Interwoven legal traditions. The extent to which state based decision makers are engaging with Indigenous legal traditions and the extent to which this is feasible: A celebration of an exceptional outcome

by

Natalie Johnston

B.A., The University of Sydney, 2004
LL.B, The University of Sydney, 2005

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

The Faculty of Graduate and Postdoctoral Studies

(Law)

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

December 2014

© Natalie Johnston 2014
Abstract

In recognition of Canada being a legally pluralist state, there is ample impetus from multiple players within the Canadian legal landscape for Indigenous legal traditions to be recognized, respected and considered as sources of legitimate legal authority. The need to be attentive to Aboriginal interests is becoming increasingly important in the context of government decision making regulating natural resources extraction that the constitutional duty to consult governs. However, state based decision makers must be attentive to the Indigenous legal traditions that comprise the legal systems that existed upon colonial settlement and which remain alive today.

Taking the recent Caribou cases as a case study, I analyse the extent to which Dunne Za law was recognised and respected in successive administrative and judicial decision making. Several Dunne Za legal traditions were interwoven throughout the petitioners’ submissions which arguably incited the Caribou cases. Chief of these laws is the traditional seasonal round. I interpret substantive and procedural components to decision making pursuant to this land management regime for maintaining balance and order. Throughout the analysis I highlight cultural, legal and operational constraints to the ability of decision makers to consider Indigenous legal traditions. Chief of these legal impediments is the reasonableness standard of review pursuant to which decisions as to the adequacy of consultation are assessed.

The Caribou cases exhibit varying degrees of respect for Dunne Za law. The Chief Justice’s inclusive balancing approach, which considers the legal traditions that were at play as legitimate law, contrasts that of the statutory decision maker and other appellate judge, which, inter alia, devalued the petitioners’ hunting right to an interest capable of being trumped by competing
economic interests. On several levels, the Caribou cases are a positive result that ought to be celebrated. However, this case study is an exception among many battles over the duty to consult that are not won. While Indigenous law has a presence in state based decision making, considerable progress must occur in the extent of respect for and consideration of Indigenous legal traditions, before parity of influence exists with common law legal traditions in state based decision-making.
Preface

This dissertation is original, unpublished, independent work by the author, Natalie Johnston.
# Table of Contents

**Abstract** .......................................................................................................................... ii  
**Preface** ............................................................................................................................... iv  
**Table of Contents** ............................................................................................................... v  
**Acknowledgements** .......................................................................................................... viii  
**Chapter One: Introduction** .............................................................................................. 1  
1.1 Rationales for such analysis ......................................................................................... 3  
  1.1.1 A means by which to establish legal rights ......................................................... 3  
  1.1.2 Judicial and Bar Association impetus .............................................................. 5  
  1.1.3 Theoretical support: Legal Pluralism and the jurispathic court? .................. 7  
  1.1.4 My entrée into cultural untranslatability .......................................................... 9  
  1.1.5 The value of celebration and countering the collective memory of imperialism .......................................................... 13  
1.2 Thesis outline .............................................................................................................. 17  
**Chapter Two: Methodological and ethical concerns with interpreting Indigenous legal traditions** ................................................................................................................. 20  
2.1 The appropriateness of this task and methodological limitations ................. 23  
2.2 Translation .................................................................................................................. 28  
2.3 Epistemological challenges ....................................................................................... 35  
  2.3.1 Theoretical grounding ....................................................................................... 35  
  2.3.2 Identification of the researcher’s identity within the research task or situating one’s self in the research .......................................................... 37  
2.4 Voice ........................................................................................................................... 44  
2.5 Reliability of sources ................................................................................................. 44  
**Chapter Three: Indigenous legal traditions of the Dunne Za** .................................. 55  
3.1 The Traditional Seasonal Round as a quasi land use planning regime ... 56  
  3.1.1 Dreaming or dream hunting .............................................................................. 66  
  3.1.2 Substantive components of the Traditional Seasonal Round: the
Chapter Four: State based decision makers and Indigenous legal traditions 91

4.1 “First instance:” administrative decision makers and the statutory decision maker ................................................................. 95
4.2 At trial: The Supreme Court of British Columbia ........................................ 105
4.3 The Court of Appeal of British Columbia ........................................ 109
  4.3.1 Submissions of the appellants: the Province of British Columbia and First Coal Corporation ........................................ 109
  4.3.2 Submissions of the Attorney General of Alberta ......................... 112
  4.3.3 Submissions of the Petitioners / respondents on appeal ............... 113
  4.3.4 The content of consultation issue: what was the scope of the Duty to Consult? ................................................................. 115
  4.3.5 The interpretation issue: the nature of the treaty right to hunt ...... 124
  4.3.6 The adequacy of consultation ..................................................... 133
  4.3.7 The accommodation issue ....................................................... 147
4.4 Evolution in the degree of engagement? Comparison with a decision 26 years prior: Blueberry River v Canada (DIA) [1987] FCJ 1005 ................................................................. 148
4.5 The extent of engagement with the Indigenous legal traditions of the Dunne Za ................................................................. 151

Chapter Five: The extent to which decision makers are able to engage with Indigenous legal traditions ......................................................... 159

5.1 Cultural untranslatability: a clash of worldviews ......................... 159
  5.1.1 A further symptom of cultural untranslatability: the legitimacy of law derived from oral history .................................................. 169
5.2 Technical legal impediments: at the mercy of legal ingredients ......... 173
5.3 Operational limitations .............................................................. 196

5.3.1 Policy and economics .......................................................... 197

5.3.2 A divided Crown and impact upon the honour of the Crown ...... 202

5.4 Conclusion .............................................................................. 204

Chapter Six: Conclusion .................................................................. 209

Bibliography .................................................................................. 226
Acknowledgements

Thank you to my supervisor Dr Douglas Harris for considering my researched ideas which were largely based on an amalgam of Australian and Canadian law, and for his tolerance in approaching the challenges which reconciling these jurisdictional differences and paradigms presented. Thank you also to Mr Michael Jackson, QC for reviewing this thesis and for inspiring me with his stories of working with Aboriginal communities in combating the challenges that over-tenuring presents.

Many thanks to the following people for answering my many questions, encouraging me to think independently and to question the status quo, and for their professional and ethical guidance. The Honorable Justice R N Talbot, Professor D. P. H. Hasselman, Ms Deborah Kol.
1. Introduction

Aboriginal people have always had a voice. It is the non-Aboriginal world that is learning to listen.\(^1\) The need to listen is becoming increasingly important in the context of the balancing of rights and interests involved in government decision making relating to natural resources extraction that is governed by the deliberative democratic mechanism of the constitutional duty to consult. Both the government administering the duty to consult and accommodate’s implementation in policy, and the judiciary crafting its evolution in response to the submissions of advocates, must be attentive to Aboriginal voices. For the Aboriginal peoples of Canada, it is imperative that decision makers listen to their voices for several reasons, including that the duty to consult provides the means by which “Aboriginal interests” might be preserved as an interim measure pending claims resolution,\(^2\) or in a treaty context it provides the opportunity for obtaining an improved outcome for defined treaty rights.\(^3\) However, decision makers must listen not merely to “Aboriginal interests,” because as the operation of the duty to consult illustrates, despite having constitutional protection, these interests may be outweighed in the decision making calculus by competing interests, particularly economic ones. As such, Aboriginal interests are not indefeasible. Rather, for reasons which I proceed to explain, decision makers must be attentive to the Indigenous legal traditions that comprise the legal systems that were in existence upon colonial settlement and which remain alive today.

---


\(^2\) In *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511, the Supreme Court of Canada employs the language “Aboriginal interests.”

\(^3\) *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, provides that *Haida* consultation rights extend to the treaty context.; Lawyer Ms Lee Schmidt described the duty to consult as a gift for the opportunity it provides for securing an improved outcome for Aboriginal peoples. Tom Isaac, Lee Schmidt, Erin Tully, “The Duty to Consult”, seminar hosted by the Indigenous Law Students Society at the University of British Columbia, Faculty of Law, 21 November 2012.
Taking a case study of the decision making that occurred with respect to the recent “Caribou cases,” namely *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 and *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (West Moberly), as the primary focus of analysis, this thesis examines the extent to which administrative and judicial decision makers recognise, respect and consider Indigenous legal traditions. The first of the Caribou cases concerned a petition for judicial review brought by Chief Wilson of the West Moberly First Nation and the West Moberly First Nation (the petitioners). The West Moberly First Nation descend from the Mountain Dunne-Za, also known as the Beaver Indians. The petitioners sought to quash three decisions of government officials that would facilitate a proponent, First Coal Corporation, obtaining a bulk sample of coal as well as pursuing an advanced exploration program in relation to an existing mineral tenure located within West Moberly traditional territory. The petitioners alleged, amongst other things, that the impugned decisions were made without proper consideration of their right to hunt caribou in the affected area as part of their traditional seasonal round, and without making adequate provision for the protection and restoration of those caribou.\(^4\) Central legal issues were the adequacy of the Crown consultation and accommodation. The petitioners succeeded in the Supreme Court of British Columbia, after which the Provincial Crown appealed to the Court of Appeal of British Columbia in the second of the caribou cases. While the majority reasoning differed from that of the trial judge, the Court of Appeal upheld the principal finding that the Crown’s consultation and accommodation had been inadequate. It held that the Crown’s inaccurate characterization of the nature and scope of the Treaty hunting right guaranteed to the petitioners in Treaty 8, infected the Crown’s assessment of the content of the duty to consult.

\(^4\) *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 (Factum of the Petitioners, Written Argument of the Petitioners to the Supreme Court of British Columbia) at para 2.
1.1 Rationales for such analysis

Why complete this kind of work? Why is it important to analyze the extent to which decision makers who receive their authority from the state are attentive to Indigenous legal traditions? Several well-established justifications have garnered professional and academic support. There is no need to explain these at length. Rather, I am more interested in articulating my own evolved reasons for such exploration, as well as those that are perhaps less commonly discussed. Nevertheless, I commence by acknowledging the more pertinent of these well established justifications.

1.1.1 A means by which to establish legal rights

From the point of view of many Aboriginal peoples of Canada, a pertinent reason for such inquiry is that the language of Delgamuukw v British Columbia [1997] 3 SCR 1010 provides that the means by which Aboriginal peoples can establish their entitlements, is by their laws. That is, Indigenous legal traditions have an important role to play in securing recognition of Aboriginal title. This point is perhaps less relevant to my case study where the West Moberly First Nation have treaty protected rights. However, it is of the utmost importance to other First Nation governments, particularly in British Columbia, with its relative dearth of treaties.

In Delgamuukw, the Gitksan and Wet’suwet’en First Nations relied upon the adaawk and kungax respectively to support their claims for Aboriginal title. The Gitksan relied upon the adaawk as a component of and as proof of the existence of a Gitksan system of land tenure. As legal scholar

---

5 Delgamuukw v British Columbia [1997] 3 SCR 1010 at para 94.
Val Napolean explains, the *adaawk* are the ancient formal collective oral histories of the house. Each house owns an *adaawk* that links the group to its territories and establishes the rightful owners of land and resources. The *adaawk* tells of the group’s origins and migrations to its cultural territories, of explorations and covenants established with the land, and of songs, crests and names that result from the spiritual connection between members and their land. The Gitksan Nation submitted that Aboriginal title may be established, at least in part, by reference to Aboriginal law. They maintained that Aboriginal title arises from and should reflect the pattern of land holdings under Aboriginal law. Similarly, the Wet’xuweten introduced the *kungax* as being relevant to the proof of Aboriginal title.

The Supreme Court of Canada (SCC) eventually held that Aboriginal title arose out of the relationship between the common law and pre-existing systems of Aboriginal law: “the source of Aboriginal title appears to be grounded both in the common law and the Aboriginal perspective on land. The latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing proof of occupancy.” The SCC reasoned thus: Aboriginal title arises from the prior occupation of Canada by Aboriginal peoples and this is relevant in two ways. First, the physical fact of occupation derives from the common law principle that occupation is proof of possession in law. Secondly, Aboriginal title is a distinct legal interest or...

---

8 Delgamuukw at para 147.
9 *id* at para 94.
10 *id* at para 147.
11 *id* at para 111.
12 *ibid*. 
literally, of its own family, *sui generis*, owing to the timing of its legal recognition: it arises from possession *before* the assertion of British sovereignty, as distinct from estates in fee simple, which arise after the assertion of British sovereignty.13

1.1.2 Judicial and Bar Association impetus

Consistent with the language of *Delgamuukw*, former Chief Justice Lance Finch of the British Columbia Court of Appeal recently proposed that the legal profession had an obligation to learn in the sense of being receptive to multiple sources of legitimate legal authority. In the context of seeking to make space for Indigenous legal orders within the Canadian legal order, that is, of incorporating Indigenous legal orders into the common law,14 he suggested that a more widely applicable concept of the honour of the Crown imposes on all members of the legal profession the duty to learn, “at the very least, to hold ourselves ready to learn.”15

More than encouragement, Finch CJ has labelled this obligation a duty.16 His mandate provides first, that “the idea of making space within the legal landscape does not fully reflect the nature of the enterprise.”17 “We must find ways to achieve reconciliation by finding space for the Canadian legal order within the pre-existing legal landscape.”18 Emphasising that Canadian legal

---

13 *id* at para 111.
15 *id* at para 14.
16 As distinct from a guideline or similar which is less weighty and obligatory. I am alluding to the distinction between mandatory and discretionary language in statutory interpretation. See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia*, (Australia, Lexisnexis Butterworths, 2006), at 271.
18 *ibid*. 
practitioners are “the strangers in the landscape,”” Finch CJ insists that the current Canadian legal system must reconcile itself to co-existence with pre-existing Indigenous legal orders. In addition to this inversion of onus and perspective, the duty has an epistemological component. It is also a matter of attempting in good faith, and as respectfully as possible, to enter new legal, ethical and cultural landscapes.

As to the content of the duty, being “ready to learn” incorporates a need to be receptive to Indigenous legal orders. Receptivity demands entering a landscape empty handed, with all senses open. Moreover, it involves acknowledgement of past and present wrongs. That is, receptivity to the memory of such wrongs as well as to new knowledge. Receptivity must take account of context, including the context of the colonial enterprise and the injustice it has so often created. Secondly, the duty entails respect. It incorporates a need to acknowledge diversity and difference between and likely also within, Aboriginal and non Aboriginal value systems, and that, “we all have much to learn from one another.”

Consistent with this mandate, the Canadian Bar Association (CBA) has recently urged “judges, lawyers, law makers and legal academics to recognize and value Indigenous legal traditions within the Canadian legal system.” The resolution’s preamble recognises most notably that “to effect meaningful reconciliation between the Crown and Aboriginal Peoples in Canada, it is necessary to

---

19 *id* at para 43.
20 *ibid.*
21 *id* at para 38.
22 *id* at para 39.
23 *id* at para 41.
24 *id* at para 40.
25 In Resolution 13-03 M of 16-17 February 2013. Canadian Bar Association Resolution 13-03-M, carried by the Council of the Canadian Bar Association at the Mid-Winter Meeting held in Mont-Tremblant, QC, February 16-17, 2013 online: Canadian Bar Association <http://www.cba.org/CBA/resolutions/pdf/13-03-M-et.pdf>.
**recognize, respect and consider**, Indigenous legal traditions, in accordance with the customs and traditions of each Aboriginal group or Nation from which the law emanates.”26 Moreover, it provides “there is no inherent limit to the ways in which Canadian and Indigenous legal orders may be mutually enriched and harmonized,” and that the onus is on “judges, lawyers, lawmakers and legal academics,” “to address the profound change in perspective required to effectively recognize and incorporate Indigenous legal orders into Canadian law.”27

Neither the former Chief Justice’s mandate nor the subsequent CBA Resolution fuelled my interest in this project. Rather, as I elaborate upon below, my initial interest was in exploring the means by, feasibility of and extent to which traditional knowledge may be incorporated into the environmental assessment process having come from a legal background featuring primarily statutory, as distinct from constitutionally mandated, consultation processes, and relating to rather different subject matter.28 However, such Judicial and Bar Association callings lend credibility to me expending time to complete this project.

### 1.1.3 Theoretical support: Legal Pluralism and the jurispathic court?

The third reason for embarking upon this project lies in the recognition of Canada as a multi-juridical state with multiple legal orders—common law, civil law, and Indigenous legal traditions—

---

26 *ibid*. Emphasis added.

27 *ibid*. Emphasis added.

28 As a solicitor practicing in NSW environment and planning law, I worked in public consultation related to town planning and major project applications. This did not involve consultation with Aboriginal peoples. Also, in this legal context not all obligations to consult were sourced in statute. For example, an obligation to consult could derive from a legitimate expectation, itself emanating from a public proclamation or government policy or similar. For detailed discussion of the sources of a legal obligation to consult in a planning and environment context, see Chief Justice Preston “Consultation: One aspect of procedural propriety in administrative decision making,” A paper presented to the Australian Institute of Administrative Law, 26 June, 2008.
-existing simultaneously. Within this legally pluralist setting, there is a need to acknowledge Indigenous legal traditions. Professor Borrows advocates Legal Pluralism and justifies his invitation for others, including non Indigenous peoples, participating in understanding and applying Indigenous norms, with the rationale that “this provides the potential for widening our interpretative legal communities and improving each legal tradition.”

As a non Indigenous person and an Australian trained lawyer, I am taking up the invitation.

Robert Cover famously described courts as jurispathic, that is, as having agency in the killing of law. In the context of Legal Pluralism, Pooja Parmar explains, “we are all familiar with the scenario where norms generated by different communities (including the state), compete for validation by the courts, the formal institutional sites of such contestation and norm generation. Courts as we know, choose certain narratives over others. This suppression of certain visions of law and the worlds it can create, by courts, led Cover to describe courts of the state as jurispathic.” Some scholars including Sakej Henderson, also subscribe to this critique. He writes, “in most translation processes, Courts have to violate the fundamental assumptions and premises of First Nations jurisprudences, in order to maintain fidelity to the essential characteristics and patterns of common law jurisprudence.” In view of such criticism, and having worked in varying capacities in a judicial system in the past, I am intrigued to test this criticism. Is this the reality here? Are things changing? Is the killing of law only the product of a Court’s agency? What role

---

29 John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 10. I suggest a loose comparison is the fresh perspective that can be gained by non planning lawyers interpreting town planning legislation, as occurred in *Ballina Shire Council v Ian Watson* [2006] NSWLEC 827.


32 S J Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006 at 120.
for the portrayers of Indigenous legal traditions themselves in achieving their traditions being heard and respected? As a former litigator, I suggest it is too simplistic and incomplete an evaluation to examine this question without also exploring the role of the portrayers of legal traditions themselves, in seeking to have their traditions taken into account.

1.1.4 My Entrée into cultural untranslatability

My initial interest in examining the means by and extent to which traditional knowledge is and can be incorporated into the environmental assessment process, as well as with the realities of consultation involving Aboriginal peoples generally, emerged from witnessing the case of Roy Kennedy v Director-General of the Department of Environment and Conservation and Another [2006] NSWLEC 456. At this time, still wearing legal training wheels,33 I observed the apparent incommensurability of difference in the modus operandi of the Aboriginal applicant and non-Aboriginal proponent of development, in relation to the means of communication and negotiation.

Kennedy concerned a judicial review challenge in which the applicant, Mr Roy Kennedy, an Aboriginal person of the Yuin Monaro people, sought a declaration of invalidity with respect to a consent issued under a provision of the National Parks and Wildlife Act (Parks Act), to permit destruction of Aboriginal objects in association with a Council approved residential development at Sandon Point, NSW.34 Alternatively, if such consent were valid, Mr Kennedy pleaded that the proponent had not complied with two of its conditions by not having operative within 12 months of the consent’s issuing, an Aboriginal Keeping Place for any Aboriginal objects collected or

33 I observed this case from the neutral perspective as a Judge’s Associate. I was a Law graduate but not yet admitted as a Solicitor. I was not thereby, advocating for any one party.
34 Kennedy at para 1.
salvaged from the subject site. Mr Kennedy challenged the validity of the impugned consent on various grounds, including inconsistency, a failure to take into account relevant considerations, and a taking into account of irrelevant considerations. In a legal paradigm lacking any constitutional duty to consult with Aboriginal peoples, as well as any constitutionally protected Aboriginal rights, all challenges relied on impact on cultural heritage and were grounded in administrative law principles. Relying upon the doctrine of legitimate expectations, there was an issue as to the source of any obligation to consult with the applicant (Mr Kennedy), and effectively, as to the adequacy of such consultation. With there being no express or implied statutory requirement to consult in the Parks Act, and insufficient evidence to found any claim of an express promise made to or an arrangement with the applicant, the only basis for an obligation to consult the applicant was a public statement or practice adopted by the decision maker. Three policy documents were capable of founding the source of such an obligation on the first respondent Department to consult Mr Kennedy.

The evidence provided that the Department’s policies and practices with respect to consultation about s 90 applications for consent to destroy Aboriginal objects were generally implemented through the actions of applicants for such consents and their consultants. The Court noted that the contents of documents the applicant relied upon contained principles and practices “developed to guide Parks and Wildlife staff and consultants / contractors it employs, in planning and

35 id at para 5.  
36 id at para 85.  
37 id at para 86.  
38 id at para 89.  
39 id at para 90. A consent to destroy an Aboriginal object, which is now called an Aboriginal heritage impact permit or AHIP, is a statutory instrument that the Director General of the Office of Environment and Heritage issues under s 90 of the National Parks and Wildlife Act, 1974 (NSW), to manage harm or potential harm, to Aboriginal objects or places, when development impacts upon an Aboriginal object, place, land or activity.
conducting consultation with communities in cultural heritage issues.” These guiding principles included that “all relevant parties should be notified of the consultations that occur in their area of operation” and should be included in the consultation process. Moreover, the documents provided that “in determining whether a permit under s 90 should be issued, the National Parks and Wildlife Service (NPWS) needs to consider the significance of the Aboriginal object or place. The involvement of Aboriginal people in the assessment of significance of the object or place, although not required by the Act, is sought as a matter of practice.”

With respect to what might be termed the adequacy of consultation, Jagot J noted the applicant received a letter inviting him to contact the proponent’s consultant with queries about the application and providing further details about the works proposed. Ultimately, Jagot J found that “any expectation which the applicant might have had as a consequence of the three documents, and any practice of prior consultation about Sandon Point, was fulfilled.”

The cross examination of Mr Kennedy in particular, incited my interest in what I would later understand as “cultural untranslatability” or incommensurability of difference. As noted, in the event the subject consent were found to be valid, the applicant pleaded in the alternative, non

---

40 id at para 91. Emphasis added.
41 id at para 91.
42 ibid.
43 id at para 94.
44 id at para 95. Jagot J reasoned thus, “The applicant as a “relevant party” for consultation in the Sandon Point area was notified of the s 90 application. Such notification extended to the applicant an invitation to meet with NPWS archaeologist to discuss the application. In this manner, both of the relevant guiding principles were fulfilled: As a relevant party, the applicant was both, notified of the application and was included in the consultation process. As contemplated by the “guiding principles,” it was then a decision for the applicant whether to participate further in that process.” Emphasis added.
45 See Sophie Mc Call, First person Plural: Aboriginal storytelling and the ethics of collaborative authorship (Vancouver: UBC Press 2011) at 70 where she discusses the problem of “cultural untranslatability.”
compliance with two of its conditions. Special conditions 2 and 3 of the impugned consent provided:

2 The Aboriginal Keeping Place must be operative within twelve months of the issuing of this consent, and the keeping Place must be made available for any Aboriginal objects collected or salvaged from the area of Sandon Point Stages 1 to 6.

3 The form and location of the Aboriginal Keeping Place and a plan for its management must be negotiated with the Aboriginal community groups listed in Schedule C.\(^46\)

To determine the issue of compliance, Jagot J construed the conditions of consent thus: Special conditions 2 and 3 qualify the authority to knowingly destroy the Aboriginal objects within the sites identified by providing that an Aboriginal Keeping Place must be operative within 12 months and is to be negotiated between the consent holder and the groups nominated in Schedule C.\(^47\)

With respect to Special Condition 3 in particular, Jagot J accepted “it does not permit the consent holder or any one of the five groups nominated, to dictate the form and location of the Aboriginal Keeping Place or a plan for its management.”\(^48\) The consent holder has no capacity to require any one of the five groups so nominated to negotiate. The consent holder is bound to negotiate, but the five groups are not bound.\(^49\)

Jagot J accepted the evidence of the proponent’s consultant as to the steps she had taken on its behalf to negotiate the form and location of the Aboriginal Keeping Place with the groups specified in the consent,\(^50\) and in particular, the evidence that plans for its negotiation had been delayed for various reasons/disagreements with some of the groups about how the negotiation

\(^{46}\) _Kennedy_ at para 70.
\(^{47}\) _Id_ at para 176.
\(^{48}\) _Ibid_.
\(^{49}\) _Ibid_. Emphasis added.
\(^{50}\) _Id_ at para 177.
ought to proceed.\textsuperscript{51} Jagot J found that the proponent had to date, negotiated the form and location of the Aboriginal Keeping Place as required by the condition and that the fact that the negotiations remained incomplete did not place the proponent in breach of this condition.\textsuperscript{52} 

The content of much of the oral evidence concerned the negotiation of the Keeping Place and the difficulty of achieving this. From Mr Kennedy’s perspective, the system did not respect, amongst other things, his community’s means of communicating. In contrast, the proponent for development appeared frustrated with the failure by the applicant to attend meetings to facilitate the Keeping Place, and with the applicant’s slow pace of operating in general. The disparity in the positions of Mr Kennedy and the proponent in relation to this negotiation and the evident frustration of both of these parties, seemed to illuminate a challenge of not so much being heard, as understood. Despite the judge’s ruling on the legal issues, I perceived the apparent failure in negotiation for this Keeping place.

\textit{1.1.5 The value of celebration and countering the “collective memory of imperialism”}

In the course of preparing my research I turned to the work of Linda Tuhiwai Smith. Smith’s \textit{Decolonising Methodologies} indicts the story-telling of Western research by imperial interests and provides insight into the type of epistemological shift necessary for researchers to provide meaning and sensitivity to voice within Indigenous communities.\textsuperscript{53} Smith’s rationales apply to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{51} \textit{ibid.}
\item \textsuperscript{52} \textit{ibid.}
\end{itemize}
\end{footnotesize}
“indigenist research.”\textsuperscript{54} However, I suggest that several of her arguments have resonance as justifications for engaging with Indigenous legal traditions.

Smith’s chief caveat for researchers is that they must appreciate the historical context, what she terms, “the collective memory of imperialism,”\textsuperscript{55} because of its central place in the modern indigenous identity and reality. As Smith explains: “imperialism \textit{frames} the Indigenous experience. It is part of our story, our version of modernity.”\textsuperscript{56} Such is the case, Smith details, owing to the fact that Indigenous peoples have historically been the passive objects of research. They were most often the subjects of study by non-Indigenous researchers and were neither considered agents themselves, nor as having expert knowledge about themselves. They were not self defining. Rather, they were \textit{defined by} social scientists.\textsuperscript{57}

As a result of this legacy of research by Imperial interests, there is a need to reframe and re-cast the narrative. Consistent with this effort, I suggest that uncovering and disseminating the worldview of the Dunne Za that I hypothesise is insufficiently attended to in the decision making that I examine, is arguably a way of what Smith terms “representing back” to the West to combat the collective memory of imperialism.\textsuperscript{58} It provides an opportunity to correct a skewed historical record in which likely more is known about one side of the encounter than the other, and possibly, to correct misrepresentations perpetuated by colonial interests and I submit also, earlier decision makers.

\textsuperscript{54} This is a specific type of research which involves engaging in research on a community’s own terms. It is culturally safe, culturally relevant and appropriate, while simultaneously, satisfying the rigour of research. See Linda Tuhiwai Smith, \textit{Decolonising Methodologies Research and Indigenous Peoples}, 2d ed (London: Zed Books, 2012) at 185-186.

\textsuperscript{55} \textit{id} at 1.

\textsuperscript{56} \textit{id} at 20. Emphasis added.

\textsuperscript{57} \textit{id} at 21.

\textsuperscript{58} \textit{id} at 1.
However, lest I over-emphasise any potential benefits of my project, I take guidance from those who work closely with Indigenous communities who advise that assisting Indigenous communities is akin to acting as a project manager in that one must be mindful of the bigger picture, particularly the economic context, and in the allocation of resources to a problem or issue, appreciate that it is often one of many concerns.\(^{59}\) In a similar vein, Smith explains, *Decolonising Methodologies:*

> attempts to do more than de-construct Western scholarship simply by our own re-telling. In a decolonizing framework, deconstruction is part of a much larger intent. Taking apart the story, revealing underlying texts, and giving voice to things that are often known intuitively, does not help improve their current situation. It provides words, explains certain experiences, but it does not prevent someone from dying.\(^{60}\)

Applying this advice, one could question the potential benefit of my project in view of the context in which this community of the West Moberly First Nation lives. When encroaching resource extraction activities are merely one of many concerns, what is to be gained by “taking apart the story” (in this case, the Court decisions), “revealing underlying texts” (namely the Indigenous worldview that was variably prominent in the legal findings), and “giving voice to things that are often known intuitively” (such as Indigenous legal traditions and values)? What is the utility of extracting the Indigenous law from the West Moberly First Nation’s initial submission and communicating this?\(^{61}\) In particular, I question the value in the context of this community possessing defined treaty rights. Smith touches upon this predicament when she notes, “while Indigenous peoples live in conditions below that of the non-indigenous world…within these sorts

---

\(^{59}\) Personal communication, Ms Lee Schmidt, 21 November 2012. Tom Isaac, Lee Schmidt, Erin Tully, “The Duty to Consult”, seminar hosted by the Indigenous Law Students Society at the University of British Columbia, Faculty of Law, 21 November 2012. Ms Schmidt noted that working with enforcing the duty to consult involves sitting down with one’s client and working out priorities. It is very strategic and political, and not merely legal.

\(^{60}\) Smith *supra* note 54 at 4.

\(^{61}\) By this I mean the Initial Submission of the West Moberly First Nation to the Ministry of Energy Mines and Petroleum Resources of June 2009 entitled, I Want to Eat Caribou before I die (the initial submission).
of social realities, questions regarding Imperialism and the effects of colonialism, may seem to be merely academic. Sheer physical survival is far more pressing.**62

In response to questions about the utility of communicating Indigenous legal traditions, I embrace Vizenor’s notion of “survivance” and suggest it has application here.63 As Smith explains, celebrating survival is a particular approach that counters much non-Indigenous research that has commonly documented “the demise and cultural assimilation of indigenous peoples.”64 Instead, it celebrates survival or what Vizenor calls, survivance, survival and resistance, by accentuating the degree to which Indigenous peoples and communities have retained cultural and spiritual values and authenticity in resisting colonialism.65 Consistent with this rationale, there may be merit in seeking to disseminate the role of Indigenous legal traditions in inciting the West Moberly’s legal challenge, and in illustrating legal traditions that are still being applied. This would go some way towards demonstrating that the legal traditions of the West Moberly First Nation remain alive and have relevance and utility in the colonised world.

In addition, I speculate this means of celebrating the survival and endurance of this law might also heighten morale for members of the West Moberly First Nation. Smith hints at the intangible and psychological benefit that may ensue from such celebration: “the past, our stories local and global, the present, our communities, cultures and languages and social practices, all may be spaces of marginalization. But they have also become spaces of hope.”66 Similarly, the positive comments of some of the Aboriginal participants from a workshop I participated in, in which participants

---

62 Smith, supra note 54 at 4.
64 Smith, supra note 54 at 243.
65 ibid.
66 id at 35. Emphasis added.
extracted and applied legal principles contained in Dene, Anishnabe and Cree stories, support the notion that celebrating the endurance of these legal traditions, might have a positive impact on the community’s wellbeing.67 Such a positive psychological contribution is perhaps equally as important as seeking to re-frame the narrative by countering and responding to misleading and questionable accounts, especially in a climate that risks being plagued by “consultation fatigue,” which can result from Aboriginal communities being overwhelmed by the sheer number of consultation referrals received, and deters some from persisting with seeking to protect their constitutionally protected rights.

1.2 Thesis outline

This thesis commences in Chapter Two by outlining various ethical and other considerations that have informed my work on this project. First and foremost, I question the appropriateness of a non-Dunne Za person and accordingly, an outsider, engaging with Dunne Za legal traditions, and the risk of misrepresenting identity and way of life that accompanies this. Secondly, I discuss my concern with what I perceive to be my “translation approach,” that is, a comparative law approach that resembles a translation exercise. In seeking to decipher Indigenous legal traditions, do we only detect what we are trained to recognize? Was I extracting Indigenous law or was my product better characterized as my attempt using my training in non-Indigenous legal traditions, to make sense of Indigenous legal traditions? This concern illustrates a further epistemological challenge: that of comprehending another worldview and the impossibility of approaching the task of deciphering Indigenous legal traditions tabula rasa. Accepting the theoretical guidance of Robert

67 Namely the workshop entitled Thinking about and Practising with Indigenous Legal Traditions, held in November 2011 in Fort St John. (The 2011 Conference).
Cover as to the strength of influence of normative backgrounds, Chapter Two articulates the need to appreciate one’s own biases as well as those of the people one is studying. I address this by locating my identity within this research project in the effort to achieve as objective an analysis as possible. Finally, I identify concerns with the reliability of the work of the four anthropologists upon whom I rely in order to comprehend the legal traditions of the Dunne Za, and to supplement the snippets of detail contained within the petitioners’ legal submissions.

Mindful of these ethical considerations, in Chapter Three I decipher examples of Indigenous legal traditions, both principles and practices, that material prepared by the West Moberly First Nation and instigator of the subject legal challenge hints at, which are well established in the anthropological literature, and which were before the successive decision makers. I rely principally on the initial submission as well as the petitioners’ submissions to the Supreme Court of British Columbia. The initial submission is not a comprehensive account of Dunne Za law. It was prepared expeditiously given the urgency of the consultation process and the claims which it sought to support. As such, I see it as a non-comprehensive survey of applicable Dunne Za law.

I proceed in Chapter Four to evaluate the extent to which these legal traditions are respected, recognized and considered as sources of legitimate legal authority by the three levels of decision-making that occurred, from the initial administrative decisions of the statutory decision makers, to the differing judgments in the British Columbia Court of Appeal where the case was finalised. This comparative analysis permits certain findings. However, it is perhaps inappropriate to draw

---

68 By this I mean the initial submission. See note 61 supra.
69 I am grateful to the submission’s author, Mr Bruce Muir for this information, namely its expeditious preparation in the span of a month so as to put the Ministry on notice as to breaches of the duty to consult.
70 I note that both British Columbia and First Coal Corporation sought leave to appeal to the Supreme Court of Canada, which leave was subsequently withdrawn.
wide reaching conclusions from a single case study. Throughout the analysis I draw attention to intricacies of the legal ingredients and certain technicalities which arguably inhibit the ability of decision makers to take account of Indigenous legal traditions. Chief of these is the reasonableness standard of review pursuant to which decisions as to the adequacy of consultation are assessed.

Consistent with the effect of these legal technicalities, in Chapter Five I discuss how emerging trends in decision making and its review also complicate the capacity of Indigenous legal traditions to have significant influence on state-based decision makers. In addition, I discuss the dilemma of cultural untranslatability, which manifests in certain tendencies, such as a reticence to acknowledge myth as a legitimate source of law. Similarly, a failure to be receptive to the mechanics of certain Indigenous legal traditions, namely their substantive and procedural components, yields a risk that aspects of hunting decisions made pursuant to the traditional seasonal round for example, are dismissed as “haphazard, irrational and improvident.” This illustration of cultural untranslatability played out, arises from a conflict between Dunne Za decision making methodologies and those of Canadian administrative law. Previous judicial decision making suggests that a refusal to acknowledge aspects of Indigenous legal traditions as being legitimate laws, is a genuine risk. Finally, I comment upon operational realities of the duty to consult’s implementation which further constrain its deliberative democratic function.

71 See McCall, note 45 supra.
2. Methodological and ethical concerns with interpreting Indigenous legal traditions

This project is a fragment of a larger envisaged qualitative research project that I had originally planned. Premised on the fact that legal judgments can only tell so much, can deliver procedural orders but not betray insight into the reality of the implementation of the duty to consult on the ground, the original project aspired towards a threefold inquiry. First, taking a broad definition of “impact” it sought to explore the impacts that the petitioners alluded to in their multiple submissions but which did not receive much or any attention in the judgments. These included: the ability to transmit traditional ecological knowledge, the impact of consultation with government agencies on the legal order of the Dunne Za, and accompanying psychological impacts ensuing from the impact on a traditional way of life and increasing encroachment of resources extraction industries. Within the theme I termed the social and psychological impact of feared dispossession or social impact assessment, I was particularly interested in exploring the impact of the erosion of the relationship with the animal world and the accompanying spiritual connections. I anticipated a whole host of problems might ensue from severing that bond, because then, what would differentiate Dunne Za members from the balance of society? The judgments do not discuss psychological harm and yet, the initial submission of the West Moberly First Nation alludes to this being arguably the greatest threat from erosion of way of life.73

73 The initial submission mentions impacts including, the loss and fragmentation of culture which is akin to a loss of language, the loss of transmission of knowledge, cultural genocide: the importance of the land and linkage of habitat destruction with cultural genocide: See the initial submission of the West Moberly First Nation to the Ministry of Energy Mines and Petroleum Resources of June 2009 entitled, I Want to Eat Caribou before I die (the initial submission) at 73. The initial submission also contains much emotive language and words alluding to emotional and psychological impact. For example, that plants and water are no longer trusted: initial submission at 70, uncertainty about cultural continuity: at 70, and embarrassment, sadness, anger, depression and confusion: initial submission at 71.

Professors Booth and Skelton document related findings from their 2008 fieldwork with the West Moberly and Halfway River First Nation governments. The issue of psychological impacts was raised as one that is never considered in any consultative process. Booth and Skelton found that the psychological impacts of ongoing processes are devastating. In relation to timing for example, they
Secondly, it proposed cultural and institutional lines of inquiry. Within the theme, “the language / discourse of communication and accommodating multiple worldviews: a cultural impasse,” in the context of consultation processes, it was to consider the receptivity of Canadian decision makers. It also aspired to provide feedback for policy makers designing guidelines and policy to support the duty to consult’s implementation on the ground.\textsuperscript{74}

Finally, it proposed to explore the \textit{possibility} of cultural translation by examining what is lost in the translation process. That is, in seeking to translate and package Dunne Za law into legal arguments intelligible to a common law adjudicator, I intended to examine what was lost in the process. What happens in the transmission of Dunne Za / West Moberly First Nation voices, from the production of the initial submission to the legal arguments and submissions presented in Court?\textsuperscript{75}

---

\textsuperscript{74} I have since learned that Professor Parmar undertook this inquiry in her PhD thesis. See Pooja Parmar, “Claims, histories, meanings: indigeneity and legal pluralism in India,” PhD Thesis, University of British Columbia Faculty of Law, 2012, unpublished.

\textsuperscript{75} The prospective application of a governance regime requires not only its design and implementation, but also, best practice management mandates monitoring and feedback to ensure its goals are being attained. This research project also aspired towards achieving such a proactive educational role. The ability to undertake research with critical inquiry objectives derives from Tri Council Policy Statement, Chapter 9, “Research involving the First Nations, Inuit and Metis Peoples of Canada,” which provides in Article 9.7, “research involving Aboriginal peoples that critically examines the conduct of public institutions, First Nations, Inuit and Métis governments, institutions or organizations or persons exercising authority over First Nations, Inuit or Métis individuals, may be conducted ethically, notwithstanding the usual requirement of engaging community leaders.”

\url{http://www.pre.ethics.gc.ca/eng/policy-politique/initiatives/tcps2-epct2/chapter9-chapitre9/}

The research project’s primary inquiry was: Is the duty to consult, as an extension of Section 35 of the *Constitution Act, 1982*, making a positive difference to communities on the ground, who seek to employ the protection it offers in order to preserve their interests? Can these people achieve their intentions by seeking to uphold its fulfillment?76

Through this larger project, I was encouraged to interview elders and other members of the West Moberly First Nation who were involved in initiating the legal challenge. For various reasons, including that as a non-Aboriginal person I am an outsider, the proposal required identifying and addressing several ethical concerns associated with interviewing human participants. This fieldwork and as such this larger described project, was not possible. My interest in the subject matter and issues compelled a complete sketch of the topics I have articulated above.77 However, pragmatism, both temporal and financial, tempers the scope of inquiry I am pursuing at this point. Moreover, I do not think that the absence of fieldwork removes the need for applying ethical and other caution in the task of interpreting legal traditions from the West Moberly’s submissions. It seems logical that if one must exercise extreme caution in seeking to interview Aboriginal peoples about their legal traditions, then one must also exercise caution in purporting to interpret such traditions from written material.

---

76 Mc Call raises similar questions in her exploration of the politics of voice. See Sophie Mc Call, *First person Plural: Aboriginal storytelling and the ethics of collaborative authorship* (Vancouver: UBC Press 2011) at 70 where she discusses the problem of “cultural untranslatability.” Anthropologist Bruce Millar, in his work with oral traditions and their receptiveness by Canadian Courts, also explores what happens to oral materials on the path to the courtroom. He maintains that scholars, academics, judges, lawyers all might benefit from considering the various components of the process leading to the courtroom. See Bruce Millar, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press 2011) at 9.

77 As did my awareness of the rare, one off opportunity this degree provided to conduct research independent of any commercial imperative or influential government policy.
There are several concerns with such a task, which recent scholarship affirms.\textsuperscript{78} I divide these broadly into two categories within which there are sub-categories, namely ethical and historical concerns.

\section*{2.1 The appropriateness of this task and methodological limitations}

I had proposed interviewing so as to acquire a more complete picture. As a result of this not being possible, I was tasked with seeking to decipher and interpret the legal traditions and way of life of the Dunne Za without the benefit of being able to ask the submission’s authors for clarification. Mindful of my ethical duties, I initially apprehended possible ethical violation or the risk of this. How could I legitimately interpret something as fundamental as identity and way of life without guidance? I was anxious not to misrepresent identity and a way of life. I met this reality with trepidation and concern, and I questioned the appropriateness of this task. For the very purpose of seeking to interview, stemmed from my impression that Indigenous legal traditions were absent or at least \emph{underplayed} as legal traditions in the submissions and judgments.

Upon reading an outline of ethical and other caveats associated with such a task, which a recent paper delineates,\textsuperscript{79} I took some comfort that I have not been inappropriately cautious in approaching this exercise, and that my concerns are warranted. Expressed concisely, Professor Borrows concisely encapsulates the magnitude of such epistemological and other risks associated with seeking to engage with Indigenous legal traditions and another worldview, when he notes, “in practice, there are enormous risks for misunderstanding and misinterpretation when Indigenous

\textsuperscript{78} The Honourable Lance Finch Chief Justice of British Columbia, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (Paper delivered at the CLEBC Indigenous Legal Orders and the Common Law Conference November 15\textsuperscript{th}, 2012).

\textsuperscript{79} \textit{ibid}.
laws are judged by those unfamiliar with the cultures from which they arise. The potential for misunderstanding is compounded if each culture has somewhat different perceptions of space, time, historical truth, and causality.\textsuperscript{80}

The former Chief Justice’s paper is comprehensive as to its cautions and guidance, several of which parallel the concerns I raised in the course of preparing my proposal for behavioural research ethics review. Accordingly, rather than recite all of its detailed guidance, I incorporate only those cautions that are additional to those I had identified, and which there seems to be merit in acknowledging. I note that Finch CJ focuses his attention on what might be termed cultural impediments to the task of incorporating Indigenous legal traditions into the common law. Whereas, in the context of the duty to consult, I am also concerned with technical legal impediments as well as operational constraints to the ability of Indigenous legal traditions being substantively and procedurally considered.

It seemed that the greatest barrier to this task was convincing myself that the initial submission of the West Moberly First Nation provides a reasonably accurate portrayal of Dunne Za law. As a student with both legal and historical training, I perceived I was at risk of producing mere conjecture. It seemed that the best means of seeking to appease my concerns was to locate other reliable sources of guidance as to the way of life and legal traditions of the Dunne Za. Consequently, I researched other case law in which evidence of the way of life and legal traditions of the Dunne Za had been admitted. For example, the judgment in Blueberry River Indian Band \textit{v} Canada (Department of Indian Affairs and Northern Development) [1987] FCC 1005 (the Apsassin case) which I refer to in Chapter 3, contains admitted oral evidence, including of oral

\textsuperscript{80} John Borrows, \textit{Canada’s Indigenous Constitution} (Toronto: University of Toronto Press, 2010) at 140.
histories, of the Dunne Za. This is in contrast to the reliance upon submissions and affidavit evidence only in *West Moberly*, by virtue of it being a judicial review proceeding. Thus, in the pursuit of circumventing my methodological obstacles I referred to a previous decision that directly relates to the Dunne Za, and in which oral evidence was adduced. In addition, as I elaborate below, I sought to ascertain the most reliable anthropological accounts. In this way, my approach is comparable to reliance upon circumstantial evidence in lieu of having sufficient “direct evidence,” in which I reach “findings” and draw inferences based upon a preponderance of evidence.\footnote{I rely upon leading High Court decisions in relation to circumstantial evidence, namely *Shephard v R* (1990) 170 CLR 573 at para 4 as well as *Chamberlain v. The Queen (No. 2)* (1984) 153 CLR 521.}

Having read several commentaries that address the task of an outsider engaging with Indigenous legal traditions, there seems to be an active sub-debate at play with respect to the appropriateness of this endevour. Should outsiders engage with Indigenous legal traditions? Whereas some scholars are vehemently opposed, others welcome the scholarship. There certainly does not appear to be unanimity as regards its appropriateness.

