appeal is found in s. 683 of the *Criminal Code* and, for the purpose of this appeal, s. 683(1)(b) which provides:

> 683.(1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
>
> …
>
> (b) order any witness who would have been a compellable witness at the trial, whether or not he was called to the trial,
>
> (i) to attend and be examined by the court of appeal, or
>
> (ii) to be examined in the manner provided by the rules of court before a judge of the court of appeal…

Section 683 of the *Criminal Code* creates a broad discretion to admit fresh evidence if the interests of justice require it.

[114] The test for the admission of fresh evidence was set out in ***Palmer v. The Queen***, [1980] 1 S.C.R. 759. Aspects of the relevant principles have been

subsequently considered but the test in ***Palmer*** remains the overriding authority on the issue of admission of fresh evidence. The ***Palmer*** principles direct that evidence admitted on appeal be relevant, credible, and material to the outcome. ***Palmer*** restricts the admission of fresh evidence if it could have been adduced at trial with due diligence.

[115] Central to the Crown motion to adduce fresh evidence was the submission that neither party had adduced evidence as to enforcement consultation at trial because it was not thought relevant to the issues at trial. However, the trial judge's conclusions on the duty of enforcement consultation now make evidence on the issue central to this appeal.

[116] The Crown proposed the introduction of affidavit evidence from Gary MacDonald and Allan MacLean. In response, Martin and Googoo introduced the affidavit of Phillip Drinnen.

[117] At the time of the offence in question, MacDonald was a Fishery Officer with the Conservation and Protection Branch of the Department of Fisheries and Oceans (Canada). He was assigned to the Baddeck detachment of the department and held the position of Field Supervisor. The fisheries officers who investigated Martin and Googoo reported their findings to MacDonald. They reported that on

the day of the offence, Martin and Googoo had been detained and questioned but that no further enforcement action had been taken. MacDonald immediately reported the incident to his supervisor, Bruce Brown.

[118] MacDonald said he then acted in accordance with departmental policy and on October 11, 2007, contacted Philip Drinnen, Director of Fisheries for Waycobah First Nation. He advised Drinnen of the details of the offences committed by Martin and Googoo. There was conversation between the two men and it was MacDonald's evidence that Chief Morley Googoo would be advised and his support sought "regarding the prohibition against harvesting salmon in the Middle and Baddeck Rivers". It was also his evidence that Drinnen did not voice an objection to Martin and Googoo being charged.

[119] On May 9, 2008, MacDonald provided an update to his supervisor. It was his evidence that in the period between the October 10, 2007, and August 6, 2008, no representative of Waycobah took any action against Martin and Googoo, nor was any action taken by the Band to prevent reoccurrence of the offences.

[120] On cross-examination, MacDonald acknowledged that he was acting on the basis of a departmental policy regarding enforcement when he contacted Drinnen. He testified that the policy obligated him to notify the Band that two of their

members had contravened the Communal Fishing License. He confirmed that his point of contact with the band was Drinnen. Under the policy it would be Drinnan who would be advised of the events and from whom they expected a response from behalf of the Band. He complied with this requirement and understood the information would be passed along to Chief Googoo. He hoped to receive support from the Band in some form.

[121] MacDonald was asked about the notes which were exhibited to his affidavit. He could not say why these notes had not been disclosed prior to filing his affidavit.

[122] Next, the Crown offered the evidence of Allan MacLean. In 2007 and 2008, MacLean was the Maritime Regional Director of Conservation and Protection with the Department of Fisheries and Oceans. He worked out of the regional office in Halifax. It was MacLean's evidence that he contacted Chief Morley Googoo and advised him directly of the offences committed by Martin and Googoo before any charges were laid against them.

[123] MacLean was cross-examined about his conversation with Chief Googoo. He said it was a very short conversation during which Chief Googoo confirmed he was aware of the incident involving Martin and Googoo. MacLean said his goal in

speaking to Chief Googoo was to gage the community reaction to the "enforcement action". The call was informal. There were no notes made. He recalled inviting Chief Googoo to call if he had any concerns. There was no further contact prior to charges being laid.

[124] The affidavit of Philip Drinnan was offered in response. It was introduced by consent and there was no cross-examination. Drinnen was employed as Director of Fisheries and Natural Resources with Waycobah First Nation at the relevant times. He acknowledged a call with MacDonald during which he was advised of the events involving Martin and Googoo. He was not aware that he was being advised pursuant to any DFO policy and was not aware that he was considered the point of contact for the Band for any such purpose.

[125] Drinnen's evidence was that he was not aware of conservation issues on Middle River until the call with MacDonald. He did subsequently speak with band members and fishers about the salmon conservation issues on Middle River. He was not involved in any other consultations respecting the Martin and Googoo matter.

(b) *Decision on Fresh Evidence*

[126] In my view, it is in the interests of justice to admit the evidence and consider it on this appeal.

[127] On the basis of the fresh evidence, I find that adequate notice was given to Waycobah of Martin and Googoo's breach of the terms of the Communal Fishing License. Feedback was invited. I find that no response was provided before the decision to charge on August 6, 2008. I conclude that the duty to consult was discharged in this case.

Conclusion

[128] In the end, I find that a duty to consult prior to enforcement arose in this case and was discharged by way of adequate notice and information and an invitation to reciprocate.

[129] I stop short of endorsing enforcement consultation as a general concept. Given that the honour of the Crown is always at stake in dealings with Aboriginal peoples, such cases will demand an assessment of whether a duty to consult arises, and if so, what it entails in the circumstances. In the context of this assessment,

technical and administrative defences are to be discouraged. The ultimate goal of reconciliation should be the focus and a prospective approach is encouraged.

[130] I allow the appeal in part, admit fresh evidence, set aside the stay of proceedings, and enter convictions against both Martin and Googoo under the Information dated August 6, 2008.

[131] The matter is remitted back to the trial judge to impose sentence.

[132] Order accordingly.

Gogan, J.