Legal scholar Sakej Henderson champions opposition to this task. He notes, “the vast depth and discourses of First Nations jurisprudences, makes communication difficult outside its language. Its distinct processes and languages have made it difficult for Canadian jurisprudence to comprehend these sources of jurisprudence.”\footnote{S J Henderson, *First nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 120.} Further, “in most translation processes, Courts have to violate the fundamental assumptions and premises of First Nations jurisprudences, in order to maintain fidelity to the essential characteristics and patterns of common law jurisprudence.”\footnote{ibid.} Mindful that
Henderson is describing the agency of courts in engaging with Indigenous legal traditions, I think one can infer that he does not think this should be embarked upon without proficiency with Indigenous languages. Henderson proceeds to discourage with greater force. In relation to First Nations teachings contained in stories, he suggests, “the conceptual and experiential level of these teachings, requires a comprehension of First Nations languages and ceremonies based on years of detailed, rigorous and disciplined training.” 84 Similarly he declares, “Indigenous knowledges…form a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity that can only be fully learned or understood by means of the pedagogy traditionally employed by these peoples themselves, including, apprenticeship, ceremonies and practices.” 85 At its highest, Henderson insists that “a fundamental prerequisite of comparative jurisprudence, is that non-Aboriginal scholars be taught Aboriginal languages, and without years of preparatory training accompanied by rigorous experience and discussion, it is difficult for anyone to understand the different levels of First Nations knowledge and jurisprudence.” 86 I surmise he provides that language competency to a very high standard is a condition precedent to the ability to engage with First Nations traditions. Is this task then exclusively the domain of First Nations peoples with their language and embedded in their cultural practices? What role then for the outsider such as me who could not attempt engagement “without years of preparatory training.” 87

Similarly, targeting a wider audience, an Indigenous Legal Traditions Discussion Paper warns of the risks apparent albeit not with equivalent vigour. It does not equate this endeavour to a prohibition absent necessary training. It provides, “indeed, no system of law has meaning outside

84 id at 121.
85 ibid. Emphasis added.
86 ibid. Emphasis added.
of its cultural context. Since every culture has its own notions of space, time, historical truth and causality, and since a shared understanding of such concepts is taken for granted when drawing inferences or conclusions about a given set of facts, there is much scope for misinterpretation when people unfamiliar with Indigenous cultures interpret Indigenous laws.88

I take a degree of comfort from John Borrows who appears to advocate that a lack of language competency ought not be a deterrent. Speaking of his 2010 compilation, Borrows hopes that this work “represents a further invitation for those interested in this topic to join with him and other willing scholars, practitioners, politicians, policy analysts, elders, Chiefs and leaders in the identification, recognition, questioning and further development of our legal traditions.”89 He predicts, as more people participate in understanding and applying Indigenous norms, the potential exists for the widening of our interpretative legal communities and the improvement of each legal tradition.90 From Borrows’ perspective, there are no antecedents to participation. This is not a task that is confined to Indigenous peoples. Rather, he encourages others to participate and alludes to the potential for great benefits to accrue “by others adding their critical voices or their commendations of the concepts covered here.” 91 He provides, “further discussion and development of these traditions, are essential to ensure that Indigenous legal traditions do not become withdrawn from critical inquiry, or become lost in mythologies of the past.”92 In summary, Borrows’ is not an admonition but a mindful invitation.

89 Borrows, supra note 80 at 10. Emphasis added.
90 ibid. Emphasis added.
91 id at page 104. This is comparable to the perspective gained by non town planning lawyers interpreting environment and planning legislation. As my former mentor commented, it provides the opportunity for fresh perspectives in statutory interpretation.
92 ibid. Emphasis added.
Professor Johnston takes issue with Henderson’s caution, noting that pragmatically, if only those with Aboriginal language skills completed the work, then very little would be done. As such, I infer that it must, by necessity occur. Consistent with this, the whole premise of the former Chief Justice’s duty to learn, is that as an extension of and consistent with the courts’ recognition of Aboriginal societies, and the fact that Aboriginal legal orders and Aboriginal societies are inextricably linked, it would be tantamount to evading the courts’ responsibilities, for courts and the legal profession to avoid engaging with Indigenous legal traditions.

In conclusion, the academic literature and professional guidance support my ethical and other apprehensions as legitimate. Nevertheless, in the interest of seeking to contribute to the continued vitality and growth of Indigenous legal traditions, I proceed to embark upon the task of extracting and deciphering Dunne Za law to test the degree that it is being understood and recognised by decision makers, without the benefit of clarification by the Dunne Za with due caution.

2.2 Translation

In the process of extracting and deciphering the Indigenous law from the initial submission, I relied upon my own legal training, as well as an understanding of other cultures in which a relationship with the “other than human” or natural world different to an anthropocentric

---

93 Personal communication, 23 July 2012.
94 The former Chief Justice provides, “It is artificial to separate the concept of pre-existing societies from that of pre-existing legal orders. No bright-line distinction exists between a normative principle and an identifiable law, much less in the case of societies which do not frame their own legal orders around the idea of written common law or statutes.” That is, Finch deduces as such: Courts recognise pre-existing Aboriginal societies. Such societies cannot be distinguished from Aboriginal legal orders. It follows that Courts also need to recognise pre-existing legal orders. See Finch supra note 78 at para 1.
95 I have been encouraged to adopt Hallowell’s typology for the non human world. See A Irving Hallowell, “Ojibwa Ontology, Behavior and World View” in Raymond Fogelson and Richard Adams,
paradigm existed, in order to comprehend and interpret the legal traditions. It struck me that through such reliance I was employing a comparative law approach that very much resembled a translation exercise. I apprehended certain risks with such methodology. First, as to the product I was achieving, it concerned me whether what I was extracting was Indigenous law, or rather, my attempt using my training in non-Indigenous legal traditions, as well as initially at least, my existing knowledge of ancient societies and their legal systems and religion, to make sense of Indigenous legal traditions. Articulating this concern simply, it is one of recognition. Do we only detect what we are trained to recognize? For example, I proceed to recognise the Dunne Za’s traditional seasonal round as a quasi land use planning strategy given my experience with interpreting and applying environmental planning instruments. Similarly, I interpret substantive and procedural components to Dunne Za decision making, due to my training in environmental law with its administrative law mechanics. Whereas, I suspect that a Dunne Za person might not categorise his or her legal traditions in this way.

---


97 As a comparative aide to make sense of the spiritual underpinning and mindset within which Dunne Za society was based and governed, including a differing relationship with the animal world, while being attuned to the differences, I have been mindful of other societies in which a spiritual element and differing relationship with the animal world was pervasive and highly influential in the social order and to an extent, governance. Historically, a relationship with the animal world different from an anthropocentric relationship was not unusual. The spiritual connection and influence of animals in governance and decision-making is not new. In the Roman Republic, Triumvirate and Empire for example, augurs interpreted the flight of birds as an omen that influenced leaders’ decisions, such as whether to wage war on a potential Roman colony as a means of expanding the empire. Similarly, soothsayers (hauruspices) interpreted the entrails of animals for similar purposes. Animals communicated the will of the Gods, namely the Olympic Gods or deified leaders, and thereby influenced decision making be it of the Consuls in the Republic, Triumvirirs throughout the Triumvirate or Emperors in the Empire. Despite having leaders to an extent, Romans lived by the will of the Gods.

98 For example, my interpretation of State Environmental Planning Policy (Seniors Living) 2004 in working on the Native Vegetation (Application of Act) Regulation 2009 (NSW), which I was responsible for drafting, as an amendment to the Native Vegetation Act, 2003 (NSW).
I sensed that this comparative exercise of drawing analogies with non-indigenous legal principles, standards and methodologies, and essentially drawing from my own experience, might be inappropriate and that I should instead seek to approach this task *tabula rasa* because the differences outweigh the commonalities. Faced with such dilemmas, I sought guidance from my supervisor who responded that it was not possible to approach the task with a blank slate given that we are all influenced by our backgrounds. I note that Finch CJ provides similar guidance in noting the influence of the “presence of one’s own pre-existing cultural tenets,” in the task of interpreting another culture’s precepts.99

Related to this point, Borrows advocates Legal Pluralism and argues that incorporating Indigenous law into Canadian law can strengthen Canadian law but first there is a need to acknowledge differences in paradigm, values and institutions, and that we must appreciate our own biases as well as those of the people we are studying.100 Guided by such cautions and methodological direction, I proceed to “situate myself” in this research below. Prior to doing this, I briefly acknowledge substantiation for my concerns with this translation approach that the academic literature provides. I believe this gives credence to my concerns while also highlighting related ones.

First, as regards the visibility only of legal principles that resemble common law legal principles, Borrows affirms this risk is real. In the context of judicial interpretation of Indigenous law, he provides “judges are susceptible to the danger of only recognizing law within Indigenous societies if they find analogies to concepts within English law. The Court said “this tendency has to be held

---

100 Borrows, *supra* note 80 at 141.
in check” because it would prevent the recognition of beneficial rights that developed under Indigenous systems.”

In addition, Finch CJ raises a slightly different concern, namely the risk that translation yields a different meaning or put another way, fails to achieve the intended meaning. He provides, “unavoidably, the vast majority of judicial or lawyerly encounters with Indigenous laws will occur in translation; in the process, these spoken or written translations may present an incomplete or even skewed characterization of the original concept.” Translation risks being unable to grasp the nuances and subtleties of intended meaning that only an appreciation of the source language can detect. Owing to such risk, Borrows declares there is an obligation accompanying such task, which is indicated by the mandatory language “must,” to pay attention to implicit meanings. He provides, “those who evaluate the meaning, relevance, and weight of Aboriginal legal traditions must ... appreciate the potential cultural differences in the implicit meanings behind implicit messages if they are going to draw appropriate inferences and conclusions. They should attempt to grasp their unspoken symbolic aspects in order to evaluate their truth and value.” This parallels much of the former Chief Justice’s invitation for a duty to learn.

What Borrows expresses as guidance and articulates in theory, Pooja Parmar illustrates in operation through her recent PhD thesis. Parmar addresses two perspectives with respect to

---

101 *Amoudi Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 402-4 (JCPC). Cited in note 80 *supra* at 16, footnote 72.
103 I have had my own experience of this predicament when my Professor for Italian 1001 told me that while, owing to my experience with the Latin language my comprehension of Italian grammar was sound, I needed to pay attention to intonation else I risked mis-conveying the intended meaning of the dialogue.
translators as well as her own role as a translator. My thesis is less directly concerned with examining the impact of the role of other people as translators and representers of meaning. However, I might be providing an incomplete commentary of this methodological approach and its risks if I neglected to address Dr Parmar’s recent analyses in relation to, *inter alia*, the effects of translation.

A primary focus of Parmar’s thesis is the role and repercussions of others as translators of meaning. Parmar examines the destruction of particular and situated meanings that occurs when claims of Indigenous peoples are translated into the stronger language of the formal legal system via acts of representation of their stories. In her case study, such representation is by people seeking to support the interests of Adivasis, and yields the result that critical elements of what the dispute means to them, are lost. In this way, Parmar examines the process of translation as a causation agent in precipitating a loss of meaning. Through exploring the accounts of some of the instigators and protagonists of the sit in agitation, Parmar finds that when Adivasi protests are understood on their own terms in the context of their lives, the meanings that emerge differ markedly from the ones that other people’s accounts convey about these protests. As such, one of her key findings is that translation into a language that is adjudicable and intelligible to decision makers and thereby, “acceptable to the target audience,” yields a loss of meaning. As to the mechanism by which such loss occurs and its specific causation, Parmar suggests this loss of meaning is the result of a meeting of different normative worlds, whereby people inhabiting one

---

106 In her case, the Adivasis or original inhabitants of Kerala State, India, in their dispute with Coca Cola.
107 Parmar, *supra* note 105 at 3.
108 *id* at 15.
normative universe receive, interpret, and re-order and represent claims that arise in and are informed by legal cultures different than their own.\textsuperscript{109}

Parmar’s illustration of the difference between claims, as represented before the judicial system, and as understood by protagonists, as being due to the agency of translators, falls within the theme of cultural untranslatability, elements of which I discuss to an extent in Chapter 5 This thesis is less directly concerned with examining the impact of the role of other people as translators and representors of meaning, as I am not critiquing the representation of West Moberly First Nation claims before the Supreme Court of British Columbia for example, and the extent to which the West Moberly First Nation’s genuine grievances permeated their submissions to the Court.\textsuperscript{110} I am not examining that particular translation role. Rather, I am being mindful of the effect of my own role as a translator.

I am more interested with Parmar’s musings as to her own role as a translator, as some of her apprehensions parallel and complement those I have identified, albeit that her role, which included having performed extensive fieldwork, differed. Parmar identifies at least two pertinent concerns. First, what Robert Cover might characterise as the ability to penetrate and comprehend another nomos or worldview. Parmar provides, “translation of unfamiliar stories narrated in unfamiliar languages into familiar languages, does not however, automatically lead to comprehension of life worlds.”\textsuperscript{111} She draws attention to our inability to “see and experience the world as does another

\textsuperscript{109} id at 13.
\textsuperscript{110} I note that I contemplated this in my proposed fieldwork.
\textsuperscript{111} Parmar, \textit{supra} note 105 at 17.
human being living in a different life.”

Secondly, she notes “the difficulties of translation also encompass the trouble we have in accepting the process of translation for what it is: *imprecise, imperfect and provisional*, and our *impatience* with the imprecision and imperfection.”

The problem with translation is our refusal to acknowledge that *we do not all speak the same language*, and that in trying to translate, that is, communicate across difference, we often want to forget that we are in fact translating and that our language may not be *able* to represent fully what is expressed in a different language.

Finally, she refers to James White who suggests that the failure we experience in an attempt to translate, is “a necessary and instructive experience” because it is in trying to translate that we learn to recognize and respect the “other,” even as we often “assert ourselves and our own languages” in relation to the other.

In response to these concerns, I address the ability to penetrate and comprehend other *nomoi* in the segment below. Secondly, as regards the process of translation as imperfect and provisional, I think I have already been mindful of this concern. Finally, as to James White’s declaration that failures at attempts to translate are part of the necessary *evolution* of the translation process in the respect it yields for the other, I experienced this in the process of trying to decipher Indigenous law from the initial submission. In attempting to apply my western legal training to Indigenous legal traditions, I came to appreciate that I was not really comparing apples with apples. Moreover, I particularly felt this in my attempt to engage with the oral histories of the Dunne Za. I was

---

112 *id* at 17-19.


baffled by perceived incongruities and consequently, intrigued. The degree of incomprehensibility indicated the degree of difference in worldviews I was trying to fuse.

2.3 Epistemological challenges

In undertaking this work, I am dealing with another worldview. As such, this is an attempt at an epistemological shift, or a shift in the lens with which one views the world. I am most interested in this. Indeed my reason for wanting to complete a Masters degree was so as to appreciate coming to terms with a different paradigm for viewing the world, and the extent to which decision makers are able to comprehend this.

2.3.1 Theoretical grounding

Owing to the different normative backgrounds or nomoi from which we derive, to which attach their inherent biases and preconceptions, there is a need to situate one’s self in the research to in order to be able to conduct an objective analysis. This is an uncontroversial point that the academic literature identifies and applies and which the professional commentary sustains. All the commentators I have examined are unanimous upon this point as they all take theoretical

---

116 Personal communication with Professor Darlene Johnston on 11 May 2012 during which I asked, in the context of critique of Supreme Court duty to consult case law, “At what point does the lens become blurry?”

117 I note that both Professors Promislow and Napolean situate themselves in their research. I have taken guidance from these models. See Janna Beth Promislow, “Towards a Legal History of the Fur Trade: Looking at Law at York Factory, 1714-1763” (LLM Thesis, York University, October 2004) in which Promislow deciphers law from fur trade records, and Val Napolean “Living Together Gitksan Legal Reasoning as a Foundation for Consent,” in Jeremy Webber, Colin McCleod and Others, Between Consenting Peoples: Political Community and the Meaning of Consent (Vancouver: UBC Press 2010), in which Dr Napolean unpicks Gitksan legal reasoning evident in the dispute resolution process pertaining to the Ganeda Crest dispute.
direction from Professor Cover. So, what is Cover’s explanation that has been so influential? Professor Cover discusses much in his seminal article _Nomos and Narrative_. The principal point to derive from his discussion that is of relevance to this thesis seems to be the role of nomoi in the interpretation of law, namely the strength of influence of normative backgrounds and the need to acknowledge this.

Cover explains that we are embedded in normative worldviews, or nomoi, in which we “constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.”¹¹⁸ This “normative universe” or nomos, as he borrows from the Greek, is equally as important in achieving meaning in law or legal interpretation, as the “official application of legal precepts.” In relation to this role of nomoi in legal interpretation, or the inseparability of law and narrative, Cover provides, “no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”¹¹⁹ “Every prescription is insistent in its demand to be located in discourse – to be supplied with… explanation and purpose.”¹²⁰ Prescription cannot “escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.”¹²¹ “The normative universe is held together by the force of interpretative commitments...these commitments – of officials and others – do determine what law means and what law shall be.”¹²² As such, a legal tradition is “part and parcel of a complex normative world.”¹²³

---

¹¹⁹ id at 4.
¹²⁰ id at 5.
¹²¹ id at 6.
¹²² id at 7.
¹²³ id at 9.
2.3.2 Identification of the researcher’s identity within the research task or situating one’s self in the research

In this way, the acknowledgment of one’s biases helps to limit the permeation and pre-judging of another worldview. Such identification seeks to strengthen the objectivity and thereby credibility, and if not, at least, the utility of one’s work. Moreover, a particular rationale is the effort to avoid a Eurocentric perspective. Eurocentrism has been defined as “the manifestation of ethnocentrism by Europeans. The ubiquitous tendency to view all peoples and cultures of the world from the central vantage point of one’s own particular ethnic group and, consequently, to evaluate and rank all outsiders in terms of one’s own particular cultural standards and values.”

As such, I do my utmost to articulate my preconceptions and normative universe so as to identify my conscious and unconscious interpretive commitments. I arrive at this task with a background in environmental law and a long held interest in environmental sustainability broadly. I have had to come to terms with a new legal and social paradigm for understanding the relationship between humans and the natural, or, what some term, the “other than human” world. However, my interpretative commitments and normative universe lends me amenable to this transition. I have previously worked in a world in which environmental assessment and other decision-making occurred within legislative and policy regimes which strove towards achieving ecologically sustainable development (ESD), namely, development that “requires the effective integration of

---

125 For example, in addition to having practiced in planning and environmental law, I have volunteered at the Environmental Defenders Office Ltd and the Centre for Sustainability Leadership Ltd.
126 See Hallowell, *supra* note 95.
economic and environmental considerations in decision-making processes," and which is achieved though the implementation of principles including the precautionary and polluter pays principles. In particular, I worked on threatened species and native vegetation litigation, legislation and advisory matters, and which broadly might be termed, biodiversity law. As part of the development assessment regime, specific legislation exists which, with its provisions integrated with many other acts, aims to prevent declining rates of biodiversity. Take the Threatened Species Conservation Act, 1995 (TSC Act) for example. With its ostensible aim at its inception being to address the loss of Australia’s native plants and animals, it constitutes a legislative response to a concern with the numerical loss of species, and the fact of Australia having “the worst rate of mammal extinction rates in the world.” One of the Act’s objects, which remains identical today as at its inception, is to “to prevent the extinction and promote the recovery of threatened species, populations and ecological communities.” Although another principal aim is to “conserve biological diversity,” the Act does not operate in a vacuum devoid of the influence of other economic and social interests. Rather, the TSC Act’s provisions, protections and offences are integrated into the environmental assessment and development

---

128 ibid.
131 Section 3 (b) TSC Act.
132 Section 3 (a) TSC Act.
133 Consider for example, decisions pertaining to license applications whereby the Director General must in Section 97, in considering whether to grant or to refuse to grant a licence application, take into account amongst other things, any species impact statement. In addition, subsection (2) provides that the Director General must also consider, “the likely social and economic consequences of granting or refusing to grant a licence application.”
control process,\textsuperscript{134} such that the TSC Act has been described as “primarily a strategic document designed to identify management priorities for the conservation of the biodiversity,”\textsuperscript{135} and is effectively a tool that forms part of the apparatus for managing frequently competing interests.

The operation of species conservation law and its effect in potentially acting as a constraint on development approval, is illustrated in the relatively recent decision of\textit{Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited} [2010] NSWLEC 48, which, \textit{inter alia}, applies and interprets provisions of the TSC Act. \textit{Speleological Society} concerned an appeal by an objector against the grant of development consent to a limestone quarry and the extraction of 2.4 million tones of limestone over thirty years, on land featuring the endangered ecological community of White Box Yellow Box Blakely’s Red Gum Woodland (the White Box EEC) and habitat of the threatened species commonly known as the Squirrel Glider. Two of the issues in the appeal concerned threatened species, namely impacts on surface ecology and on cave dwelling fauna.\textsuperscript{136} In relation to the surface ecology issues, the applicant contended the proposal was likely to significantly effect the White Box EEC and the squirrel glider habitat so as to require a species impact statement (SIS) to accompany the development application by reason of a provision of the EPA Act.\textsuperscript{137} The effect of this provision being a jurisdictional fact was that the existence of this fact and accompanying need for an SIS operated as a precondition to the power to grant development consent. Essentially if this fact existed, the lack of a SIS for gauging impact on the EEC would invalidate the development consent. After favourably determining the threshold issue of whether the vegetation on the project site constituted White Box EEC consistent with the description in the final determination of the

\textsuperscript{134} Of the EPA Act. See Ms Allan, \textit{supra} note 130.
\textsuperscript{135} Bateman, \textit{supra} note 129.
\textsuperscript{136} \textit{Speleological Society} at para 28.
\textsuperscript{137} Namely, s 78A (8) (b) of the EPA Act. \textit{Speleological Society} at para 29.
TSC Act’s Scientific Committee to list the White Box Yellow Box Blakely’s Red Gum Woodland as an endangered ecological community,\textsuperscript{138} the Court found that the jurisdictional fact was not established.\textsuperscript{139} That is, the development was not likely to significantly impact the White Box EEC. As such, there was no need for an SIS and accordingly, the applicant’s challenge to the decision on this ground failed.

Such cases illustrate that impact on threatened species can operate as a hurdle to achieving development approval. Similarly, in duty to consult litigation, impact on asserted or established aboriginal rights can be sufficient to quash approval absent adequate consultation. As such, the mechanics of duty to consult challenges, as another application of administrative law principles, do not constitute a difficult cognitive leap. Rather, they merely involve comparable principles being applied to different subject matter. The cognitive transition that I have experienced, relates to seeking to comprehend a \textit{relationship} with the natural world that characterizes certain Indigenous legal traditions, and being absent the legal traditions with which I practised, constitutes a different normative universe.

As suggested above, the principal purpose for implementing the TSC Act, was concern with statistical loss of species, the fact of Australia having “the worst rate of mammal extinction rates in the world.”\textsuperscript{140} I suggest one can read into the TSC Act and the regime it supports, an anthropocentric paradigm for viewing the world. That is, broadly speaking, one in which humankind is the central element of existence with the animal or “other than human” or natural world, inferior. Several references within the Bill’s second reading speech suggest this

\textsuperscript{138} id at para 42.
\textsuperscript{139} id at para 118.
\textsuperscript{140} See Ms Allan, \textit{supra} note 130.
understanding. For example, I note the Environment Minister’s closing invitation, “...more than two centuries after Europeans began to make their indelible mark on this unique country, let us begin a process of recovery and restoration ...this Government seeks only a commitment from across the community to pass on to future generations an environment and its natural heritage, at least as rich as that left to us.” Similarly, earlier in this invocation the Minister alluded to the beneficiaries of the Act as being “this State’s plants and animals.”

Explicit within these references, is an understanding of flora and fauna or the natural world, as something that humanity owns and manages as a thing that is able to be passed on, and a need to protect it for the sake of humanity or the benefit of the State. Perhaps I make too much of such language and references as indicative of an anthropocentric paradigm and relationship with the animal or other than human world. While this is arguable, at the least, this speech and others supporting subsequent amendments to the Act, as well as the substantive content of the Act

---

141 That is, the Second Reading speech to the Threatened Species Conservation Bill (No. 2).
142 Ms Allan, supra note 130. Emphasis added.
143 “Unfortunately for this State's plants and animals, the previous Government's masterful inactivity turned that gap into a yawning chasm.” See Ms Allan supra note 130. Emphasis added.
144 For example, the Prologues and other segments of several International legal treaties arguably discuss the need to preserve the environment for the benefit of human beings. See for example, Principle One of the Rio Declaration which provides, “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” Rio Declaration on Environment and Development, 14 June 1992, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992)
145 Rather, the impetus for conservation efforts explicit in the Second Reading speech to the Biodiversity Banking Bill which amended the TSC Act to provide for the insertion of the BioBanking Scheme, was to balance and manage the competing economic interests in development and loss of biodiversity, particularly, large “patches” of biodiversity:

“...Our objective is to move biodiversity conservation beyond the unproductive and frequently caricatured battles between housing and an endangered snail or between a shopping centre and an orchid. We are bringing forward a system that creates the flexibility to allow for good development results and biodiversity conservation.”

Again, the notion of human ownership of biodiversity is implicit in references such as, “Unfortunately, most of Western Sydney's unique species are now extremely rare due to the massive changes caused by clearing and by changed hydrological regimes from dam construction...” See NSW, Legislative Assembly, Hansard, Second Reading Speech to the Threatened Species Conservation Amendment (Biodiversity Banking) Bill, 8 June 2006, Mr Bob Debus (Blue Mountains – Attorney General, Minister for the Environment and Minister for the Arts).
itself, betray no inkling of a relationship with threatened species as being an impetus for conservation efforts.

The further cognitive divide I have crossed is that I worked in a legal context where there were no Aboriginal rights at play or anything equivalent to an Aboriginal right due to the absence of Aboriginal rights in the Australian Constitution. Consequently, there was no area of “Aboriginal law” interpreting any such provisions. Rather, conservation of species and native vegetation was frequently the primary issue.\(^{146}\) Having no prior knowledge of the concept of Aboriginal rights, one of my preconceptions was that environmentalists and Aboriginal peoples were allied in their interests and efforts. Discovering that frequently their respective interests conflicted proved quite a realization.\(^{147}\)

In summary, I have experienced a transition in normative universes from one in which emphasis was placed on species conservation motivated by concern for loss of biological diversity and the

\(^{146}\) Despite the absence of constitutionally protected Aboriginal rights per se, State legislation provides exceptions to offences applicable to non Aboriginal persons so as to permit Aboriginal peoples to carry out traditional activities. See for example, section 117 (2) of the NPW Act which provides that the restriction on the picking or possession of native plants, does not apply “in relation to the picking or possession of a protected native plant in a nature reserve or wildlife refuge or in lands reserved or dedicated under Part 4A by an Aboriginal owner on whose behalf the lands are vested in an Aboriginal Land Council or Councils under that Part or any other Aboriginal person who has the consent of the Aboriginal owner board members for the lands for purposes referred to in section 57 (7).” Accessed 26 March 2014.

Moreover, despite the lack of constitutionally protected Aboriginal rights, the Australian Federal Parliament has taken steps towards facilitating the formal recognition of Aboriginal peoples as Australia’s first peoples within the Australian Constitution. This is by way of the Aboriginal and Torres Strait Islander Peoples Recognition Act, 2013 (Cth), which provides, in section 5, a two year period in which Australians may approve a referendum to amend the Constitution so as to recognize Aboriginal and Torres Strait Islander Peoples as Australia’s First Peoples. See in relation to the Bill, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd074.

I note that at a Federal level, Native Title may be established through the process provided for in the Native Title Act. By virtue of having worked exclusively with State and Local Government law, I have not had any experience with this regime.

\(^{147}\) In West Moberly the Aboriginal petitioners worked with the assistance of a public interest Environmental Non Governmental Organisation and bolstered their primary treaty right argument with species conservation concerns. However, this amalgamation of more traditionally distinct “environmental” and “Aboriginal” concerns does not always occur.
accompanying impact for humanity, to a world in which sustainable use of the natural world, its flora and fauna occurs as part of sustaining a way of life. In addition, animals are “like friends,” and a more egalitarian relationship with the “other than human world” exists. This is not a relationship in which humans are dominant over nature and adapt it to suit their needs, and 

\textit{perhaps it is not quite the inverse}. At the least, it is a more \textit{respectful} relationship.

In essence, I have sought to understand a legal system and worldview that \textit{thinks} differently about the relationship between humans and the natural world. However, I note that this has not been a difficult cognitive transition and is not so much a new “reality,” as, as an advocate for the deep ecology school of thought I am amenable to this cognitive and epistemological shift. Indeed, it provoked my interest in climate change law and decision to abandon the relatively anthropocentric native vegetation and threatened species area of law in favour of areas that require appreciation of metaphysical and other variables.

\begin{footnotesize}
\begin{enumerate}
\item \textit{West Moberly First Nations v. British Columbia (Chief Inspector of Mines)}, 2010 BCSC 359 (Factum of the Petitioners, Initial Submission of the West Moberly First Nation to the Ministry of Energy Mines and Petroleum Resources, I Want to Eat Caribou before I die, June 2009), Citing Catherine Dokkie at 65.
\item Coined by Arne Naess to describe the deeper, more spiritual approach to nature exemplified in the writings of Rachel Carson, the essence of Deep Ecology is to keep asking more searching questions about human life, society and nature as in the Western philosophical tradition of Socrates. As distinct from the relatively shallow approach of scientific ecology, deep ecology goes beyond the factual, scientific level to the level of self and earth wisdom. Deep Ecology sharply contrasts with the dominant worldview of technocratic, industrialized societies, which regards humans as fundamentally separate from the rest of Nature, and as superior to it.

Central tenets of deep ecology include the dissolution of boundaries between human and non-human existence. Namely, the idea that we can make no firm ontological divide in the field of existence. That there is no bifurcation in reality between the human and the non-human realms. Similarly, the principle of Biocentric Equality provides that all things in the biosphere are equal and have equal rights to reach actualization of their respective existences. The well being and flourishing of human and non human life, have value in and of themselves. That is, their value is independent of any use for humans. It follows that if we harm the rest of nature, we are harming ourselves.

\end{enumerate}
\end{footnotesize}
2.4 Voice

A related concern and something that scholars have critiqued is the difficulty and effect of speaking for others. For example, in the context of examining anthropologist Hugh Brody’s representation of Dunne Za voices in *Maps and Dreams*, Sophie McCall draws attention to the impact of voice upon the delivery of material and its effect, a phenomenon she terms, the “politics of voice.” McCall emphasizes the need for the voices of Aboriginal participants to be heard, as distinct from being funnelled through the medium of non-Aboriginal researchers and slanted in such a way that the contribution of the persons being researched is overshadowed by the work of the ethnographer. She notes these are mediated voices, and highlights the role of the intermediary’s voice and perspective upon the subsequent communication presented. This concern is less relevant in this project as I am not acting as a mediator as a researcher. Nevertheless, I am still producing a translation. As such, I cannot ignore the potential impact of my voice and must be mindful of the need to represent the Dunne Za voices I am referencing as faithfully as possible, within the worldview that produced them.

2.5 Reliability of sources

Having decided that it is appropriate to proceed, wearing the hat of an historian and applying this training to anthropological accounts of the Dunne Za, several salient concerns in relation to these sources are worthwhile appreciating. I rely upon the work of Pliny Goddard, Diamond Jenness,

---

150 Sophie Mc Call, *First Person Plural: Aboriginal storytelling and the ethics of collaborative authorship* (Vancouver: UBC Press 2011) at 44.

151 *id* at 45.

152 Mc Call declares while researchers have the best of intentions “to expose injustice and give voice to marginalized Aboriginal groups,” “they sometimes overlook their own role as mediators in cross cultural dialogues and exchanges.” *ibid.*
Robin Ridington and Hugh Brody. I envisage a hierarchy of relevance of these sources that is based upon certain criteria. Such criteria include:

- a) What is the purpose of the source?
- b) How long did the author spend with the Dunne Za?
- c) Is it a one off study, a longitudinal study or a longer-term study, or did the author complete multiple studies?
- d) When was it written? How advanced was the anthropology at that time?
- e) How long after the study or fieldwork was the report written?

By asking these questions, as one might when conducting a voir dire on the admissibility of evidence, I seek to evaluate the relative weight, persuasiveness and authority of the sources, as well as the risks associated with reliance upon them. A separate but related point to consider as part of this evaluation is whether the source pertains to the Beaver Indians or to the neighbouring Sekani Indians. That is, is the source directly relevant?

Dealing first with whether or not the sources pertain directly to the Beaver Indians, I note that Anthropologist Diamond Jenness wrote about the neighbouring Sekani Indians of British Columbia as distinct from the Beaver Indians per se. Do I then discount this material as not being directly relevant? The expert report of Anthropologist Dr Wendy Aasen that the petitioners relied on in support of their submissions to the Supreme Court of British Columbia, notes “the term Mountain Dunne Za is used to describe Beaver and Sekani Indians who utilized resources in and around the Rocky Mountain region. It reflects the mixed nature of the Beaver Sekani of Hudson’s
Hope.” Further, the Aasen Report cites from Jenness and provides, “we know very little about the early customs of the Beaver, except that they did not differ greatly from the Sekani.” Similarly, Ridington declares it is helpful to envisage “their social groups as having been like a series of partially overlapping circles.”

In addition to these corroborating anthropological accounts, it is helpful to bear in mind that the division into bands is a construction of the Indian Act, 1876, and that prior to the Indian Act’s delineation, there was greater homogeneity. Jenness too seems to acknowledge this. He informs us “not many centuries ago the Sekani and Beaver were one people divided into many Bands which differed little in language and customs.” As such, it seems safe to conclude that sources pertaining to the Sekani Indians are helpful for my purposes and ought not be discounted.

Jenness

Returning to the questions of relevance, reliability and limitations of the sources, applying my criteria to the work of anthropologist Diamond Jenness, I note that Jenness wrote this document at the behest of government in that it is produced for Canada’s Department of Mines and Resources.

156 An Act to amend and consolidate the laws respecting Indians, S.C. 1876, c. 18.
157 Specifically, the Department of Indian Affairs and Northern Development and its equivalent, had and has responsibility for division of Aboriginal communities into Bands under the Indian Act, RSC 1985, c 1-5. See the current section 17 which empowers the Minister for Indian Affairs and Northern Development to create new Bands.
As to the length of time spent with the Dunne Za, Jenness visited McCleod Lake in the summer of 1924 and spent only three weeks with the community. His was not a longitudinal study but rather, a one off visit. Perhaps the greatest caveat with this source is that it was written in 1937. I question what the prevailing government policy towards Aboriginal peoples was at this time. If it was still one of assimilation with intended genocide as its fundamental goal, then it seems legitimate to question the reliability of this source, and secondly, to inquire as to its independence. Are there any prejudices, agendae, or influential policy considerations governing its content? Jenness’ work contains useful chapters on social order and what he terms, religion. However, a Eurocentric view seems apparent for example, in the repeated imagery of primitive natives,\(^\text{159}\) which can lead to the inference that they needed to be civilized. I speculate whether this was an intention.\(^\text{160}\) Finally, I note that Jenness’ work was written with a considerable time gulf of thirteen years separating it from his fieldwork. Against these concerns, Borrows seems to rely on Jenness without caution.\(^\text{161}\) Moreover, Ridington also comments positively on the work of Diamond Jenness.\(^\text{162}\)

\(^{159}\) For example, describing the Beaver and Cree, Jenness notes, “The routes to the eastward led to the Beaver and Cree Indians, who were not only hostile, but nearly as primitive as the Sekani themselves. The Kaska to the north contributed nothing to their welfare; those first cousins were even lower than themselves on the scale of civilization.” \(\text{id at 3. Emphases added.}\)

Further in describing the influence of monotheism, Jenness’ juxtaposition of “minds to gross to be converted” with “our worthy chief,” is illuminating. He provides,

“The new doctrine of monotheism received a powerful impetus from Oregon, where the teachings of the first missionaries...produced an amazing Messianistic craze that spread northward up Fraser river through the Shuswap to the Carrier, whom it reached about 1830.

…As to the doctrines of our holy religion, their minds were too gross to comprehend, and their manner too corrupt to be influenced by them. They applied to us for instruction and our worthy chief spared no pains to give it...” \(\text{id at 64. Emphases added.}\)

\(^{160}\) Historically, such propaganda is far from novel. See for example accounts of the expansion of the Roman Empire to colonies in Briton, Gaul, Bythinia et cetera, and the need to spread civilization and to an extent, \textit{urbanitas} (refinement, sophistication) in the works of Catullus, Tacitus and Cicero amongst others, through the \textit{necessary} stage of conquest.

\(^{161}\) For example in describing Carrier legal traditions, Borrows relies upon and draws inferences from, stories heard by Jenness that taught lessons in relation to the proper treatment of salmon. Borrows provides,

“Kungax reinforce the rules governing the proper treatment of salmon by providing commentaries about consequences for mistreatment. The Kungax not only provides precedent to guide future behaviour, it also creates strong feelings that motivates and encourages listeners to properly meet their obligations to the salmon.”

47
In conclusion, although the initial submission makes frequent reference to the work of Jenness, which is most useful for its references to the mystic bond with caribou, I defer to Ridington to explain the cosmology of the Dunne Za, and, as to the seasonal round, I use Jenness only secondarily, so as to bolster and thereby, add credibility to Brody’s work. Accordingly, due to my limited reliance upon this source I am not too concerned with the cautions I have identified with it.

*Brody*

The work of anthropologist Hugh Brody was not written for the same purpose as that of Jenness. Brody, whom the initial submission identifies as a cultural geographer, is perhaps the most influential or at least the most well known of the anthropologists who have conducted fieldwork in Treaty 8. Amongst other reasons he conducted this work to explore and then articulate the Aboriginal interests in the area. His research for the Union of British Columbia Indian Chiefs with the Beaver Indians of Treaty 8 in the late 1970s yielded the seminal work, *Maps and Dreams* in 1981, in which he presents, in alternating chapters, both a social scientific analysis as well as a personal narrative of his time spent in the Athapaskan territory. In his even numbered chapters, Brody records re-writings of a land use and occupancy study that he prepared for the Union of British Columbia Indian Chiefs, which aimed to gather evidence for a public hearing to oppose the construction of a natural gas pipeline along the Alaska Highway by the Northern Pipeline Agency.163 This land use study is most famous for presenting Brody’s “individual map

---

162 He comments for example, “Diamond Jenness must have been a magnificent fieldworker for the descriptions he gives us of the Indian worlds he visited are rich in the kind of detail only a trusted and sympathetic friend would be told.” Robin Ridington *Little Bit Know Something, Stories in a Language of Anthropology*, (Iowa: University of Iowa Press, 1990) at 52.
biographies,” namely his research methodology in which he had Dunne-Za men and women from reserves in the area, create maps by drawing their hunting, gathering and fishing routes in Dunne-Za territory on top of a standard ordinance survey grid.\footnote{164}

These individual map biographies are highly personal translations of land, which translate both land as well as “a people’s way of expressing their historical and ongoing relationship with” it.\footnote{165} They have the effect of illustrating an intensive use and occupation of the land. In doing so, they refute that the land is terra nullius, and assert instead that it is deeply inscribed with conflicting histories.\footnote{166} Brody’s work and the mapping exercise, demonstrated that there are Aboriginal interests to reject the acquisition of land as being unoccupied and without legal interests, and to meet the prevailing challenge at the time, namely the prospect of resources infrastructure that would encroach upon and impair the exercise of treaty protected rights.

Such was the primary purpose of Brody’s work. Brody spent two years with the Beaver Indians to produce his study. Brody’s was a one off study.\footnote{167} Brody published his book in the early 1980s, and shortly after his fieldwork of the late 1970s. Significantly, at the time of his writing, North

\footnote{164} McCall, supra note 150 at 68.
\footnote{165} id at 72.
\footnote{166} id at 69. While McCall uses the term terra nullius, this should not be confused with the application of this doctrine in Australian law. \textit{Mabo v Queensland (No 2) [1992] HCA 23, (1992) 175 CLR 1} established that the doctrine of terra nullius did not have application in Australian law. In Canada, this doctrine was never required to be undone.
\footnote{167} Mr Bruce Muir, former land use manager for the West Moberly First Nation of seven years, and whose expertise I am thankful for, warned to be careful with mentioning Brody’s work in any potential interviewing. This was due to the fact that Brody was not liked by some owing to his research practice of having gone into the community, carried out his land use and occupancy study and not returned or given anything back to the communities in the future. Personal communication, August 2012.
East British Columbia was merely a dream of mining and resource exploitation companies. One can certainly not say the same now.

Brody’s work is an ethnography, a cultural translation, whose reliability is strengthened by the fact that he writes with the first hand experience of having participated in the seasonal round with the Beaver Indians. However, it is relatively old anthropology. Brody’s work was carried out over 30 years ago and prior to the constitutional protection given to treaty rights in 1982. At the time of his work, the Beaver Indians possessed treaty rights that were formalized in 1899. However, these rights did not enjoy constitutional protection from offending government legislation. As such, it occurred in a rather different legal context.

Brody speaks of the Beaver Indians generally and sometimes specific First Nations, but never the West Moberly First Nation. However, the initial submission notes that Brody interviewed members of the West Moberly First Nation as well as of other First Nations. As such, while Brody’s work is not specific to the West Moberly First Nation per se, but rather, cumulatively to

---

168 At the time of his writing, Brody narrated in explanation of his book’s title, “at the same time, the region is more and more a focus of dreams about new sources of energy and unparalleled industrial development. North East British Columbia is a route and a resource: a place for White men to dream about.” See Brody, supra note 163 at 29.

By acute contrast presently there are over 18 000 wells in British Columbia and nearly 350 active wells in the vicinity of the Doig River First Nation alone. Treaty 8 contains the second largest hydrocarbon deposit on earth with the Western Canadian sedimentary basin valued at over half a trillion dollars in bitumen alone. With the amount of over-tenuring in North East British Columbia, it certainly no longer seems merely a dream of resource developers. I owe these statistics to Mr Caleb Behn who cites information from the Public Health Officer of 2007. See Caleb Behn, “Indigenous Law as a Solution to Resource Conflict in Treaty 8,” Presentation co-hosted by Lawyers Rights Watch Canada, delivered at the Vancouver Public Library, 28 February 2013.

169 I am grateful to PhD candidate Ms Brenda Fitzgerald for the brief conversation we had regarding Brody’s work, and her anthropological perspective.

170 The treaty rights of the West Moberly First Nation were formalized in 1914, when it adhered to Treaty 8 as the Hudson’s Hope band.

the Dunne Za which includes the West Moberly First Nation, it would be false to conclude that variations unique to the West Moberly First Nation are not acknowledged.

**Ridington**

Professor Ridington has spent over 40 years working with the Dunne Za and has produced several texts that document his ethnographic work. I rely principally on *Little Bit Know Something*, which the initial submission cites, for its detailed explanation of the cosmology of the Dunne Za and what might be termed, spiritual way of life. Such explanation and emphasis is absent other anthropological authors. *Little Bit Know Something* is a collection of academic papers that Ridington wrote between 1968 and 1989 based upon what he learned “about learning in an Indian way” from having camped with Dunne Za members Jumbie and his wife, Saweh, Johnny and Julie Chipesia, and Sam and Jean St Pierre in the summers of 1964-1969 in the Peace River country.

Ridington declares that the purpose of this work was “to understand the cultural psychology of people who lived by hunting.” In contrast to the work of Jenness and other anthropologists, Ridington has spent considerable time working with the Dunne Za. Ridington’s work is valuable in part because of his extended contact with the Dunne Za. He first met the Dunne Za in 1959 where as a young anthropologist, his need for scientific data contrasted with a Dunne Za man

---


173 See Ridington, *supra* note 162.

174 *id* at xiii.

175 *id* at x.

176 *ibid*.

177 *id* at 6.
Chickadee’s need for the “wind, stars, moose meat and his language.”

Having dedicated so many years to working with the Dunne Za, his work speaks with much authority. Moreover, he has worked with the Dunne Za on multiple occasions.

However, the credibility and historical value of Ridington’s work derives not merely from its longevity, but also from being based upon the personal experience and relationships he has forged with members of the Dunne Za. As Ridington recounts, he was “immensely privileged to be among the outsiders with whom Dunne Za elders shared their knowledge” and to have “experienced something of the world that hunting people brought from ancient times to the present.” He speaks of having gained insights into “an empowering “cultural intelligence” that evolved as we humans perfected the arts of living with one another and with the non human persons of a country that is itself alive.”

However, Ridington’s work is based on fieldwork with the Doig and Blueberry River First Nations and not the West Moberly First Nation. Consequently, one could suggest that it is not entirely on point as regards the way of life of the West Moberly First Nation. Nevertheless, given what I have said earlier about the imposed division of the Dunne Za into differing Bands being a relatively recent product of the Indian Act, it is perhaps wrong to make too much of this distinction.

---

178 *id* at 7.
179 *id* at xiv.
180 *ibid.*
Goddard

The earliest anthropological source upon which I rely and which the initial submission references, is that of Pliny Earle Goddard.\textsuperscript{181} Goddard’s work consists of some brief ethnological notes to which attach several stories, some of which the initial submission cites. I read Goddard’s notes for guidance as to the interpretation of these stories and the teachings, law, and insight into the Dunne Za worldview they might contain. However, such guidance was not particularly forthcoming and these notes were not particularly useful for a few reasons.

First, the purpose for which I am seeking to use Goddard’s notes does not align with their primary purpose. Goddard’s ostensible purpose was not to conduct an ethnographic study. Rather, he declared that he “secured the few ethnographic notes presented here mostly \textit{incidentally} to the linguistic work and the collecting of specimens.”\textsuperscript{182} Other limitations and factors that bear upon the historical value of this source for my purpose include the limited length of time spent with the Dunne Za. Goddard “visited the Beaver of Fort St John and Dunvegan in late August / September”\textsuperscript{183} of 1913. It was a one off study. Goddard’s work was published three years after his study of 1913, in 1916. It is the earliest anthropological source that the initial submission references. In common with the work of Jenness, a Eurocentric view seems apparent. Goddard employs similar “scale of civilization” assessment language. For example, he describes the Rocky Mountain Indians, as “in many respects” “\textit{more primitive than} either of the other two groups.”\textsuperscript{184}

\textsuperscript{182} \textit{id} at 203.
\textsuperscript{183} \textit{ibid}.
\textsuperscript{184} \textit{id} at 208. Emphasis added.
As to its substantive content, there is no explicit annotation or attempt at commentary or explanation of the stories. The notes and stories are discrete. Goddard’s notes contain scant reference to the cosmology and any relationship with what Goddard terms the supernatural world. For example, one brief detail that he does include merely states, “hunters whose success was attributed to supernatural power or, to what really amounts to the same thing, a supposed inclination of the moose towards the hunter.” These brief references arguably sustain the accounts provided by Jenness and Ridington, albeit, in substantially less detail.

Applying all of these criteria, I find that Ridington’s is the most reliable and leading authority, chiefly because he has spent over 40 years working with the Dunne Za and has carried out multiple studies. Consistent with what I said above about the methodology being analogous to a fact finder’s reliance upon circumstantial evidence in lieu of sufficient direct evidence to reach inferences and draw conclusions, the above “voir dire” hierarchical ranking of the relevance of sources is also akin to the approach of an archaeologist piecing together a story from many fragments, some of which have greater reliability than others. With all these caveats in mind, as I set out in the following chapter, I have derived from these accounts what I perceive to be the following principles of Dunne Za law.

---

185 id at 215.
186 See for example Jenness’ substantial detail as to the mystic bond with Caribou: Jenness supra note 158 at 64-72 in which he describes the Sekani “belief that man and the animal world are linked together in some mysterious way, and that the animals possess special powers which they may grant to man if he seeks them in the proper manner.”
3. Indigenous legal traditions of the Dunne Za

In the following chapter I identify both principles and practices of Indigenous law of the Dunne Za that derive from the initial submission of the petitioners. Comparable with a governance regime consisting of legislation and policy implementing it, the submission appears to identify principles and norms, and practices implementing these. I commence with an outline of the most complex of the identified Indigenous laws, the traditional seasonal round of the Dunne Za. I identify substantive and procedural components to decision making pursuant to this land management regime for maintaining balance and order. Following this, I examine the moratorium of the West Moberly First Nation, which lacks the complexity of the seasonal round. Thirdly, I examine the principle of respect as a distinct legal principle. I complete this chapter by examining law sourced in the oral histories of the Dunne Za.

In relation to the sources upon which I rely, I have divided my analysis of Dunne Za law between sources. I first address the initial submission which was before the mining decision makers, some of which the submissions to the Supreme Court of British Columbia sustain. While the Initial submission has been my primary reference point for identifying Dunne Za law, I have referred to the work of anthropologists which the initial submission references, in order to supplement and thereby comprehend, the snippets of detail that the initial submission provides. Secondly, I attempt to grapple with extracting legal principles from some of the oral histories or stories, which were noted in the initial submission to varying degrees and which were therefore before the decision.

---

187 The initial submission notes, cites and refers to the oral histories to varying extents. For example, at page 45, it refers to a story told by Jumbie, however, it does not extract this story. Elsewhere it contains segments of some of the oral histories as well as noting concisely their respective lessons and themes. See West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359 (Factum of the Petitioners, Initial Submission of the West Moberly First Nation to the Ministry of Energy Mines and Petroleum Resources, I Want to Eat Caribou before I die, June 2009) at 53-54.
makers. However, there seems to be overlap. Some legal principles appear to infuse both the submission and the stories. As such, some of the principles identified in the stories are not discrete and serve to reinforce laws enunciated in the submissions. I speculate that much of the legal authority for principles in the submissions derives from principles contained in the stories.

3.1 The Traditional Seasonal Round as a quasi land use planning regime

One key legal tradition for the Dunne Za who are hunters and gatherers is the seasonal round. The submissions provide a broad outline of the operation of the traditional seasonal round. I defer to Brody and Ridington whose work elaborates upon aspects that the submissions merely allude to, particularly in relation to pertinent aspects of the traditional seasonal round that risk being under appreciated.

The principal source of evidence on the traditional seasonal round as a land use regime comes from the work of Hugh Brody. At least some of Ridington’s work supplements certain components of Brody’s portrait to achieve a different emphasis. The work of anthropologist Diamond Jenness contains one small comment on the traditional seasonal round, which sustains Brody’s description. However, it does not add anything new to it.

Of the anthropologists who have worked with the Dunne Za, Brody is the key source on the traditional seasonal round as a land use regime, due to the explicit purpose of his work, Through facilitating a land use and occupancy study that documented Aboriginal interests, Brody sought to compile material to combat the threat of encroachment upon treaty protected rights by proposed

---

188 Ridington details the spiritual aspect which Brody’s work does not emphasise.
natural resources infrastructure. Brody spent two years with the Dunne Za, including members of the West Moberly First Nation,\textsuperscript{189} carrying out a land use and occupancy study had two main objectives: to demonstrate the extent of land use and to elucidate the people’s land use systems.\textsuperscript{190}

Brody describes the source of his knowledge as to the traditional seasonal round from his land use and occupancy study, as such:

The majority of the men and many of the women in 7 of the region’s 9 reserves drew maps of their land use. They also explained the seasonal round, shared knowledge, described changes over time, and indicated other aspects of land occupancy that underpin and interpret the information that they drew on their maps.\textsuperscript{191}

The Indians of British Columbia made maps, explained their system, gave detailed information about their economy, and took us into the bush with them. They did so because they believe that knowledge of their system will result in an understanding of their needs, and that this in turn will help establish and protect their interests.\textsuperscript{192}

Due to my training in town planning law and experience with interpreting and applying environmental planning instruments, I understand and analysed the traditional seasonal round as akin to a land use planning regime. This background has assisted my understanding.\textsuperscript{193} However, my understanding would be deficient if I relied purely on this legal training which relies upon knowledge based upon western science, and if I thereby failed to embrace the epistemological intricacies unique to the Dunne Za that characterize the seasonal round.\textsuperscript{194}

\begin{flushright}
\textsuperscript{190} Hugh Brody, Maps and Dreams: Indians and the British Columbia Frontier (Vancouver: Douglas & McIntyre 1981) at 148.
\textsuperscript{191} id at 149.
\textsuperscript{192} id at 177.
\textsuperscript{193} Which includes, for example, interpreting provisions of State Environmental Planning Policy (Seniors Living) 2004 as part of the task of amending the Native Vegetation Act 2003 by means of a Regulation amendment, namely, the Native Vegetation (Application of Act) Regulation, 2009.
\textsuperscript{194} Such as, differing comprehensions of time.
\end{flushright}
Stated *concisely*, the traditional seasonal round involved hunters travelling “to particular preferred areas within the Treaty territory during certain times of the year based on their knowledge of animal behaviour and distribution.” 195 Brody’s diagram depicts these geographic and temporal variables. 196 Similarly, the initial submission extracts some of the maps of hunting areas Brody helped coordinate, which illuminate their geographic scope. 197 However, as I shall expand upon below, the traditional seasonal round was much more complex than merely featuring these two variables. Rather, it involved multiple constituent elements and characteristics, such that it would be wrong to dismiss it merely as comparable with a land use planning regime that delineates various zones in which certain uses are permissible, or what could be analogized with a three dimensional model. 198 As Brody enunciates, “the people’s maps demonstrate the extent of Indian interest in the land, and are a *starting point* of any account of these accommodations. But they cannot do justice to the sophistication of an economic system involving varying patterns of movement at different times of the year, shifts from one kind of resource harvesting to another, and a *knowledge of the land – and its animals*, whose richness is astounding.” 199

This final feature, namely the traditional knowledge informing the seasonal round, is itself rich in its complexity and contains variables that defy an anthropocentric epistemology and a western comprehension of knowledge. It is such a central component of Dunne Za law that I explore the intricacies of its substance and procedural operation at length below. Before doing so, I comment


196 See Brody, *supra* note 190 at 198, which depicts “Figure 2 The Indian Year, Pre-1960,” and what I interpret also portrays the geographic and temporal variables of the Dunne Za Traditional Seasonal Round.

197 See Brody, *supra* note 190 at 41 which depicts one of Brody’s “individual map biographies” of the West Moberly hunting areas.

198 Due to the analogy with a three dimensional versus four dimensional world.

199 See Brody, *supra* note 190 at 190. Emphasis added.
on what I perceive to be the most salient of the characteristics and features of the traditional seasonal round, and what I perceive could be under appreciated, through a failure to “learn” or to try to learn, in the sense of being receptive to multiple ways of life and thoughtworlds, and instead, employing an anthropocentric lens of analysis that is not attuned to the particular metaphysical intricacies at play.

Petitioner Willson described the traditional seasonal round as follows:

We are Mountain Dunne Za people. Our treaty right includes our mode of life which is based on our traditional seasonal round which targets specific species during different times of the year in specific locations…Caribou are an integral part of the seasonal round of the West Moberly.

… Our mode of life is part of defining who we are as an Aboriginal people. Our mode of life, based on the traditional seasonal round, connects us to our traditional territory through our use of the land and being out on the landscape.

The seasonal round comprised a mixture of activities, namely five periods of activity: the fall dry meat hunt, early winter hunting and trapping, late winter hunting and trapping, the spring beaver hunt and the summer slack. Each of these has a distinct pattern and area of land use. Jenness’s portrayal of the seasonal round sustains the delineation of activities that Brody describes. He refers for example, to the summer slack as part of this round, which he describes as follows:

The Sekani generally spent the period from about November until mid summer on the plateaux and mountain slopes, running down the Caribou and moose on the snow and when the snow had melted, driving them into snares and trapping groundhogs.

---

200 I borrow the word “thoughtworld,” from Ridington, in reference to the different ways of knowing and the cognitive shift that is necessary to comprehend differing ways of life. See Robin Ridington Little Bit Know Something, Stories in a Language of Anthropology, (Iowa: University of Iowa Press, 1990) at 10.
201 See the initial submission, supra note 187 at 82.
202 id at 43 citing Hugh Brody, Maps and Dreams: Indians and the British Columbia Frontier (Vancouver: Douglas & McIntyre 1981). See Brody, supra note 190 at 197 which depicts “Figure I The Indian Year: A Seasonal Round.”
203 Brody, supra note 190 at 191.
About mid-summer they resorted to the lakes to fish, or visited the various tribes beyond their borders…Eastward there was a route up the Ospika via Laurier pass.\textsuperscript{204}

Describing one fifth of this round, namely the fall dry meat hunt and how \textit{mountain ecological zones} were used, Brody provides:

Most of the species hunted, especially Moose and deer, tend to be dispersed. In their hunting, men either follow the game’s seasonal movements, or they travel to areas where a \textit{specialized habitat supports particular species in abundance}.

In late summer and early fall, the bands split into small groups to begin the dry meat hunt. This is a period of dispersal to camps that may be as little as five and as much as 30 miles from summer locals. The people travel to areas, which based on their knowledge of animal behaviour and distribution and their understanding of the current population levels of the major resource species, they predict animals may be \textit{numerous enough to provide} their winter supply of dry meat. Nor are these the same each year. At times of great need, when moose and deer populations are low, they may move to distant areas to hunt for mountain sheep and caribou.\textsuperscript{205}

Brody’s description of the fall dry meat hunt evidences geographic fluidity in the seasonal round. It provides, “nor are these the same each year. At times of great need when moose and deer populations are low, they may move to distant areas to hunt for mountain sheep and caribou.”\textsuperscript{206} In further support of the malleability of this conservation law, the relatively recent modification of the traditional seasonal round attests that the seasonal round and the hunting economy on the whole that it supports, has similarly morphed. Brody informs us:

most of the bands moved into permanent housing on the Reserves in the early 1960s. From that time their pattern of residency can be said to have changed from semi-nomadic to semi-sedentary. The traditional seasonal round was \textit{modified}. Those who continue to hunt and trap do so from a single, permanent base camp. But the animals harvested and the seasonality of the harvests – the Indian year – have stayed the same.\textsuperscript{207}

\textsuperscript{204}Diamond Jenness, \textit{The Sekani Indians of British Columbia} (Ottawa: J. O. Patenaude, 1937) at 2.
\textsuperscript{205}See the initial submission, \textit{supra} note 187 at 43. Emphasis added.
\textsuperscript{206}See Brody, \textit{supra} note 190 at 192 and cited in the initial submission, \textit{supra} note 187 at 43.
\textsuperscript{207}Brody, \textit{supra} note 190 at 194. Emphasis added.
The petitioners’ submissions to the Supreme Court of British Columbia sustain the characterisation of the traditional seasonal round as an adaptive *land use strategy* that has evolved. These provide:

West Moberly members continue to practice our traditional harvesting practices in areas within Treaty 8 territory that are best suited to our hunting and trapping needs. For example, hunting grounds close to our reserve are part of our preferred Treaty territory. Although these areas are sometimes called our “traditional territories” or “traditional hunting grounds,” those areas are really our “preferred territory” or “preferred treaty territory” because they are where we prefer to do our traditional hunting and trapping due to our present mode of life for example, living on our reserve or in nearby towns, rather than in camps on the land as we traditionally lived.208

From these extracts, it seems apparent that the traditional seasonal round is a legal tradition that remains alive and has evolved to adapt to changes including reserve delineation yielded by virtue of the *Indian Act*. Such flexible endurance is consistent with descriptions of the hunting economy per se as well as the way of life of the Beaver Indians, which Brody has described numerously as follows: “The Aboriginal inhabitants of what is now North East British Columbia are the inheritors of one of the purest forms of hunting economy; purest in the sense that they are peoples who are *flexible in the face of every changing circumstance*.”209 Similarly, “their knowledge and techniques grew and changed, as the variety of their cultures testifies. But some of the basic characteristics remained much the same, including the ever-present flexibility that is expressed in virtually every part of the system.”210 Finally, “hunters continued to practise their systems following ancient, though *never static, patterns*.211

---


209 See Brody, *supra* note 190 at 85.

210 *id* at 28.

211 *id* at 35.
A final feature of the seasonal round which Brody captures and which distinguishes it from non-Dunne Za land use planning regimes,\(^{212}\) is its spontaneity. Brody provides, “everything about the Indian of North East British Columbia points to a readiness to change and to move; hunting techniques; clothing; spiritual and religious systems that govern relations among people and between the people and their land; reliance upon knowledge and skill (which of course are carried in the head).”\(^{213}\) Similarly, “a readiness to adapt to new environments, to use different resources, and to seize new technological advances, has always been at the heart of Athapaskan culture.”\(^{214}\)

The language describing the seasonal round suggests that certain themes are apparent as to its governance. Chief among these I interpret a conservation intent as one such purpose of the seasonal round. There are many references to a conservation objective as motivating the seasonal round. For example, “in their hunting, men either follow the game’s seasonal movements, or they travel to areas where a specialized habitat supports particular species in abundance.”\(^{215}\) Such areas or zones are akin to a land use being permissible with or without consent, because the impact would not be devastating. It would not extirpate the species. Similarly, “the people travel to areas, which based on their knowledge of animal behaviour and distribution and their understanding of the current population levels of the major resource species, they predict animals may be numerous enough to provide their winter supply of dry meat.”\(^{216}\)

In a similar vein, the following comment suggests that a sustainable approach to land use was an overriding principle that guided land use, comparable to the way in which a government policy,

---

\(^{212}\) As I have explained, land use plans that I have worked with such as LEPs and SEPPs created under Part 3 of the EPA Act, are rigid or fixed. Their amendment requires multi-phase decision making processes involving public consultation and other processes.

\(^{213}\) See Brody, supra note 190 at 85.

\(^{214}\) id at 86.

\(^{215}\) id at 43. Emphasis added.

\(^{216}\) id at 191. Emphasis added.
such as ministerial guidelines to support the implementation of a legislative regime as a governance tool, guides land use:

In the present day with the population of not only Caribou at a critical stage but other species as well, many of our members recall hunting trips to be much more prosperous because of the more sustainable approach to land use.\(^{217}\)

The following comments, which detail practices implementing Dunne Za law, provide further support for a conservation objective as motivating the traditional seasonal round:

As noted by Brody, our nation has long been concerned with conservation and we have adopted a number of strategies to protect animals. These include planning where families will go, rotating our use of particular areas, selecting the time of year when the animal is least likely to be impacted.\(^{218}\)

One winter they trap one area. Next winter they leave that place, they would trap in a different area… By the time they finish all of this, it is 6-7 years, and they go back. They don’t kill off one place everything.\(^{219}\) In summer, once they move out there they put up the poles where they camp. Six or seven years later they used the same poles because they don’t want to ruin the land.\(^{220}\)

The Indians’ system was not easy to discern but, as I shall show, it was patterned and thoughtful. The Indians certainly did not think that they were surrounded by limitless and underused resources, nor did they ever accept that their hunting practices were wasteful.\(^{221}\)

Seemingly, much thoughtful planning and deliberate intent informed these conservation and hunting practices.

\(^{217}\) id at 57. Emphasis added.
\(^{218}\) id at 62. Emphasis added.
\(^{219}\) id at 63. Emphasis added.
\(^{220}\) id at 63. Emphasis added.
\(^{221}\) id at 8.
As a separate but related observation, the following description elucidates the “clash of worldviews” or cultural impasse evident in the contrast between the traditional seasonal round and non Dunne Za means of using and managing the land:

*many white trappers found themselves repeatedly at odds with an altogether unfamiliar, even incomprehensible, way of harvesting the land’s resources…White settlers and trappers had clear notions of orderly land use that were based on well tried patterns of frontier homesteading. They imagined that a trapping area they had claimed would be theirs alone, an area where they would have an exclusive right to harvest furs. The Indians’ system was based on freedom of access, flexible use and rotational conservation, which meant that some areas went un-trapped for seasons on end.*

Exclusive possession juxtaposes a sharing, collective approach that characterizes Dunne Za land use law. Moreover, the rigidity of the system of land management for regulating trapping that was imposed upon the Dunne Za’s legal systems, conflicts with the relative flexibility of the Dunne Za’s relationship with the land. Indeed, as I suggest and purport to establish below, this relationship is pervasive and is a key distinguisher that cannot be under-appreciated.

*My conclusion*

I envisage the seasonal round as comparable with a land use planning regime whereby hunting is a land use and the West Moberly have certain hunting zones. These are areas where their knowledge of animal behaviour and other variables determine it is permissible to hunt because hunting will not yield extirpation and “spiritual dismemberment” of the Caribou. It won’t upset the balance and order. Moreover, such zones delineating hunting areas are depicted on Brody’s maps as

---

222 *id* at 87. Emphasis added.
223 *id* at 67.
224 *id* at 79.
squiggles, which indicate that these areas are quite different from land use zones featured in fixed land use plans.

Multiple variables determine permissible hunting areas. Two variables in this quasi land use regime are that zoning appears to be both temporal and geographic. Temporal zoning is largely determined by animals’ migration paths. The Dunne Za hunt at certain times of the year. Zoning is also geographic in that the hunters follow the game’s seasonal movements or they move to areas where “a specialized habitat supports particular species in abundance.”

Contrary to many State imposed zones in land use plans and planning instruments with which I am familiar, which are rigid and are only amendable via decision-making of the governor, minister, or his or her delegate, these zones are not fixed. Rather, they are malleable and adjust according to knowledge which some would call traditional knowledge.

I think it is safe to conclude that the traditional seasonal round was and is a means of obtaining food for the Beaver Indians. But that it also, and perhaps more significantly, may be characterized as a land management regime that is governed by conservation objectives, which respects the ability of the land to produce what is needed, without upsetting the balance or order. That is, it is a conservation mechanism. Its fluidity and ability to adapt defies the relative rigidity of land use plans of the Canadian state and other legal means for regulating land use.

---

225 id at 191 cited in the initial submission, supra note 187 at 43.
227 I have far greater experience with legal documents regulating land use and development as part of the NSW planning regime pursuant to the EPA Act. These include environmental planning instruments (EPIs), conservation agreements and conservation covenants.
In further discussion below, and based upon interpretations of stories as well as references within the initial submission, I proceed to hypothesise that the traditional seasonal round is also governed by and mindful of, *respect* for the land and “other than human” or natural world, such that consequences ensue from non-adherence to this respect. For example, if the natural world is not respected, *inter alia*, the animals will not return.

I proceed to discuss variables and components of the seasonal round that the petitioners’ submissions *allude to*, but do not *submit*, in any considerable detail.

### 3.1.1 Dreaming or dream hunting

A further and central ingredient of hunting pursuant to the traditional seasonal round, which is indicative of the differing *relationship* that the Dunne Za had with the “other than human world” or natural world, is that hunting was influenced by dreaming. Given that I *infer* that the relationship of respect and reciprocity that the Dunne Za had with the other than human or animal world is an iconic characteristic of their worldview, I merely touch upon this aspect here as it relates to the seasonal round and dream hunting, and develop it further in a separate discussion below.

The initial submission *alludes to* Dunne Za dreaming but it does not *describe* it in any detail. The initial submission mentions that hunting is a spiritual process and that the fall hunt provides spiritual wealth. For example, one such description narrates the approach of hunters as follows:

---


---
“they are out there in the bush hunting and it is not just about killing an animal. It is about that whole spiritual aspect. What it means to hunt that animal and for that animal to have given up its life to feed that family or person.” Similarly, referring to his / her Grandpa, Korrie Dokkie narrates, “when out in the bush that was the closest to God he ever felt.”

Within the umbrella of spirituality, hunting is an activity that is associated with dreaming and medicine power. The initial submission makes reference to the use of medicine power, and alludes to how medicine worked in the culture. For example, the Submission cites Jenness who provides, “Caribou … know the thoughts of men who have received medicine from them. They have spoken to them, given them songs perhaps, or told them to wear certain amulets. There is a mystic bond between them, and provided the men observe the rules the animals will obey their wishes.”

Finally, the initial submission notes that hunting medicine was obtained through dreams. Notably, the initial submission does not explain these points in any great detail. However, Chief Willson encapsulates some of these elements in a more detailed description. He notes:

I became aware that back when the prophet had this dream there was an abundance of Caribou that moved back and forth…. so at times of need you could go to Twin Sisters. Provide you meat; fish; berries; fresh clean water. Understanding that was a refuge for Dunne Za in times of trouble…so the dream of going to Twin Sisters won’t exist anymore. Our spiritual culture has been impacted that way as part of a core belief of

---

229 See the initial submission, supra note 187 at 66. Emphasis added.
230 ibid. Emphasis added.
231 id at 54-56.
232 id at 55. Emphasis added.
233 id at 54-56.
being connected to the land...So what I have lost is the spiritualness of not being able to go out and teach my son how to hunt a caribou.\textsuperscript{234}

But what does Chief Willson \textit{mean} by the prophet having a dream, and the dream revealing a location where food and resources are bountiful? To supplement the snippets of detail provided in the initial submission, I defer to Brody who, through his narrative form,\textsuperscript{235} illustrates the operation of dream hunting and hunting medicine, as influencing the operation and workings of hunting pursuant to the traditional seasonal round, or as being part of the \textit{mechanics} of hunting.

Yet Joseph’s Daddy, along with the others, sought a confirmation of the new area’s potential. This was done by means of a \textit{dream prophecy} and the erection of a \textit{medicine cross}.\textsuperscript{236}

\textellipsis

When it was in place, Patsah and others hung skin clothing and \textit{medicine bundles} from the main crosspiece, and on the panel near the base, they inscribed “all kinds of fancy” - drawings of animals that had figured in the people’s dreams, animals of the place that would \textit{make themselves available for the hunt}.\textsuperscript{237}

The night the cross was completed, an \textit{augury} came to one of the elders in a dream. A young cow moose, moving to the Patsah camp from the Bluestone Creek area, circled the base of the cross, then went off in the direction from which she had come. Two days after, hunters discovered the tracks of a young cow moose, and, following these, recognized them to be the tracks of the dream animal. The tracks led to the \textit{cross}, circled it, then returned to the Bluestone. The dream prediction had been auspiciously fulfilled. The new area would provide abundantly.\textsuperscript{238}

But what does this all mean for the worldview and legal system? What is the significance of the roles of dream hunting, prophecies, medicine bundles and medicine men, amongst other things? We have a narrative account, but no \textit{explanation}. I am still not convinced that I \textit{comprehend} dream hunting and its constituent elements, interconnections and relationships. Ridington’s

\textsuperscript{234} \textit{id} at 79.
\textsuperscript{235} This is distinct from his land use report.
\textsuperscript{236} Brody, \textit{supra} note 190 at 8. Emphasis added.
\textsuperscript{237} \textit{ibid}. Emphasis added.
\textsuperscript{238} \textit{id} at 9.
analysis provides a very useful exposition that goes much further towards explaining the contribution of all of these elements. I extract much of this below as it is inseparable from the discussion of traditional knowledge and its role in hunting practice and law. I note too that Jenness provides a detailed description of medicine power and dreaming, which I discuss also, to the extent that this is necessary.

3.1.2 Substantive components of the Traditional Seasonal Round: the role of traditional knowledge

A related critical element that seems false to isolate from the discussion of dreaming, is that the Dunne Za traditional seasonal round is based on traditional knowledge. Traditional knowledge informs the decision-making pursuant to the traditional seasonal round. The submissions allude to this. However, this risks being underappreciated. That is, the mechanics of traditional ecological knowledge, including its influence upon decision-making, risk being under appreciated. In this way, the seasonal round is arguably an application of traditional knowledge.

The submissions provide: “traditional ecological knowledge about the seasonal patterns of flora and fauna, and the institution of traditional conservation practices, enabled the Mountain Dunne-za to ensure the continuity of preferred game and plant resources in their preferred Treaty territory.” However, the initial submission does not directly state that traditional ecological knowledge informs the seasonal round.

\[239\] West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359 (Factum of the Petitioners, Written argument of the Petitioners to the Supreme Court of British Columbia) at para 52 citing Affidavit #1 of George Desjarlais at paras 25-27; Affidavit #1 of Catherine Dokkie at paras 2-6; Affidavit #1 of Roland Willson at para 8.
In relation to the importance of traditional knowledge to hunting, Brody’s discussion contains snippets of detail, particularly as regards the uniqueness of decision-making. Brody indicates that “successful harvesting of its resources requires knowledge of animal movements over the whole area, including places that are rarely, if ever, visited.” Moreover, “this round varied from year to year and some territories were left fallow for several reasons depending on the hunters’ and trappers’ assessments of a resource.”

So we are told that knowledge of animal movements as well as the hunters and trappers’ assessments of a resource influence the traditional seasonal round. Brody’s narrative account that accompanies his land use report complements such description with illustrative examples. Describing his participation with Joseph Patsah in the Spring Beaver Hunt, which comprises one fifth of the traditional seasonal round, Brody writes:

Joseph had asked me to ride with him several miles upstream to look over an area of beaver dams and lodges that he had not hunted for several years. When he came near to the dams, he dismounted and walked slowly from one to the other, making his way through a tangled profusion of trees which the beaver had felled.

It was a landscape signposted by the pale freshness of newly gnawed stumps and the dark decay of older cuttings. Joseph read these and other signs. He was checking his fields, counting stock, reviewing assets. The analogies of the other economic orders spring to mind, though none does justice to the massive body of information that such eyes as his could see in these trails, stumps, dams and lodges.

From this account it appears that the economic system of which the seasonal round is a part was governed by “this massive body of information.” As such, traditional knowledge is a critical ingredient of the Dunne Za economic system.

---

240 Brody, supra note 190 at 174. Emphasis added.
241 id at 87. Describing trapping country and traplines. Emphasis added.
242 id at 221. Emphasis added.
In contrast to these brief narrative accounts and fragments of detail, Ridington specifically addresses the role of knowledge, or what he terms artifice, in adaptive strategies such as the traditional seasonal round.\textsuperscript{243} Describing the Doig River First Nation, Ridington eschews the preoccupation of anthropologists and others with artefacts, namely physical, tangible, material objects, and instead emphasizes the importance of appreciating artifice, namely the intelligence informing decision making and strategy. Capturing the chasm dividing certain societies’ preoccupation with the material and tangible from that of hunting and gathering societies such as the Dunne Za, he writes, “we inadvertently overlook the artifice behind technology in favour of the artefacts that it produces.”\textsuperscript{244} He insists such emphasis is misplaced, as “hunting and gathering societies seem particularly to value the possession of technical knowledge over the possession of material artifacts.”\textsuperscript{245} Put concisely, “the carrying device is an essential artifact of hunting and gathering technology.”\textsuperscript{246} But “the technique of being able to carry the world around in your head is even more fundamental.”\textsuperscript{247}

But what is such artifice? What constitutes this “technical knowledge”? It is essential to appreciate not just the fact that hunting decisions are based on “a massive body of information,” from the land and “other than human world,” namely the substantive component, but also, that epistemologically this involved a very different decision making methodology or process. That is,

\textsuperscript{243} See “Technology, Worldview and Adaptive Strategy in a Northern Hunting Society” in Ridington, \textit{supra} note 200 at 84.
\textsuperscript{244} \textit{id} at 86.
\textsuperscript{245} \textit{id} at 85.
\textsuperscript{247} Ridington, \textit{supra} note 200 at 87.
there seem to be both substantive and procedural components to the decision making involved with the regulation of the use of the land pursuant to the traditional seasonal round.  

Ridington elaborates that “the essence of hunting and gathering adaptive strategy, is to retain and be able to act upon, information about the possible relationships between people and the natural environment.” “When realized, these life giving relationships are as much the artifacts of hunting and gathering technology as are the material objects that are instrumental in bringing them about.”

But what are the mechanics of knowledge as informing the traditional seasonal round? That is, how does this work? Brody’s narrative of the Spring Beaver Hunt extracted above alludes to this mechanism, whereby decision making is based on “a massive body of information” that is “read” by the hunter. What Brody illustrates, Ridington explains as follows:

“Hunters and gatherers… internalise detailed information about topography, seasonal changes and mineral resources. They plan their own movements in relation

---

248 On this point I noted that former Chief Justice Finch commented on the need for both substantive and procedural elements of Indigenous legal traditions to be acknowledged. I have inadvertently recognized these and did not set out to detect them. Albeit I am not sure that a member of the Dunne Za trained in Dunne Za legal traditions, would characterize the seasonal round in this way. Finch CJ provides at para 26,

Moreover, severance of Indigenous laws from their spoken medium is just one aspect of an overall severance from individual Indigenous cultures’ laws of procedure. At least in rights and title jurisprudence thus far, the courts’ consideration of the Indigenous legal perspective amounts to a substantive weighing. Because this weighing occurs within the Canadian court system, substantive principles, insofar as they are granted weight, are considered outside of the unique procedural systems in which they are intended to be communicated and applied. In other words, the “what” of the principles is considered independently of the “how.”


249 Ridington, supra note 200 at 86. Emphasis added.

250 ibid. Emphasis added.

251 Brody, supra note 190 at 221.
to the information they hold in mind about the world in process around them. Often, information about the resource potential of the environment *is processed and organized in their minds through the use of dreams and divinatory devices.* (Ridington 1987a). Their plans are central to an adaptive strategy in which control of information maximized control over the relationship between people and the environment.²⁵²

As such, the operation of traditional knowledge in the traditional seasonal round or the means by which traditional knowledge influences the seasonal round, seems analogous to the realization of a kinetic potential energy. Intellectual capital or knowledge about possible relationships between people and the natural environment is *absorbed* from the environment including the other than human world and is *internalized*. It is *resolved and processed* in dreams in a period of marination during which understanding is reached. It exists and is *able to be acted* upon.

Ridington expands in great detail as to the mechanisms by which traditional knowledge informs the seasonal round. Not all of his details are supported by *explicit* references within the initial submission or Court submissions. However, the initial submission notes that Ridington’s writings as to Dunne Za spirituality and worldview, document and interpret vision quests, medicine powers and dreamers.²⁵³ As such, we know that the evidence before the decision makers *made mention of* Ridington’s work as interpreting these things. In particular, it specifically cites Ridington’s 1990 work, which I principally rely upon for guidance. Moreover, the initial submission refers to at least one story that Ridington documents as authority for its propositions.²⁵⁴ I speculate that many of the details Ridington documents as to the role of traditional knowledge in hunting law and

²⁵² Ridington, *supra* note 200 at 87.
²⁵³ See the initial submission, *supra* note 187 at 56. The Initial Submission references Ridington’s 1981, 1990 and 1998 works as interpreting these things.
²⁵⁴ *id* at 45. The initial submission refers to, but does not extract, a story told by Jumbie whose father’s kinsmen were at Hudson’s Hope.
practice, are supported to varying degree, through some of the oral histories or stories that the initial submission extracts.

In relation to the substantive content of knowledge, Ridington further provides: “the Beaver had and still retain, a rich and complex set of ideas about the possibility of meaningful human action in relation to the resource potential of their varied environment. They related to one another and to the animals with whom they shared the world on the basis of subtle references to mutually understood information. The importance of mutual understandings was evident, both in interpersonal relations and in those between people and animals.”255 Further, “relations between people and animals were also organized by reference to common understandings believed to exist between hunters and their game.”256 “In order for a hunt to be successfully completed, the animal had to have previously given itself to the hunter in a dream.”257 Both animals and hunter were supposed to have been known to one another before their physical meeting in the hunt itself. Animals were believed to be pleased by the hunter’s respect for their bodies, and to notice his generosity in distributing the meat.258 Hunters sought to develop an ability to think like game animals in order to predict their behaviour. They were trained to interpret the environment from an animal’s perspective. The hunter’s understanding of an animal’s thought process, was believed to be mirrored by the animal’s understanding of how humans fulfilled obligations incurred in the hunt.259

---

255 Ridington, supra note 200 at 88. Emphases added.
256 ibid. Emphasis added.
257 id at 89.
258 id at 89.
259 ibid.
The fact that the Beaver are described as sharing the world with the animals suggests a more egalitarian relationship than a hierarchical and anthropocentric one in which humans are the dominant species and adjust the environment to suit their needs. Consistent with this, several elements suggest a relationship of reciprocity as existing between the human and what Ridington would call the natural world, but which other anthropologists have termed the “other than human world.”

The fact that certain information is mutually understood as well as that common understandings are believed to exist between hunters and their game, attests to mutual exchange between human and animal. Such is the means by which the hunter has knowledge of an animal’s geographic location in the hunt. Reciprocity implies mutual give and take. In consideration for animals being pleased with hunter’s respect for their bodies and generosity in distributing meat, animals give themselves to hunters in a dream. The fact that the revelation of the animal’s location is a requisite for the hunt to be successfully completed, affirms the importance of knowledge to the operation of the seasonal round, which I think, is Ridington’s principal thesis. That is, the seasonal round is not just based on traditional knowledge. Rather, traditional knowledge is required. Moreover, drawing from these details, it seems that the reciprocal relationships between hunters and animals, are indispensable to the content of knowledge that informs the operation of the seasonal round.

A further example of the interplay of such reciprocal relationships, which supports what Jenness describes as a mystic bond as existing between hunters and game, is that the fact of hunters developing the ability to think like animals and to interpret the environment from an animal’s perspective, seems to be reciprocated by the animal’s understanding of how humans fulfilled obligations incurred in the hunt.

---

260 See Hallowell, supra note 228.
261 See Jenness, supra note 204. And further, see note 187 supra at 55.
Some final but critical comments from Ridington capture the symbiosis between the human and natural world, and correlation between human action and the natural world. Moreover, they attest the importance of knowledge and lack of differentiation between human and animal world in this respect, that is, that the human and animal world are united by knowledge. Ridington provides:

People were also expected to be well informed about their relationships to one another. They believed that the quality of their interpersonal relations, was reflected in the quality of their relations with animals. Animals were believed to know when people behaved badly toward one another and to withdraw from contact with them.262

The Beaver people viewed human experience as a life sustaining network of relationships between all components of a sentient world. They experienced their world as a mosaic of passages and interactions between animate beings in motion against the backdrop of a terrain that was itself continually in process through the cyclical transformations of changing seasons.263

They looked upon the trails of people and animals as a record of these interactions. Each trail they believed, continued backward and forward beyond the point at which it could no longer be followed physically. The trails that lay ahead, as well as those that lay behind, could be followed by people in their dreams. The trail of every adult could be followed in the mind back to the point of visionary encounter with a medicine animal,

... Each actual point of meeting between person and animal was believed to be the manifestation of antecedent meetings in the medium of a dream or vision.264

It seems that human agency directly impacted upon the behaviour of animals.265 Moreover, again alluding to the relative egalitarianism of their worldview, it appears the Beaver people do not distinguish between human and animal “life,” in the sense that the animal world seems to share equally as a component of the sentient or knowing world. In addition, animals have a role in the world order that is equal or at least not inferior to, the role of human actors. It seems humans and animals are united by knowledge.

262 I speculate that the actions of the protagonist in the oral history I extract below, illustrates this principle.
263 See Ridington, supra note 200 at 90. Emphasis added.
264 ibid. Emphasis added.
265 A principle I observe in the oral history below.
Further, we must appreciate an epistemological shift in that Beaver people envisaged life both animal and human, as *existing at a particular point in time on a trail*. In addition to the above extract, Ridington continues:

Traditional Beaver world view centred around their image of the trail. *Every sentient being was perceived as existing at a particular point on a trail that could be imagined projecting forward and backward from that point.* This projection was accomplished through the *use of dreams*. Success depended on being able to make decisions about how best to move in relation to the complex network of trails emerging from the past and merging into the future.

Hunters believed that in the dream state they could *resolve* a larger pattern of interrelated trails, than would be possible in ordinary waking consciousness. In dreams, a person could draw on his or her own *personal relationship to the natural world* established during the visionary experience of childhood. The *power conveyed* by that experience was believed to *facilitate later dream contact* between people and animals.

The Beavers’ beliefs about dreaming seem to have reflected an understanding that when the mind is released from the task of processing information from the immediate perceptual environment, it may concentrate on processing information *generated internally and derived from past experience.*

Returning to an argument that Brody touched upon without elaboration in relation to the sophistication of the economic system, it seems that control of these relationships between human and animal life is *mandatory* to hunting. Accordingly, it would be wrong to state merely that the traditional seasonal round is *based upon* traditional knowledge, for this description does not adequately explain the myriad of interconnections and relationships, and variables encompassed within traditional knowledge, particularly the substantive and procedural elements by which it influences decision making pursuant to the traditional seasonal round. As Ridington articulates, “success or failure in hunting *depended upon* a person’s ability to conceptualise and control the

---

266 Ridington, *supra* note 200 at 91. Emphasis added.
mosaic of relationships between people, animals, and celestial bodies.” Further, “the technology of subsistence required that a person be able to bring about a regular and coherent relationship between the trails of people, animals, and the sun and moon.”

In this way, the analogy I suggested earlier with comprehending a three dimensional versus four dimensional worldview or lens becomes more comprehensible. Hunting pursuant to the traditional seasonal round differed significantly from a land use regulated by “three dimensional” land use planning. It contains substantive and procedural variables and dimensions that a non Dunne Za person might legitimately find difficulty with comprehending. Chief of these are the variable of time, pre-existing relationships with the natural world and the process of dreaming.

3.1.3 Procedural elements of Dunne Za decision making

Earlier I speculated that both substance and process components ought be considered as part of the means by which traditional knowledge influences the operation and regulation of hunting pursuant the traditional seasonal round. Returning to the procedural aspects, a further and striking example of the divide separating Dunne Za and non Dunne Za legal systems is implicit in Brody’s enunciation of the epistemological shift that is necessary to appreciate the legal system and way of life of the Beaver Indians. He provides:

The way to understand this kind of decision making is also to live by and even share it, is to recognize that some of the most important variables are subtle, elusive, and extremely hard or impossible to assess with finality. The Athapaskan hunter will move in a direction and at a time that are determined by a sense of weather (to

---

267 *ibid.*

268 *ibid.* Emphasis added.
indicate a variable that is easily grasped if all too easily oversimplified by the one word) and by a *sense* of rightness.\(^{269}\)

As I discuss further in Chapter 5 below in relation to the feasibility of decision makers being able to embrace and appreciate Indigenous legal traditions, such decision making, specifically, the “process components” informing the operation of the traditional seasonal round, might likely perplex non Dunne Za decision makers for several reasons. For example, how might one quantify and assess such intangible variables as *senses* of weather and rightness? Similarly, other variables which are “impossible to assess with finality.” Are these not vague and uncertain? Such intangible variables seem to defy the pursuit of achieving determinative considerations, that is a feature of administrative decision making.\(^{270}\) Although it is unlikely that a non-Dunne Za decision maker would have to review Dunne Za decision making, I suggest that the vagueness of being guided by *sense* might be difficult for a non Dunne Za person or adjudicator to appreciate.

Brody’s further caution further emphasizes the sharp polarity in perspectives and decision making methodologies:

But already the nature of the hunter’s decision making is being misrepresented by *this kind of listing*. To *disconnect the variables*, to *compartmentalize the thinking* is to fail to acknowledge its sophistication and *completeness*. He considers variables as *a composite*, in parallel and with the help of a *blending of the metaphysical and the obviously pragmatic*.\(^{271}\)

\(^{269}\) Brody, *supra* note 190 at 37. Emphasis added.

\(^{270}\) I touch upon this purported incompatibility with administrative decision making briefly in Chapter 5 below.

\(^{271}\) Brody, *supra* note 190 at 37. Emphases added.
The decision making methodology whereby lists of compartmentalized considerations are weighed up to achieve a compromised outcome,\textsuperscript{272} contrasts with decision making that melds both pragmatic and metaphysical variables and which is a \textit{fusion} of both.\textsuperscript{273}

Brody discusses at length how this differs from non-Dunne Za notions of a \textit{decision} and \textit{decision making}, that, substantively omits such metaphysical variables and procedurally, seeks \textit{certainty} or at least, to quantify the determinative considerations. Epistemologically, we have fundamentally different notions of what constitutes a decision and the methodology involved in decision-making. This is an important illustration of the “clash of worldviews” that occurs when these substantially different decision making methodologies intersect, as they do in “environmental” decision-making, that is, decision making involving natural resources and environmental subject matter and resources disputes. It would seem that Brody compels his audience “to learn” in the sense of being receptive to these differing methodologies. By contrast, as I explore in Chapters 4 and 5, \textit{prima facie}, it appears some administrative and judicial decision makers do not even \textit{try}.

As an example of the application of this type of decision-making, I think one can infer from the initial submission that \textit{respect} is one such intangible variable that influences decision making operation pursuant to the seasonal round. That is, I think one can read from the initial submission

\textsuperscript{272}I am referring to the application of the administrative law doctrine of relevant considerations as applied in leading cases such as \textit{Minister for Aboriginal Affairs v Peko Wallsend Ltd} (1986) 162 CLR 4. Much town planning decision making sees the application of this principle, such as for example, decisions of a consent authority pursuant to Section 79C of the Environmental Planning and Assessment Act, 1979 (NSW), which outlines the factors the consent authority is bound to take into account. These include for example, “the provisions of any environmental planning instrument:” s 79C (1) (a) (i) and “the suitability of the site for the development: s 79C (1) (c). I suggest such factors contrast the vagueness of variables such as senses of weather and rightness which seem to inform decision making pursuant to the traditional seasonal round.

that respect for the “other than human world” is an intangible variable that informs decision-making. Accordingly, decisions are not based exclusively on quantitatively how much meat is needed for consumption by the Beaver Indians. Rather, intangible variables such as the \textit{relationship} with the animal world influence decision-making.

In conclusion, returning to the concern as to my methodology, namely that I was not convinced that the initial submission, which was expeditiously prepared,\textsuperscript{274} provided a complete portrayal of Dunne Za law, the snippets of detail and hints in the submissions, together with Brody’s narrative account and brief explanation, and Ridington’s detailed explanation, combine to sufficiently inform me to be able to reach, I believe, reasonable inferences as to the Dunne Za worldview and legal system.

3.2 The moratorium

A second such law that seems entirely distinct from the traditional seasonal round is the moratorium on hunting Caribou that the West Moberly First Nation implemented in the 1970s. While it is unclear, I speculate that the subject legal challenge was at least partially incited or at least, influenced by the need to uphold the purpose of this law, in the sense that the ostensible grounds for bringing the case adhere with its purpose. The ban on hunting was implemented so as to allow the species to rejuvenate in order to permit hunting in the future. Similarly, the case was brought to prevent encroachment upon Caribou territory to allow the herd to rejuvenate. It seems the West Moberly First Nation were seeking to enforce their law, which arises from Dunne Za legal traditions, by means of this case.

\textsuperscript{274} See the initial submission, \textit{supra} note 187 at 33.
As to the rationale for the law and details of its enforcement, the initial submission provides:

One extreme measure that is used is a moratorium on hunting a particular species. As the result of the decline in Caribou numbers, which corresponds to the construction of the WAC Bennett Dam, the elders restricted the use of Caribou by our nation:

It was a few years after that…when the elders noticed that there were not as many Caribou in the Upper Moberly... there wasn’t as many Caribou, I guess after taking a real good look at the numbers compared to what they were before, basically told all of us young people that were doing all the hunting for our communities and families, that we should quit hunting caribou until the numbers built up enough so that they would be – so we could harvest them sustainably for sustenance.\(^\text{275}\)

The submission continues: “Back in the 1970s…under our tradition we still can’t hunt. We are not allowed to yet by our people. Right now the only elder that is basically enforcing that law, that is left alive, is my dad.”\(^\text{276}\)

I note as a verification limitation that I am able to say considerably less about this legal tradition due to the absence of any discussion of it in the anthropological accounts.\(^\text{277}\) Pragmatically however, distinct from the complex intricacies of the seasonal round and the consequent need to decipher it in detail, the moratorium seems relatively straightforward.

Comparable to state imposed command and control regulation, the moratorium appears to be a prohibition that is enforced. I speculate whether it is also an offence provision and akin to a criminal law. If so, what is the penalty? Is the penalty felt by and imposed upon the collective as

\(^{275}\) id at 63-64.

\(^{276}\) id at 64.

\(^{277}\) I note that Dunne Za member Caleb Behn briefly mentioned the existence of the moratorium as still being enforced at his presentation of February 2013. I do not think he was permitted to say more about this. See Behn, supra note 273. Bruce Muir suggested it is still being enforced. Personal Communication, August 2012.
distinct from an individual? The use of the plural “we” in the above extract implies this. For example, in at least some coastal First Nation communities, over-fishing and not respecting the relationship with salmon might result in the Salmon not returning in the same numbers. I note that all Indigenous laws apply to the collective as individual rights are a western and positivist concept. As such similarly here, breach of this prohibition would be felt by the collective, namely all members of the West Moberly First Nation.

3.3 The principle of respect

Above I discussed principles of respect and reciprocity for the natural world, that seem to influence the operation of the traditional seasonal round, namely, decision making pursuant to the traditional seasonal round as part of the content of traditional knowledge, and as a legal regime for regulating the practice or “land use” of hunting and maintaining balance with the natural world. I proceed to discuss the principle of respect as what seemingly, is submitted as a discrete principle of its own right. In relation to the anthropological support for some of the inferences I draw from the initial submission, I note that Ridington addresses principles of respect and reciprocity. In addition, the work of Jenness, which the initial submission relies heavily upon, sustains some of Ridington’s details as relate to reciprocity and in particular, what he terms the mystic bond between human and animals.278

278 See Jenness, supra note 204 (referred to in Chapter 2, Part 2).
Practice: sustainable use of hunted animals

The initial submission refers to several practices as evidencing, and being governed by, the principle of respect. One such practice is the sustainable use of hunted animals. Rather than being explicit, this practice appears to be implied law or what a non Dunne Za person might understand as convention or unwritten law. The initial submission provides, “the animal is used for a variety of purposes. These include spiritual, trade, food, ceremony, clothing, art and other cultural purposes.” Moreover, Catherine Dokkie describes the use of Caribou: “They didn’t leave nothing…we don’t throw away nothing. We use everything except [caribou] lungs.”

It would appear that it is illegal or contrary to Dunne Za legal traditions to kill an animal and not use all of its parts. I infer that it offends Beaver Indian legal traditions such that respectful use is an unwritten law. I speculate that we can deduce this from, amongst other things, the attitude and reaction that Beaver Indians have towards the waste resulting from sports hunting. George Desjarlais discusses sports hunting but only to the extent that the animals being taken has an impact on the West Moberly First Nation’s treaty right. However, Brody’s discussion of sports hunting is enlightening, as is the reaction of Joseph Patsah and other characters. Brody provides:

Almost every Indian hunter tells of beaver, lynx, moose calves, and other animals that have been found dead or dying during the sports hunting season. Many also tell stories about dead horses and even cattle shot, they assume, in an abysmal extreme of ignorance. The abuse of wildlife disgusts and alarms the Indians. It represents a

---

279 The initial submission, supra note 187 at 43.
280 id at 51.
281 Such was also apparent from conversations I had with Mr Bruce Muir in August 2012, as well as one of Brody’s films. See Anne Cubbit, Hugh Brody, Treaty 8 Country [Video recording], [Canada]: Treaty 8 Film Collective; Vancouver: Moving Images Distribution, 1982.
282 The initial submission, supra note 187 at 60.
dangerous failure to respect the animals and the land, a respect that is essential for the Indians’ own continued supply of food; essential that is, for their security.\textsuperscript{283}

The juxtaposition of the particulars of hunting with respect, with the indiscriminate slaughter of sports hunters, sustains this deduction. George Desjarlais provides:

Old people, especially First Nations people, go hunting \textit{they don’t just shoot anything they come across}. They will kill specific animals at different times of the year because they know which animals are fat and healthy. And that is \textit{why they will only kill fat and healthy animals}. Not like the way licensed hunters hunt. Where they go out and \textit{kill anything they come across}. Even if it is a cow moose.\textsuperscript{284}

Finally, and more explicitly stated, the following recitation of Dunne Za values, in which animals I including Caribou, are referred to as being “just like our friends,"\textsuperscript{285} supports the existence of the principle of respect, which manifests in practices such as an unwasteful use of animals. In addition, as alluded to above, notions of friendship with the animal world affirm the relatively egalitarian and non anthropocentric relationship that the Dunne Za have with the natural world.

Like our forefathers, \textit{we still hold traditional values as Mountain Dunne Za peoples.} These include \textit{viewing animals like people}, respect for animals and their habitat, and \textit{an ethic not to waste plants and animals}...the bush, that’s our playground: up to the hills...and those animals, they were \textit{just like our friends}. They would just look at us. \textit{We care for these animals [caribou] not just because we want to eat them.}\textsuperscript{286}

3.4 Legal principles sourced in oral histories

Whereas for other First Nations peoples such as the Haida, who are a totemic people and depict much law upon their totem poles, for the Dunne Za who are not a totemic people, law is \textit{contained} in stories. Dunne Za member and former oil and gas officer for the West Moberly First Nation, Mr

\begin{flushright}
\textsuperscript{283} Brody, supra note 190 at 233. \\
\textsuperscript{284} The initial submission, supra note 187 at 63. \\
\textsuperscript{285} \textit{id} citing, Catherine Dokkie at 65. \\
\textsuperscript{286} \textit{ibid.} Emphases added.
\end{flushright}
Caleb Behn, has hinted at the importance of narrative as a source of law for the Dunne Za. Stated concisely, “the Dunne Za experience their lives as stories.”

At the same time as there is a need to attempt to grapple with deciphering law from the oral histories because they are an integral source of law for the Dunne Za, the dilemma I am presented with is that these are more difficult to access and interpret as a source of Indigenous law, than the text of the initial submission for example, because they are a highly contextualized discourse. The oral histories have a greater need for guidance and verification by an Elder or other person of the Dunne Za who is versed in their legal traditions. Professor Borrows seems to articulate this need concisely when he states, “a full understanding of First Nations law, and their principles for governance, requires familiarity with other stories of the particular culture and the surrounding interpretations given to them by the people.” Their translation is aided by review of detailed anthropological work. However, the inability to access current elders or other members who understand and can explain their meaning is a limitation. By contrast, the initial submission was produced in concert with the then land use manager for the First Nation and its lawyers. Consequently, it is in a form and style that is more intelligible to a non Dunne Za person who is not trained in Dunne Za legal traditions.

Mindful of this limitation, the initial submission extracts segments of several myths that are said to illustrate the significance and role of caribou. In particular, it notes that Pliny Earle Goddard

---

287 See Behn, supra note 273.
288 Ridington, supra note 200 at xiii. See also Robin Ridington and Jillian Ridington in collaboration with Elders of the Dane-Zaa First Nations, Where Happiness Dwells: a history of the Dane-Zaa First Nations, (Vancouver: UBC Press, 2013) at 2 which provides, “to understand Dane Zaa history and culture, one must understand Dane-Zaa storytelling.”
289 id at xiv.
documented Caribou in five stories that impart moral lessons, guide appropriate conduct and serve as spiritual teachings. One such story that the submission extracts in part, is that of Tumaxale, A Culture Hero, which is published in Goddard’s compilation, “Anthropological Papers of the American Museum of Natural History, Volume X, Part IV, The Beaver Indians” under the heading, “Myths and tales.” Owing to its length, I extract a segment of this story that illuminates what I perceive to be, some of its teachings and law. I note that I am neither extracting nor addressing, any possible law illustrated by a role of Caribou from the balance of the story, as the intended meaning from these references is unclear to me.

There were once two brothers who were traveling together. When they came to a large lake they decided to separate, one going along the shore in one direction and one in the other.

One of them, Tumaxale, had not gone far before he came to a trail which had been used by people. He followed this trail between two mountains until it came out again on the large lake. He passed along where sky and water were seen on either side, and walked across on an old beaver dam. He saw a pretty girl sitting nearby, whom he addressed as sister, asking her why she was there. The girl, as soon as she saw someone approach, began to cry. "Why do you cry, sister?" the young man asked. "A large beaver lives here that can only be pacified by giving him a human being. I have been given to him," she replied. "He said he would come to get me this evening when the sun is half way down that big mountain.' Saying that he would watch for the beaver, he left the girl on the top of the mountain where he told her to wait for him. The girl told him that the beaver came out just at the edge of the water where the beaver dam made a bend. The young man sat there watching for the beaver and keeping track of the sun, and said to himself, "My sister said he will come out when the sun reaches that point."

The water began to move. Although the lake was a large one it was all set in motion. The beaver himself looking like a mountain came out at the turn of the dam. When the young man saw the beaver he said to himself that he was too big; but he also remembered how bad he was, and shot him, the arrow striking just behind the ear. He then ran away, Oh how he ran. He came up where the girl was sitting and the rising water came right up toward them. The water receded, and they followed it back until they came to the beaver dam. Because the beaver was so large he cut it up in little pieces and threw them all over the country. "You will be only so large," he said. The pieces were as large as a man's little finger and there became as many beaver as there were pieces which were scattered over the world.

---

291 The initial submission, supra note 187 at 54.
They two started after the people who were living on ahead. "I will sit here and wait for you, sister," he said. "Go to your relatives." As soon as they saw her coming they all started to cry, thinking they would not live. "My brother killed it," she told them. "Where is your brother?" they asked. "He is sitting right there," she said. "And what is your brother's name?" they asked her. "His name is Tumaxale (he goes along the shore)," she told them. They were all glad he had done that, and did not want to let him go away. Each one of them asked him to be a son-in-law.

He stayed there a short time, but concluded he would not remain in one place. He told them he was going out. They warned him there were bad people there. He went up to them and clubbed them all to death, leaving not one of them alive.

He walked along the road until he came to a large place where he slept. There was a narrow place between two hills where it was the custom to set snares. He set a snare there and went to bed. It was very dark and daylight did not return. He kept climbing up the hill to look for the dawn, but there was not a sign of it. The darkness had lasted so long his wood was all gone. Although it was still night he went back where he had set the snare. He found it was the sun that had been caught, but it was so hot he could not go near it. "Let all the animals come here quickly," he said to himself. They all came running there, but could do nothing. The very last, a mouse, came running back all burned. He had gnawed the rope off. The young man ran back along his own road to the place where the sun had been caught and took his snare again.

He went on the way he had been going. Winter came on him again. As he was walking along, he came to a place where someone had drawn a sleigh along. Tumaxale had slept there and hung up a lynx. Some one had eaten some of the lynx in his absence.292

Upon reading a selection of the myths featured in the initial submission, I selected this one to analyse as I find it enigmatic and thus, intriguing. It seems incongruous that the protagonist Tumaxale is, upon my reading at least, benevolent to a seeming stranger who he terms his "sister," and promptly afterwards, murderous. A possible interpretation I have of the law contained within this segment of the story is that Tumaxale’s actions and the consequences he receives, reinforce first, the reciprocity that exists between human and animal beings, as well as the principle of respect. Tumaxale comes to the aid of the girl by shooting the mountain-sized Beaver and preventing her from being given to it. His valour is recognized when he is then invited to become

the son in law of many of the girl’s relatives. However, shortly after this, he proceeds to club them all to death. Not long afterwards, darkness endures in Tumaxale’s world when daylight does not return. Tumaxale soon learns that the sun has been caught. He seeks the help of animals but they can do nothing. In addition, some of the slain lynx he had hung up has been eaten.

I suspect that the maladies that befall Tumaxale, particularly the fact that his ability to summon the help of animals proves futile, are penalties that reinforce the reciprocity and respect that exists between human and animal beings. Animals are aware of human actions, and animals’ behaviour is influenced by, and responds to, their knowledge of these actions. By this rationale, the animals’ inability to help Tumaxale and the fact of some of his lynx having been eaten are punishments that are deserved, and are a direct response to, his lack of respect for the girl’s relatives. The dark imagery of the lack of dawn, the sun having been caught and the return of winter, seems to emphasise Tumaxale’s wrong doing. If this is indeed a correct interpretation, this would indicate how some of the principles contained within the Dunne Za myths or oral histories, overlap with and I speculate, provide the authority for, the law contained within the initial submission.

As I mentioned above, I was drawn to examine these stories owing to the enigma they present. In particular, because, although the initial submission states that Goddard documented Caribou in five stories that impart moral lessons, guide appropriate conduct and serve as spiritual teachings, after several readings, the role of Caribou in demonstrating these themes, remained elusive. Such a

---

293 See at note 262 supra which references Ridington’s discussion of the correlation between human action and the response of the animal world. Namely, the Dunne Za belief that the quality of their interpersonal relations, was reflected in the quality of their relations with animals. Animals were believed to know when people behaved badly toward one another and to withdraw from contact with them.
predicament recalls in my mind the role of characters in drama and narrative who have significance in sub-plots, but whose importance to the primary narrative seems marginal.\textsuperscript{294} It appears we have multiple narratives at play. The primary, of Tumaxale, and secondary perhaps, in which Caribou are\textit{ actors}. What then is the relevance of the sub-plot? While I am unable to decipher the significance of the role of the Caribou, and this would require exploration in concert with members of the Dunne Za trained in these oral histories, what \textit{at least} I can glean from the references in the oral histories, segments of the initial submission and the words of deponents in the affidavit evidence,\textsuperscript{295} is that Caribou seem to have a role in the order and \textit{governance} of the Dunne Za. It is possible they form part of the institutional social fabric. They do not appear to be merely passive objects to be hunted. Rather, they seem to be\textit{ active agents in the world order}. Such detail is not appreciated by a reading of the Court judgments alone.

\textsuperscript{294} Such as Shakespeare’s Rosencrantz and Guildenstern, the sycophantic seeming friends of Hamlet who did “make love to [their] employment” of being actual informants to the King: See Hamlet Act V, Scene 2, line 57. Rosencrantz and Guildenstern play a minor role in the primary narrative and yet others such as Tom Stoppard, have explored and embellished their role on the margins of existence to suggest that they have a greater purpose than what focusing on the principal plot might reveal.

\textsuperscript{295} For example, Dr Aasen for the petitioners, deposed that Caribou were of deep cultural and spiritual significance. She explained,

The importance of caribou to the Mountain Dunne-za is demonstrated by its \textit{role in worldview, myth, and spirituality}. After a review of the literature, I conclude that in addition to entertainment value, caribou myths and stories \textit{taught and reinforced appropriate norms, beliefs and codes of conduct}. Individual members of the Mountain Dunne-za actively sought caribou as a \textit{powerful spirit helper}, whom, if respected in prescribed ways, was believed to aid a hunter throughout his life.

\textit{West Moberly First Nations v. British Columbia (Chief Inspector of Mines)}, 2010 BCSC 359 (Factum of the Petitioners, Affidavit #1 of Wendy Aasen Exhibit “B” at 29).
4. State based decision makers and Indigenous legal traditions

Having identified some key legal traditions of the Dunne Za which were either submitted or alluded to in the initial and court submissions, paying some attention to the extent to which these were submitted as laws, in this chapter I examine the degree to which these legal traditions were recognized, respected and considered in the recent Caribou cases by examining the principal findings and reasoning of the successive decision makers.

West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2011 BCCA 247 (West Moberly) concerned a petition by Chief Willson of the West Moberly First Nation and the West Moberly First Nation (the petitioners) to quash three decisions of government officials that permitted a proponent, First Coal Corporation (FCC), to obtain a bulk sample of coal as well as pursue an advanced exploration program. The first of these three decisions, made 1 September, 2009 by the Chief Inspector of Mines, was to amend an existing Mines Act permit to allow FCC to obtain a 50,000 tonne bulk sample of coal. The second decision, by the Inspector of Mines on 14 September 2009, was to amend FCC’s existing permit to conduct a 173 drill hole, 5 trench advanced exploration program on the same land. Thirdly, the final contested decision was that of the Ministry of Forests and Range on 8 October 2009 to permit FCC to cut and clear up to 41 hectares of land to facilitate the advanced exploration program (the clearing decision).

FCC held existing mineral licences or tenures to explore for coal. Its proposed coal exploration activities were to occur in an area near Chetwynd within the Goodrich properties, approximately 50 kilometres south west of the West Moberly Reserve, and within what the petitioners considered

---

to be a preferred traditional hunting area.\textsuperscript{297} It sought to obtain a bulk sample of coal from this tenure in order to determine the commercial viability of exploiting this resource and whether to apply for subsequent approval to exploit it. Additionally, it sought to test a new technology for the mining of coal known as the “Addcar System.”\textsuperscript{298}

The petitioners, the West Moberly First Nation, sought a Court order to quash the decisions on the basis of inadequate consultation and accommodation of their Treaty 8 hunting rights. They claimed that in issuing the permits the subject of the impugned decisions, the Crown had failed to consult adequately and meaningfully concerning their Treaty 8 right to hunt caribou, and had failed to reasonably accommodate their hunting rights. Specifically, they alleged that the first two decisions were made without proper consideration of their right to hunt caribou in the affected area \textit{as part of their traditional seasonal round}, and without making adequate provision for the protection and restoration of those caribou, described as the Burnt Pine caribou herd (BPCH).\textsuperscript{299}

The petitioners enlivened this cause of action for a breach of the duty to consult following the Province’s failure to implement a rehabilitation plan for the BPCH. Prior to this application for judicial review, the West Moberly First Nation had sought that the Province implement a recovery plan for this herd.\textsuperscript{300} They noted its vulnerable conservation status with the population of which it is a sub-species, being federally listed under the \textit{Species at Risk Act}, 2002 (SARA).\textsuperscript{301} The BPCH forms part of the Southern Mountain \textit{population} of Woodland Caribou, which is a \textit{species} listed as

\begin{enumerate}
\item \textit{West Moberly} at para 21.
\item \textit{id} at para 32.
\item \textit{id} at para 2.
\item \textit{West Moberly First Nations v. British Columbia (Chief Inspector of Mines)}, 2010 BCSC 359 (Factum of the Petitioners, Affidavit # 1 of Roland Willson sworn 19 October 2009) at para 86; See also Garson JA’s account of the consultation and meetings of 5 and 12 August 2009 in which West Moberly First Nation concluded that “a real recovery plan” should be implemented as well as legal protection for the BPCH. In \textit{West Moberly} at para 278.
\item \textit{Species At Risk Act} SC 2002, c 29.
\end{enumerate}
“threatened” under SARA. Census data at the time of the application indicated the BPCH, which traditionally inhabits the land included within FCC’s mineral tenure, had been reduced to 11 members. However, the principal motivation for bringing the proceedings was not species conservation per se, but was part of an attempt to rejuvenate the population so as to permit its hunting, which traditionally, was integral to their way of life and identity as Aboriginal people.

_The significance of the Burnt Pine caribou herd to the West Moberly First Nation_

The evidence of petitioner Chief Willson of the West Moberly First Nation and, in an abridged form, the judgment of Finch CJ, provide insight into the importance of hunting caribou to the way of life of the West Moberly First Nation. The caribou are important as a food source but their significance far exceeds subsistence purposes. The evidence established, first, that the Mountain Dunne-Za historically were hunters who followed game’s seasonal migrations and redistributions based on their knowledge and understanding of animal behaviour. In their seasonal round, the Dunne-Za hunted ungulate species, including moose, deer, elk and caribou, in addition to birds and fish. Moose appeared to be the most important food source, but caribou hunting was important, especially in the spring. The animals were taken in large numbers when available, and the meat was preserved by drying. Dry meat was an important year-round food source for the Mountain Dunne-Za. Further, the Dunne-Za utilized the whole of the Caribou, from which they made clothing, bags, tools and utensils. Thirdly, Caribou utilize specific habitats different from other ungulate species. West Moberly hunters would go to these areas to hunt caribou. Their

---

302 West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359 (Factum of the Petitioners, Written argument of the Petitioners to the Supreme Court of British Columbia) at para 86.
303 West Moberly at para 22.
304 ibid. See also Anne Cubbit, Hugh Brody, Treaty 8 Country [Video recording], [Canada]: Treaty 8 Film Collective; Vancouver: Moving Images Distribution, 1982.
305 id at para 23 and Willson, supra, note 300 at para 9.
traditional ecological knowledge includes knowledge of the use of the land by animals including Caribou. This knowledge is an integral component to their traditional mode of life.\textsuperscript{306} Finally, the evidence provided that:

The Mountain Dunne-Za valued the existence of all species, including Caribou, and treated them and their habitat with respect. They knew where the caribou’s calving grounds were, and where the winter and summer feeding grounds were located. The people felt and feel a deep connection to the land and all its resources, a connection they describe as spiritual. They regarded the depopulation of the species they hunt as a serious threat to their culture, their identity and their way of life.\textsuperscript{307}

Consistent with their concern and taking what action they could,\textsuperscript{308} the West Moberly First Nation passed a law in the 1970’s, banning their peoples’ hunting of caribou. This is the moratorium to which I have referred in Chapter 2.

As to the existence of the duty to consult and the adequacy of its fulfillment, all parties agreed the Crown was required to consult West Moberly on the basis of its treaty right to hunt. However, the parties differed as to the nature and ambit of that right. Similarly, the parties advanced opposing submissions as to whether the Crown had adequately consulted and accommodated West Moberly's concerns.

I proceed to examine the findings and rationale in relation to the principal issues in this matter and in doing so, I explore the extent to which each decision maker, commencing with the statutory decision maker of the relevant provincial ministry, and culminating with the judges of the Court of Appeal of British Columbia, engaged with the Indigenous legal traditions contained in varying degrees within the evidence before them. In doing so, I seek to decipher the underlying or

\textsuperscript{306} Willson, supra note 300 at para 8.  
\textsuperscript{307} West Moberly at para 25.  
\textsuperscript{308} id at para 118.
governing rationale of the decision. Is the decision maker recognising Indigenous law? Is s/he balancing economic and other interests? To what extent does Indigenous law substantively influence the decision maker’s reasoning? Additionally, my intent is to evaluate how the decision maker sees these legal traditions when they are brought before it. Are they being recognized as sources of legitimate legal authority? To what extent are these decision makers incorporating notions of Indigenous law into their decision making? To what degree are they recognizing and confirming or affirming a role for it in the decision making process?

What does it mean to appropriately engage with or take into account, Indigenous law? What is the standard I am using to evaluate the successive decision making? I am not sure it is appropriate to have a single inflexible standard. However some guidelines are: is the decision maker recognizing Indigenous legal traditions as legitimate law that is of equivalent weight and status as Canadian law? Is it equally as influential? Or in the decision making calculus, is it relegated to the status of an interest? Secondly, does the decision maker recognize that Indigenous law emanates from a different source than State based law? Thirdly, does the decision maker examine the substance of Indigenous law, or is it enough that s/he confirms processes that provide space for Indigenous law? In considering these guidelines it is appropriate to consider what is said as well as what is unsaid. Omissions are revealing.

4.1 “First instance:” administrative decision makers and the statutory decision maker

In the effort to decipher the extent to which the statutory decision makers were attentive to the Indigenous legal traditions contained within the initial submission of the West Moberly First Nation, I must acknowledge an evaluative limitation. I lack the reports of the decision makers,
namely the Chief inspector of Mines and Inspector of Mines, and any internal ministerial advice that informed their decisions. As such, I am compelled to rely upon the extracts of these that the respective judges’ analyses contain in the reported cases. In relation to what the administrative decision makers had before them to assess, I note that the West Moberly First Nation provided the document *I Want to Eat Caribou Before I Die*, the initial submission, to the Ministry of Energy, Mines and Petroleum Resources (MEMPR) in the pre-trial consultation phase.\(^{309}\) The content of the submissions contained within it does not differ materially from the submissions before the Supreme Court of British Columbia. As such, I am not going to elaborate upon the submissions relating to the issues of Canadian law contained within the initial submission in any detail.

*The Ministry of Environment*

In relation to the role of the Ministry of Environment (MOE), they were not the statutory decision maker, however, their advice informed the statutory decision makers. Dr Dale Seip, wildlife ecologist with the Crown’s Northern Interior Forest Region, commented on 25 September 2008, on FCC’s planned operations as such: “the proposed activities occur directly on core winter range of this threatened Caribou herd and will result in the *destruction of critical caribou habitat*.”\(^{310}\) Similarly, Dr Seip noted that “activity in the sampling area may deter Caribou movement along the ridge and *preclude their use of the large block of core habitat* on the northern edge of the ridge.”\(^{311}\)

---

\(^{309}\) See the petitioners’ submissions to the Supreme Court of British Columbia, *supra* note 302 at para 24, provides that the West Moberly First Nation forwarded to the Crown a 98 page document being, “the initial extensively researched and written submission of the West Moberly people concerning First Coal Corporation’s Goodrich property.”


\(^{311}\) *ibid.*
Pierre Johnstone, ecosystem biologist with the MOE wrote to the Inspector of Mines, Victor Koyanagi raising specific concerns about the FCC project on 16 December 2008. As a further example of internal advice provided to the statutory decision maker, Mr Johnstone articulated similar concerns with habitat destruction.312

Subsequent to this, Dale Seip commented on FCC’s Caribou Mitigation and Monitoring Plan (CMMP) on 9 March 2009 as such:

The mitigation plan does an excellent job of attempting to reduce the environmental impacts of the bulk sampling and exploration program on Caribou. However, the program will still destroy or compromise substantial amounts of core winter and summer habitat for the BPCH…If the Government intends to conserve and recover the BPCH, habitat conditions need to be maintained or improved. Allowing additional habitat destruction is incompatible with efforts to recover the populations.313

This concern with habitat destruction falls within the ambit of a species conservation concern, which derives from an environmental science knowledge base. Moreover, it constitutes an anthropocentric concern with the loss of species that betrays no concern with addressing impact on Indigenous law as contained within the initial submission, such as an impact on the West Moberly First Nation’s relationship with Caribou. However, it is unclear whether the MOE had knowledge of the content of the initial submission or if in this capacity as advisor to the MEMPR regarding the impact of the proposed works, it was even required to consider it. The MOE was not itself a statutory decision maker. Falling within the environment portfolio of the provincial ministries, as ministerial employees, they likely had no duty to “learn” or similar obligation to take into account

312 id at para 23.
313 id at para 57. Emphasis added.
Indigenous values in their assessments of the impact of the proposed works. As such, they likely assessed the proposed works in accordance with their policy mandate.

In summary, these Ministerial employees reached an identical conclusion to the petitioners to reject the bulk sampling and exploration the subject of the permit amendments. However, they did so pursuant to a different knowledge base to the petitioners, who rely primarily upon Indigenous values.\footnote{Which they bolstered with species conservation arguments.}

*The Ministry of Energy, Mines and Petroleum Resources: the statutory decision maker*

The reasoning of the MEMPR is revealed in their document, “Considerations to Date,” (MEMPR Considerations) which constitutes information the ministry was considering with respect to the FCC operation as at 20 July 2009. In defiance of the advice of the Ministries of Environment and of Forests and Range (MOFR), which MEMPR seems to have ignored, the MEMPR Considerations notes that maintaining or increasing the population of the BPCH is not currently planned.\footnote{West Moberly at para 27.} The Ministry took the position that as the BPCH constitutes a very small portion of the total population of Caribou herds in the territory, the opportunity for the petitioners to hunt Caribou in their traditional territory will not be significantly reduced.\footnote{West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359 at para 29.} I note that in my experience at least, contravention of the advice of a crown ally is a common occurrence.\footnote{For example, in my brief experience the NSW Departments of Planning, and of Environment, Climate Change and Water respectively, frequently held varying positions with respect to Native vegetation policy amendments. I observed such differences while participating in negotiations that sought to reduce the incidence of “dual consents” in development assessment, in response to a 2008 Cabinet Directive.} The MEMPR has a different policy mandate to the MOE. It would not be unusual for them to disagree in their position with respect to various applications, owing to their differing mandates and...
priorities. I question the influence of policy in such decisions. Similarly, were there any overriding economic imperatives? This is a point which I explore in Chapter 5.

Secondly, as to the interpretation of the treaty right, the MEMPR Considerations quotes the take up provision without referring to the SCC’s comments concerning the impact of the oral promises made by Crown representatives at the treaty’s inception.\footnote{West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359 at para 28. By the “take up” provision, I am referring to the clause within several of the historical treaties that provides: “And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.]” See Canada, Treaty No. 8 made June 21, 1899 and Adhesions, Reports (Ottawa: Queen's Printer, 1966), online: http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853#chp4. Cited in West Moberly at para 53.} Given as I expand upon below, that treaties are a fusion of Canadian and Indigenous law, does such flawed interpretation, ignorant of the impact of the oral promises, also constitute a failure to respect the Indigenous legal traditions contained within the treaty?

Procedurally, I note that MEMPR reached its decision to a large extent based on timing. As Garson JA observes, after the final consultation meeting of 12 August, 2009:

\begin{quote}
It was evident that by this time a decision had to be made. Dr Dale Seip had described the CMMP as doing “an excellent job of attempting to reduce the environmental impacts of the bulk sample and exploration program on Caribou…But he concluded that …if the government intended to conserve and rehabilitate this small caribou herd” granting permits was “incompatible with efforts to recover the population.”\footnote{West Moberly at para 280. Emphasis added.} The Statutory Decision Makers were thus faced with two incompatible positions. After years of consultation in which the competing interests were fully explored, “somebody [had] to bring consultation to an end and weigh up the respective interests: Beckman at [84]. The Statutory Decision Makers did just that…They made their decisions to approve the permits on the basis of the generality
of the treaty right in question, limited impact of the proposed permits on that right
and incorporation of accommodation and mitigation measures into the project.\textsuperscript{320}

As to the extent to which the MEMPR was attentive to the Indigenous legal traditions contained
within the initial submission, the weighing of “respective interests” and the terminology of
“interests” in particular, which ignores the fact of the decision making calculus containing
constitutionally protected treaty rights, and not merely interests equivalent to those of the
proponent’s mineral tenure, suggests the Ministry’s approach was very much a \textit{balancing exercise}
that appears to have ignored the petitioners’ Indigenous legal traditions.

Narrating the MEMPR’s approach, Finch CJ held that the decision reached by MEMPR based on
the CMMP and the position put forward by the petitioners were “as two ships passing in the night.
There was \textit{no real engagement} of the petitioners’ position. It was not a position that could be
dismissed out of hand, supported as it was by the expert opinions of the government’s own
biologists, Dr Seip and Pierre Johnstone.”\textsuperscript{321} Further, “\textit{MEMPR never considered the possibility
that the petitioners’ position might have to be preferred.} It based its concept of consultation on the
premise that the exploration projects should proceed and that some sort of mitigation plan would
suffice.”\textsuperscript{322} Commencing consultation on that basis did not recognize the full range of possible
outcomes, and amounted to nothing more than an opportunity for the First Nations “to blow off
steam.”\textsuperscript{323}

The MEMPR’s lack of any genuine engagement with the substance of \textit{the petitioners’ position},
which was infused with impact upon the legal traditions of the Dunne Za, chiefly, on the treaty

\textsuperscript{320} \textit{West Moberly} at para 280. Emphasis added.
\textsuperscript{321} \textit{West Moberly} at para 147 Emphasis added.
\textsuperscript{322} \textit{id} at para 149. Emphasis added.
\textsuperscript{323} \textit{ibid.}
protected hunting right and the seasonal round, affirms the statutory decision maker was neither sensitive nor attentive to these legal traditions and the petitioners’ genuine concerns. It did not acknowledge the seasonal round and hunting right as having the status and weight of law. Rather, this was an interest that was capable of being defeated.

In response to the West Moberly First Nation’s request that the Crown engage in land use planning, the MEMPR Considerations states this request is met by the Economic Benefits Agreement (EBA) to which West Moberly First Nation is a party and for which it had received extensive funding.\textsuperscript{324} MEMPR’s understanding was that the EBA provided a mechanism for addressing West Moberly First Nation’s concerns regarding cumulative impacts and efforts to recover caribou populations. The government’s intention that certain concerns such as cumulative impacts can legally be addressed and absorbed through an economic benefits agreement, while being a slight diversion from my principal inquiry, is a purposeful inquiry that is worthy of comment. The MEMPR Considerations notes, “through promotion, facilitation and participation in planning processes flowing from the EBA as well as Caribou task force, MEMPR will work towards addressing the issues of cumulative impacts.”\textsuperscript{325}

The EBA in question, namely the \textit{Amended Economic Benefits Agreement, 2009}, dated 17 December 2009, between the Province and Doig River, Prophet River and West Moberly First Nations, provides \textit{inter alia}, for two forms of payment to the First Nations by the Province: an equity payment following the signing of at least four completed agreements,\textsuperscript{326} and an annual

\textsuperscript{324} \textit{West Moberly} at para 275.
\textsuperscript{325} \textit{West Moberly} at para 276. Emphasis added.
\textsuperscript{326} See at 3.2.2 of the EBA.
payment calculated in accordance with a detailed formula. This regulatory approach, involving the exchanging of biodiversity for money, resembles a primitive form of biodiversity trading. However, unlike other established biodiversity trading schemes it is not supported by a consistent methodology for calculating transactions. For example, what precise value is attributed to the loss of the BPCH from this lump sum payment within the EBA? And how are the Caribou to be “offset” elsewhere?

In purporting to use this regulatory approach as a means of softening the loss of caribou, the Province is effectively sanctioning the loss of biodiversity by permitting impediments to the exercise of treaty rights. Effectively we have a treaty within a treaty. By contrast, governments enter into similar agreements with proponents for development in order to resolve development assessment disputes, such as where a development necessitates impact upon threatened species. In that case, biodiversity credits, attained by improving and maintaining biodiversity values elsewhere, are exchanged for the ability to impact threatened species on the development site.

But is the current example an appropriate regulatory response for addressing impediments to constitutionally protected treaty rights? How can money “offset” the irreplaceable value of spiritual significance and a reduced capacity to exercise a way of life? As a legal question, I question the fungibility of constitutionally protected treaty rights. Moreover, does MEMPR’s intention of using the EBA as a means of “negotiating out” concerns, in the sense of removing

---

327 See at 3.5.1 of the EBA.
328 I have analogized that there is a “treaty within a treaty,” as the Province of British Columbia has entered into an agreement (the EBA) that operates in addition to Treaty 8, which is an agreement binding the Federal Government and members of Treaty 8. Viewed in this way and from the point of view of the West Moberly First Nation, the EBA constitutes an agreement within an existing agreement.
329 I am referring to a biodiversity trading scheme of another jurisdiction, namely the BioBanking Scheme currently operating in NSW pursuant to Part 7A of the Threatened Species Conservation Act (1995). Other governments operate comparable biodiversity trading schemes.
them from discussion, evidence a further failure to respect the Indigenous legal traditions of the Dunne Za, including those contained within the treaty right?

I raise a legitimate inquiry, the general tenor of which was picked up on in the more recent decision of *Louis v. British Columbia (Minister of Energy, Mines, and Petroleum Resources)* 2013 BCCA 412. In *Louis*, the impugned decision in question was the grant of a permit amendment that permitted the construction of a mill and expansion infrastructure. This permit formed one of many permits issued by the MEMPR and MOFR in association with the expansion of an existing molybdenum mine in north central British Columbia, approximately 10 km removed from the main community of the Stellat’en First Nation.\(^{330}\) The Court of Appeal affirmed unanimously the trial judge’s decision that MEMPR’s consultation had been adequate.\(^{331}\) From the perspective of the Stellat’en First Nation, meaningful consultation had failed to occur owing to fundamental differences between the Stellat’en and the Crown as to the scope of consultation required to adhere with the Crown’s duty.\(^{332}\) In its final ground of appeal, the Stellat’en sought a ruling that the Crown’s offer of an Economic Community Development Agreement (ECDA) did not meet the

---

\(^{330}\) *Louis* at para 6. See also *Louis* at para 17 for full list of the permit amendments sought to facilitate the expansion.

\(^{331}\) *id* at para 122 and 126.

\(^{332}\) The judicial review application in *Louis* related to a permit that approved construction of a mill and the expansion of infrastructure: *Louis* at para 17 and 56. Throughout the consultation in relation to various permit applications associated with the expansion of the mine, the Stellat’en First Nation submitted that meaningful consultation had failed to occur in relation to the entirety of the expansion project. It maintained that “only consultation on the entire mine expansion project would meet the Crown’s consultation duties.” See *Louis* at para 25 and 27. It objected to the splitting of the permitting process and submitted it was “unreasonable for the Crown to divide up its consultation into numerous specific sub permits” when it was never consulted upon whether the mine expansion as a whole should be allowed: *Louis* at para 59 and 32. Further, in a legal setting preceding the SCC’s decision in *Rio Tinto*, it objected to a lack of previous consultation on the existing mine: *Louis* at para 42.

Owing to the Crown and the Stella’ten First Nation’s fundamental disagreement as to the scope of consultation required, “consultation efforts faltered at a nascent stage.” The Crown was not prepared to address past disturbance caused by the existing mine. While for the Stella’ten, consultation was “a non starter” unless the consultation included the past disturbance. See *Louis* at para 65.
honour of the Crown as an appropriate form of accommodation. In this way, *Louis* evidences an extension of my earlier concern, which is expressed but taken further, such that the notion of an EBA or similar being *able* to be appropriate accommodation is not only inappropriate, but fails to meet the honour of the Crown.

Interestingly, Groberman J in *Louis*, avoided having to tackle the “appropriateness question,” by simply accepting without analyzing, the MEMPR’s interpretation of the ECDA as existing as a separate effort, additional to and beyond, formal accommodation measures. Groberman J agreed with the characterization of the ECDA as separate from consultation and accommodation, and therefore, immune from scrutiny. Instead of forming part of the accommodation initiatives, he characterized it as falling within the ambit of “other discussions,” permitted to occur between the Crown and a First Nation, and comparable to ongoing treaty negotiations, which *Haida* contemplates as occurring simultaneous to consultation efforts. Arguably this is a convenient interpretation that contrasts the MEMPR’s position in *West Moberly*, where an EBA to address concerns such as cumulative impacts and efforts to recover Caribou populations, was put forward in lieu of land use planning, as being an appropriate component of the accommodation package.

What has brought about this change of position in the MEMPR? Is this indicative of an internal ministerial policy change in relation to the *form* of accommodation measures? If so, it illustrates the influence that government policy can have in the interpretation of constitutional provisions, in

---

333 *Louis* at para 73 and 119.
334 *id* at para 119.
335 *id* at para 120.
336 *ibid.*
the implementation of the duty to consult, and in the development of law governing consultation between the Crown and First Nations governments.337

In conclusion, extracts from the judgments at least, indicate that, to the extent to which the petitioners’ legal traditions had been communicated to these administrative decision makers, the statutory decision maker and the ministry upon whose advice it relied, were not attentive to this Indigenous law. It did not have a role in their decision making processes and provision of expert advice.

4.2 At trial: The Supreme Court of British Columbia

In relation to what the Supreme Court of British Columbia was tasked with assessing, the petitioners’ submissions before the Supreme Court of British Columbia did not differ materially from the submissions contained in Part Three of the Initial Submission, or from those before the Court of Appeal.338 I document the parties’ respective submissions in detail in Part 3.3 below.

At first instance, Williamson J of the Supreme Court of British Columbia held that the provincial Crown did not meaningfully consult with West Moberly First Nation, and that the accommodation put in place was inadequate in the circumstances. In addition to this declaration, he stayed the effect of issuing the amendment to the Advanced Exploration Program, and suspended the effect

337 I note that my original fieldwork proposal aimed to make recommendations to policy makers implementing the duty to consult. While I might not here make such recommendations, one can arguably see the influence of Government policy in the duty’s implementation by the Crown.

of the clearing decision for ninety days. Further, Williamson J ordered that within this ninety day period the Province in consultation with the petitioners was to “proceed expeditiously to put in place a reasonable, active plan for the protection and augmentation of the Burnt Pine caribou herd, taking into account the views of the petitioners, as well as the reports of” the Province’s wildlife ecologists and biologists (the augmentation order).\textsuperscript{339} Williamson J adopted West Moberly First Nation’s understanding of the meaningful right to hunt as both location and species specific. He concluded that the right to hunt had to be “meaningful,” and affirmed the \textit{Mikisew} finding that “a meaningful right to hunt means a right to hunt in “its” (here West Moberly’s) traditional territories.\textsuperscript{340}

With respect to what Williamson J’s reasoning reveals about the extent to which Dunne Za law contained within the initial submission and which was before him in evidence, influenced his decision making: Williamson J acknowledged that the affidavit evidence “discloses that West Moberly’s harvesting practice included a traditional seasonal round, which meant that hunters travelled to particular preferred areas within the treaty territory during specific times of the year, including the area impacted by the First Coal mining operation.”\textsuperscript{341} Moreover, he held “the Court is required to take into account West Moberly’s treaty protected right to hunt, including the traditional seasonal round, and the impact of these decisions upon that right. Here, I conclude that the treaty protected right is the right is to hunt caribou in the traditional seasonal round in the territory effected by the First Coal Operation.”\textsuperscript{342} As such, Williamson J specifically

\textsuperscript{339} Order 3 of the decision of the Supreme Court of British Columbia. See note 308 \textit{supra} at para 83. Cited in \textit{West Moberly} at para 3.


\textsuperscript{341} \textit{id} at para 16.

\textsuperscript{342} \textit{id} at para 63.
acknowledged the existence of the traditional seasonal round. In this way, he explicitly acknowledged the Indigenous law informing the content of the treaty right.

In addition, Williamson J found in favour of the West Moberly First Nation and arguably took into account their legal traditions and value of hunting Caribou, to the extent that he actually made an order to augment the Caribou herd. This order was contentious for several reasons, including that the petitioners did not seek it. In a climate in which environmental advocacy groups were seeking the Federal Environment Minister to recommend to the Governor in Council that it make an emergency order for the protection of the woodland caribou species,343 to have a trial court commanding efforts to recover a herd, a sub-species whose protection is not caught within the ambit of the SARA, which applies to the subject Treaty 8 land, raises the issue of the consistency of this court order with the SARA protections, as well as with the requirements SARA imposes on the Federal, not provincial, Environment Minister. These issues were not raised in the Court of Appeal proceedings, and even if they were, they would have been moot given the augmentation order was abandoned.344

343 See Adam v Canada (Environment) 2011 FC 962.
344 Nonetheless, it is interesting to consider these given that the Court of Appeal did not appear to rule definitively upon the augmentation order’s validity. The majority removed this order, reasoning as follows. Emphases are added:

[163] Having said that, it is not in my respectful view necessary to reach a final conclusion on whether the judge erred in declaring a specific form of accommodation. The Judicial Review Procedure Act would appear to grant a sufficiently broad discretion to make such an order but this, and other courts, have shown a reluctance to do so, so as not to impair further consultation.

[164] For the reasons expressed above, I have concluded that the judge was correct in holding that the consultation process was not meaningful, although for somewhat more expansive reasons than he gave on that issue. For that reason, it seems to me the proper remedy is to remit the matter for further consultation between the parties, having regard for what the scope of the consultation ought properly to include.

[165] I make no further comment on the ambit of a judge’s discretion to give specific directions as provided for in ss. 5 and 6 of the Judicial Review Procedure Act. However, it is preferable in this case that the specific direction be set aside so that the parties may resume consultation as indicated, and unfettered.
As to the remaining Indigenous legal traditions identified above, namely, the principle of respect and its accompanying practices, as well as the moratorium, the judgment made no mention of the moratorium or of the principle of respect.

Williamson J comments twice as to the primary concern of the West Moberly First Nation. First, he concludes, “the diminished state of the herd is at the heart of the West Moberly concerns.” Similarly, he notes that “the prime concern of the West Moberly is the real potential for the extirpation of the Burnt Pine caribou herd.” From such findings it might appear that he was not sufficiently mindful of the other Indigenous law that informed the petitioner’s claim and as contained within the initial submission, notably, the principle of respect and its accompanying practices. However, I think such inference would be difficult to substantiate. Moreover, in the task of evaluating such an inference, it would be necessary to consider how well this Indigenous law was presented to the Supreme Court as Indigenous law that was capable of being upheld. I address this point in Chapter 6.

Nevertheless, the inclusion of cultural reasons within Williamson J’s ultimate finding, namely, his satisfaction that “the Crown recognized that it had a duty to consult with and accommodate reasonably, the concerns of the West Moberly,” and lack of satisfaction that “in the circumstances the Crown consulted meaningfully, nor that the Crown reasonably accommodated

So, although Finch CJ noted that the JRP Act appears to grant a sufficiently broad discretion to make such an order, he overtly declared that he did not “reach a final conclusion on whether the judge erred in declaring a specific form of accommodation.” Similarly, his disinclination to make “further comment on the ambit of the Judge’s discretion to give such directions as provided for in ss 5 and 6 of the JRP Act,” sustains the view that he did not rule definitively on the validity of the augmentation order.

346 id at para 51. Emphasis added.
347 id at para 75.
West Moberly’s concerns about their traditional seasonal round of hunting caribou for food, for cultural reasons, and for the manufacture of practical items,\textsuperscript{348} suggests that he acknowledged some of the cultural reasons contained within the initial submission and submissions to the Supreme Court of British Columbia. Cultural reasons could be sufficiently expansive to encompass the West Moberly’s relationship with the Caribou herd.

In conclusion, to the extent to which they permeated the legal submissions, it seems that Williamson J’s findings were quite sensitive to the petitioners’ Indigenous legal traditions.

\textbf{4.3 The Court of Appeal of British Columbia}

At the Court of Appeal, the clearing decision was not an issue.\textsuperscript{349} The appeal proceedings concerned only the first two decisions of the respective mining inspectors. The court was not unanimous. Madam Justice Garson provided a dissenting opinion. The majority of the Court of Appeal dismissed the Province’s appeal, agreeing with Williamson J that the Crown’s consultation had not been meaningful, and therefore, not reasonable. However, it set aside the accommodation ordered by Williamson J to permit further consultation. In these appeal proceedings there was no new evidence and the matter proceeded by way of the existing affidavit evidence.

\textsuperscript{348} \textit{ibid}. Emphasis added.
\textsuperscript{349} \textit{West Moberly} at para 5.
4.3.1 Submissions of the appellants: the Province of British Columbia and First Coal Corporation

The Province acknowledged its duty to consult which it said was fulfilled. It argued Williamson J erred in holding that the Crown’s consultation and accommodation had not been meaningful and was unreasonable.

The interpretation issue

Specifically, the Crown argued Williamson J erred in interpreting West Moberly First Nation’s Treaty 8 hunting right as a “species specific” right, in holding that West Moberly First Nation’s interests could only be accommodated in one specific way, and in evaluating the Crown’s consultation process from that perspective. It took issue with the precision with respect to species and location, with which the right was characterized, namely, as a right to hunt caribou within the traditional seasonal round in the territory affected by the First Coal operation. With respect to species, it maintained that the judge erred in holding the petitioners had a specific treaty right to hunt and harvest the BPCH, that such a narrow approach would yield the “balkanization” of treaty rights, and that the hunting right is not so confined. Rather, it characterized the hunting right as a right to hunt anywhere in the petitioners’ traditional Treaty 8 territories, and for such species as may be available. Further, with respect to its geographical scope, it interpreted the right as a right to hunt throughout all of the Treaty 8 Territory. In addition, it submitted the hunting right is subject to the Crown’s right to take up such tracts of land as may be required for, inter alia, mining. Accordingly, the hunting right includes other land uses as provided for in the Treaty.

350 id at para 6.
351 id at para 7.
352 id at para 6 and 59.
353 id at para 56.
354 ibid.
355 id at para 57.
The delegation issue

Further, the Province alleged Williamson J erred in holding the departmental officials to an unreasonable standard as to the scope of their delegated authority, as they were not authorized to address all Aboriginal issues and concerns (the delegation issue).356

The scope of the duty to consult

FCC supported the Province’s appeal. In addition to the Province’s submissions, it took issue with the scope of the duty to consult, and in particular, the cumulative effects or the “Rio Tinto issue.” FCC argued that Williamson J erred in holding that the scope of the Crown’s duty to consult included consideration of the cumulative effect of “‘past wrongs’ and potential future developments,” rather than focusing on the potential impact of the challenged permits.357 It maintained the scope of the duty to consult was limited to the impact of the amended sampling and exploration permits that were challenged on this judicial review.358

To substantiate its position FCC relied on its understanding of the SCC’s decision in Rio Tinto Alcan v Carrier Sekani Tribal Council 2010 SCC 43.359 FCC proclaimed that Rio Tinto established first, that the Crown’s duty to consult is confined to adverse impacts flowing from the specific Crown proposal at issue, not to larger adverse impacts of the project of which the subject proposal is a part. And secondly, that the subject of the consultation is the impact on the claimed rights of the current decision under consideration. Thirdly, FCC understood Rio Tinto to provide that prior and continuing breaches trigger a duty to consult only if the current decision could cause a novel adverse impact on a present claim or existing right.

356 id at para 6.
357 id at para 8.
358 id at para 64.
359 id at para 65.
The accommodation issue

FCC also submitted Williamson J erred in his decision about what would constitute reasonable accommodation in the circumstances of this case. Specifically, it argued that Williamson J erred in law by rejecting FCC’s Caribou Mitigation and monitoring plan as a reasonable form of accommodation\(^{360}\) and by holding the Crown in breach of its duty to accommodate by failing to put in place “an active plan for the protection and augmentation of the BPCH.”\(^{361}\) FCC contended the potential impacts of the sampling and exploration projects were limited and the mitigation proposed was reasonable. MEMPR’s decision to grant the permits was reasonable and the judge should not have substituted his view of the matter for that of the decision maker.\(^{362}\)

4.3.2 Submissions of the Attorney General of Alberta

Alberta also supported the Province’s appeal. It also indicted Williamson J’s narrow characterisation of the Treaty right to hunt, arguing that Williamson J misinterpreted this as species specific, and erred in deciding a public policy question, namely, restoration of caribou, which is a matter within the authority of other branches of government.\(^{363}\) The Attorney General further submitted the focus should be on the reasonableness of the consultation process, rather than upon its outcome.\(^{364}\)

\(^{360}\) *id* at para 8.

\(^{361}\) *id* at paras 155 to 156.

\(^{362}\) *id* at para 67.

\(^{363}\) *id* at para 10.

\(^{364}\) *id* at para 71.
4.3.3 Submissions of the Petitioners / respondents on appeal

The petitioners responded that Williamson J correctly determined both the nature and scope of the petitioners’ Treaty 8 right to hunt and the seriousness of the impact that the mining exploration would have on that right. Further, they argued that he correctly held that the consultation process was unreasonable and that the proposed accommodation did not honorably balance the rights and interests at stake.\(^{365}\)

The petitioners perceived two over-arching issues. The first is the nature and scope of the Treaty 8 hunting right guaranteed to the First Nations. The second is the reasonableness of the relief ordered by the chambers judge.\(^{366}\) Regarding the first issue, they submitted the statutory decision maker was wrong, that the petitioner’s right to harvest caribou and other game is rooted in the traditional seasonal round of the Mountain Dunne-Za, and to ignore this was to misapprehend the nature and scope of the duty to consult. They maintained that correctness is the standard of review for assessing the nature and scope of the duty to consult, that the statutory decision maker got this wrong and the chambers judge got it right. Further, they submitted that the Chambers Judge had proper regard for the text of Treaty 8 and for the Crown’s oral promises to the First Nations people.

In relation to the adequacy of consultation, the petitioners argued the appropriate standard of review for assessing the process actually engaged in by the Crown is reasonableness, and that the consultation process engaged in by the MEMPR and the mitigation and accommodation measures it adopted from the CMMP, were unreasonable.\(^{367}\)

\(^{365}\) id at para 11.
\(^{366}\) id at para 76.
\(^{367}\) id at para 78.
The petitioners relied on the opinions of experts in the Ministries of Forests and Range and of Environment. Both said the proposed exploration activity, even with the mitigation proposed in the CMMP, would yield unacceptable adverse impacts to the caribou. It would destroy core winter habitat for the caribou, which is incompatible with recovery of the BPCH.  

As to the cumulative impacts or “Rio Tinto issue,” they maintained the preservation of a resource is necessary for the continuing treaty rights to exploit that resource, that it is appropriate to consider cumulative impacts and that this case is distinguishable from Rio Tinto. Further, they contended the MEMPR’s decision to issue the amended permits failed to consider the petitioners’ right to hunt caribou according to the traditional seasonal round. British Columbia and MEMPR mistakenly characterized the petitioners’ existing treaty right as an asserted but unproven and potential Aboriginal right. The treaty right existed and included the right to its meaningful exercise. It was an error of law for MEMPR to so mischaracterize the treaty right, and the consultation and accommodation were therefore unreasonable.

As to the content of the duty to consult and accommodate, the petitioners argued that the chambers judge adequately assessed the seriousness of the potential adverse effects of MEMPR’s decisions on the affected treaty right. The MEMPR did not. The seriousness of the impact must take into account its effects on the First Nations peoples. One cannot assess those effects without considering the history of the relationship between the Crown and the First Nations. The historic decline of the caribou is a relevant concern because the impact of the proposed exploration will be

368 ibid.
369 id at para 79.
370 id at para 80.
371 id at para 81.
372 id at para 83.
felt on the herd in its depleted condition. The new adverse impacts distinguished the case from *Rio Tinto*.

As a result of these submissions, the Court of Appeal faced the task of resolving six issues. In relation to shedding some light on the extent to which the respective judges engaged with and took into account the petitioners’ legal traditions in their decision making, the interpretation issue is most illuminating. Nevertheless, I also examine the reasoning governing the findings in relation to the remaining principal issues namely, the scope of consultation and its adequacy.373

4.3.4 The content of consultation issue: what was the scope of the Duty to Consult?

The appellants submitted the trial judge erred in considering past wrongs or the cumulative effect of past events that led to the depleted population of the BPCH as well as future events, namely the impact of a full mining operation, rather than simply the exploration programs authorized by the amended permits. This submission was twofold. Dealing first with the “past wrongs” limb, FCC maintained consultation should have been limited, as it was my MEMPR, to the immediate adverse impacts of the two amended permits and whatever steps were necessary to address and accommodate those impacts.374 Moreover, in embarking upon a consideration of the historical decline of the BPCH, the trial judge purported to redress “past wrongs.”375 The effect of these considerations on the Chambers Judge’s decision is evident in his holding that the Crown failed to

---

373 I note that the Court also considered the further administrative law issue of the degree of oversight over or extent of intrusion a Court should have into the role of statutory decision makers and the ambit of decision makers’ delegated authority to decide Aboriginal legal issues (the delegation issue). This issue is less relevant for present purposes. It suffices to note that the Court found, at para 107 of *West Moberly*, that the Crown decision makers were not prevented by the scope of their delegated authority, “from consulting whatever resources were required in order to make a properly informed decision,” including Treaty 8, and they did not properly do so.
374 *West Moberly* at para 110.
375 *id* at para 111.
put in place a plan for the protection and rehabilitation of the BPCH.\textsuperscript{376} The focus on and attempts to remedy events in the past is contrary to \textit{Rio Tinto}.\textsuperscript{377} The order to rehabilitate or augment the BPCH is a remedy for prior events which have no causal connection to any adverse impacts that the amended permits might yield.\textsuperscript{378}

Regarding the requirement for a causal relationship between the government’s decision and the risk of an adverse impact, Finch CJ for the majority held \textit{Rio Tinto} was distinguishable on its facts.\textsuperscript{379} Whereas in \textit{Rio Tinto} there was a finding that the sale of excess power pursuant to the 2007 energy purchase agreement would have no adverse effect on the Nechako River and its fishery,\textsuperscript{380} in this case there was a link between the adverse impacts under review and past wrongs. That is, Finch CJ distinguished \textit{Rio Tinto} based on the conduct contemplated in the permits at issue having an adverse impact on the defined treaty rights. He held:

\begin{quote}
I do not understand \textit{Rio Tinto} to be authority for saying that when the “current decision under consideration” will have an adverse impact on a First Nations right, as in this case, that what has gone on before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners’ treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners’ treaty right to hunt.\textsuperscript{381}
\end{quote}

Further, with respect to the rights the subject of adverse impact, he found:

\begin{quote}
The amended permits authorized activity in an area of fragile caribou habitat. Caribou have been an important part of the petitioners’ ancestors way of life and cultural identity, and the petitioners’ people would like to preserve them. There remain only 11 animals in the BPCH, but the experts consider there to be at least the possibility of the herd’s restoration and rehabilitation.\textsuperscript{382}
\end{quote}

\begin{footnotes}
\begin{enumerate}
\item \textit{id} at para 112.
\item Namely, \textit{Rio Tinto} at para 45 to 54. See \textit{West Moberly} at para 113.
\item \textit{id} at para 113.
\item \textit{id} at para 116.
\item \textit{ibid.}
\item \textit{id} at para 117. Emphasis added.
\item \textit{id} at para 118. Emphasis added.
\end{enumerate}
\end{footnotes}
To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.383

Quite apart from Finch CJ’s finding in relation to the content of the duty, he explicitly upheld the role of Caribou in the way of life and cultural identity of the West Moberly First Nation. This finding respects the value in the community of hunting caribou. Arguably it also upholds what I have earlier speculated, as to Caribou having a role as part of the institutional social fabric and in the legal order of the Dunne Za, albeit that with this role being indecipherable, I was unable to determine its particulars.384 Such recognition is notable, and contrasts with the dissenting judgment and its neglect of such detail.

Future impacts

With respect to the second, “future impacts” arm of the submission, FCC argued the scope of the duty to consult must exclude consideration of whatever effects a full mining operation might have.385 Specifically, FCC contended the chambers judge erred in holding that the duty to consult included an obligation to consider the potential adverse impacts of a full mining operation that might follow the exploration programs.386 FCC drew attention to the following pieces of evidence as attesting this incorrect scope. First, the “longer term implications… [of mining] over this entire area” are referred to in Dr Seip’s comments of 25 September 2008 and in the petitioner’s response to a letter from MEMPR of 8 August 2009, in which the Ministry said, “further stages of

---

383 id at para 119.
384 In Chapter 3 at 3.3, from the extracts of oral histories in Goddard’s account and the words of deponents, particularly that of Dr Aasan, I speculate that Caribou have a role in the order and governance of the Dunne Za and are part of the institutional social fabric. They are active agents in the world order as distinct from merely being passive objects to be hunted.
385 West Moberly at para 121.
386 id at para 114.
development would not be considered in the permit amendment decisions."387 Secondly, in his analysis, the Chambers Judge referred again to the reports of Dr Seip and Pierre Johnstone in which Dr Seip expressed a view that the bulk sampling and exploration programs would cause habitat destruction “incompatible with efforts to recover the populations” and Pierre Johnstone is quoted as saying, “mine development” in the habitat area would be inconsistent with maintaining or increasing the number of caribou.388

The Court held it was correct that consultation must be directed at the bulk sampling and advanced exploration permits and their impact, but, that the result of this consultation will necessarily determine not only what constitutes reasonable accommodation for the exploration permits, but will also affect subsequent events if the exploration proceeds.389 It found it was appropriate to consider future impacts for three reasons. First, in order to respond to the petitioners’ submission. The Court observed that “the whole thrust of the petitioners’ position was forward looking. It sought to preserve not only those few animals remaining in the BPCH, but to augment and restore the herd to a condition in which it might once again be hunted. If that position were to be given meaningful consideration in the consultation process,” one could not ignore at least the possibility of a full mining operation. Secondly, the Court correctly identified that pragmatically a full mining operation “was the whole object of the bulk sampling and Advanced Exploration Programs.”390 Thirdly, the Court noted the appellants did not provide any evidence to refute the view of the government’s own expert, Dr Seip, that “it is short sighted and misleading to evaluate this proposal for bulk sampling without also considering the longer term consequences of more

387 ibid.
388 id at para 115.
389 id at para 122.
390 id at para 123.
widespread mining activity occurring over the entire property.”391 The Court concluded from these three reasons that the trial judge committed no error in considering future impacts beyond the immediate consequences of the exploration permits as coming within the scope of the duty to consult. Further, to the extent that the MEMPR failed to consider the impact of a full mining operation in the area of concern, it failed to provide meaningful consultation.392

The label “future impacts” coupled with the word “might” in the FCC submission, suggests a remote likelihood of this occurring. This is misleading. Consistent with Finch CJ’s reasoning, it is better to frame these as intended impacts given that they are not only possible, but are almost certain to occur if the antecedents to enabling this are achieved. That is, if FCC was to attain these exploration permits and bulk sampling proved viable. To this extent, one might term the impugned decisions, “gateway decisions” given that their attainment unlocks the door to future exploration.

In addition, Finch CJ held that in order for consultation to have been reasonable, the Crown would have had to explain to West Moberly that their position, namely that permits should be rejected and the project relocated away from the caribou habitat, had been “fully considered” and that there were “persuasive reasons why West Moberly’s suggestions were unnecessary, impractical or otherwise unreasonable.”393 Consultation could not have been meaningful without a “reasoned basis” for rejecting West Moberly’s position.394 The Court found that the starting point for the Crown was that the exploration programs should proceed and the CMMP and other measures were simply

391 id at para 124.
392 id at para 125.
393 id at para 144.
394 ibid.
proposed to minimize or mitigate adverse effects, without considering that the petitioners’ position of not allowing the exploration to occur might be preferred.\textsuperscript{395}

The Chief Judge found this approach to be inconsistent with West Moberly First Nation’s Treaty 8 rights, noting that the concept of mining at the time of the treaty-making did not include the possibility of destruction to an important habitat that a modern mining operation would cause.\textsuperscript{396} I note that this finding did not derive from the petitioners’ submissions. I speculate, though am not certain, that the fact of Finch CJ having exceeded the petitioners’ submissions is indicative of the degree of respect he had towards the petitioners’ rights. I surmise that he supported these rights which included the Indigenous law of the right to hunt pursuant to the traditional seasonal round, to the extent of making findings that exceeded their submissions.

\textit{The dissent}

Garson JA presented two reasons for her dissenting view. First, she held that it was wrong to consider possible, \textit{hypothetical} scenarios that are not the subject of the present application. Garson JA was persuaded by FCC’s submission that “before a permit is granted for an operational mine, there will be a full environmental review.”\textsuperscript{397} And that “the decision makers were mandated to consider three very limited permit applications, one of which actually reduced the impact of FCC’s activities.”\textsuperscript{398} In addition, she adopted Ministry evidence that sustained her position, including that of Hans Anderssen of 8 August 2009, which stated, “only if the exploration stage is successful in delineating an economic resource that a decision is made by a company to proceed to

\textsuperscript{395} \textit{id} at para 149.  
\textsuperscript{396} \textit{id} at para 150.  
\textsuperscript{397} \textit{id} at para 228.  
\textsuperscript{398} \textit{ibid.}
a Mines Act mine application and an Environmental Assessment if the project exceeds a certain threshold. MEMPR is committed to consulting with the West Moberly First Nation should that occur and accommodate where appropriate.” Similarly, the MEMPR’s “Considerations to Date” of 20 July 2009 decreed that “any proposal to move towards an operating mine by FCC will be subject to further assessment and review through the Environmental Assessment process.” And, “impacts... [are] measured on the merits and impacts of the proposed activity alone and not potential future activities of greater impact.”

Garson JA held, “consideration of the impact of a possible full scale mining operation on the herd, would be the subject of a full environmental review, and was beyond the scope of these decision makers’ mandates.” She reasoned thus: practically speaking, the decision makers did not have an application for a full mining operation before them. It was certainly possible that the nature of the project would change, and it was not wrong for the decision makers to limit their inquiry to the adverse effects of the permits under review and to decline to consider possible future scenarios on a hypothetical basis.

The italicized language conjures a false sense of remoteness of the event of a full mining operation coming into fruition. This is false because mindful of the intention motivating the application, a full mining operation was intended to proceed. As Finch CJ identified, the whole purpose was to examine the viability of commercially exploiting coal within the tenure. Thus, it was not some remote possibility. Rather, if FCC was able to surmount the antecedent threshold of gaining approval for the exploration permits and if sampling proved viable, it was highly likely to occur.

399 id at para 230.
400 id at para 232. Emphasis added.
401 id at para 239.
402 id at para 240.
In addition to this, the reassurance of the project being subject to a full Environmental Assessment (EA) evident in the “Considerations to Date” and in Garson JA’s findings, is inaccurate, as triggering the requirement for provincial environmental assessment under the British Columbia Environmental Assessment Act (BCEA), requires a project to exceed a certain size, indicated in the Reviewable Project Regulations or to be designated as a reviewable project by order of the Minister or the Executive Director. In fact, the amended project the subject of the judicial review proceedings did not trigger a BCEA assessment. Accordingly, while it might have undergone a Mines Act assessment, it would not have been subject to the relative rigour of an EA.

I suggest that in having sanctioned the tendency on the part of the Ministry to defer consultation, and having omitted any mention of the significance of the role of Caribou in the way of life of the petitioners, as punctuates Finch CJ’s reasoning, that Garson JA is not respecting the petitioners’ Indigenous legal traditions. The petitioners’ concerns are not recognized as including Indigenous law that must be addressed together with applicable Canadian law, rather than being deferred for later consideration with other interests.

Garson JA’s second reason for dissenting on this issue resulted from her interpreting the petitioners’ submission that the Rio Tinto need to show a new adverse impact is met, such that a new adverse impact did not exist. Garson JA expressed the petitioners’ submission as follows: “the cumulative impacts of development in West Moberly First Nation’s treaty protected hunting areas have resulted in fragmentation and decimation of the BPCH.” “The present state of the herd was a proper consideration for the decision makers.” “The permits are part of an incremental process that has resulted in the present, threatened state of the herd, and that

---

403 Sections 6 and 7, Environmental Assessment Act.
404 West Moberly at para 229.
405 ibid.
incremental context was something the statutory decision makers were obliged to consider.”406 The grant of permits “might be the tipping point in terms of the life of the herd.”407 The “possible extirpation of the herd is a new adverse impact which expands the scope of the duty to consult.”408

In response, Garson JA creatively interpreted the petitioners’ submissions inferring a contention that was not formally submitted in order to make Rio Tinto apply and thereby refute their claim. She held: “Rio Tinto is applicable for the more general proposition that there must be a causative relationship between the proposed government conduct and the alleged threat to the species from the conduct.”409 West Moberly First Nation submitted, “this is not a “taking up” case, because the land had already been taken up for mining purposes.”410 That is, “the taking up occurred when the original permits were granted in 2005.”411 “This statement belies the contention that the statutory decision makers ought to have taken into account the fact that earlier Crown authorized activity had at least in part, caused the present decimated state of the BPCH, thus the need for an augmentation …plan to restore the health of the herd. The need for recovery arose from past development and thus would not be a consequence of the permits under consideration.”412 “The decision makers drew the line at implementing a recovery plan because the need for recovery …was not causally related to, the permits sought.”413 From one perspective, having inferred a contention that was not submitted, it is arguable that Garson JA was going out of her way to dismiss the petitioners’ submission.

406 ibid.
407 ibid.
408 ibid. Emphasis in original.
409 id at para 237. Emphasis added.
410 id at para 238.
411 ibid.
412 ibid.
413 id at para 239. Emphasis added.
4.3.5 The interpretation issue: the nature of the treaty right to hunt

Finch CJ held that Williamson J did not err in considering the specific location and species of the West Moberly First Nation’s hunting practices. He found that the trial judge had not interpreted the Treaty 8 right to hunt as a species-specific right but rather as a right to hunt *caribou*. As noted above, the province disputed the precision with respect to species and geographical scope with which Williamson J defined the treaty right. It maintained due consideration was given to the treaty right to *hunt* in the consultation process.

The Court cited the following principles and factors that govern the interpretation of treaty rights. First, the nature and scope of the right to hunt must be understood as the petitioners’ ancestors and the Crown’s treaty makers would have understood that right when the treaty was made or adhered to. We must derive this understanding from the language of the treaty informed by the report of the Commissioners who negotiated it. Secondly, in examining the ambit of the right to hunt, we must remember that it is not merely an asserted and unproven right but is an existing right agreed to by the Crown and recorded in a Treaty. Thirdly, consultation must begin from the premise that the First Nations are entitled to what they have been granted by the Treaty.

With respect to Treaty 8 specifically, the Court noted the Treaty grants the Crown’s representations that the same means of earning a livelihood would continue after the Treaty as existed before it, and the Indians would be expected to continue to make use of them. Secondly,

---

414 *id* at para 128.
415 *id* at para 129.
that the Indians would be as free to hunt after the treaty as if they had not entered into it. Thirdly, that the treaty would not lead to “forced interference with their mode of life.”

Moreover, the Court affirmed that the general principles of treaty interpretation enunciated in *R. v. Badger*, [1996] 1 S.C.R. 77 apply. First, treaties relating to Indigenous people should be construed liberally. Secondly, that “any uncertainties… should be resolved in favour of the Indians.” Thirdly, that the “words of the treaty must not be interpreted in their strict technical sense nor subjected to rigid, modern rules of construction.”

Applying these points, the court declared the following: “British Columbia relies on the words of the Treaty that limit the right to pursue hunting et cetera ‘saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.’” “Taking up” and “mining” must be understood as the treaty makers would have understood these terms. Secondly, after citing an extract from *Badger*, it held “‘some white prospectors [who] might stake claims’ to the understanding of those making the Treaty, would have been prospectors using pack animals and working with hand tools. That understanding of mining bears no resemblance whatever to the Exploration and bulk sampling projects at issue here, involving as they do road building, excavations, tunneling, and the use of large vehicles, equipment and structures.” Thirdly, it reiterated from *Mikisew Cree First Nation v. Canada*

---

416 *id* at para 150.
418 *ibid*. Emphasis added.
419 *West Moberly* at para 133.
420 *id* at para 134.
421 At para 59, which itself cited from René Fumoleau, *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart, 1973) the following: “We are just making peace between whites and Indians for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.”
422 *West Moberly* at para 135.
Badger recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians’ rights to hunt, fish and trap would continue ‘after the treaty as existed before it.’

Further, it affirmed that the ‘meaningful right to hunt’ is not ascertained on a treaty-wide basis.”

The Court found it was clear from these passages that while Treaty 8 does not enumerate specific species and locations of hunting, it guarantees a “continuity in traditional patterns of economic activity” and respect for “traditional patterns of activity and occupation.” The focus of the analysis is on those traditional patterns.

Ostensibly the Court found in the petitioners’ favour by means of applying well-established principles and factors that govern the interpretation of treaty rights. However, this is too simplistic an analysis of its reasoning. What does this mean legally? It is imperative to be mindful of what scholars such as Henderson explain as to the role of Indigenous legal traditions or, what he terms, First Nations jurisprudences, in treaties between the Crown and the Aboriginal peoples of Canada. Henderson provides: “First Nations jurisprudences *inform* Aboriginal and treaty rights in the Constitution of Canada, which establishes new constitutional rights discourses.” This *sui generis* approach is not based on common or civil law discourses of rights. Rather it is based on First

---

425 *West Moberly* at para 137.
426 S J Henderson, *First nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 120.
As a union of Indigenous and Canadian law, treaties contain Indigenous legal traditions. As such, by acknowledging these “traditional patterns of activity and occupation,” which is a reference to the traditional seasonal round, Finch CJ explicitly acknowledges this Indigenous law which informs the content of the treaty right. As noted above, he recognizes and his decision making is influenced by, the value to the community of hunting Caribou.

Further, by finding that “‘some white prospectors [who] might stake claims’, to the understanding of those making the Treaty, would have been prospectors using pack animals and working with hand tools,” and that “that understanding of mining bears no resemblance whatever to the Exploration and Bulk Sampling Projects at issue here, involving as they do road building, excavations, tunnelling, and the use of large vehicles, equipment and structures,” Finch CJ reiterates a finding which did not derive from a submitted contention. The Chief Justice exceeded the petitioners’ submissions to make a ruling favourable to the petitioners.

The Court found an adverse effect on hunting rights from the proposed activity, which triggered the duty to consult, for the following reason:

In this case it is clear that the petitioners have historically hunted caribou in the area affected by the Bulk Sampling and Advanced Exploration Programs. Since the 1970s West Moberly elders have imposed a ban on hunting caribou because of diminishing numbers, but it is hoped that hunting may resume in the future. It is also clear from the evidence of Pierre Johnstone and Dr. Seip that the Bulk Sampling and Advanced

---

427 ibid.
428 West Moberly at para 135.
429 ibid.
Exploration Programs as well as any full mining operation will have an adverse impact on caribou in the area and consequently the petitioners’ ability to hunt.\textsuperscript{430}

I note that in contrast to the judgment of Williamson J, Finch CJ specifically acknowledged the moratorium of the West Moberly First Nation. The Court’s ultimate ruling on this issue was that the Chambers Judge did not err in considering the specific location and species of the petitioners’ hunting practices.\textsuperscript{431}

Having explicitly acknowledged both the traditional seasonal round as well as the moratorium, Finch CJ’s finding on this issue constitutes strong recognition of the Indigenous legal traditions which were before him in evidence. His respect for these legal traditions and the influence they had in his reasoning, contrasts with the approach of the dissenting judge, which as I demonstrate, may be best characterized as a balancing act that neglects to acknowledge and is not attentive to, such traditions.

\textit{The dissenting view}

\textbf{Ambit of the treaty right?}

Picking up on the appellants’ submission,\textsuperscript{432} Garson JA cited several authorities dealing with both aboriginal and treaty rights “on the question of whether hunting, fishing and trapping rights pertain to a specific species.” These included \textit{R v Powley} [2003] 2 SCR 207, a Metis rights case,  

\textsuperscript{430} \textit{id} at para 139. Emphasis added.

\textsuperscript{431} \textit{id} at para 140.

\textsuperscript{432} See \textit{West Moberly} at para 6 and para 56 as to British Columbia’s submission that the treaty right is not species specific.
where the right to hunt moose, a specific species, was not pleaded. In Powley, in response to provincial charges of unlawful hunting of game, the protagonist Ron Powley alleged an Aboriginal right to hunt for food as distinct from a right to hunt for a particular species. As such, this example is not apposite.

Garson JA concluded from these authorities and the language of the treaty itself, that the treaty right is not a specific right to hunt the BPCH. Rather, that it affords protection to the activity of hunting. In addition to the choice of cases to substantiate her interpretation, Garson JA seems to take a literal interpretation of the text of the treaty, without also considering the accompanying promises of the treaty commissioners. We can infer this as she does not refer to these promises. Not only does such approach violate well-established principles of treaty interpretation, it also completely ignores the Indigenous law informing the content of the treaty right.

The third support Garson JA employs to justify her interpretation of the treaty right as a global right to hunt, is the reasoning of the statutory decision makers for MEMPR and MOFR. She adopts this to conclude that “the right in question is a general right to hunt.” For example, she cites correspondence of Hans Anderssen of 8 August 2009, which she alleges, “provided a thorough explanation of the basis for his conclusion that the treaty right in question was not species specific.” Anderssen refers to the “meaningful right to hunt wildlife generally.” Similarly, she cites the Rationale for Approval of the Occupant Licences to Cut authored by Dale

---

433 id at para 215.
435 West Moberly at para 218.
436 West Moberly at para 222.
437 West Moberly at para 219.
438 id at para 219.
Morgan of the MOFR, which describes the right to hunt as “‘global’ in nature.”

Garson JA concludes, “that bundle of rights includes the right to participate in various hunting activities and the right to hunt many species.” Further, that it was entirely appropriate for the statutory decision makers to take into account the abundance of other ungulates and the proportion of caribou territory impacted by the contemplated permits. Finally, that the inclusion of rights to a particular species or herd within the right to hunt does not translate into an absolute guarantee to hunt that species or herd.

The omissions from Garson JA’s conclusion are telling. Garson JA ignores the petitioners’ practice of hunting caribou pursuant to the traditional seasonal round, and the importance of Caribou within the hierarchy of animals hunted within the seasonal round. In addition to what I have extracted in Chapter 3 above, submissions such as the following suggest these particulars of Dunne Za law: “in the context of Treaty No. 8, the uncontested evidence on this application is that the harvesting of large ungulates according to the traditional seasonal round by West Moberly is the practice protected by the harvesting rights under Treaty No. 8. The harvesting of caribou is a critical aspect of the practice of the traditional seasonal round.”

Similarly, “not all species have the same significance to West Moberly within its traditional harvesting practices.” The evidence shows that West Moberly has practiced a traditional seasonal round in which large ungulates, such as caribou, were of special importance. Thirdly, caribou have enormous cultural significance to West Moberly and form an integral part of their mode of life and usual

---

439 id at para 220.
440 id at para 222.
441 ibid.
442 id at para 223.
443 id at para 12. Emphasis added.
444 id at para 69. Emphasis added.
445 id at para 77. Emphasis added.
vocations as protected by Treaty No. 8.⁴⁴⁶ Again, Garson JA’s approach and findings starkly contrast those of Finch CJ as to the characterisation of the treaty right, in particular, as to Caribou having a significant role in the culture and way of life of the petitioners and the value within the community of hunting Caribou.

**Historical or modern Treaty interpretation**

Garson JA’s conclusion on this point was twofold. First, “the promises made under Treaty 8 must be interpreted within their historical context.”⁴⁴⁷ In addition, the degree to which “government action adversely impacts those promises” must be considered “in light of modern realities.”⁴⁴⁸ She supports this “correct interpretation of the treaty,”⁴⁴⁹ by declaring that “the manner in which the First Nations treaty rights are exercised is not frozen in time:” R. v. Van der Peet, [1996] 2 S.C.R. 507 at [132]. And further, that “an assessment of the degree to which government conduct impacts the exercise of those rights cannot ignore the modern day economic and cultural environment.”⁴⁵⁰

Garson JA adopted the interpretation of Treaty 8 enunciated in *Mikisew*. Namely that the rights it conferred with respect to land use were intended to be fluid and dynamic such that it provided a framework for the evolving interpretation of rights, rather than “a finished land use blueprint.”⁴⁵¹ She picks up on the language of change and the management of change that punctuates the SCC’s

---

⁴⁴⁶ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 (Factum of the Petitioners, Written argument of the Petitioners to the Supreme Court of British Columbia) at paras 1-2.

⁴⁴⁷ *West Moberly* at para 241.

⁴⁴⁸ *ibid*. Emphasis added.

⁴⁴⁹ *id* at para 246.

⁴⁵⁰ *id* at para 241. Emphasis added

⁴⁵¹ *Mikisew* at para 27 cited in *West Moberly* at para 245.
judgment in *Mikisew*. She notes while the Treaty guaranteed certain rights, it did not promise continuity of 19th century patterns of land use. Further, that none of the parties to the Treaty expected it to constitute a finished land use blueprint. Rather, Treaty 8 “signalled the advancing dawn of a period of transition,” and provided for relations “that would govern future interaction” “and thus prevent any trouble.”

Applying these points Garson JA found that part of the task of the statutory decision makers was the actual *balancing of these competing interests*, informed by a correct understanding of the interpretation of the Treaty. She held, “the statutory decision makers were entitled to, and did, balance the competing interests in the *context of a modern culture and environment*.”

As I discuss further in the dissection of the issue to follow, Garson JA’s approach was very much a balancing exercise that in contrast to the approach of *being attentive to* and taking into account, the Indigenous legal traditions that were at play, seems to have been *governed by* “the modern day economic and cultural environment,” which undoubtedly, includes the economic imperatives of mining. Finch CJ also carried out a balancing exercise. However, whereas his “equation” was

---

453 Such language includes:
- at para 50, “The parties did in fact contemplate a difficult period of *transition* and sought to soften its impact as much as possible, and any administrative inconvenience incidental to *managing the process* was rejected as a defence in *Haida Nation* and *Taku River*;

454 *ibid.* Emphasis added.
455 *West Moberly* at para 246.
456 *id* at para 249.
457 *ibid.*
458 *id* at para 241.
infused with appreciation for the Indigenous values and traditions that permeated the initial submission and submissions to the Supreme Court of British Columbia, and some of which defined the treaty right, Garson JA’s reasoning suggests that “the context of a modern culture and environment” was the determinative influence upon her findings. From this perspective, the modern day economic and cultural environment and all that this entails, seems to be mutually exclusive of Indigenous values. They were “competing interests.”

4.3.6 The adequacy of consultation

Finch CJ commenced his analysis by defining the standard for a reasonable process as “one that recognizes and gives full consideration to the rights of Aboriginal peoples, and also recognizes and respects the rights and interests of the broader community.” His first finding was that the petitioners’ position—that the permits should be rejected, the proposed activities relocated to an area where the habitat for the BPCH would not be affected, and that a plan ought be put in place for the recovery of the BPCH—was “completely irreconcilable with the projects proposed by FCC.”

Further, in relation to the law on the duty to consult, he held that to be considered reasonable, the consultation process “would have to provide an explanation to the petitioners that, not only had their position been fully considered, but that there were persuasive reasons why the course of action the petitioners proposed was either not necessary, was impractical, or was otherwise unreasonable. Without a reasoned basis for rejecting the petitioners’ position, there cannot be said

459 id at para 249.
460 id at para 141. Emphasis added.
461 id at para 144.
to have been a meaningful consultation."\textsuperscript{462} This appears to uphold the \textit{Mikisew} requirement for the duty to consult having “both informational and \textit{response} components.”\textsuperscript{463} In relation to whether this constitutes a development of the law on consultation, I do not think it does. The requirement for such an explanation is consistent with the procedural fairness requirement to give adequate reasons for a decision, which is affirmed in cases such as \textit{VIA Rail Canada Inc. v. National Transportation Agency}, [2001] 2 FCR 25, 2000 CanLII 16275 (FCA). The Supreme Court of Canada in \textit{Beckman v. Little Salmon / Carmacks First Nation}, 2010 SCC 53 (Beckman) affirmed that in discharging the Crown’s duty to provide meaningful consultation, “regard may be had to the procedural safeguards of natural justice mandated by administrative law.”\textsuperscript{464} It went on to explain that “the relevant “procedural safeguards” mandated by administrative law include not only natural justice but the broader notion of procedural fairness.”\textsuperscript{465} As such, consistent with \textit{Beckman}, Finch CJ’s finding here seems to affirm that procedural fairness considerations are also relevant to execution of the duty to consult.

Applying this point, Finch CJ held that the MEMPR’s “reasons for its decision” contained in its documents, “Considerations to date” of July 2009 and “Rationale” of September 2009, did not meet this test. He held, “MEMPR \textit{effectively accepted} FCC’s CMMP as a satisfactory response to the petitioners’ position. However, the CMMP \textit{does not explain} why the petitioners’ position that the exploration permits should be cancelled, the activities relocated and the BPCH restored, was rejected.”\textsuperscript{466} Rather, the CMMP proceeds on the footing that the bulk sampling and Advanced Exploration Programs should proceed, and then proposes measures to minimize or mitigate

\begin{footnotes}
\item[462] ibid.
\item[463] \textit{Mikisew} at para 64 cited in \textit{West Moberly} at para 145.
\item[464] \textit{Beckman} at para 46 citing from \textit{Haida} at para 41.
\item[465] \textit{Beckman} at para 46.
\item[466] \textit{West Moberly} at para 146. Emphasis added.
\end{footnotes}
whatever adverse effects those programs will have. It contains proposals to monitor the impact of
the projects on the BPCH and to “discuss” ways in which FCC can assist in recovery of the
caribou population.”467

Further, he held that the decision reached by MEMPR based on the CMMP and the position put
forward by the petitioners were “as two ships passing in the night. There was no real engagement
of the petitioners’ position. It was not a position that could be dismissed out of hand, supported as
it was by the expert opinions of the government’s own biologists, Dr Seip and Pierre
Johnstone.”468

The majority finding indicates the degree of engagement that consultation should provide. It
noted:

If the petitioners’ position were to be addressed head on, and a careful consideration
given to whether the exploration programs should be cancelled, FCC’s activities
relocated, and the BPCH restored, it may be that MEMPR could give a persuasive explanation as to why such steps were unnecessary, impractical or otherwise unreasonable. The consultation process does not mandate success for the First
Nations interest. It should, however, provide a satisfactory, reasoned explanation as to why their position was not accepted.469

However, according to the majority, the inverse occurred. “MEMPR never considered the
possibility that the petitioners’ position might have to be preferred. It based its concept of
consultation on the premise that the exploration projects should proceed and that some sort of
mitigation plan would suffice.”470 Commencing consultation on that basis did not recognize the

467 ibid. Emphasis added.
468 West Moberly at para 147. Emphasis added.
469 id at para 148. Emphases added.
470 id at para 149. Emphasis added.
full range of possible outcomes, and amounted to nothing more than an opportunity for the First Nations “to blow off steam.”

In relation to the Ministry’s conception of the treaty right, the majority found that effectively the MEMPR regarded the petitioners’ Treaty 8 right to hunt as subject to, or inferior to, the Crown’s right to take up land for mining or other purposes, and that this was problematic for at least two reasons. First, it was “inconsistent with what First Nations people were told when the Treaty was signed or adhered to. They were given to understand that they would be as free to make their livelihood by hunting and fishing after the Treaty as before, and that the Treaty would not lead to “forced interference with their mode of life.” Secondly, the MEMPR’s conception of the treaty right was problematic because “the concept of mining, as understood by the treaty makers would never have included the possibility that areas of important ungulate habitat would be destroyed by road building, excavations, trenching…and the installation of the Addecar system.”

Finch CJ concluded that a consultation that proceeds on a misunderstanding of the Treaty, or a mis-characterisation of the rights that the treaty protects, is a consultation based on an error of law, and cannot therefore be considered reasonable. The Chief Judge highlighted that his reasons for finding that consultation was not meaningful differed from those of Williamson J, stating that while the trial judge’s reasons were also correct, the underlying reason “for MEMPR’s slow and superficial response” and for lack of meaningful consultation, was the Crown’s “failure to

---

471 ibid.
472 West Moberly at para 150.
473 ibid.
474 ibid.
understand or appreciate the basis of the petitioners’ objection, grounded in a constitutionally protected treaty right.\footnote{475}{id at para 153.}

As I noted above in my evaluation of the MEMPR decision making,\footnote{476}{See at page 103.} the miscomprehension of the treaty right on the part of MEMPR, achieved a lack of acknowledgment of the Indigenous law contained within the treaty right. MEMPR misunderstood the content of the treaty right, which included the traditional seasonal round. Entering into this process with this flawed comprehension infected the process at the outset. Finch CJ’s cognizance of this error and how it dismantled any chance at a reasonable consultation process, reinforces his strong respect for the Indigenous law informing the content of the treaty right.

\textit{Dissent}

Garson JA agreed with Finch CJ that the adequacy of consultation is to be reviewed on a standard of reasonableness. At the outset, she cites \textit{Dunsmuir v. New Brunswick}, 2008 SCC 9 as authority for this principle. \textit{Dunsmuir} provides, “a court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and the outcome.”\footnote{477}{West Moberly at para 252.} It is questionable whether, in evaluating the adequacy of the consultation process, Garson JA places equal emphasis on both process and outcome, because, as will be shown, she pays scant attention to the impact of her finding on the petitioners’ treaty protected rights.
Garson JA evokes the principle of the honour of the Crown and cites from *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, the requirement “that the Crown must act honourably in accordance with its historical and future relationship with the Aboriginal peoples in question.”\(^{478}\) It is unclear what role the honour of the Crown plays in her reasoning, and whether she pays anything more than lip service to it.

Early in her reasoning, it seems that the principles and variables guiding her analysis of the reasonableness of the decision making process are threefold: the honour of the Crown, reconciliation, and the degree of time expended on consultation. Dealing first with the role that the expenditure of time plays, Garson JA cites Binnie J’s comment in *Beckman* that “somebody has to bring consultation to an end and weigh up the respective interests.”\(^{479}\) Regardless of the fact that *Taku* concerned asserted rights whereas *West Moberly* concerned constitutionally protected treaty rights, Garson JA finds “it helpful to compare the consultation in *Taku* to that in the case at bar.”\(^{480}\) She notes that the distinguishing feature of an asserted right was “not particularly important because the Aboriginal rights claim in *Taku* was relatively strong and the potential negative impact of the contemplated Crown conduct was significant.”\(^{481}\) The notion that an asserted Aboriginal right is analogous to an agreed and defined treaty right suggests at least something about the degree of respect Garson JA has for treaty rights.

The failure to acknowledge that *West Moberly*’s was a treaty protected right and all that this entailed as a fusion of Indigenous and Canadian law, indicates Garson JA was ignoring or at least, not respecting the Indigenous law contained within this treaty right. Moreover, having affirmed

---

\(^{478}\) *Taku* at para 24. Cited in *West Moberly* at para 254.

\(^{479}\) *Beckman* at para 84. Cited in *West Moberly* at para 256. Emphasis added.

\(^{480}\) *West Moberly* at para 258.

\(^{481}\) *ibid.*
the MEMPR’s approach of weighing up the respective “interests,” Garson JA indicates that her approach to assessing reasonableness is a balancing act. This contrasts Finch CJ’s inclusive “full consideration of the rights of Aboriginal peoples”\(^{482}\) and simultaneous recognition of “the rights and interests of the broader community.”\(^{483}\)

Garson JA provides details of what she perceives as several similarities between the consultation processes that occurred in \textit{Taku} and by MEMPR respectively. These included:

* \textit{The length of time consultation consumed}: A 3.5 year environmental assessment process in \textit{Taku} and 4 years expended on consultation in \textit{West Moberly}.

* \textit{The number of meetings between the project proponent and the First Nation}: In \textit{Taku}, the project sponsor met several times with the First Nation to discuss the project and its concerns regarding the project’s impact. In \textit{West Moberly}, procedural aspects of the consultation were delegated to FCC, and Debra Stokes on behalf of FCC had several meetings with the West Moberly First Nation.

* \textit{The engagement of consultants by the proponent to undertake expert studies}: The proponent in \textit{Taku} engaged an independent consultant to conduct archaeological and ethnographic studies. In \textit{West Moberly}, FCC engaged a consultant to prepare the CMMP.

* \textit{The adoption of mitigation strategies into the terms and conditions of certification}: Both the environmental assessment certificate in \textit{Taku} and the Mines Act permit in \textit{West Moberly}, contained conditions mandating mitigation.\(^{484}\)

* \textit{The opportunity for further input and accommodation at subsequent stages}: In \textit{Taku} it was held that project approval certification “was simply one stage in the process by which development

\(^{482}\) \textit{West Moberly} at para 141.

\(^{483}\) \textit{ibid.}

\(^{484}\) \textit{West Moberly} at para 260.
moves forward,“ and weight was given to the fact of there being opportunity for First Nation input beyond the EA process. Similarly, Garson JA emphasizes that a rigorous environmental assessment with opportunities for further consultation by the West Moberly First Nation was to follow.

Without peering too closely into the substance of these meetings, these events combined in her view to achieve sufficient numerical compliance to constitute adequate consultation. Based upon these perceived similarities, Garson JA concludes, “the consultation in the present case was comparable to that undertaken in Taku in all of the above mentioned respects.” Noticeably lacking is detail of the degree of engagement with impact on the treaty protected right.

An observation of the government’s approach towards consultation which Garson JA upholds, is that the time expended in consultation is seen to be determinative of its adequacy, rather than the substance of what actually transpires in communications. For Garson JA, the fact that the duration and other features of the consultation process resembled that of Taku, which was found to be adequate, was highly influential to her determining that the process was adequate on a reasonableness standard. From her perspective, and also that of the government decision makers, a process totaling 4 years with at least 6 face-to-face meetings, is adequate.

By contrast, the affidavit evidence of petitioner Willson on several occasions casts doubt on the effectiveness of communications between MEMPR and West Moberly First Nation. For example at the meeting of 5 August 2009, at which West Moberly First Nation expected substantive discussion of their initial submissions, Petitioner Willson deposed:

485 id at para 262.  
486 id at para 260.
MEMPR representatives at the meeting were not willing to have a meaningful conversation about West Moberly’s Treaty rights. I tried to explain that Treaty 8 protects our traditional mode of life, which includes hunting caribou. They simply said that West Moberly did not have a species-specific right to hunt caribou.  

The law governing reasonableness, Dunsmuir, asks for a consideration of both process and outcome in assessing reasonableness. A further observation from West Moberly’s dissenting judgment is that it is arguably not a question of the reviewer Garson JA having placed too much focus on process with insufficient attention to the decision’s outcome. Rather, one could observe that this judgment evidences the reviewer, in conformity with the statutory decision makers, having placed emphasis on numerical compliance as an indicator of the consultation’s adequacy, with arguably insufficient attention to the substance of the communications.

**Choice of standard of review**

Garson JA applied a lower standard of reasonableness for assessing the adequacy of consultation, than provided for in Beckman, reasoning that a historical treaty lacks “the degree of specificity necessary to ascertain the correct” process.” She opined that a historic treaty, such as Treaty 8, is not a “precise document negotiated by sophisticated and well resourced parties.”

Within her analysis of the reasonableness of consultation, Garson JA adopts a finding from Rio Tinto, that consultation “is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent

---

487 Willson, supra note 300 at paras 84 and 85.
488 West Moberly at para 196.
489 id at para 195.
Crown and Aboriginal interests.\textsuperscript{490} “Compromise is a difficult, if not impossible, thing to assess on a correctness standard.”\textsuperscript{491}

Quite apart from the strict standard of review applicable, Garson JA’s reasoning suggests much about the attitude she has towards the role of the duty to consult in dispute resolution. Seemingly, it is primarily a task of effecting compromise. This task does not involve engaging with Indigenous law. Rather, it involves a balancing act of competing interests to achieve compromise. This resembles McLaughlin CJ’s approach in \textit{Taku}.\textsuperscript{492} It is notable that, whereas Finch CJ’s judgment contains no such references to achieving compromise as the goal governing consultation, there are four references to compromise within Garson JA’s judgment.

In summary, as to the extent of engagement with Indigenous law suggested by Garson JA’s findings, it seems that it is not a task of respecting Indigenous legal traditions, but \textit{rather}, a balancing act to achieve compromise. Compromise contrasts Finch CJ’s inclusive approach. Moreover, it implies some “interests” are \textit{capable} of being “negotiated out” in contrast to an inclusive approach which implies all are “factored in” to the decision making.

In addition to the commonalities Garson JA identifies above, she elaborates at length on what she considers to be an extensive record of consultation apparent from the evidentiary record.\textsuperscript{493} In particular she notes:

\textsuperscript{490} \textit{Rio Tinto} at para 74, cited in \textit{West Moberly} at para 197. Emphasis added.  
\textsuperscript{491} \textit{ibid}.  
\textsuperscript{492} See for example \textit{Taku} at para 2, “compromise is inherent to the reconciliation process.”  
\textsuperscript{493} \textit{West Moberly} at para 263.
As the Chief Judge found, the Crown was entitled to delegate some of the procedural aspects of consultation to FCC. Debra Stokes, Director of Environment for FCC managed the consultation process on behalf of FCC. Since about January 2008, Ms Stokes had devoted a “significant amount of (her) time” to working with First Nations in connection with the consultation process related to these applications. She had consulted with all Treaty 8 First Nations. Of these, she identified four with an interest in consultation concerning FCC’s applications,\(^\text{494}\) two of which had entered into Memoranda of Understanding with FCC, which included economic opportunities for the First Nations.

In response to concerns regarding the impact on Caribou, FCC funded the purchase of radio collars to assist with their long term monitoring.

FCC retained an independent wildlife biologist to develop a plan to address concerns raised by the West Moberly First Nation over the potential impact of the project on Caribou.

FCC undertook the process of formulating the CMMP, which was subject to several revisions in response to comments from the West Moberly First Nation.

Mitigation required under the CMMP included, the establishment of a “Burnt Pine Caribou Task Force” in conjunction with local First Nations with reporting of results and suggestions to regulators. In addition, it required the immediate cessation of activities upon sight of Caribou.\(^\text{495}\)

FCC was involved in consultation with all stakeholders including West Moberly First Nation and the Crown.\(^\text{496}\)

Wildlife biologists were an integral part of all significant consultations.

\(^\text{494}\) id at para 264.
\(^\text{495}\) id at para 267.
\(^\text{496}\) ibid.
• In October 2008, FCC committed to modifying the project to avoid the windswept areas so critical to the Caribou. The spine road reclamation plan was discussed at numerous meetings. The spine road had been built in an area that was windswept.  

I intervene at this point to note that Garson JA glosses over the fact that this was illegally cleared land. This omission paints the picture of a benevolent proponent doing all it can to avoid the most sensitive land. This is misleading. FCC illegally cleared this land and it is somewhat ludicrous to consider its rehabilitation as anything more than a restoration of the status quo. It should certainly not have been considered an accommodation. For what deterrence is achieved by the awarding of permits following illegal clearing?

Returning to Garson JA’s extensive record of consultation, her account further provides:

• The MEMPR Considerations of 20 July 2009, released one month after the West Moberly First Nation initial submissions entitled I Want To Eat Caribou Before I Die, inter alia, notes the Ministry had been engaged in consultations with the four affected Treaty 8 First Nations for over four years. Such engagement included six face-to-face consultation meetings which took place between September 2008 and July 2009.
• The MEMPR Considerations attempts to quantify the adverse effects of FCC’s applications on Caribou generally and on West Moberly First Nation’s treaty right specifically. It notes there are 1599 Caribou within Treaty 8 Territory. The affected BPCH consists of 11 animals and represents 0.69% of the Caribou population in West Moberly First Nation’s traditional territory.

---

497 ibid.
498 West Moberly at para 270.
499 id at para 273.
Based upon this, it concludes, “the opportunity for West Moberly First Nation to hunt and trap Caribou in their traditional territory will not be significantly reduced.” Additionally, it notes the possible extirpation of the BPCH, relying on the comments of Mr Johnstone of MOE.

- In response to the West Moberly First Nation’s request that the Crown engage in land use planning, the MEMPR Considerations states this request is met by the EBA to which West Moberly First Nation is a party and for which it had received extensive funding. MEMPR’s understanding was that the EBA provided a mechanism for addressing West Moberly First Nation’s concerns regarding cumulative impacts and efforts to recover caribou populations.

Garson JA concludes her analysis by returning to a point with which she began, namely of time expended on consultation as being a consideration determinative of its reasonableness. She observes that after the final consultation meeting of 12 August, 2009:

\[\text{It was evident that by this time a decision had to be made. Dr Dale Seip had described the CMMP as doing “an excellent job of attempting to reduce the environmental impacts of the bulk sample and exploration program on Caribou… But he concluded that “…if the government intended to conserve and rehabilitate this small caribou herd” granting permits was “incompatible with efforts to recover the population.” The statutory decision makers were thus faced with two incompatible positions. After years of consultation in which the competing interests were fully explored, “somebody [had] to bring consultation to an end and weigh up the respective interests: (Beckman at [84]). The statutory decision makers did just that. They made their decisions to approve the permits on the basis of the generality of the treaty right in question, limited impact of the proposed permits on that right and incorporation of accommodation and mitigation measures into the project.}^{502}\]

Based on the above noted “extensive record of consultation,” Garson JA concludes, “the accommodation measures proposed by MEMPR were an adequate compromise which attempted to

\[\text{\textit{ibid.} }\]
\[\text{\textit{id at para 274.}}\]
\[\text{\textit{id at para 280. Emphases added.}}\]
balance the competing interests of West Moberly First Nation, FCC and society at large.\textsuperscript{503} She concludes overall, “the consultation process was directly responsive to the concerns raised by West Moberly First Nation, insofar as those concerns related to the permits under consideration. In light of West Moberly First Nation’s treaty protected right and particular interest in hunting caribou, significant accommodations were made to protect the existing caribou herd.”\textsuperscript{504}

To reiterate, it appears Garson JA misunderstood the significance of the traditional seasonal round to the treaty-protected right, and that it constitutes the substantive content of the treaty right. References to “the generality of the treaty right”\textsuperscript{505} and “particular interest in hunting Caribou,”\textsuperscript{506} suggest this.

As noted, despite Garson JA having identified that attaining the standard of reasonableness requires consideration of both process and outcome, she neglects to examine in any detail the consequences of her finding on the petitioners’ rights. She merely appends to her finding, “it is true that the outcome of the consultation process was not that which West Moberly First Nation desired. But it cannot be said that the outcome, given all the factors listed by the decision makers, was unreasonable.”\textsuperscript{507} Due to this discrepancy in emphasis, weighted towards process, her reasoning approach seems to parallel the submission of the Attorney General of Alberta that the focus should be on the reasonableness of the consultation process, rather than upon its outcome.\textsuperscript{508}

\textsuperscript{503} id at para 284. Emphasis added.  
\textsuperscript{504} id at para 286. Emphasis added.  
\textsuperscript{505} id at para 280.  
\textsuperscript{506} id at para 286. Emphasis added.  
\textsuperscript{507} ibid.  
\textsuperscript{508} id at para 71.
4.3.7 The accommodation issue

The appellants challenged the augmentation order. They maintained Williamson J erred by holding that only one method of accommodation was reasonable in the circumstances, namely a plan to protect and augment the BPCH. British Columbia, supported by FCC submitted, “the predetermination of the only acceptable accommodation coloured the Judge’s consideration of whether the consultation was meaningful and reasonable.”509 The Judge’s focus on a single herd of caribou, as opposed to restoration of caribou generally, will result in the balkanisation of treaty rights or the “micro application” of the treaty right. This is not a remedy sought in the petition.510 The petitioners submitted the accommodation ordered was within the Judge’s discretion as delineated in the remedial powers within sections 5 and 6 of the Judicial Review Procedure Act (JRP Act).511

As to the validity of the augmentation order, Finch CJ held it was unnecessary to reach a final conclusion on whether Williamson J erred in declaring a specific form of accommodation.512 Instead, he set aside the augmentation order so as to permit the parties to resume consultation.513 Thus, he found that the proper remedy was to stay the implementation of the permits, set aside the accommodation and remit the matter for further consultation, having regard to the proper scope of the consultation set out in his reasons.

509 *id* at para 158.  
510 *id* at para 159. See also the submission of the Intervenor the Attorney General of Alberta discussed above at page 116.  
511 *id* at para 161.  
512 *id* at para 163.  
513 *id* at para 165.
So, the result of the majority’s judgment was that Finch CJ affirmed that the Crown failed to accommodate reasonably West Moberly First Nation’s hunting rights, and concluded the Trial Judge was correct in holding that the consultation process was not meaningful although for reasons that exceeded those provided by Williamson J.\textsuperscript{514} In contrast, Garson JA briefly commented on the appropriateness, but not legal validity, of the augmentation order. In her view, the order was the product of Williamson J’s erroneous finding of a species specific right to hunt. She found that Williamson J’s error in characterizing the treaty right to hunt as a specific right to hunt the BPCH, rather than as a more general right to hunt,\textsuperscript{515} led him to conclude that the impact of the permits was significant and required more in the way of accommodation.\textsuperscript{516}

### 4.4 Evolution in the degree of engagement? Comparison with a decision 26 years prior: *Blueberry River v Canada (DIA) [1987] FCJ 1005*

Having seen varying degrees of engagement with the Indigenous legal traditions of the Dunne Za by the successive decision makers in the relatively recent “Caribou cases,” it is useful to complete this analysis with a brief examination of a considerably earlier decision in which some of the same legal traditions appeared in evidence. I seek to be able to comment on the degree to which judicial decision making at least may be evolving to become more receptive towards engaging with and respecting Indigenous law, to the extent to which such limited data analysis permits.\textsuperscript{517}

*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* 1987 FCJ 1005 concerned an action brought against the Department of Indian

\textsuperscript{514} *id* at para 164.

\textsuperscript{515} *id* at para 218.

\textsuperscript{516} *id* at para 223.

\textsuperscript{517} How robust, persuasive and credible can findings be that derive from such limited data, namely, two cases?
Affairs (DIA) and the Director of the Veterans Lands Act, in relation to title to a former Indian Reserve, the Moberly Reserve and the mineral rights under that land. These had become at issue following certain transactions which took place in the twentieth century, chief of which was the disposal of Indian Reserve 172 (the land) to veterans and others, following the earlier surrender of the land (the 1945 surrender), and separate surrender of its mineral rights, by the band to the DIA, and DIA’s subsequent transfer of the land to the Director, Veterans Lands Act.

Among other things, the plaintiffs claimed the DIA breached its fiduciary duty to the Band by fraudulently securing its consent to the 1945 surrender, and that the DIA was guilty of fraud and numerous breaches of fiduciary duty to the Band by its 1948 transfer of the land. At first instance, the plaintiffs lost by virtue of having breached the limitation period. The interpretation and legal effect of Treaty 8 and the 1940 surrender were at issue. The plaintiffs claimed that between 1916 and 1945, the defendant was guilty of several acts and omissions that constituted negligence and breach of fiduciary obligations towards them, and that by virtue of various acts and omissions, the defendant acted both in breach of its fiduciary relationship and fraudulently in securing and accepting the Band’s 1945 surrender.

At first instance, Addy J of the Federal Court commenced his examination of the issues by declaring that an appreciation of the culture of the Dunne Za, their way of life, degree of sophistication as well as how the society was organized and functioned, is “of some importance in determining many of the issues raised.”\footnote{Blueberry River v Canada (DIA) [1987] FCC 1005, directly following the heading “The Dunne Za Cree Society.” Emphasis added.} In his examination of the oral and written evidence presented by the Indian witnesses and expert witness Hugh Brody, Addy J comments instructively,
“they also lacked to a great extent, the ability to plan or manage, with any degree of success, activities or undertakings other than fishing or hunting and trapping.” From this and other observations of Addy J, at its highest, a generous interpretation might be that he acknowledged the Dunne Za’s harvesting methods of hunting, fishing and trapping, involved careful planning and management. However, Addy J also observes, “it seems that many of their decisions even regarding these activities, that is, hunting, could be better described as spontaneous or instinctive, rather than deliberately planned.” In contrast, as I have examined in Chapter 3 above, Brody discusses decision making by the Beaver Indians in some detail, as including consideration of many variables that epistemologically constitutes a very different approach and method to non-Dunne Za decision making, to the extent that Brody concedes its complexity would evade most non-Beaver. Further, I speculated that spontaneity was one such feature of the traditional seasonal round and of the Dunne Za hunting economy.

Can we conclude that Addy J has failed to appreciate and respect the complexity of the Dunne Za decision-making process and all of the many variables and considerations involved? And failed to adequately try to comprehend this? Can we infer this without the benefit of the parties’ submissions and an extensive summary of the evidence? Unfortunately, I suggest that the Apsassin case is not so useful for this purpose. Although considerable oral evidence was tendered, Addy J addressed this evidence at the outset by declaring, an appreciation of the way of life, culture, degree of sophistication and societal function and organization, was “of some importance” in determining the issues. Similarly, he declared it was not his “intention to

519 id, under the heading “The Dunne Za Cree Society.”
520 ibid. Emphasis added.
521 id, directly following the heading “The Dunne Za Cree Society”. Emphasis added.
comment extensively on” the “way of life, culture and other related matters,”522 and that that he merely touched “on some of the highlights.”523 I infer that Addy J only considered the evidence to a limited extent and that his was a relatively superficial analysis, as that is all he thought was warranted to address the issues at hand.

I sought by means of the evaluation of the Apsassin case to be able comment on the degree to which judicial decision making may be evolving so as to be more receptive towards Indigenous legal traditions having a role as law in an adjudicator’s reasoning. For the reason just noted, namely, Addy J’s seemingly superficial engagement with the evidence, I am cautious about drawing wide reaching conclusions, such as, that the case is an illustration of the failure to embrace or even try to embrace, the Indigenous legal traditions that were in evidence. At the least however, I think it is fair to say that Addy J’s superficial engagement with the account of the way of life of the Dunne Za starkly contrasts Williamson J’s and Finch CJ’s meticulous attention and inquiring approach.

4.5 The extent of engagement with the Indigenous legal traditions of the Dunne Za

Equipped with some understanding of the degree to which the petitioners’ legal traditions had a role in the successive decision makers’ reasoning in the Caribou cases as sources of legitimate legal authority, I can now present some form of comparative conclusion. I am mindful of the Dunne Za law I extracted and described in detail in Chapter 3, and also of the degree to which these legal traditions pervaded the submissions as law as distinct from constituting evidence.

522 id, under the heading “The Dunne Za Cree Society.”
523 ibid. Emphasis added.
First, in relation to the traditional seasonal round, the majority upheld the trial judge’s finding that the treaty right was defined as a right to hunt according to the traditional seasonal round. This was determinative in that the MEMPR’s misunderstanding of the treaty right was central to the majority’s finding that the Province’s consultation was inadequate. Given that treaties contain Indigenous legal traditions, by acknowledging the Dunne Za’s “traditional patterns of activity and occupation,” Finch CJ explicitly acknowledged and respected the existence of, the Indigenous law that informs the content of the treaty right. He recognized and his decision making was influenced by, the value in the community of hunting Caribou.

Having explicitly acknowledged both the seasonal round and the West Moberly First Nation’s moratorium, Finch CJ’s findings constitute strong recognition of the Indigenous legal traditions that were before him in evidence. His respect for these Indigenous laws, and the influence they had on his reasoning, contrasts with the reasoning approach of the MEMPR and also of Garson JA, whose approaches were heavily influenced by the “modern day economic and cultural environment.”

In its consultation, the MEMPR could be critiqued for having breached the third criterion with which I am examining the successive decision making, for its failure to genuinely engage with the substance of the petitioners’ position, which was infused with impact on Dunne Za law. The MEMPR participated in a process that provided space for Indigenous law to potentially be articulated and considered by the statutory decision makers. And yet this consultation was in form only owing to its neglect of the substance of the petitioner’s position. The statutory decision maker

---

524 West Moberly at para 137.
525 id at para 241.
526 id at para 147.
was neither sensitive nor attentive to the petitioners’ Indigenous law as having any role in its decision making process relating to the permit applications.

Further, by means of its weighing of respective interests, which ignored the petitioners’ constitutionally protected hunting right and the fact that the petitioners’ interests were not merely interests equivalent to those of the proponent’s mineral tenure, the MEMPR did not acknowledge the seasonal round and hunting right as having the status and weight of law. Rather, the hunting right was an interest that was capable of being trumped by competing economic interests. The petitioners’ interests were also deemed capable of being deferred for later consideration, as distinct from including Indigenous law that must be addressed together with applicable Canadian law. In short, MEMPR’s decision making constituted a balancing act that ignored the petitioners’ Indigenous law.

As to Garson JA’s interpretation of the treaty right, She took a literal interpretation devoid of the consideration of the accompanying oral promises made at the treaty’s inception. Her approach ignored the Indigenous law informing the content of the treaty right. In assessing the adequacy of the consultation process, Garson JA affirmed the approach of the statutory decision makers of balancing “the competing interests in the context of a modern culture and environment.” From Garson’s perspective, the petitioners’ “particular interest in hunting caribou,” was not an Indigenous law. Rather, it was given the status and weight of an interest that was capable of being balanced in equal fashion with other interests, such as FCC’s mineral tenure.

---

527 id at para 249.
528 id at para 286.
Garson JA’s approach to assessing reasonableness was very much a balancing exercise, which in contrast to the approach of taking into account the legal traditions that were at play as legitimate law, seems to have been governed by the “modern day economic and cultural environment,”\(^\text{529}\) which undoubtedly includes the economic imperatives of mining. The act of balancing per se is not problematic. All judges must balance. Finch CJ also carried out a balancing exercise. However, his equation was infused with appreciation of the Indigenous law that permeated the initial submission and some of which defined the treaty right. His balancing involved an inclusive full consideration of the rights of Aboriginal peoples and simultaneous recognition of the rights and interests of the broader community.\(^\text{530}\) In contrast, Garson JA’s reasoning suggests “the context of a modern day culture and environment” was the determinative influence on her findings. This context was mutually exclusive of Indigenous law. They were competing interests. The danger of this approach is that it suggests that Indigenous law does not have a modern presence and role to play in adjudication within Canada, a legally pluralist state.

Prima facie, Garson JA could be critiqued for failing to examine the substance of communications made within consultation, and for merely confirming a process that potentially provided space for Indigenous law to be articulated and considered. In her review of the adequacy of MEMPR’s consultation, without examining the substance of consultation meetings et cetera, the consultation efforts exhibited sufficient parallels with those in Taku, to constitute reasonable consultation. However, as I discuss in the following chapter, Garson JA’s diligent application of the reasonableness standard prevented her from inquiring into the substance of these meetings.

\(^{529}\) *id* at para 241.

\(^{530}\) *ibid.*
Beyond recognition of the existence of the seasonal round, the judgments revealed minor appreciation of its significance as a conservation regime and legal mechanism for maintaining balance and order. That is, as a deliberate and well thought out land use planning and management scheme. There was minimal discussion of the procedural and substantive components of the seasonal round. However, these features were largely not submitted as such either. In noting details such as that “hunters followed game’s seasonal migrations and re-distributions based on their knowledge and understanding of animal behaviour,”\(^{531}\) Finch CJ seemed to acknowledge the seasonal round as being an application of traditional knowledge and at least referred to some elements of traditional knowledge. However, the fact of Dunne Za decision making pursuant to the seasonal round being influenced by dreaming and the roles of medicine power and pre-existing relationships with the animal world, was absent from the decision makers’ reasoning.

Secondly, as to the West Moberly First Nation’s moratorium on hunting Caribou, this was absent the reasoning of the statutory decision maker and the trial judge. The Chief Justice explicitly identified the moratorium and in doing so, recognized the value in the community of hunting Caribou. From one perspective, this Indigenous law made its way to the majority judgment to an extent.\(^{532}\) It was acknowledged as an attempt by the West Moberly First Nation as a means of preserving the Caribou population. As Finch CJ narrated, “since about the 1970s, the West Moberly elders have imposed a ban on their people’s hunting of caribou.”\(^{533}\) Further, “the petitioners’ people have done what they could on their own to preserve the herd, by banning their people from hunting caribou for the last 40 years.”\(^{534}\) However, this is the extent of its recognition as an Indigenous law. From another perspective however, it is arguable that the majority decision

\(^{531}\) id at para 22.
\(^{532}\) See at para 26 and 118 of West Moberly.
\(^{533}\) West Moberly at para 26.
\(^{534}\) West Moberly at para 118.
alone constitutes recognition of this law within the Indigenous community as the judicial review application was largely incited by the need to uphold the purpose of this law.

The third Indigenous law I examined is to the principle of respect and its resulting practices, which is evident in the sustainable use of hunted animals, and I surmise, in the story of Tumaxale whose incongruous and murderous behaviour yields a denial of assistance from the animal world. This principle was arguably not submitted in any explicit way as a principle of Dunne Za law. However, it was contained within the initial submission, which formed part of the evidence. Moreover, the petitioners’ submissions to the Supreme Court of British Columbia also arguably alluded to the principle of respect. For example, they cite West Moberly member Catherine Dokkie as explaining the West Moberly’s unique connection with animals living in its traditional territory, as follows:

Our people are closely connected to the land and the animals. We think of “the bush” as our playground... We have a special relationship with the animals. We protect them. We don’t just do this because we want to eat them. We see them like people. The moose, the grizzly, the caribou: they are all our friends. When a hunter kills an animal, they will often say a prayer or give an offering, because that animal gave up its life to feed us.  

I am not sure to what degree this legal principle pervaded the decision makers’ findings and reasoning. For Williamson J, his dissatisfaction “that the Crown reasonably accommodated West Moberly’s concerns about their traditional seasonal round of hunting caribou for food, for cultural reasons, and for the manufacture of practical items,” suggests that he acknowledged some of the cultural reasons contained within the initial submission. I have speculated this could possibly encompass respect for the Caribou. However, this inference seems tenuous.

More cogent seems to be Finch CJ’s narration of the factual background, as distinct from a finding, which provides:

The Mountain Dunne-Za valued the existence of all species, including Caribou, and treated them and their habitat with respect… The people felt and feel a deep connection to the land and all its resources, a connection they describe as spiritual. They regarded the depopulation of the species they hunt as a serious threat to their culture, their identity and their way of life.537

The Chief Judge’s description seems to sustain Catherine Dokkie’s words as to the petitioners’ special relationship with and respect for animals, albeit that this account does not explicitly acknowledge this as being a principle of Indigenous law.

Finally, I addressed the remaining legal principles contained within the oral histories. In relation to Caribou as active agents in the worldview and order of the Dunne Za, which I speculated but could not specifically identify within the oral histories, the initial submission extracts segments of several myths said to illustrate the significance and role of Caribou. In particular, it notes that Goddard documented Caribou in five stories that impart moral lessons, guide appropriate conduct and serve as spiritual teachings. Beyond the initial submission this law permeated the submissions to the Supreme Court of British Columbia by way of the evidence of Anthropologist Dr Wendy Aasen. Dr Aasen deposed,

The importance of caribou to the Mountain Dunne-za is demonstrated by its role in worldview, myth, and spirituality. After a review of the literature, I conclude that in addition to entertainment value, caribou myths and stories taught and reinforced appropriate norms, beliefs and codes of conduct. Individual members of the Mountain Dunne-za actively sought caribou as a powerful spirit helper, whom, if respected in prescribed ways, was believed to aid a hunter throughout his life.538

537 id at para 25.
538 West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359 (Factum of the Petitioners, Affidavit #1 of Wendy Aasen Exhibit “B” at 29. Emphasis added.)
The notion of Caribou being active agents in the Dunne Za worldview and order, assuming a quasi governance role and separately, as being a powerful spirit helper that aided Dunne Za hunters, is noticeably absent Garson JA’s reasoning. Arguably traces of its recognition permeate Finch CJ’s reasoning. In his findings in relation to the scope of the duty to consult, Finch CJ explicitly acknowledged the importance of Caribou to the way of life and cultural identity of the West Moberly First Nation finding as such, “Caribou have been an important part of the petitioners’ ancestors way of life and cultural identity, and the petitioners’ people would like to preserve them.”539 Way of life and cultural identity could encompass the role of Caribou in the way of life of the West Moberly First Nation.

---

539 West Moberly at para 118.
5. The extent to which decision makers are able to engage with Indigenous legal traditions

In the previous chapter I examined the extent to which decision makers recognise, respect and consider Indigenous legal traditions. This chapter examines cultural, technical and operational impediments to this effort that I observed from critique of the administrative and judicial decision making in the Caribou cases. I commence by illustrating the complex issue of what has been termed “cultural untranslatability,” as well as noting ramifications for decision makers of this issue. I use this term to encompass the ability and receptivity of western-trained adjudicators and decision makers to comprehend and accommodate multiple worldviews. I then examine intricacies of the legal ingredients at play in the operation of the duty to consult that impact the capacity of decision makers to consider Aboriginal concerns. In particular, I note concerns with the reasonableness standard as it is applied to the substantive legal question of the adequacy of consultation. Finally, I discuss pragmatic features of the operation of the duty to consult and the actors involved in its implementation that impede the ability of decision makers to take into account the genuine concerns of First Nations participants.

5.1 Cultural untranslatability: a clash of worldviews

As I stated at the outset, I had conceived a larger project involving fieldwork to test the hypothesis that certain types of values are excluded by the governance regime of the duty to consult, namely, by the system within which these rights, interests and values are managed. Related within this broad inquiry, I sought to explore sub topics including “the language / discourse of communication and accommodating multiple worldviews: a cultural impasse?” My careful review

540 Sophie Mc Call, First person Plural (Vancouver: UBC Press 2012) at 70.
of the initial submission of the West Moberly First Nation, particularly examples such as the following, incited this interest:

And that is something that we don’t get to talk about with the Province or Federal Government is our spiritualness, our connection with the land. It is one and the same…our church is our land…the animals and the connectivity of everything.

Omissions from consultation discussions with Provincial government consultors, such as spiritual impact and also secondary psychological impacts, which are prominent in the initial submission, are notable. In addition, West Moberly Elders at the 2011 conference on working with Indigenous legal traditions sourced in oral histories, voiced similar frustration with the limits of the consultation process and the permissible scope of discussion. These examples and a conversation I had with Chief Willson of the West Moberly First Nation, provoked several questions in my mind: are the consultors and consultees communicating “with the same language” such that effective communications are able to be achieved? That is, are they mutually intelligible? To be heard, one needs to be able to be received. Are the consultors sensitive to and accommodating the language and cultural intricacies of the Dunne Za consultees? Are they able to be accommodating of each other? Are cultural differences and an inability to respect these, an impediment to consultation “success”? Is this an institutional problem? Do the consultors, such as the Aboriginal Relations Branch of the MEMPR have the capacity to hear these concerns? Do they lack the relevant experience?

542 id at 79. Emphasis added.
543 See note 67 in Chapter 1 for the details of this Conference.
544 Personal Communication, 1 October 2011.
Ultimately I found myself pondering the point of consultation meetings if the parties were not understanding each other or lacked the will to achieve effective and meaningful communications. In seeming contrast, as to the question of the ability to be receptive to differing worldviews and ways of life, I was mindful of a specialist tribunal in New South Wales that possesses decision makers with specialized knowledge in for example, Aboriginal land rights and disputes involving Aboriginal peoples, amongst ecological, town planning and other qualifications and experience, such that decision makers are able to hear and comprehend concerns, at least better than a decision maker lacking this expertise.545

These general lines of inquiry, which could be subsumed within the headings “cultural untranslatability,”546 “intelligibility” and “receptiveness,” are not new.547 Much was articulated to the same general effect in former British Columbia Court of Appeal Chief Justice Lance Finch’s call to the legal profession to pay attention to Indigenous legal traditions.548 However, I would go further than Finch CJ’s mandate and suggest that any duty to learn as the former Chief Justice

545 For example, Acting Commissioners Jeffrey Kildea and Megan Davis of the Land and Environment Court of NSW, who adjudicate, mediate and conciliate appeals, in addition to working in concert with Judges in cases where legal issues arise. See http://www.lec.lawlink.nsw.gov.au/lec/judicial_officers.html Accessed 10 May 2014. Such Commissioners are equipped to understand Aboriginal concerns at least as they form part of the evidence. By distinction, I am unaware of whether this extends to embracing Indigenous legal traditions. I am also unaware of the status of any movement towards legal pluralism in Australian jurisdictions.

546 See McCall, supra note 540 at 70.

547 The general line of inquiry of accommodating multiple worldviews is comparable with Irlbacher Fox’s work in a different geographical area and for differing purposes, which inter alia, explores government discourse that serves to sustain inequalities in the context of self government negotiations in the North West Territories. Stephanie Irlbacher-Fox, Finding Dashaa: Self-Government, Social Suffering, and Aboriginal Policy in Canada (Vancouver: UBC Press) 2009; Hugh Brody also explores these issues of “cultural untranslatability” particularly in his narration of the consultation meetings that took place in relation to the Alaska Highway Pipeline. See Hugh Brody, Maps and Dreams: Indians and the British Columbia Frontier (Vancouver: Douglas & McIntyre 1981) at Chapter 15 “A Hearing.”

548 Finch CJ also discusses, amongst other things, the need to be receptive though in the context of seeking to incorporate Indigenous legal orders into the common law and not in relation to the duty to consult per se. See The Honourable Lance Finch Chief Justice of British Columbia, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (Paper delivered at the CLEBC Indigenous Legal Orders and the Common Law Conference November 15th, 2012).
expresses the requirement, that is, to be or at least try to be receptive to another worldview, *at least in the context of the duty to consult* as distinct from the effort to establish Aboriginal rights, ought also extend to administrative decision makers.

As to Finch CJ’s intended audience and those whom the duty binds, he draws attention to the “present and future ability of individual judges, and lawyers, to approach this task in a principled and effective manner.”[^549] and similarly, refers to the problem of “lawyers and judges in Canada being unfamiliar with Indigenous languages, cultures and worldviews.”[^550] He provides more expansively, “before space can be made in the Canadian legal landscape for Indigenous law, the participants in the process judges, lawyers, and lawmakers, as well as academics—must be able to conceptualize and recognize what they are making space for, or the exercise will be futile.”[^551]

As such, it appears that the objects of the calling are judges, lawyers, lawmakers and academics. However, in the context of the operation of the duty to consult, any duty to learn must target closer to the source of impugned decisions to the actual decision makers, as it is the administrative decision makers within government ministries for example, ministers and directors general, who, advised by policy officers, are making these decisions, as distinct from lawyers.[^552] These officials, such as those within various Aboriginal Relations branches of ministries, are critical participants in the process. Moreover, government members of Aboriginal Relations branches of ministries for example, are often the first point of contact with First Nations peoples in any consultations.

[^549]: *id* at para 1. Emphasis added.
[^550]: *id* at para 2. Emphasis added.
[^551]: *id* at para 5. Emphasis added.
[^552]: I note that within government Ministries, in house lawyers may advise on the legal validity and mechanics of achieving policy change, or as to the merits of a permit application for example. However, such lawyers are *not* the decision makers. Such decisions ultimately are made by ministers and delegated decision makers such as senior policy officers.
Accordingly, it would make sense that such policy officers and government employees, including those “who reside within the bowels and recesses of government departments” also be duty bound. It is arguably too late in the process if the duty only applies at the phase of lawyers challenging administrative decisions, because, as will be seen in the following discussion of the standard upon which such decisions are reviewed, at that point, any decision need only be reasonable. As a consequence, any failure to “learn” or to try to learn, in the sense of being receptive to cultural intricacies amongst other things, could well be gotten away with by virtue of the deference attributed to the administrative decision maker. How to enforce any such duty is of course a separate question.

I have already documented key examples of where this clash of worldviews and need for receptiveness plays out. As I mentioned in Chapter three, when describing and analysing the traditional seasonal round and what might be characterized as its substantive components, several of its features acutely contrast contemporary land use planning regimes. To reiterate, I maintained that the following description elucidates the cultural impasse evident in the contrast between the traditional seasonal round and non Dunne Za means of using and managing the land:

many white trappers found themselves repeatedly at odds with an altogether unfamiliar, even incomprehensible, way of harvesting the land’s resources…White settlers and trappers had clear notions of orderly land use that were based on well tried patterns of frontier homesteading. They imagined that a trapping area they had claimed would be theirs alone, an area where they would have an exclusive right to harvest furs. The Indians system was based on freedom of access, flexible use and rotational conservation, which meant that some areas went un-trapped for seasons on end.\(^5\)


Exclusive possession juxtaposes a sharing, collective approach that characterizes Dunne Za land use law. Moreover, the rigidity of the system of land management for regulating trapping that was imposed upon the Dunne Za’s legal systems, conflicts with the relative flexibility of the Dunne Za’s relationship with the land.

Similarly, in relation to the procedural components of the seasonal round, I maintained that a further striking example of the divide separating Dunne Za and non-Dunne Za legal systems, is implicit in Brody’s description of the epistemological shift that is necessary to appreciate the legal system and way of life of the Beaver Indians. Brody provides:

> The way to understand this kind of decision making is also to live by and even share it, is to recognize that some of the most important variables are subtle, elusive, and extremely hard or impossible to assess with any finality. The Athapaskan hunter will move in a direction and at a time that are determined by a sense of weather (to indicate a variable that is easily grasped if all to easily oversimplified by the one word) and by a sense of rightness.\(^{555}\)

Such decision making, specifically the “process components” informing the operation of the traditional seasonal round, might likely confound decision makers for several reasons. For example, how might one comprehend such intangible variables as senses “of weather and rightness,” and similarly, other variables which are “impossible to assess with finality?”\(^{556}\) Are these not vague and uncertain? Such intangible variables seem to defy the pursuit of achieving determinative considerations that is a feature of administrative decision-making.\(^{557}\)

---

\(^{555}\) *id* at page 37. Emphases added.

\(^{556}\) *ibid.*

\(^{557}\) If the traditional seasonal round is comparable to a State implemented land use planning or management regime, such as the scheme for the prevention of broad scale land clearing under the Native Vegetation Act 2003 (NSW), with all of its prohibitions, offences and exceptions, the ground of review of decisions being void for uncertainty as an invalid exercise of power, by virtue of the decision being incapable of compliance, leaped out in my mind from the previous description, as being potentially applicable. As a former Government lawyer, this was a familiar concern with drafting and reviewing conditions of licences under the Protection of the Environment Operations Act (1997), and also remedial
I suggested earlier that it is unlikely that a non-Dunne Za decision maker would ever review Dunne Za decision making, and that the vagueness of being guided by sense might be difficult for a non-Dunne Za person or adjudicator to appreciate. However, as I refer to below, non-Dunne Za decision makers have had to consider Dunne Za decision making, at least as it forms part of the evidentiary record.

As an application of traditional knowledge, the traditional seasonal round would likely confound non-Dunne Za decision makers and risks its intricacies and multiple variables being misunderstood. Brody comments that Dunne Za map making, such as that featured in the initial submission, is potentially subject to the critique of being incompatible with the aims of scientific work: “it will be said that this land use mapping is incompatible with the aims of scientific work, and at odds with the need for objective data.” Similarly, “protests against the hunting way of life have often paid hostile attention to its seemingly haphazard, irrational and improvident nature.”

I suggest that both of the above described features could be caught by these criticisms and inaccurate characterisations. Intangible variables that are subtle and elusive, arguably vague and directions as a regulatory response to land clearing in contravention of the Native Vegetation Act. That is, as a regulator, we could not draft conditions that were so vague that they were incapable of enforcement. This now rather old case also addresses this concern albeit in relation to a Council development consent: Levenstrath Community Association Inc v Tomies Timber & Anor [2000] NSWLEC 95.

I have questioned the considerations informing Dunne Za decision making pursuant to the seasonal round for being vague and uncertain, governed by “senses of rightness” which are incapable of assessment with finality, as distinct from a resulting decision, which triggers the void for uncertainty ground of judicial review. As such I am possibly referring to the incorrect ground of review. While I suspect that uncertainty is the incorrect ground of administrative law, what at least this example highlights, is the potential for Aboriginal decision making, not being entirely in alignment with Canadian administrative law principles. While I note he examines the different setting of Aboriginal self government, Sossin explores the general theme of the collision of Indigenous legal traditions and Canadian administrative law in some detail. See Lorne Sossin, Indigenous Self Government and the Future of Administrative Law” UBC Law Review (2012) 45(2) at 595.

558 Brody, supra note 554 at 174.
559 ibid.
uncertain and “impossible to assess with finality,” could be seen to conflict with the alleged objectivity of scientific work. Similarly, failure to be attentive to the substantive and procedural components of the traditional seasonal round risks it being perceived as “seemingly haphazard, irrational and improvident.”

Recent academic critique of traditional knowledge confirms that Brody’s fears were entirely legitimate and potently illuminates the very real issue of cultural untranslatability. In multiple works, commencing in 1996 and most notably in her 2008 *Disrobing the Aboriginal Industry: the deception behind Indigenous cultural preservation*, Professor Frances Widdowson criticises *inter alia*, the incorporation of traditional knowledge into the environmental assessment process. In summary, Widdowson maintains that owing to its spiritual component and unscientific reasoning, traditional knowledge is a threat to the environmental assessment process wherever it is applied. Further, she suggests that the incorporation of traditional knowledge into public policy more generally yields incorrect assumptions since spiritual beliefs cannot be challenged or verified.

Widdowson indicts the foundations of traditional knowledge as a seasoned litigator seeks to debunk an expert witness’s opinions by undermining the bases of his/her claims, or the witness’s

560 *id* at 37.
561 *id* at 35.
562 Frances Widdowson and Albert Howard, *Disrobing the Aboriginal Industry: the deception behind Indigenous cultural preservation* (Montreal: McGill Queens University Press 2008). This is in addition to the 2006 publication which I rely on for this chapter, Frances Widdowson and Albert Howard, “Aboriginal “Traditional Knowledge” and Canadian Public Policy: Ten Years of Listening to the Silence” (Presentation for the Annual Meeting of the Canadian Political Science Association, delivered at York University, Toronto, Ontario June 1-3, 2006).
563 *ibid.*
Several pillars of her assault include, first, that traditional knowledge cannot make a contribution to scientific research because it lacks a methodology for determining the accuracy of observations. Further, that there is a need for more objective methods for selecting information to ensure that the data used is sufficiently consistent and precise. She prizes the scientific method and claims that science provides an appropriate methodology.

Widdowson particularly indicts the spiritual source of traditional knowledge and questions its reliance upon spiritual beliefs. She claims, “Aboriginal people use spiritual beliefs to explain natural phenomena. These assertions, based on unverifiable beliefs in the supernatural, have not been derived from any observations, no matter how unsystematic or vague.” How might Widdowson respond to the notion that animals which are sought to be hunted are located via dreaming, and antecedent relationships with animals, as part of the procedural components of the traditional seasonal round?

Widdowson’s denigrates traditional knowledge to the extent of equating it with “junk science,” which results when conclusions are drawn from low quality data such as anecdotes, rather than from randomised, controlled clinical experiments. What place is there for oral histories within her permissible methodologies and sources of knowledge? Seemingly none.

---

564 I owe this insight to working with Philip Clay SC on Ashbian Nominees Pty Ltd v Sydney City Council [2008] NSWLEC 1436.
565 Frances. Widdowson and Albert Howard, “Aboriginal “Traditional Knowledge” and Canadian Public Policy: Ten Years of Listening to the Silence” (Presentation for the Annual Meeting of the Canadian Political Science Association, delivered at York University, Toronto, Ontario June 1-3, 2006).
566 ibid.
567 id at 7. Emphasis added.
568 id, at 13.
569 ibid.
Although Widdowson’s comments apply more generally to traditional knowledge *per se*, and not of the Dunne Za specifically, they have been published by a reputable publisher and have generated considerable academic discussion.570 There is a risk that her opinions could be used by interests antagonistic to those of Aboriginal claimants.571 Indeed, to demonstrate that critique and perspectives *comparable* to Widdowson’s are not without their threat to the veracity and legitimacy of traditional knowledge, I briefly re-consider a past example where a judge was required to consider traditional knowledge as part of the evidentiary record.

I refer again to the Apsassin case of the late 1980s whose facts I have narrated above. In his examination of the oral and written evidence presented by the Aboriginal witnesses and expert witness Hugh Brody, Addy J’s comments are revealing. He notes, “they also lacked to a great extent, the ability to plan or manage, with any degree of success, activities or undertakings other than fishing or hunting and trapping.”572 Addy J also observes, “it seems that many of their


571 Sinclair notes that scholars including Tom Flanagan and political think tanks such as the Frontier Centre for Public Policy, and national Globe and Mail columnist Margaret Wente, all endorse Widdowson’s view of Indigenous peoples, their relationship with Canada, and the ways they should "develop." Moreover, he speculates that several practices and policies of the federal Government, unfavourable to Canada’s Aboriginal peoples, have been influenced by Widdowson’s views. Similarly, Decoste and Friedland note that The National Post has installed Widdowson as its go-to expert on Aboriginal affairs. See F.C Decoste, and Hadley Friedland. "Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation," Book Review of *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* by Frances Widdowson and Albert Howard (2010) 377 Ottawa Law Review 277.

decisions even regarding these activities, that is, hunting, could be better described as *spontaneous or instinctive, rather than deliberately planned.*”

As I have narrated above, spontaneity is seemingly a feature of the traditional seasonal round and the Dunne Za economic system in general, which adapts to changing conditions and whose fluidity defies contemporary land use planning regimes. However, it seems Addy J deduces that the seasonal round is flawed by virtue of its spontaneity, rather than seeing this as a feature of the traditional seasonal round and adaptive land management. That is, that a lack of deliberate planning spoils or at least, *undermines* its methodology. Addy J rejects this different methodology comparable to the way in which Widdowson indicts the methodologies of traditional knowledge in general.

5.1.1 A further symptom of cultural untranslatability: the legitimacy of law derived from oral history

In extracting and deciphering Dunne Za law, for clarity of organisation I chose to grapple with the oral histories as a source of law separate from the initial submission. Similar to the way in which the attitudes of Widdowson and Addy J seem to evidence a failure to try to be receptive to other ways of life and a reticence towards embracing other epistemologies, the enigma presented by much of the oral histories aroused in my mind, a further symptom of cultural untranslatability: the challenges and risks for those seeking that decision makers recognise oral histories as a *legitimate source of law*. This is distinct from the principles and practices contained within oral histories being weighted as *evidence* and one of multiple considerations in the decision-making calculus, as

---

573 *ibid.* Emphasis added.
occurs for example, in administrative decision making, such as evaluating the adequacy of consultation in duty to consult matters.

At the outset of his chapter which discusses the sources of Indigenous legal traditions and, amongst other things, what gives them binding authority, Borrows identifies a fundamental issue characterizing Canada’s multi-juridical landscape, namely that problems plaguing Canada’s law, stem from “long standing disputes about the legitimacy of its origins.” By way of contrast, statute law derives legitimacy from the institutions of representative democracy and responsible government that bind its makers, whereby the people, *demos*, elect representatives who pass laws on their behalf. It follows that there is a need to understand Indigenous legal institutions and governance, in order to understand that such teachings had legitimacy as law. It is beyond the scope of this thesis to examine the legal institutions of the Dunne Za in any detail, given I was only able to glean scant reference to these from within the initial submission.

Returning to the question of how one “legitimizes” narrative as a source of binding authority, namely legal principles and practices, in the eyes of non Dunne Za decision makers, there is the risk that this source of law will be equated with myth, and be seen as fantastic, unreal and devalued as of less or no *legal* weight. By way of comparison, in Greek mythology, myths and legends communicated lessons and themes. However, contrary to Indigenous legal traditions, I do not think they carried decision-making influence in the sense that lessons from such stories were not applied in the Heliaia of Fifth Century Athens. There were separate judicial and legislative

---

574 See John Borrows, *Canada’s Indigenous Constitution* (Toronto, University of Toronto Press, 2010) at 6, which provides, “while Canadians have much to celebrate because of our law, we simultaneously continue to suffer from conflicts rooted in long standing disputes about the *legitimacy of its origins*, the *justice of its contemporary application.*”

systems. Accordingly, a risk of terming oral histories as myth seems that they will be compared with Greek and other mythologies and not appreciated as authoritative sources of binding law.

However, this risk is arguably a product of assuming a Non Dunne Za epistemology that falsely dichotomises history and historical method from myth and experience, rendering one a legitimate source of authority, and the other, fantastic. Ridington identifies what he perceives is a false demarcation between these methodologies, and what are deemed to be the authoritative sources, of history and myth. He explains, “history was a resource to be mined from lodes of artifacts and documents. History was dead and gone from the breadth of experience. Beyond history lay myth and legend.”

To illustrate this divide, I extract in part, a story told by Doig First Nation member, Japasa as paraphrased by Ridington:

My dad said that when he was a boy, about nine years old, he went into the bush alone. He was lost from his people. [In the night it rained]. He was cold and wet from the rain, but in the morning he found himself warm and dry. A pair of silver foxes had come and protected him. After that, the foxes kept him and looked after him. He stayed with them and they protected him.

Those foxes had three pups. The male and female foxes brought food for the pups. They brought food for my dad, too. They looked after him as if they were all the same. Those foxes wore clothes like people. My dad said he could understand their language. He said they taught him a song.

“At this point in the narrative, the old man sang the boy’s song. He sang his medicine song…I did not know he was giving up the power the foxes gave to him in a time out of time, alone in the bush in the 1890s.”

---

577 id at 7.
578 id at 8.
My dad said he stayed out in the bush for twenty days. Ever since that time foxes have been his friends. Anytime he wanted to he could set a trap and get foxes…”

Ridington’s annotation and commentary helpfully provides, “the old man’s stories recalled times that we would think of as being very different from one another. One that we would call history, the other myth.” Moreover, “we can use the traditions of historical scholarship to substantiate that what Japasa described really happened. There is no documentary or scientific evidence to indicate that frogs really sing… But the old man said he experienced this too. Because we lack documentary evidence we are compelled to class his second story as myth. In our thoughtworld, myth and reality are opposites.”

Ridington cautions, “unless we can find some way to understand the reality of mythic thinking, we will remain prisoners of our own language, our own thoughtworld. In this world, one story is real, the other fantasy.” By contrast, “in the Indian way of thinking, both stories are true because they describe personal experience.” “Both of Japasa’s stories were true to his experience.”

Summarising this concisely, the fault lies in the failure to embrace the Dunne Za epistemology or thoughtworld. That is, the lens with which their world is viewed. A non Dunne Za paradigm does not necessarily accommodate myth as a legitimate source of authority. These differing epistemologies result in our interpreting the legitimacy of respective legal traditions as such:

“Our own translations strongly stress obedience to duly constituted authority… we are literal minded in interpreting the meaning of experience in a hunting culture.”

We misunderstand myth by interpreting it as flawed history…For hunters, dreams

579 ibid.
580 id at 10. Emphasis added.
581 ibid. Emphasis added.
582 ibid.
583 ibid.
584 ibid.
585 id at 6.
and visions validate and explain the past in terms of present experience. For historians, the past is validated by documents rather than by personal experience... the true history of these people will have to be written in a mythic language. Like the stories of Japasa, it will have to combine stories of people coming together with other people and those that tell of people coming together with animals.586

As such, it seems that failing to be sensitive to the Dunne Za “thoughtworld” or epistemology, risks interpreting its legal traditions, some of which are sourced in myth, as deriving from illegitimate sources of authority. Due to this, Dunne Za epistemologies, whose intricacies include the fact that “dreams and visions validate and explain the past in terms of present experience,”587 must be appreciated in order to comprehend the significance of oral histories as legitimate sources of law. Put concisely, we must be sympathetic to the methodologies supporting the Dunne Za epistemology or thoughtworld in order to see legitimacy in its legal traditions.

In spite of Professor Ridington’s careful explanation, and although people such as myself might be amenable to such ways of thinking, there is a risk that decision makers who are not also trained in anthropology and amenable to the need to appreciate multiple epistemologies, will not be able to embrace such traditions as law.588

5.2 Technical legal impediments: at the mercy of legal ingredients

Moving on from consideration of cultural impediments to decision makers’ capacity to respect and consider Indigenous legal traditions, I now turn to examine, technical legal ones. The trigger for

586 id at 13. Emphases added.
587 id at 12.
588 Many decision makers may be used to the scientific method, from, for example, hearing expert witnesses give evidence with respect to ecology and other disciplines that are sourced in western scientific principles.
the following discussion derives from the Supreme Court’s emphasis on the duty to consult as part of the process of reconciliation, as well as the dissenting judgment of Garson JA in *West Moberly* and what it indicates as to how the reasonableness standard is applied to the substantive legal question of the adequacy of consultation. The reiteration of the duty as forming part of a process of reconciliation, and concern with the adequacy of process, which is often proven statistically by the amount of time expended in consultation,\(^{589}\) as opposed to the outcome attained by this process, is troubling for what it indicates as to the direction that interpretation of the duty is taking.

In the SCC’s analysis of at least three of the duty to consult cases that have come before it,\(^{590}\) the SCC emphasizes the duty to consult as being part of a process of reconciliation. In *Rio Tinto* in particular, the SCC notes, “the honour of the Crown is best reflected by a requirement for consultation *with a view to reconciliation.*”\(^{591}\) Further, that “the duty seeks to provide protection to Aboriginal and treaty rights *while furthering the process of reconciliation.*”\(^{592}\) Similarly, the post-*Haida* case law confirms, “consultation is concerned with an ethic of ongoing relationships” and seeks *to further an ongoing process* of reconciliation by articulating a preference for remedies “that *promote* ongoing negotiation.”\(^{593}\) The aspirational language italicized is noteworthy. The SCC cites a segment from *Haida* that encapsulates this emphasis:

> The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. *Reconciliation is not a final legal remedy in the usual sense.*

---

\(^{589}\) For example, the 3.5 year consultation process in *Taku*, and Garson JA’s similar approach in *West Moberly* at para 273.

\(^{590}\) Namely *Haida, Taku* and *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* 2010 SCC 43.

\(^{591}\) *Rio Tinto* at para 35.

\(^{592}\) *id* at para 34 Emphasis added.

Rather, it is a process flowing from the rights guaranteed by s 35 (1) of the Constitution Act, 1982.\textsuperscript{594}

The salient impression gleaned from the words italicised is worrisome. It suggests that ostensible effort on the part of the Crown is good enough, and that provided that the process followed is reasonable and that both parties are working together, whether or not rights and interests are realized and protected, is of secondary importance. This interpretation is problematic. The persuasive minority judgment of Garson JA attests this is a realistic concern.

I have critiqued Garson’s judgment for not paying equal attention to both process and outcome. Secondly, in commonality with the *Taku* reasoning, I have indicted it for placing emphasis on what I have termed “numerical compliance” with insufficient attention to, the *substance* of communications. From my perspective, her approach raises serious concerns about the ability of First Nation interests to be heard. For example, it struck me that to satisfy a reasonable *process*, and review on a reasonableness standard, to what extent does it matter what transpires at consultation meetings? Similarly, to what extent could an applicant *require* inquiry into the substance of communications? However, upon further reflection, while I think my concerns about the ability of Indigenous legal traditions to be taken into account are legitimate, some of my critique as to Garson JA’s *legal* reasoning seems unwarranted. That is, I think she may have had a point.

The reasoning of Garson JA in its contrast to the evidence of Petitioner Willson,\textsuperscript{595} illuminates a predicament for applicants seeking to have their concerns taken into account and for decision

\textsuperscript{594} *Rio Tinto* at para 38, citing *Haida* at para 32. Emphases added.

\textsuperscript{595} See at 5.1 above.
makers’ ability to do so. We have a problematic scenario in the sense of having a situation governed by legal mechanics that permit unsatisfactory outcomes as we have a substantive outcome that only needs to satisfy a reasonableness standard. To be clear, the topic requires some clarification. While the scope of consultation is a procedural question of law and evokes a correctness standard, the adequacy of consultation is a substantive, and not a procedural question, of mixed fact and law, and is subject to a reasonableness standard upon review. Borrowing from Binnie J in Dunsmuir, such a scenario, whereby there are multiple aspects of administrative decisions, is “known in the judicial review court as segmentation.”

To examine the legality of Garson’s reasoning, I must first explain, the workings, rationale and application of the reasonableness standard. I defer to Dunsmuir for such guidance, in the hope that it can answer my inquiries. In Dunsmuir, the leading case on the reasonableness standard and on which Garson JA relies, the SCC abolished the former multiple variants of reasonableness, and collapsed these into a single reasonableness standard, such that two standards of review exist in Canadian administrative law: correctness and reasonableness. An implication of such conflation is that multiple variables inform the degree of deference to attribute the decision maker in a reviewer’s exercise of calibrating the degree of deference, or what has been termed, “judging reasonableness,” which is required within the task of reviewing a decision pursuant to the reasonableness standard. This in itself requires some explaining.

597 id at para 45 and 134.
598 id at para 150.
599 I note this is Binnie J’s articulation of the application of the single standard or reasonableness. As Professor Woolley points out, David Mullan has noted that Binnie J’s notion of having differing degrees of deference, as distinct from having a single type of deference, was not unanimous and that this point remains unresolved. That is, Dunsmuir did not clearly resolve “whether within reasonableness review and depending on the type of decision and / or decision maker, varying forms of deference were appropriate.” See David Mullan, “Dunsmuir v. New Brunswick, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!” (2008) 21 Can. J. Admin. L. & Prac. 117 at 134-136,
Reasonableness and deference: its rationale and implications

A governing consideration for the application of the reasonableness standard, and indeed, the rationale for this standard, is deference. The majority in Dunsmuir has performed an excellent job of outlining the role and implications of deference and as such, I largely borrow from it. “In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.” As Bastarache and Le Bel JJ explain, by virtue of the fact that Courts exercise the “constitutional functions of judicial review,” they “must be sensitive... to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.” Professor Mullan completes the explanation of deference’s rationale, noting the policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime.”

But what does it mean to be deferential? How does this manifest? The majority informs, “the concept of deference... is both an attitude of the court and a requirement of the law of judicial cited in Alice Woolley and Shaun Fluker, What Has Dunsmuir Taught? Case Comment (2010) 47 Alta. L. Rev. at 1017 – 1035 at para 2.

Whereas the majority applies their conflation of two standards of reasonableness to one in the context of review of decisions of administrative tribunals, Binnie J extends the application of a single reasonableness standard to all contexts of administrative review. That is, to review of decision making by any administrative decision maker. See Dunsmuir at para 134.

Dunsmuir at para 49.

id at para 27.

ibid.

review. It does not mean that courts are subservient to the determinations of decision makers…Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law.”604 As a result of such respect, the concept of deference requires of the courts “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.”605 Specifically, “deference in the context of the reasonableness standard requires that courts “give due consideration to the determinations of decision makers.”606

By way of historical background, which is necessary to understand the intricacies of and difficulty with the current application of the reasonableness standard, Bastarache and Le Bel JJ explain that prior to Dunsmuir two standards of reasonableness were available to the judicial review court which was tasked with determining whether the standard of patent unreasonableness or reasonableness simpliciter applied. Determining which standard ought apply proved problematic,607 as did the application of the patent unreasonableness standard.608 This situation, was explained by the idea that multiple, valid interpretations of a statutory provision or answers to a legal dispute might exist.609

Justice Binnie in Dunsmuir explores the implications of the Court having abandoned the distinction between patent unreasonableness and reasonableness simpliciter in some detail. From his perspective, though this is not uncontested, the variables that previously informed the choice of

---

606 Dunsmuir at para 49.
607 id at para 39.
608 ibid.
609 id at para 41.
either patent unreasonableness or reasonableness *simpliciter* now determine the degree of
deferecne to award the decision maker in the application of the single standard of reasonableness.
One might call this an inter to intra transition in the sense that debate remains, but the debate has
shifted from one *between* the choice of patent unreasonableness and reasonableness *simpliciter*, to
debate *within* a single standard as to the appropriate degree of deference to attribute a decision
maker. This task is one of “judging reasonableness.”³⁶¹⁰ It must be calibrated to fit the applicable
circumstances.³⁶¹ Such variables that inform the degree of deference to attribute the decision
maker in applying the reasonableness standard include, the nature and content of the question,
which “helps to define the range of reasonable outcomes within which the administrator is
authorized to choose.”³⁶¹²

Justice Binnie casts doubt on the efficacy of such conflation declaring, “in practice, the result of
today’s decision may be like the bold innovations of a traffic engineer that in the end do no more
than shift rush hour congestion from one road intersection to another without any overall saving to
motorists in time or expense.”³⁶¹³ More pertinently, Binnie J draws attention to an accompanying
risk. He warns, that a danger of labelling the most “deferential” standard as reasonableness is that
it might be taken wrongly as an invitation to reviewing judges to re-weigh the *input* that resulted
in the administrator’s decision, as if it were the judge’s view of reasonableness that counts.³⁶¹⁴ This
risk and its potential for reviewing judges to effectively apply a correctness standard under the
guise of being deferential, is real and has been the subject of recent academic critique.³⁶¹⁵

³⁶¹⁰ *id* at para 150.
³⁶¹¹ *ibid*.
³⁶¹² *id* at para 138.
³⁶¹³ *id* at para 142.
³⁶¹⁴ *id* at para 148.
Having established the rationale for the reasonableness standard, namely its governance by the guiding principle of deference owing to the constitutional delegation of some matters to administrative decision makers, by virtue of their particular expertise or “field sensitivity,” 616 and others to courts, Bastarache and Le Bel JJ specify that the reasonableness standard is animated by the principle that underlies the development of the two previous standards of reasonableness. Certain questions that come before administrative tribunals do not lend themselves to one specific particular result. Rather, they may give rise to a number of possible reasonable conclusions. As a consequence, tribunals have a margin of appreciation within the range of acceptable and rational solutions. 617

Secondly, they provide a test for a reasonable decision. This involves a court inquiring “into the qualities that make a decision reasonable, referring both to the process of articulating reasons,” 618 the “justification, transparency and intelligibility within the decision making process,” 619 and to outcomes. 620 In relation to the second component, outcomes, or the substance of the decision, reasonableness is also concerned with whether, in substance, “the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” 621 In applying this test, a judge’s role is to identify the outer boundaries of reasonable outcomes within which the administrator is free to choose. 622 Moreover, a reviewing court is tasked with juggling multiple variables.

616 Dunsmuir at para 49.
617 id at para 47.
618 ibid.
619 ibid.
620 ibid.
621 ibid.
622 Dunsmuir per Binnie J at para 148.
So, “a standard of reasonableness…requires a reviewing court to look at the process and substance of the administrative decision,” or put simply, the how and what of an administrative decision. What does it mean in practice to assess the "justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"? In relation to the second substance limb, Woolley and Fluker suggest that “for courts to follow the mandate of Dunsmuir requires focusing on the concept of a range of solutions, and identification of whether the decision in question falls within that range, without a detailed exegesis of why the decision is not only reasonable, but also correct (or not only unreasonable, but also incorrect). A useful analogy illustrates what “doing deference" constitutes: “occupying a position of deference is difficult. When someone, even someone to whom one is personally connected, like a spouse, does something with which one disagrees, it can be extraordinarily difficult to simply say, "well, it is not what I would have done, but it can be justified, and it is his/her decision to make.”

Application of these points to Justice Garson’s analysis

Despite having examined the rationale for the reasonableness standard and the test for applying it, I have still not been able to answer my own inquiries. Namely, the particulars of what applying the reasonableness standard requires, as well as clarifying whether Garson JA’s findings were legally sound. I have indicted the Garson JA judgment for, inter alia, having placed too much focus on the process of consultation and scant attention to outcome. Does a reasonableness review require a

---

623 Woolley, supra note 615 at para 37.
624 Dunsmuir at para 47.
625 Woolley, supra note 615 at para 37.
626 id at para 46. Emphasis added.
627 id at para 5.
628 id at para 46. Emphasis added.
reviewer to conduct two discrete analyses of the reasonableness of the process of consultation as well as of the reasonableness of the outcome, with equal weight being awarded to both? Looking at West Moberly, this point is unclear. I shall term this question “the process vs outcome ratio question.” Do equal “parts” process and equal “parts” outcome inform the reviewer’s decision? The submissions of the petitioners in West Moberly suggest this. Namely, they suggest that two discrete analyses are required. The discussion of the rationale, workings and genesis of the single standard of reasonableness above, provides a useful foundation from which to examine these questions.

Relying upon Gitxsan First Nation v. British Columbia (Minister of Forests) 2004 BCSC 1734, (2004) B.C.J. No. 2714 (S.C.) (QL), the petitioners submitted, “more recently, this court has adopted a two-stage approach which considers first the reasonableness of the process of consultation and secondly the reasonableness of the overall outcome (that is, the accommodations reached, if any).” ⁶²⁹ The petitioners call for two discrete analyses contrasts with Justice McLaughlin’s comments in Haida:

> The process itself would likely fall to be examined on a standard of reasonableness. *Perfect satisfaction is not required*; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right

---

⁶²⁹ West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359 (Factum of the Petitioners, Written argument of the Petitioners to the Supreme Court of British Columbia at para 14: Gitksan at para 63 provides,

> “In assessing the adequacy of the Crown's efforts to fulfil its duty to consult and accommodate, the court will usually look at the *overall offer of accommodation* made by the Crown and weigh it against the *potential impact* of the infringement on the asserted Aboriginal interests having regard to *the strength of those asserted interests.*

> *The court will not normally focus on one aspect of the negotiations because the process of give and take requires giving in some areas and taking in other areas. It is the overall result which must be assessed.*” Emphasis added.
in question”: Gladstone, supra, at para. 170. What is required is not perfection, but reasonableness.\textsuperscript{630}

Further, “the focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.”\textsuperscript{631}

Relying again on Gitksan, the petitioners submitted that such comments are distinguishable, as Haida contemplated the existence of an administrative process such as that which occurred within the statutory consultation provided for in Taku under the Environmental Assessment Act,\textsuperscript{632} such an administrative process being absent in the decision making process that affected the West Moberly First Nation.

In the event of such ambiguity, to test the legality of Garson JA’s analysis, I defer to Dunsmuir. As I have noted above, Dunsmuir provides that reasonableness involves a court inquiring “into the qualities that make a decision reasonable, referring both to the process of articulating reasons”\textsuperscript{633} and to outcomes. In relation to the second component outcomes, or the substance of the decision, reasonableness is also concerned with whether in substance “the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”\textsuperscript{634}

\textsuperscript{630}Haida at para 62. Emphasis added.
\textsuperscript{631}id at para 63. Emphases added.
\textsuperscript{632}Gitksan at para 41 provides: “She subsequently made comments at [paragraph] 60 - 63 with respect to the standard of review that the courts would likely apply in judging the adequacy of the government’s efforts to discharge its duty to consult and accommodate pending claims resolution.

However, these latter comments were made in the context of an administrative process which the Province had yet to establish in that case. Similarly, no administrative process was in place for the purposes of this case.” Emphasis added.
\textsuperscript{633}Dunsmuir at para 47.
\textsuperscript{634}ibid.
However, *Dunsmuir* is not too helpful in answering this ratio question, or demonstrating how this test is to be applied. The more recent decision of *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 interprets *Dunsmuir* and sheds some light on how this test is to be applied. In particular, it emphasizes the principles that govern its application of the *Dunsmuir* test and “frame its analysis.” At the outset I note that *Newfoundland Nurses* explores the adequacy of reasons in some detail and primarily concerns the role and influence of reasons in the *Dunsmuir* test for reasonableness. This is less relevant to my inquiry. I rely upon *Newfoundland Nurses* more broadly for guidance in interpreting the *Dunsmuir* test as a whole, and particularly, for demonstrating a reviewing court’s task of identifying the range of reasonable outcomes.

*Newfoundland Nurses* concerned the judicial review of an arbitrator’s reasons for its decision. As a result of a dispute between a union and an employer, an arbitrator was tasked with deciding the issue of whether time as a casual employee could be credited towards annual leave entitlement if that employee became permanent. The arbitrator decided in the negative, after which the Union challenged the legality of the arbitrator’s decision-making process on the ground that the reasons were insufficient and therefore, that the decision was unreasonable. The arbitrator was required to interpret provisions of the applicable collective agreement, which is “classic fare” for labour arbitrators. Its reasoning outlined the facts, the parties’ arguments, relevant provisions of the collective agreement, and a number of applicable interpretive principles. In its review, the SCC concluded, “these points…provided a reasonable basis for the arbitrator’s conclusion, based on a

---

635 *Newfoundland Nurses* at para 11.
636 *id* at para 5.
637 *id* at para 23.
638 *id* at para 5 to 6.
plain reading of the agreement itself.” Moreover, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes. The SCC commenced its analysis by reciting key passages from *Dunsmuir* that framed its analysis. I have referred to several of these above. In particular, these passages emphasise the deference attributed to the decision maker in the application of the reasonableness standard and the need to exercise judicial restraint. The Court reiterated the need for judicial restraint in assessing the decisions of specialized *administrative tribunals*, reasoning that *Dunsmuir*’s calling for justification, transparency and intelligibility, “represents a *respectful appreciation* that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often *counter-intuitive to a generalist.*” The justification for judicial restraint stems from recognition of the expertise of certain decision makers “rendering decisions in their respective spheres of expertise.”

---

639 *id* at para 7.
640 *ibid.*
641 See *Newfoundland Nurses* at para 11. Chief of these were:
* “Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: Certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions;” *Dunsmuir* at para 47;

* Reasonableness “is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law;” *Dunsmuir* at para 47;

* “A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes;” *Dunsmuir* at para 47;

* “Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law.” *Dunsmuir* at para 48.
643 *ibid.*
Importantly for my purposes, the SCC eschewed a formalistic approach to the test in *Dunsmuir*. It held:

read as a whole, I do not see *Dunsmuir* as... advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result\(^{644}\)... *It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.*\(^{645}\)

This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at “the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes” (para. 47).\(^{646}\)

Further, the SCC re-affirmed its approval of Evans J.A. in *Canada Post Corp.* v. *Public Service Alliance of Canada*, 2010 FCA 56 (CanLII), namely that *Dunsmuir* seeks to “avoid an unduly formalistic approach to judicial review.”\(^{647}\) Moreover, that “perfection is not the standard” and that reviewing courts should ask whether “when read in light of the evidence before it and the nature of its statutory task, the Tribunal’s reasons adequately explain the bases of its decision.”\(^{648}\) In addition, hinting at what a good example of “doing deference” or proficient application of the Reasonableness standard\(^{649}\) requires, the SCC provided:

In assessing whether the decision is reasonable *in light of the outcome and the reasons*, courts must show: “respect for the decision-making process of adjudicative bodies with regard to both the facts and the law” (*Dunsmuir*, at para. 48). This means that courts *should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.*\(^{650}\)

---


\(^{645}\) *Newfoundland Nurses* at para 14 Emphasis added.

\(^{646}\) ibid.

\(^{647}\) *Canada Post* at para 164. Cited in *Newfoundland Nurses* at para 18.

\(^{648}\) *Newfoundland Nurses* at para 18. Citing *Canada Post* at para 163.

\(^{649}\) Woolley, *supra* note 615 at para 5.

\(^{650}\) *Newfoundland Nurses* at para 15. Emphasis added,
In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.\footnote{651}

An Assessment

After this lengthy diversion into Dunsmuir and Newfoundland Nurses, I do not think that Newfoundland Nurses definitively answers my question as to the intricacies of the application of the reasonableness standard to the substantive legal question of the adequacy of consultation, and in particular, the “process vs outcome ratio” question which was at issue in West Moberly. Nevertheless, it applies the Dunsmuir test and eschews a formalistic approach to its application. It upholds Dunsmuir’s intention as seeking to “avoid an unduly formalistic approach to judicial review.”\footnote{652} Rather, it is to be “a more organic exercise”\footnote{653} whereby the reasons are to be “read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.”\footnote{654} This I think is the primary message from this case. Perhaps demanding that a decision maker’s reasoning ostensibly provide equal weight to both the process of consultation as well as to it outcome, is too formalistic, and is contrary to Newfoundland Nurse’s ratio. Indeed, such an interpretation would adhere with Dunsmuir’s simplifying intention with respect to the choice of standard of review and its application.\footnote{655}

Secondly, with respect to the legality of Garson JA’s reasoning, measured against what is required to “do deference”\footnote{656} in the application of the reasonableness standard, I recall Binnie J’s

\footnote{651} id at para 16. Emphasis added.
\footnote{652} Dunsmuir at para 164.
\footnote{653} Newfoundland Nurses at para 14.
\footnote{654} ibid.
\footnote{655} Woolley, supra note 615 at para 1, referencing Dunsmuir at para 34.
\footnote{656} id at para 5.
admonition that the risk associated with “labeling the most “deferential” standard as reasonableness, is that it might be taken wrongly as an invitation to reviewing judges…to re-weigh the input that resulted in the administrator’s decision, as if it were the Judge’s view of reasonableness that counts.”

Academic commentators have helpfully completed much analysis of case law, from which they derive indicia of “good” and “bad” examples of “doing deference” in the application of the reasonableness standard.

Consistent with Dunsmuir’s test applied in Newfoundland Nurses, and the inverse of Binnie J’s concern, proficient application of the reasonableness standard requires the court to identify the outer boundaries of reasonable outcomes, rather than the Court re-weighing the inputs that led to the administrative decision as if it were the Judge’s view of reasonableness that counts.

Secondly, competent application of the reasonableness standard requires “the discipline to avoid being more intrusive in review than this test contemplates.” It demands a reviewer resist imposing its own view of matters. Similarly, it is evidenced by a reviewer not deliberating whether it agreed with the administrative decision. From Woolley’s perspective and the result of the findings of her examination of cases, such is indicated by “the relatively short length, at most several paragraphs of text, of the Court’s application of the reasonableness standard to the impugned decision, generally finding that either the decision falls within a range of outcomes or that there was evidence to support the decision.”

---

657 Dunsmuir at para 141 per Binnie J.
658 Woolley, supra note 615 at para 42.
659 id at para 5.
660 id at para 40.
661 id at para 45.
By contrast, indicia of a flawed application of deference include viewing the decision before the administrator in full and concluding whether the decision is reasonable “based on its agreement / disagreement with the decision”\(^{662}\) such that the “…reasonableness of the decision turns on its correctness.”\(^{663}\) Similarly, being purportedly deferential yet instead of canvassing the range of possible outcomes, displaying an intent from the outset to decide whether the decision was correct.\(^{664}\) Separately, flawed deference is indicated by a lack of “discussion as to whether the panel’s decision was intelligible, justifiable and transparent.”\(^ {665}\) As well as, omission of “discussion as to whether panel’s discussion fell within a range of outcomes.”\(^ {666}\)

In summary, if there are critical features that betray a result of a reasonableness review being tantamount to correctness, these might constitute a reviewer effectively re-litigating the issue before the administrative decision maker and indicating an agreement or disagreement with the decision.\(^ {667}\)

**Doing deference?: Newfoundland Nurses’ adherence to the *Dunsmuir* test and Woolley criteria**

In *Newfoundland Nurses*, after reviewing the facts, the parties’ arguments, provisions of the applicable collective agreement and applicable interpretative principles, the SCC concluded that there was a reasonable basis for the arbitrator’s conclusion, based on a plain reading of the collective agreement. The SCC found succinctly that the arbitrator’s reasons showed the arbitrator

\(^{662}\) *id* at para 4.

\(^{663}\) *ibid*. Emphasis added.

\(^{664}\) Example from *Calgary (City of) v. Alberta (Municipal Government Board)* 2008 ABCA 187 cited in Woolley, supra note 615 at para 43.

\(^{665}\) Woolley, *supra* note 615 at para 44.


\(^{667}\) *id* at para 5.
was “alive to the question at issue and came to a result well within the range of reasonable outcomes.”

Applying the *Newfoundland Nurses* analysis to the “Woolley indicia,” the SCC’s approach is arguably a good example of “doing deference,” as it abstains from re-litigating the issue, seems to focus on the more general question of whether the decision may be *rationally supported* by the governing legislation, declines from re-weighing the inputs, and refrains from imposing its own view of matters or commenting upon whether it agreed with the administrative decision. Moreover, consistent with the *Dunsmuir* test, it draws attention to justification, transparency and intelligibility within the decision making process while also stating that the result falls within the range of reasonable outcomes, albeit that it does not comment upon what such outcomes are.

**Degree of deference implicit in Garson JA’s analysis in *West Moberly***

Testing Garson JA’s application against the *Dunsmuir* test, what subsequent cases have suggested as to its application and what academic commentary indicates as to how it ought to apply, Garson JA details what she perceives as several similarities between the consultation processes that occurred in *Taku* and by MEMPR respectively. These include: the length of time consultation consumed, the number of meetings between the project proponent and the First Nation, the engagement of consultants by the proponent to undertake expert studies, and the adoption of mitigation strategies into the terms and conditions of certification. Based upon these perceived similarities, Garson JA concludes “the consultation in the present case was *comparable* to that

---

668 *Newfoundland Nurses* at para 26.
669 Woolley, *supra* note 615 at para 47.
undertaken in *Taku* in all of the above mentioned respects.\(^{670}\) I note that in doing so, Garson JA was seemingly not *re-deciding* the issue, but merely noting the consultation was “comparable.”

In addition to these commonalities, Garson JA elaborates at length on what she considers to be an extensive record of consultation apparent from the evidentiary record.\(^{671}\) For example, she notes the “MEMPR Considerations attempts to quantify the adverse effects of FCC’s applications on Caribou generally and on West Moberly First Nation’s treaty right specifically.”\(^{672}\) It determines that there are 1599 Caribou within Treaty 8 Territory. Such extensive record of consultation, as noted above, forms part of the evidence for the MEMPR position. Moreover, it evidences respectful attention to the reasons offered in support of the MEMPR decision, which is consistent with what deference, as the governing consideration of the reasonableness standard, demands.\(^{673}\)

I have earlier critiqued Garson JA for having concluded that the time expended on consultation was a consideration determinative of its reasonableness. For example, she observes that after the final consultation meeting of 12 August 2009:

> It was evident that by this time a decision had to be made... After years of consultation in which the competing interests were fully explored, “somebody [had] to bring consultation to an end and weigh up the respective interests: *Beckman* at [84] The Statutory Decision Makers did just that… They made their decisions to approve the permits on the basis of the generality of the treaty right in question, limited impact of the proposed permits on that right and incorporation of accommodation and mitigation measures into the project.\(^{674}\)

---

\(^{670}\) *West Moberly* at para 260. Emphasis added.

\(^{671}\) *id* at para 263.

\(^{672}\) *id* at para 273.


\(^{674}\) *West Moberly* at para 280. Emphases added.
Such is clear delineation of the evidence upon which MEMPR made their decision.

Earlier I have commented that Garson JA neglected to examine in any detail the consequences of her finding on the petitioners’ rights. She merely appends to her finding the following: “it is true that the outcome of the consultation process was not that which West Moberly First Nation desired. But it cannot be said that the outcome, given all the factors listed by the decision makers, was unreasonable.” I faulted her for the brevity of application. However, if one follows Woolley’s guidance, that same brevity is arguably indicative of the reviewer, that is, Garson JA, “not being more intrusive than this test contemplates.” While Garson JA may have expended several paragraphs noting the evidence upon which the statutory decision makers based their decision, she was very brief in her application.

Based on Woolley’s indicia of proficient and flawed applications of deference, Garson JA’s analysis arguably ticks many of the “proficient boxes.” It evidences a “relatively short length... of application of the reasonableness standard to the impugned decision... finding that... the decision falls within a range of outcomes” and, “that there was evidence to support the decision.” Moreover, I think it is fair to say that Garson JA resisted imposing her own view of matters, did not deliberate with whether she agreed with the administrative decision, and did not re-litigate the issue.

675 See at page 145 in Chapter 4 above.
676 West Moberly at para 286. Emphasis added.
677 Woolley, supra note 615 at para 5.
678 id at para 45.
679 ibid.
680 id at para 40.
681 id at para 42.
Having satisfied many of the Woolley criteria, I turn to the actual test in *Dunsmuir*. With respect to the first process limb, namely the “justification, transparency and intelligibility” within the decision making process, Garson JA’s delineation of the evidence upon which the statutory decision makers based their decision, evidences transparency and justification within the decision making process. Moreover, again consistent with what deference in the context of the reasonableness standard demands, it indicates that she gave “due consideration to the determinations of decision makers.” Her analysis is weighted heavily towards process. However, following *Newfoundland Nurses’s* calling for a [more] “organic approach,” it is arguably not problematic that there is ostensibly, not equal weight awarded to both process and outcome limbs within a reviewer’s analysis.

Secondly, in relation to the outcome limb, or the substance of the decision, namely whether, in substance, “the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law,” Garson JA states that the decision falls within the range of reasonable outcomes, but could possibly be faulted for not identifying or commenting upon what such range would be.

Notably, the decision lacks a detailed exegesis as to why it is also correct. Garson JA *overtly declares* that the decision could not be reviewed on a correctness standard. However, *in its substance* her approach is also not tantamount to having applied a correctness standard.

---

682 *Dunsmuir* at para 49.
683 *Newfoundland Nurses* at para 14.
684 *Dunsmuir* at para 47.
685 Woolley, *supra* note 615 at para 46.
686 *West Moberly* at para 198.
Finally, consistent with *Haida*, which has the authoritative strength of commenting specifically on the substantive legal question of the adequacy of consultation and not decision making more generally, and for this reason is arguably more useful a guide than guidance in relation to substantive judicial review more generally which *Dunsmuir, Newfoundland Nurses* and related cases provide, Garson JA’s focus is on process. Moreover, it arguably achieves “not perfection, but reasonableness.”

**Conclusion**

If we follow what *Newfoundland Nurses* seems to say in relation to the *Dunsmuir* test, that it is a more organic approach with a simplifying intention, McLaughlin J in *Haida*, and to assist our understanding in the event of this uncertainty, academic commentary as to the application of the reasonableness standard, which has the benefit of deriving from detailed analysis of many cases, there does not appear to be much wrong with Garson JA’s analysis. Garson JA may well have been correct in law. Notably, such was picked up on by the applicants who sought leave to appeal to the SCC from the decision of the Court of Appeal of British Columbia.

---

687 *Haida* at para 62.
688 While British Columbia did not articulate the argument I have presented or set out a similar analysis in relation to “doing deference,” it argued in its leave to appeal submissions, that Garson JA reached the right conclusion in finding the decision of MEMPR to be reasonable. See *Her Majesty the Queen in Right of British Columbia as represented by Al Hoffman Chief Inspector of Mines, Victor Koyanagi Inspector of Mines, and Dale Morgan, District Manager Peace Forest District (Applicants) and Chief Roland Wilson on his own behalf and on behalf of all the members of the West Moberly First Nations and the West Moberly First Nations and First Coal Corporation (Respondents) and First Coal Corporation (Respondent) and Her Majesty the Queen in Right of the Province of Alberta, Grand Council of Treaty 3, and Treaty 8 First Nations of Alberta (Intervenors) (Application for Leave to Appeal of the Applicants, Her Majesty the Queen in Right of British Columbia as represented by Al Hoffman, Chief Inspector of Mines, Victor Koyanagi, Inspector of Mines and Dale Morgan District Manager, Place Forest District)* at para 42.
As a result, we have a situation whereby Garson JA’s reasoning evidences a failure to engage with the Indigenous legal traditions that informed the evidence, and at the same time, her decision appears legally sound. Such result evidences a technical legal impediment to the ability of applicants to have their concerns heard, and equally, for the ability of reviewing adjudicators to take into account those concerns. Moreover, it is worrisome for the direction that the operation of the duty to consult is permitted to move. As I noted at the outset of this discussion, such legal mechanics permit a situation whereby ostensible effort on the part of the Crown is good enough, and provided that the process followed is reasonable and that both parties are working together, whether or not rights and interests are realized and protected is of secondary importance.

Moreover, as the decisions in *Taku* and *West Moberly* attest, we are seeing a trend in the Supreme Court of Canada towards concern with the adequacy of process, which is often proven statistically by the amount of time expended in consultation, as opposed to the outcome attained by this process. That is, emphasis is being placed on what I have termed “numerical compliance,” with insufficient attention to the *substance* of communications. Pursuant to such trend as I have also alerted, it does not matter so much what transpires at consultation meetings as it does how many meetings are held, how many consultants are engaged and the like. In short, what matters is how much *ostensible effort* is shown. Applicants for judicial review are at the mercy of the legal ingredients governing the duty to consult’s operation whereby, adjudged pursuant to the reasonableness standard, to an extent, it is a question of form over substance whereby substance is

---

689 For example, the 3.5 year consultation process in *Taku*, and Garson J’s similar approach in *West Moberly* at para 273.
690 A recent decision of the Supreme Court of British Columbia affirms this focus on process above and instead of outcomes. See *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* 2014 BCSC 568 at para 200.
to a degree, irrelevant. Applicants cannot require inquiry into the substance of communications. And seemingly, certain topics such as spiritual impact, remain off limits. I suggest that this reality is a long way removed from having achieved meaningful consultation.

Moreover, from another point of view, this result, namely Garson JA’s decision, also illustrates what administrative decision makers can get away with as a consequence of deference being the paramount consideration in the application of the reasonableness standard and the leeway or lenience attributed to a decision maker therein. As Binnie J concisely articulates the dilemma, an administrator acting within his/her discretion “has the right to be wrong.”

5.3 Operational limitations

Shifting gear once again while remaining within the umbrella of impediments to the task of decision makers being receptive to, respecting and considering Indigenous legal traditions, I move to consider the impact of certain operational realities.

---

691 Lawyer Tom Isaac also commented that that is what West Moberly was primarily concerned with when I asked him about this. Tom Isaac, Lee Schmidt, Erin Tully, “The Duty to Consult”, Seminar hosted by the Indigenous Law Students Society at the University of British Columbia, Faculty of Law, 21 November 2012.

692 As part of the general rules of conduct for carrying out consultation, Haida provides, “in all cases the Honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances.” See Haida at para 41. While my summation is a large leap in analysis, this example of Aboriginal applicants being at the mercy of the legal mechanics of administrative decision making pursuant to the reasonableness standard, is one, perhaps of many, that highlights that the greater effort of achieving multiple legal systems operating simultaneously has many teething problems to work through, which will likely see increasing evolution in the common law as it morphs to accommodate Indigenous legal traditions.

693 Dunsmuir at para 125.
5.3.1 Policy and economics

As the Chapter 4 analysis illustrates, the judgments reveal much about the attitudes and approach of the government players towards consultation as well as of the respective judges. Through comparing the consultation process undertaken in *Taku* with that of the provincial ministries in *West Moberly*, Garson JA’s decision highlights a recurring tendency on the part of government decision makers to defer at least some First Nations concerns for later consideration, either at the permitting phase, as was the case in *Taku*, or at a later environmental assessment phase, as was argued in *West Moberly*.

*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 arose as a result of an application by a proponent mining company (the proponent) to re-open a mine in North Western British Columbia in a pristine area at the confluence of the Taku and Tulsequah Rivers, and, in particular, from access to the mine emerging as an issue in the provincial environmental assessment process (EA). Members of the Taku River Tlingit First Nation (the Taku River Tlingit), who participated in the EA as Project Committee members, objected to the proponent’s plans to build a 160 km access road from the mine through a portion of their traditional territory. Through the provincial environmental assessment process, the Taku River Tlingit submitted the road ought not to be approved in the absence of a land use planning strategy and away from the treaty negotiation table. The EA process was unable to address these broader concerns directly. The Environmental Assessment Office (EAO) informed the Taku River Tlingit that not all of its concerns could be dealt with at the certification stage or through the EA process, and provided it with assistance in liaising with relevant decision makers and

---

694 *Taku* at para 3.
695 *id* at para 12.
The Taku River Tlingit also expressed interest in jurisdiction to approve permits for
the project, revenue sharing and Taku River Tlingit control of the use of the access road by third
parties. It was informed by the EAO that these issues exceeded the ambit of the certification
process and could only be the subject of later negotiation with the government.697

In light of the concerns voiced by the Taku River Tlingit, the SCC rationalized the ministerial
decisions by noting: the “issuance of a project approval certification does not constitute a
comprehensive “go-ahead” for all aspects of a project. An extensive “permitting” process precedes
each aspect of construction, which may involve more detailed substantive and information
requirements being placed on the developer.698 In addition, the Recommendations Report made
prospective recommendations about what ought to happen at the permit stage, as a condition of
certification. The report stated that the proponent would develop more detailed baseline
information and analysis at the permit stage, with continued Taku River Tlingit participation, and
that adjustments might be required to the road route in response.

The Taku River Tlingit lost but the SCC reassured them that “project approval certification is
simply one stage in the process by which a development moves forward.”699 It emphasised that the
consolation for the EA process not being the appropriate vehicle in which to address all of its
concerns, was that the further stages to follow, namely the permitting stage or more broadly, treaty
negotiations or land use strategy planning, provide scope for their concerns to be addressed.700

This reassurance of future action and opportunities to appease current concerns was repeated on

696 Id at para 36.
697 Id at para 12.
698 Id at para 18. Emphasis added.
699 Id at para 45.
700 Id at para 18.
several occasions.\textsuperscript{701} It is questionable whether a future permit application is the appropriate time in which to have the Taku River Tlingit’s concerns voiced and accommodated for several reasons. These include that an Environmental Assessment Certificate (EAC) authorizes development to proceed and if a condition is not obtained at this point, it would be more difficult to obtain later. For certainty and ease of enforcement, it would have been in the interests of the Taku River Tlingit to have all desired conditions attached to the EAC.

Moreover, there is a lack of consistency in this decision making approach whereby in one case, \textit{Taku}, the EA process is deemed an inappropriate venue to address all concerns, and permitting is argued as the preferable location, and subsequently in \textit{West Moberly}, permitting is argued by MEMPR and decided by Garson JA, to be inappropriate with future EA being preferable.\textsuperscript{702} What this inconsistency reveals, I think, is an underlying reticence to address the concerns in a holistic way. Given this recurring theme, one can fairly speculate that there may be an overriding policy mandate at least \textit{influencing} this approach. To illustrate this, and by way of comparison, at the Federal assessment level under the \textit{Canadian Environmental Assessment Act} (CEAA), the Federal government has previously indicated its mandate for accelerating the EA process and achieving more timely decision-making. In its budget released on 29 March, 2012, it proposed legislative reforms to streamline the environmental review process for major industrial projects, in response to what it perceived as, the increasing use of the regulatory review process to delay development.\textsuperscript{703} Similarly, it acknowledged that the current process is often triggered by small, low-risk projects, which divert resources from major projects that have a higher likelihood of environmental impact. Shrouded in the rhetoric of streamlining the assessment process so as to

\textsuperscript{701} See \textit{Taku} at paras 12, 18, 36, 46.
\textsuperscript{702} See extract from MEMPR’s “Considerations to Date” extracted in \textit{West Moberly} at para 41.
\textsuperscript{703} Blake, Cassels & Graydon LLP, Canada’s Natural Resources Paramount in 2012 Federal Budget, 3 April 2012, online: <http://www.blakes.com/english/view_bulletin.asp?ID=5308> at page 1.
increase certainty for proponents, make it easier to navigate for proponents and investors, and to reduce federal-provincial duplication, so as ultimately to encourage greater investment and create jobs, the determinative consideration seems to be what is good for the economy. For example, upon introducing the budget to the House of Commons, Finance Minister Jim Flaherty recognized that “Canada’s energy and natural resources are massive assets to our country in the global economy.” Changes, including the streamlined regulatory approach, are “intended to capitalize on these assets.” The goal of the streamlined regulatory approach is “one project, one review, completed in a clearly defined time period.” Four specific proposals support the achievement of this goal. These include capping time limits for certain categories of projects, as well as reducing duplication in assessment between the federal and provincial arenas, by allowing provincial environmental assessments to be substituted for federal assessments, and for decision-making to be transferred between federal departments and to other jurisdictions. The economic thrust of the measures suggests much about the Federal Government’s attitude towards the aims of the EA process, which are meant to promote a healthy economy and healthy environment.

I wonder whether a similar policy agenda at the provincial level influenced the approach of ministries such as MEMPR in West Moberly and precipitated a perceived need to make a timely decision, albeit with not all issues addressed, rather than addressing all issues in a “one stop shop” approach, which would inevitably have taken longer. I do not think such speculation is that far fetched. I note for example that in the more recent case Louis, MOFR acknowledged the influence of economic considerations in truncating its consultation and decision making process. I have

---

704 ibid.
705 ibid.
706 For example, 12 months for standard environmental assessments.
708 See Section 4 (1) CEAA;
narrated the facts above.\textsuperscript{709} In relation to a permit that was not the subject of the judicial review application, but one antecedent to and which was necessary for, clearing in advance of the subject permit application to MEMPR, MEMPR acknowledged that it reduced the duration of consultation with the Stellat’én for this permit. The District Manager for the Ministry wrote to the Stellat’én, saying:

Of special consideration, please note that \textit{it is essential to the Endako Mine to be able to proceed with the development of the 6.2 hectare section as soon as possible to support the commencement of their $373.6 million mill expansion project}. Although this time frame does not meet the 60 day Response Period as set out within the Forest and Range Agreement between the Ministry of Forests and Range and your First Nation, I am considering approving this particular 6.2 hectare area no later than March 20, 2008 [sic- this should be April 20, 2008] as it is \textit{essential to the Endako Mine’s substantial expansion project and the potential impacts to the economy of the local communities}.\textsuperscript{710}

Justice Groberman noticed this violation of the Forest and Range Agreement. However, he held he was not required to rule upon this, as the permit to which it attached was not the permit the subject of the judicial review application. It was not the impugned decision. Groberman J excused himself from consideration of breach of the Forest and Range Agreement thus:

\textit{I express no view as to whether the early permits issued by the Ministry of Forests would have been vulnerable to challenge had the Stellat’én brought timely judicial review proceedings in respect of them. \textit{I do express some concern that the initial cutting permit (which covered 6.2 ha. of immature forest) was issued in apparent contravention of the Crown’s Forest and Range Agreement with the Stellat’én. Nonetheless, whether or not the process for issuing the early Forest permits was suspect, it did not serve to taint the later and separate processes that are at issue in the current appeal.}}\textsuperscript{711}

\textsuperscript{709} See Chapter 4 at 4.1
\textsuperscript{710} \textit{Louis} at para 23. Emphasis added.
\textsuperscript{711} \textit{id} at para 114. Emphasis added.
As such what I have suspected influenced decision making in West Moberly appears to be confirmed in Louis. Namely, the role that implementation of government policy and economic considerations can play in impacting the ability of First Nation concerns to be heard and decision makers’ ability to take these into account. West Moberly and Louis illustrate two such operational trends: the deferral of consultation and thus the opportunity to be heard for later consideration, and reduction in the duration of consultation.

5.3.2 A divided Crown and impact upon the honour of the Crown

The reality of the Crown constituting multiple actors, and the impact of this upon the Honour of the Crown is a further operational factor that impacts upon both the feasibility of decision makers hearing First Nation concerns, and First Nations’ ability to communicate these.

Neither the majority and dissent, nor the trial judgments in West Moberly said much about the principle of the honour of the Crown. Still the petitioners relied upon it to bolster their position. Given that the honour of the Crown is always at stake in the Crown’s dealings with Aboriginal people, the following comments are worth considering. The evidence, highlighted particularly in Garson JA’s judgment, revealed that the positions of the differing government ministries were inconsistent and that the Crown was not uniform in its approach to consultation. The evidence revealed that on the one hand, the environmental scientists and biologists for the

712 As I have noted at page 137, Garson JA evokes the principle of the Honour of the Crown and cites from Taku, the requirement “that the Crown must act honourably in accordance with its historical and future relationship with the Aboriginal peoples in question. However, it is unclear what role the Honour of the Crown plays in her reasoning, and whether she pays anything more than lip service to it.

713 The petitioners submitted the Williamson J correctly held that the proposed accommodation did not honorably balance the rights and interests at stake. See West Moberly at para 11. It was also agitated in support of the delegation issue.

714 Haida at para 16.
MOE and MOFR were advocating the urgent need for caribou recovery in the face of likely extirpation. At the same time, government employees of a different ministry--MEMPR--working on the same intended project, having issued a stop work order following the investigation of illegal clearing of the Spine Road, proceeded to approve a permit that included development within a portion of the area that was illegally cleared. Further, MEMPR subsequently considered reclamation of the illegally cleared area to be an accommodation for the purposes of the duty to consult. How can one reconcile the discrepancies between the approaches of the ministries? It seems that at least in some respects, they were at loggerheads.

Aside from any issue about the message this might send to a future developer about the ability to rationalize reclaimed illegally cleared land as a form of accommodation, and the lack of deterrence implicit in this, it seems fair to say that the polarity in perspectives taken by the government agencies working on different issues (ecological and land clearing), but related to the same project, evidences a lack of cohesion in the operation of the Crown as a decision maker and trustee of the honour of the Crown. This reality has certain implications for First Nations seeking to consult effectively with the Crown and to have their concerns heard, as well as for the Crown as trustee of the honour of the Crown. What obligation do divisions within the Crown, which itself has the legal responsibility for fulfillment of the duty to consult, have to work together to reach a uniform position? Can we say that, on occasion at least, the Crown is not a single actor, but constitutes multiple actors such that there are multiple actors at the negotiating table with whom the First Nations must consult? How does one negotiate and consult with the Crown when this actor constitutes multiple entities?
5.4 Conclusion

In this chapter I examined impediments to the capacity of State based decision makers recognising, respecting and considering Indigenous legal traditions based upon my observations from the decision making that instigated and occurred within the Caribou cases. I have divided these constraints into three categories: cultural, technical legal, and operational factors. Quantitatively I have apportioned differing lengths to the discussion of these constraints. This reflects less my perception of the gravity of the problems that these factors present within the task of incorporating Indigenous legal traditions into State based decision making, and is more a function of the factors that most interested me and which have perhaps received less scholarly attention.

I commenced by discussing cultural untranslatability, a term I borrow from Sophie McCall\(^{715}\) which I use in reference to the challenge of western trained adjudicators and decision makers comprehending and accommodating, multiple worldviews. I examined several examples deriving from the Caribou cases where the clash of worldviews between Dunne Za and Canadian legal systems is apparent. These include the contrast between Dunne Za land use law and contemporary land use planning regimes. A failure to appreciate and be sensitive to the mechanics of the Dunne Za traditional seasonal round with its substantive and procedural components, many of which defy those of State imposed land use planning regimes, yields a risk that aspects of hunting decisions made pursuant to the seasonal round, are dismissed as “haphazard, irrational and improvident.”\(^{716}\)

Moreover, there is a risk that the legal system within which this decision making is made is neither acknowledged as nor given the weight of, a legal system.

\(^{715}\) McCall, *supra* note 540 at 70.

\(^{716}\) Brody, *supra* note 554 at 174.
This potential result and illustration of cultural untranslatability played out, arises from a conflict between Dunne Za decision making methodologies and those of Canadian administrative law. A Canadian decision maker such as an administrative tribunal or judge, might struggle with comprehending decision making made pursuant to seemingly vague, uncertain and intangible variables, such as senses of weather and rightness,\(^{717}\) and similarly, with decision making that draws upon spiritual knowledge.

Recent academic critique of traditional knowledge attests that mis-comprehensions arising from similar cultural chasms have confounded other critics. Moreover, previous judicial decision making within a dispute featuring some of the same Dunne Za legal traditions as that which appear in the Caribou cases, suggests that a refusal to acknowledge aspects of Indigenous law as deriving from legitimate legal systems, is a genuine risk.

A particular symptom of cultural untranslatability that I examined is the challenge of seeking decision makers to recognise oral histories as legitimate sources of law, and to acknowledge legitimacy in legal principles sourced in oral histories. This is especially pertinent to the Dunne Za for whom narrative is an important source of law, and who experience their lives as stories.\(^{718}\) I identified a risk that this source of law will be equated with myth and be seen as fantastic and unreal and devalued as having less or no legal weight. This risk is arguably a product of assuming a non Dunne Za epistemology that falsely dichotomises history and historical method, from myth and experience, rendering one a legitimate source of authority, and the other, fantastic. Dunne Za

\(^{717}\) Id at 37.

\(^{718}\) Ridington, supra note 576 at xiii. See also Robin Ridington and Jillian Ridington in collaboration with Elders of the Dane-Zaa First Nations, *Where Happiness Dwells: a history of the Dane-Zaa First Nations*, (Vancouver: UBC Press, 2013) at 2 which provides, “to understand Dane Zaa history and culture, one must understand Dane-Zaa storytelling.”
epistemologies, whose intricacies include the fact that “dreams and visions validate and explain the past in terms of present experience”\textsuperscript{719} must be appreciated in order to comprehend the significance of oral histories as legitimate sources of law. While I am amenable to the necessary cognitive transition, there is a risk that decision makers who are not also trained in anthropology and amenable to the need to appreciate multiple epistemologies, will not be able to embrace such traditions as law.

These manifestations of cultural untranslatability affirm it is a constraint to the capacity of decision makers incorporating Indigenous legal traditions into their decision making to which there is no easy solution. Encouragement such as the former Chief Justice’s duty to learn is positive. However, in the context of the implementation of the duty to consult, I would extend this obligation to all actors in the administrative decision making apparatus, and thereby, all players capable of influencing outcomes from a decision’s inception. This is particularly so owing to the legal mechanics at play in the review of the adequacy of consultation.

I spent the largest space examining these legal mechanics and the consequences they permit for several reasons. I have had some involvement with Ministerial decision making and the chain of legal advice and policy work that culminates in it. This was within an applied administrative law capacity which lacked differing standards of judicial review. Owing to my insights from this practical experience, the effect of these differing standards particularly interests me, as does the notion of extending the duty to learn to all those capable of influencing consultation outcomes, including the many employees who “reside within the bowels and recesses of government

\textsuperscript{719} \textit{id} at 12.
and whose role in working towards a ministerial decision, is akin to that of cogs in the wheel of the administrative decision making apparatus.

In addition to my personal interest, what I have learned of the reasonableness standard of review and the results that its application permits, emphasises the importance of the role of these many government officers and administrative decision makers in the larger task of seeking that Indigenous law infiltrates and influences, state based decision making. As I articulate in support of the duty to learn extending its reach to apply to administrative decision makers, if the duty does not apply at the stage of consultation with Aboriginal peoples, upon judicial review, any failure to learn could well be gotten away with by virtue of the deference awarded to the administrative decision maker.

I have explained in detail the undesirable results that application of the reasonableness standard permits. “Doing deference” to administrative decision making permits consultation outcomes whereby ostensible effort on the part of the Crown is good enough, and provided that both parties are working together, whether or not rights and interests are protected is of secondary importance. Recent judgments evidence a trend in judicial review towards concern with the adequacy of process. Adequacy is often proven statistically by the amount of time expended on consultation instead of the outcome attained in this process. Emphasis is being placed on what I have termed “numerical compliance” with insufficient attention to the substance of communications. Pursuant to such trend, it does not matter so much what transpires at consultation meetings, as how much apparent effort is shown. The adequacy of consultation has largely become a question of form over substance. Applicants challenging Crown decision making cannot require inquiry into the

\[720\] Dunsmuir at para 15.
\[721\] Woolley, supra note 615 at para 37.
Finally this chapter examined various pragmatic realities of the operation of the duty to consult which constrain the effort to have Indigenous law recognised, respected and considered. This segment discusses policy and economic influences as well as the reality of the Crown being divided. The focus on the role of government policy and economic imperatives is particularly pertinent. Regardless of what the law requires, government policy can bear an influence in consultation decision making. The effort to incorporate Indigenous legal traditions into the common law in the context of the duty to consult, cannot focus purely on the legal profession, academics and the judiciary. The administrative arm of government and those that implement law, have critical roles in achieving consultation outcomes.
6. Conclusion

In this thesis I have analyzed the extent to which Dunne Za legal traditions were recognised and respected by, and substantively influenced, the reasoning of successive decision makers in the Caribou cases. I have also alluded to the proviso that such an evaluation contains a critical further step: the need to consider the degree to which these legal traditions were submitted and articulated as legal traditions as distinct from being framed as values or similar. While there is ample impetus from multiple players within the Canadian legal landscape, including the judiciary, Bar Association and academia, for engagement with Indigenous legal traditions, analysis of the extent to which this is occurring should not ignore the fact that the end product of the extent of a decision maker’s engagement with these traditions does not merely result from a decision maker’s agency. Rather, the portrayers of Indigenous legal traditions too have a role.

One consideration for the portrayers of Indigenous legal traditions, namely Aboriginal bands who in this context are litigating breach of the duty to consult, is, are they presenting their legal traditions well enough as legal traditions, as distinct from for example, values or similar? I shall illustrate this by way of example. In relation to the traditional seasonal round, the petitioners in *West Moberly* submitted the two decisions of the Ministry of Energy, Mines and Petroleum Resources (MEMPR) were made without proper consideration of their right to hunt caribou in the area affected as part of the traditional seasonal round. In doing so, while they specifically pleaded impact on their treaty protected right and Indigenous law, namely the right to hunt pursuant to the seasonal round, the seasonal round was not overtly declared to be or identified as, Indigenous law. Further, in relation to what I have deduced as the legal principle of respect, the petitioners’ submissions to MEMPR provided:
Like our forefathers, we still hold traditional *values* as Mountain Dunne Za peoples. These include, viewing animals like people, *respect for animals and their habitat*, and an ethic not to waste plants and animals.\textsuperscript{722}

On its face it appears that the principle of respect deriving from this segment is expressed as a value as distinct from a legal tradition. Perhaps they are one and the same to a Dunne Za member. However, I suggest such values ought to be specifically identified as Indigenous laws, lest they are dismissed by a non-Dunne Za decision maker, as having the less weighty status of evidence and thereby become merely one of several factors for consideration in the decision making calculus.

Owing to my Australian common law training and litigation experience, which did not include consideration of Indigenous legal traditions or Legal Pluralism, it strikes me as somewhat judicially activist for a judge to make rulings purporting to uphold Indigenous legal traditions if these are not submitted as such. Such a judge might be criticized for elevating values and the like to the status of legal traditions. The portrayers of Indigenous legal traditions who seek to have their traditions recognised and considered, must identify their legal traditions as Indigenous laws. I have not extensively analysed the degree to which the petitioners did this in *West Moberly*. Accordingly, I have reached conclusions noting that a thorough analysis of the extent to which the decision makers recognised, respected and considered the legal traditions of the Dunne Za, ought to consider the extent to which these traditions were presented as legal traditions.

I identified several Dunne Za legal traditions as being interwoven throughout the petitioners’ submissions and which arguably incited the Caribou cases. Chief of these is the traditional seasonal round. Brody’s detailed anthropological account, which complements the more truncated

submissions, suggests the seasonal round is a means of obtaining food for the Beaver Indians and, perhaps most significantly, that it may be characterized as a land management regime that is governed by conservation objectives. It respects the ability of the land to produce what is needed, without upsetting the balance or order of the Dunne Za’s relationship with the non human world. From my experience in land use planning, I suggested that the seasonal round’s malleability defies the relative rigidity of non-Dunne Za land use planning regimes and other legal means for regulating land use. Its multiple constituent elements and characteristics suggest it would be wrong to dismiss it merely as comparable with a land use planning regime, delineating various zones in which certain uses are permissible. In particular, the traditional knowledge informing the seasonal round is rich in its complexity and contains variables that defy an anthropocentric epistemology and a western comprehension of knowledge.

Although the Dunne Za might not characterize it as such, I identified both substantive and procedural components to decision making pursuant to the traditional seasonal round. In substance, this decision making is based on traditional knowledge. Hunting decisions derive from “a massive body of information” from the land and natural world. Epistemologically, this involves a very different decision making methodology or process. In their decision-making, hunters are guided by senses of weather and rightness. Arguably vague and uncertain and difficult to assess with finality, such are the process components that inform the operation of hunting pursuant to the traditional seasonal round. However, concluding that the seasonal round is based on traditional knowledge is an inadequate assessment. Rather, intricacies deriving from Ridington’s detailed work such that the revelation of the animal’s location through dreaming is a requisite for a hunt’s

---

successful completion, affirm the importance of knowledge to the operation of the seasonal round. The seasonal round is not just based on traditional knowledge; traditional knowledge is required.

The West Moberly First Nation’s moratorium on hunting caribou that it implemented in the 1970s and which remains in force today, lacks the complexity of the seasonal round. It prohibits the hunting of caribou in order to permit rejuvenation of the population to a level at which it would be sustainable and thereby, safe to hunt. The third Dunne Za law I examined is the principle of respect as a discrete legal principle. I suggested this principle manifests in practices such as the sustainable use of hunted animals. Finally, I examined law contained within oral histories of the Dunne Za. I suggested that much of this law reinforces and provides the authority for the petitioners’ submissions.

In evaluating the extent to which decision makers engaged with Dunne Za law, I sought to decipher the governing rationale of the decision. Was the decision maker recognising Indigenous law? Was s/he balancing economic and other interests? How did each decision maker see these legal traditions when they were brought before it. Were they acknowledged as sources of legitimate legal authority? To what extent did these decision makers incorporate notions of Indigenous law into their decision making by recognizing and confirming or affirming a role for it in the decision making process?

In relation to the traditional seasonal round, the majority in West Moberly upheld the trial judge’s finding that the treaty right was defined as a right to hunt according to the traditional seasonal round and that the province’s consultation was inadequate. Given that treaties contain Indigenous legal traditions, by acknowledging the Dunne Za’s “traditional patterns of activity and
Finch CJ explicitly acknowledged and respected the existence of the Indigenous law that informs the content of the treaty right. He recognized, and his decision making was influenced by, the value to the community of hunting caribou. By explicitly acknowledging both the seasonal round and the West Moberly First Nation’s moratorium, Finch CJ’s findings constitute strong recognition of the Indigenous legal traditions that were before him in evidence. His respect for these Indigenous laws, and the influence they had on his reasoning, contrasts with the reasoning approach of the MEMPR and also of Garson JA, whose approaches were heavily influenced by the “modern day economic and cultural environment.”

In its consultation, the MEMPR failed to genuinely engage with the substance of the petitioners’ position, which was infused with impact on Dunne Za law. The MEMPR participated in a process that provided space for Indigenous law to potentially be articulated and considered by the statutory decision makers. Yet this consultation was in form only owing to its neglect of the substance of the petitioner’s position. The statutory decision maker was neither sensitive nor attentive to the petitioners’ Indigenous law as having any role in its decision making process relating to the permit applications.

Further, by means of its weighing of respective interests, which ignored the petitioners’ constitutionally protected hunting right and the fact that the petitioners’ interests were not merely interests equivalent to those of the proponent’s mineral tenure, the MEMPR did not acknowledge the seasonal round and hunting right as having the status and weight of law. Rather, the hunting right was an interest that was capable of being trumped by competing economic interests. The

---

724 West Moberly at para 137.
725 id at para 241.
726 id at para 147.
petitioners’ interests were also deemed capable of being deferred for later consideration, as distinct from including Indigenous law that must be addressed together with applicable Canadian law and consistent with Canada as a jurisdiction with multiple legal orders.

Garson JA’s approach to treaty interpretation ignored the Indigenous law informing the content of the treaty right. In assessing the adequacy of the consultation process, Garson JA affirmed the approach of the statutory decision makers of balancing “the competing interests in the context of a modern culture and environment.” 727 From Garson JA’s perspective, the petitioners’ “particular interest in hunting caribou,”728 was not Indigenous law. Rather, it was given the status and weight of an interest that was capable of being balanced in equal fashion with other interests, such as First Coal Corporation’s mineral tenure.

Garson JA’s approach to assessing reasonableness was very much a balancing exercise, which in contrast to Finch CJ’s inclusive balancing approach, which took into account the legal traditions that were at play as legitimate law, seems to have been governed by the “modern day economic and cultural environment.” 729 “The context of a modern culture and environment”730 was the determinative influence on her findings. This context was mutually exclusive of Indigenous law. They were competing interests. The omission of consideration of Indigenous law from Garson JA’s reasoning indirectly suggests that Indigenous law does not have a role to play in adjudication within Canada, a legally pluralist state.

727 id at para 249.
728 id at para 286.
729 id at para 241.
730 id at para 249.
Beyond recognition of the *existence* of the seasonal round, the judgments revealed scant appreciation of its significance as a *conservation regime* and legal mechanism for maintaining balance and order, and as I understand it, as a deliberate and well thought out land use planning and management scheme. There was minimal discussion of its procedural and substantive components. However, these features were largely not submitted as such either. In noting details such as that “hunters followed game’s seasonal migrations and re-distributions based on their knowledge and understanding of animal behaviour,” Finch CJ seemed to acknowledge the seasonal round as being an *application* of traditional knowledge and at least referred to some elements of traditional knowledge. However, the fact that Dunne Za decision making pursuant to the seasonal round is influenced by dreaming and the roles of medicine power and pre-existing relationships with the animal world, was absent from the decision makers’ reasoning.

The West Moberly First Nation’s moratorium on hunting caribou was not mentioned in the reasoning of the statutory decision maker and the trial judge. The Chief Justice explicitly identified the moratorium and, in doing so, recognized the value in the community of hunting caribou. From one perspective, this Indigenous law made its way to the majority judgment to an extent. The court acknowledged the attempt by the West Moberly First Nation to preserve the caribou population. As Finch CJ narrated, “since about the 1970s, the West Moberly elders have imposed a ban on their people’s hunting of caribou.” Further, “the petitioners’ people have done what they could on their own to preserve the herd, by banning their people from hunting caribou for the last 40 years.” However, this is the extent of its recognition as an Indigenous *law*. From another perspective however, it is arguable that the majority decision alone constitutes recognition

---

731 *id* at para 22.
732 See *West Moberly* at para 26 and 118.
733 *id* at para 26.
734 *id* at para 118.
of this law within the Indigenous community as the petitioner’s judicial review application was largely incited by the need to uphold the purpose of this law.

The third legal tradition I examined was the principle of respect and its resulting practices. This is evident in the sustainable use of hunted animals, and I surmise, in the story of Tumaxale whose incongruous and murderous behaviour yields a denial of assistance from the animal world. This principle was not submitted in any explicit way as an Indigenous law. However, it was contained within the initial submission, which formed part of the evidence. Moreover, the petitioners’ submissions to the Supreme Court of British Columbia also arguably alluded to the principle of respect. For example, they cite West Moberly member Catherine Dokkie as explaining the West Moberly’s unique connection with animals living in its traditional territory, as follows:

Our people are closely connected to the land and the animals. We think of “the bush” as our playground… We have a special relationship with the animals. We protect them. We don’t just do this because we want to eat them. We see them like people. The moose, the grizzly, the caribou: they are all our friends. When a hunter kills an animal, they will often say a prayer or give an offering, because that animal gave up its life to feed us.  

I am not sure to what degree this legal principle pervaded the decision makers’ findings and reasoning. For Williamson J, his dissatisfaction “that the Crown reasonably accommodated West Moberly’s concerns about their traditional seasonal round of hunting caribou for food, for cultural reasons, and for the manufacture of practical items,” suggests that he acknowledged some of the cultural reasons contained within the initial submission. I have speculated these could possibly

---

encompass respect for the caribou. However, this inference seems tenuous. More cogent seems to be Finch CJ’s narration of the factual background, as distinct from a finding, which provides:

The Mountain Dunne-Za valued the existence of all species, including Caribou, and treated them and their habitat with respect... The people felt and feel a deep connection to the land and all its resources, a connection they describe as spiritual. They regarded the depopulation of the species they hunt as a serious threat to their culture, their identity and their way of life.737

The Chief Judge’s description seems to sustain Catherine Dokkie’s words as to the petitioners’ special relationship with and respect for animals. However, it does not explicitly acknowledge the relationship between humans and non-humans as governed by Indigenous legal principles.

Finally, I addressed the remaining legal principles contained within the oral histories. In relation to caribou as active agents in the worldview and order of the Dunne Za, which I speculated but could not specifically identify within the oral histories, the initial submission extracts segments of several myths said to illustrate the significance and role of caribou. In particular, it notes that Goddard J documented caribou in five stories that impart moral lessons, guide appropriate conduct, and serve as spiritual teachings. Beyond the initial submission this law permeated the submissions to the Supreme Court of British Columbia by way of the evidence of anthropologist Dr Wendy Aasen. Dr Aasen deposed:

The importance of caribou to the Mountain Dunne-za is demonstrated by its role in worldview, myth, and spirituality. After a review of the literature, I conclude that in addition to entertainment value, caribou myths and stories taught and reinforced appropriate norms, beliefs and codes of conduct. Individual members of the

737 West Moberly at para 25. Emphasis added.
Mountain Dunne-za actively sought caribou as a powerful spirit helper, whom, if respected in prescribed ways, was believed to aid a hunter throughout his life.\textsuperscript{738}

The notion of caribou as active agents in the Dunne Za worldview and order, assuming a quasi governance role and separately, as being powerful spirit helpers that aided Dunne Za hunters, is noticeably absent Garson JA’s reasoning. Traces of its recognition permeate Finch CJ’s reasoning. In his findings in relation to the scope of the duty to consult, Finch CJ explicitly acknowledged the importance of caribou to the way of life and cultural identity of the West Moberly First Nation: “Caribou have been an important part of the petitioners’ ancestors way of life and cultural identity, and the petitioners’ people would like to preserve them.”\textsuperscript{739} Way of life and cultural identity could encompass the role of caribou in the way of life of the West Moberly First Nation.

In the effort to gauge any evolution in the extent to which courts were prepared to accept Indigenous legal traditions as law, I examined a decision 26 years prior to West Moberly in which at least some of the same legal traditions were in evidence.\textsuperscript{740} I concluded that the judge in this case made such minor use of the evidence of the Dunne Za’s way of life (because that was all he thought was warranted to address the issues at hand), that the case was not so useful for this comparative purpose. Nevertheless, I suggested that Addy J’s superficial engagement with the account of the Dunne Za’s way of life in the Apsassin case, starkly contrasted the meticulous attention and inquiring approach of both Williamson J and Finch CJ in the Caribou cases. From another perspective however, Addy J’s methodology resembles Garson JA’s in West Moberly:

\textsuperscript{738} West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359 (Factum of the Petitioners, Affidavit #1 of Wendy Aasen Exhibit “B”) at page 29. Cited in Written Argument of the Petitioners to the Supreme Court of British Columbia at para 56. Emphasis added.

\textsuperscript{739} West Moberly at para 118.

\textsuperscript{740} This is the analysis of the Apsassin case, Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development) 1987 FCJ 1005 which I discuss in Chapter 4 at 4.5 and also briefly in Chapter 5 at 5.1.
both adjudicators made minor use of or ignored the Indigenous legal traditions that were before them in evidence. From this perspective, the judgments of both Williamson J and Finch CJ suggest a degree of evolution in judicial decision making. At least some judges are prepared to recognise, respect and consider Indigenous legal traditions.

In relation to the capacity for and feasibility of decision makers to engage with Indigenous legal traditions, the tensions I perceived in *Kennedy*741 and the work of critics such as Frances Widdowson suggest that cultural untranslatability is an impediment to which there is no easy solution. I examined several examples deriving from the Caribou cases where the clash of worldviews between Dunne Za and Canadian legal systems is apparent. Chief of these is the contrast between Dunne Za land use law and contemporary land use planning regimes. A failure to appreciate and be sensitive to the mechanics of the Dunne Za traditional seasonal round with its substantive and procedural components, many of which defy those of state imposed land use planning regimes, yields a risk that aspects of hunting decisions made pursuant to the seasonal round, are dismissed as “haphazard, irrational and improvident.”742 Moreover, there is a risk that the legal system within which this decision making is made is neither acknowledged as nor given the weight of a legal system. This potential result and illustration of cultural untranslatability played out, arises from a conflict between Dunne Za decision making methodologies and those of Canadian administrative law. A Canadian decision maker such as an administrative tribunal or judge, might struggle with comprehending decision making made pursuant to seemingly vague,

---

uncertain and intangible variables such as senses of weather and rightness, and similarly, with
decision making that draws upon spiritual knowledge.

Recent academic critique of traditional knowledge attests that mis-comprehensions arising from
similar cultural chasms have confounded other critics. Moreover, previous judicial decision
making within a dispute featuring some of the same Dunne Za legal traditions as that which
appear in the Caribou cases, suggests that a refusal to acknowledge aspects of Indigenous law as
deriving from legitimate legal systems, is a genuine risk.

These manifestations of cultural untranslatability affirm it is a constraint on the capacity of
decision makers to incorporate Indigenous legal traditions into their decision making that requires
attention. Prospectively what implications does this present for the work of decision making and
adjudicating? How can these complex cultural impasses be sought to be addressed pragmatically?
The challenges I have faced in seeking to comprehend Dunne Za law are not unlike those of
various decision makers who are untrained in Indigenous legal traditions, who have no
background in a radically different culture, and who are presented with claims emerging from and
informed by Indigenous legal traditions, and are tasked with making appropriate use of this body
of law. The former Chief Justice’s statement about a Duty to Learn is positive. However, in the
context of the implementation of the duty to consult, I advocate extending such an obligation to all
actors in the administrative decision making apparatus, and thereby to all players capable of
influencing outcomes from a decision’s inception. This is particularly so owing to the effect of the

\footnote{id at 37}
legal mechanics at play in the review of the adequacy of consultation. Yet in common with any legal duty, there is the challenge of its enforcement which proves difficult in practice.\textsuperscript{744}

In relation to administrative decision makers and the officers of various Aboriginal relations branches of ministries involved with consultation with Aboriginal peoples, annual mandatory training in Indigenous legal traditions and coordinated with Aboriginal peoples, is one pragmatic suggestion that seems feasible and worth exploring. Comparable to the accrual of mandatory continuing legal education as a condition of a valid practising certificate for legal practitioners, government ministries could take the initiative to require training in working with and understanding Indigenous legal traditions for those officers involved in consultation with Aboriginal peoples, as an annual condition of their continued employment in this capacity.\textsuperscript{745}

For those tribunal members and judges adjudicating disputes when consultation decisions are contested, the former Chief Justice may be correct that seeking to train the current judiciary is unrealistic and, I infer, futile.\textsuperscript{746} I take guidance from the jurisdiction with which I am most familiar, namely New South Wales, and the adjudicatory model of the Land and Environment

\textsuperscript{744} I previously worked as a lawyer in the prosecution and compliance legal branch of the City of Sydney Council. We commonly brought civil enforcement proceedings in the Land and Environment Court of NSW as a result of non compliance with conditions of Council development consents, orders and other decisions. Enforcing these types of local government decisions is difficult. I suspect that seeking to enforce a duty to learn upon administrative decision makers and other government officers might well prove unworkable.

\textsuperscript{745} In my former role as a lawyer within a Government Department, I was encouraged, but not required to complete a one off three day course in Aboriginal Cultural Heritage Awareness training which was taught by an Aboriginal Australian. Training comparable to this and undertaken on a regular basis, which addresses the legal traditions of communities with which officers are working, seems ideal. Native vegetation policy officers with whom I worked were required to be skilled in Landsat imagery and Geographic Information Systems mapping in order to be able to complete their work competently. Those officers working with Aboriginal communities and exposed to Indigenous legal traditions ought to be similarly skilled.

\textsuperscript{746} The Honourable Lance Finch Chief Justice of British Columbia, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (Paper delivered at the CLEBC Indigenous Legal Orders and the Common Law Conference November 15\textsuperscript{th}, 2012) at para 45.
Court of NSW. The Land and Environment Court frequently teams commissioners of the court who possess specialised knowledge in certain areas, such as in Aboriginal land rights and disputes involving Aboriginal peoples, ecology and town planning amongst other areas of expertise, with judges, in order to resolve disputes that require proficiency with this specialised knowledge and which the judge acting in isolation would not possess. For disputes not requiring resolution of complex questions of law but still requiring adjudication of factual issues involving multiple areas of expertise, commissioners with specialised knowledge also act in combination. Acting Commissioner Megan Davis and Professor of Law at the University of New South Wales is one such commissioner. It would be worthwhile exploring the degree of influence a commissioner’s expertise has on a Judge’s findings in relation to questions of law and how these adjudicators work together. I do not know whether these commissioners have knowledge of Indigenous legal traditions. Nor am I familiar with the status of the effort to acknowledge Legal Pluralism in Australian jurisdictions. However, in principle at least, it seems appropriate to investigate adoption of this model of dispute resolution for jurisdictions of Canada, a legally pluralist state, which requires its adjudicators to recognise, respect and consider, Indigenous legal traditions together with common and civil law traditions.

These are some pragmatic responses to the complex cultural impediments I have discussed. However, this thesis also addressed technical legal ones. Owing to my background in environmental law with its administrative law mechanics, I was particularly interested in the application of the reasonableness standard to the substantive legal question of the adequacy of

---

747 I represented a client in a dispute that involved resolution of town planning as well as ecological issues and which was accordingly, adjudicated by Commissioners Tuor and Taylor due to their expertise in these respective disciplines. See Ian Black v Ku-ring-gai Council [2008] NSWLEC 1501.

748 Interviewing of Judges and Commissioners who work together to resolve Aboriginal land claims in Class 3 of the Court’s jurisdiction would be a good starting point for considering the adoption of this model in Canadian jurisdictions.
consultation and the reality of Aboriginal applicants for judicial review being at the mercy of these legal ingredients governing review of consultation decision making. I have explained in detail the deleterious consequences that these mechanics permit for Aboriginal peoples involved in consultation decision making.\textsuperscript{749} As Garson JA’s approach in \textit{West Moberly} illustrated, “doing deference”\textsuperscript{750} to administrative decision making permits consultation whereby ostensible effort by the Crown is good enough, and provided that both parties are working together, whether or not rights and interests are protected is of secondary importance. The governing consideration for the application of the reasonableness standard permits results whereby Indigenous legal traditions may be ignored, while at the same time, a decision is legally sound.

In response to the dilemma these legal ingredients present, I posit that the review of the adequacy of consultation on a correctness standard would be preferable as a reviewing court would not be curtailed from considering intricacies of consultation processes such as the substance of consultation communications, by having to show deference to the administrative decision maker.

Finally, I examined various operational realities of the implementation of the duty to consult which the Caribou cases illuminated, which impact upon the effort to have legal traditions respected and considered, and which cannot be ignored. It seems that government policy may influence the deferral of consultation to later fora including subsequent phases in assessment processes, which from the perspective of certainty that First Nation interests will be accommodated as well as timeliness, are less advantageous to the interests of a First Nation government. Moreover, economic and development imperatives can manifest in other ways.

\textsuperscript{749} See Chapter 5 at 5.2 and 5.4
deleterious to First Nations consultees, including by truncating the duration of consultation. Focus upon the role of government policy is particularly pertinent. Regardless of what the law requires it has its influence upon consultation decision making. The effort to incorporate Indigenous legal traditions into the common law in the context of the duty to consult cannot focus purely on the legal profession, academics, and the judiciary. The administrative arm of government and those who implement law have critical roles in achieving consultation outcomes.

On several levels, the Caribou cases are a positive result that ought to be celebrated. They represent the successful use of the duty to consult, albeit at substantial cost. They also reveal a willingness among some judges to work with and consider Dunne Za legal traditions. I do not feel comfortable with concluding that decision making in this case study evidenced the killing of law in the manner that Robert Cover suggests. However, I also suspect this case study is exceptional; it was a rare victory among many battles over the duty to consult that are not won. As such, while celebration is warranted, it is perhaps short lived. Duty to consult challenges are merely one manifestation of the effort by Aboriginal peoples to have their rights acknowledged. Stepping beyond the duty to consult to consider the larger context of the conflict between Aboriginal peoples and the Canadian State, in recent claims for recognition of Aboriginal title, judges have mentioned Indigenous law in the recitation of facts and have also drawn conclusions from its

---

751 Personal communication, Mr Bruce Muir, 8 August 2012. The initial submission alone cost in the order of several thousand dollars to prepare.
752 In a more recent judicial review challenge for example, the West Moberly First Nation were unsuccessful in deflecting bulk sampling in their traditional territory and impact on a different Caribou herd. See West Moberly First Nations v. British Columbia (Energy and Mines), 2014 BCSC 924 in which consultation was found to be reasonable.
753 In William v British Columbia 2012 BCCA 285 at para 13, Groberman J cited a declaration of the Xeni Gwet’in which, inter alia, prohibited logging, mining and commercial road building in an area of territory that included much of the area to which the claim for Aboriginal title attached. The declaration also made reference to Xeni Gwetin conservation rules. This declaration did not appear to have any influence in Groberman J’s resolution of the legal issues in dispute.
operation albeit neglecting its status as Indigenous law. From what reading of the written judgments reveals, Indigenous law has seemingly not influenced state based decision making with respect to the principal issues of Canadian law in dispute to the extent that the Caribou cases indicate. While acknowledging the limitations of my research, namely my principal reliance upon a single case study, it seems that although Indigenous law has a presence in state based decision making, considerable progress must occur in the extent to which state based decision makers recognise, respect and consider Indigenous legal traditions, before parity of influence exists with common law legal traditions in state based decision-making.

754 In Tsilhqot’in Nation v. British Columbia 2007 BCSC 1700 Vickers J acknowledged the existence of the Tsilhqot’in seasonal rounds and these influenced his findings in relation to some of the areas over which he would have been prepared to make findings of Aboriginal title if the pleadings permitted this. See at para 959 which William cites at para 78: “there were cultivated fields. These fields were not cultivated in the manner expected by European settlers. Viewed from the perspective of Tsilhqot’in people the gathering of medicinal and root plants and the harvesting of berries was accomplished in a manner that managed these resources to insure their return for future generations. These cultivated fields were tied to village sites, hunting grounds and fishing sites by a network of foot trails, horse trails and watercourses that defined the seasonal rounds.” However, Vickers J did not acknowledge these seasonal rounds to be Indigenous law. Moreover, Groberman J in review of Vickers J’s findings, categorised this as forming part of the “historical, ethnographic and archaeological evidence.” See William at para 30 and 34. It was not given the weight of law.
BIBLIOGRAPHY

LEGISLATION

Aboriginal and Torres Strait Islander Peoples Recognition Act, 2013 (Cth)

Indian Act, RSC 1985, c 1-5

Species At Risk Act, SC 2002, c 29

Threatened Species Conservation Act, 1995 (NSW)

JURISPRUDENCE

Adam v Canada (Environment) 2011 FC 962

Beckman v. Little Salmon / Carmacks First Nation, 2010 SCC 53

Blueberry River v Canada (DIA) [1987] FCJ 1005

Chamberlain v. The Queen (No. 2) [1984] HCA 7; (1984) 153 CLR 521

Delgamuukw v British Columbia [1997] 3 SCR 1010

Dunsmuir v. New Brunswick, 2008 SCC 9


Haida Nation v British Columbia (Minister of Forests) 2004 SCC 73, [2004] 3 SCR 511

Roy Kennedy v Director-General of the Department of Environment and Conservation and Another [2006] NSWLEC 456

Kunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations) 2014 BCSC 568

Levenstrath Community Association Inc v Tomies Timber & Anor [2000] NSWLEC 95


Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) 2005 SCC 69, [2005] 3 S.C.R. 388

Newfoundland and Labrador (Treasury Board), 2011 SCC 62
Minister for Aboriginal Affairs v Peko Wallsend Ltd [1986] HCA 40, (1986) 162 CLR 4
R v Powley [2003] 2 SCR 207, 2003 SCC 43
Rio Tinto Alcan v Carrier Sekani Tribal Council 2010 SCC 43
Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited [2010] NSWLEC 48
Tsilhqot’in Nation v. British Columbia 2007 BCSC 1700
West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359
West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2011 BCCA 247
William v British Columbia 2012 BCCA 285

GOVERNMENT DOCUMENTS

Canada, Treaty No. 8 made June 21, 1899 and Adhesions, Reports (Ottawa: Queen's Printer, 1966), online: http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853#chp4

NSW, Legislative Assembly, Hansard, Second Reading Speech to the Threatened Species Conservation Bill (No. 2), 7 December 1995, page 4482, Ms Allan (Blacktown - Minister for the Environment).

NSW, Legislative Assembly, Hansard, Second Reading Speech to the Threatened Species Conservation Amendment (Biodiversity Banking) Bill, 8 June 2006, Mr Bob Debus (Blue Mountains – Attorney General, Minister for the Environment and Minister for the Arts).

INTERNATIONAL MATERIALS

SECONDARY MATERIALS

BOOKS


CHAPTERS IN BOOKS


ARTICLES


Annie L Booth, Norm W Skelton, “You Spoil Everything!” Indigenous Peoples and the consequences of Industrial Development in British Columbia” (2011) 13 Environ Dev Sustain at 695


Robert M Cover, “The Supreme Court 1982 Term: Foreword Nomos and Narrative” (1983-84) 97 Harv. L. Rev 4


Chief Justice Preston “Consultation: One aspect of procedural propriety in administrative decision making,” A paper presented to the Australian Institute of Administrative Law, 26 June, 2008

Frances Widdowson and Albert Howard, “Aboriginal “Traditional Knowledge” and Canadian Public Policy: Ten Years of Listening to the Silence” (Presentation for the Annual Meeting of the Canadian Political Science Association, delivered at York University, Toronto, Ontario June 1-3, 2006)


COURT DOCUMENTS


Her Majesty the Queen in Right of British Columbia as represented by Al Hoffman Chief Inspector of Mines, Victor Koyanagi Inspector of Mines, and Dale Morgan, District Manager Peace Forest District (Applicants) and Chief Roland Wilson on his own behalf and on behalf of all the members of the West Moberly First Nations and the West Moberly First Nations and First Coal Corporation (Respondents) and First Coal Corporation (Respondent) and Her Majesty the Queen in Right of the Province of Alberta, Grand Council of Treaty 3, and Treaty 8 First Nations of Alberta (Intervenors) (Application for Leave to Appeal of the Applicants, Her Majesty the Queen in Right of British Columbia as represented by Al Hoffman, Chief Inspector of Mines, Victor Koyanagi, Inspector of Mines and Dale Morgan District Manager, Place Forest District

West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359 (Factum of the Petitioners, Written argument of the Petitioners to the Supreme Court of British Columbia)

SEMINARS / PRESENTATIONS / CONFERENCE MATERIALS

Caleb Behn, “Indigenous Law as a Solution to Resource Conflict in Treaty 8,” Presentation co hosted by Lawyers Rights Watch Canada, delivered at the Vancouver Public Library, 28 February 2013

Tom Isaac, Lee Schmidt, Erin Tully, “The Duty to Consult”, Seminar hosted by the Indigenous Law Students Society at the University of British Columbia, Faculty of Law, 21 November 2012

An Exploratory Workshop: Thinking about and Practising with Indigenous Legal Traditions, 30 September to 2 October 2011, Friendship Centre, Fort St John, British Columbia

THESES


INTERNET MATERIALS


MISCELLANEOUS

Anne Cubbit, Hugh Brody, Treaty 8 Country [Video recording], [Canada]: Treaty 8 Film Collective; Vancouver: Moving Images Distribution, 1982

Resolution 13-03 M of 16-17 February 2013. Canadian Bar Association Resolution 13-03-M, carried by the Council of the Canadian Bar Association at the Mid-Winter Meeting held in Mont-Tremblant, QC, February 16-17, 2013 online: Canadian Bar Association <http://www.cba.org/CBA/resolutions/pdf/13-03-M-c.pdf>.