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ABORIGINAL TRADITIONAL KNOWLEDGE

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Aboriginal peoples' traditional environmental and resource-use knowledge is playing an increasing role in regulatory and administrative decision-making in Canada. The incorporation of traditional knowledge into environmental decision making is said to allow administrative decision makers the ability to make decisions that better reflect aboriginal rights and interests.

Aboriginal traditional knowledge is difficult to define and has multiple dimensions. It encompasses the often undocumented direct observations and experience of environmental phenomena by a community over generations, a community's knowledge of the use and management of the environment including cultural practices and social activities, land use patterns, and harvesting practices past and current, as well as a community's moral and ethical values about the relationship among humans, animals and the environment.

The use and consideration of Aboriginal traditional knowledge is prescribed in a number of federal environmental and land-use statutes. For example, the *Canadian Environmental Assessment Act* provides for the consideration of community knowledge and aboriginal traditional knowledge in conducting an environmental assessment. The *Species at Risk Act* says that traditional knowledge of the Aboriginal peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures, and also in the preparation of stewardship plans. The *Mackenzie Valley Resource Management Act*, which implements regional land claims in the Mackenzie Valley in the Northwest Territories, mandates that the Mackenzie Valley Environmental Impact Review Board shall consider any traditional knowledge and scientific information that is made available to it.

Administrative environmental boards, along with some governments, are issuing policies and guidelines for the reception of Aboriginal traditional knowledge in public decision making processes. The first guidelines in Canada were produced by the Mackenzie Valley Environmental Impact Review Board. These guidelines set out, among other things, the process by which traditional knowledge holders may present their knowledge directly to the Review Board, and the means by which the Review Board assesses the relevance, appropriateness, reliability and credibility of the material presented.

The increasing reception of Aboriginal traditional knowledge in public decision-making processes not only has the potential to lead to more informed decision making by adding valuable information about resource use and environmental conditions not available elsewhere, but also may allow for more inclusive Aboriginal participation in environmental and land-use decision making processes. The Mackenzie Valley Guidelines, for instance, encourage developers and traditional knowledge holders to work extensively together prior to an environmental impact assessment in order to gain the full value of traditional knowledge during the project planning stage. In British Columbia, traditional

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knowledge studies are often conducted as part of the environmental assessment process. Such early dialogue between developers and traditional knowledge holders is designed to encourage the sharing of knowledge of environmental phenomena that may be unavailable elsewhere, and may allow for necessary project design changes to take place even before any environmental impact assessment begins. For developers, it is important to understand the increasing role of Aboriginal traditional knowledge in public decision making in Canada.

BC SUPREME COURT REJECTS A COMMERCIAL ABORIGINAL FISHING RIGHT

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On April 16, 2008, the Supreme Court of British Columbia rejected the most recent attempt by a First Nation to assert a commercial Aboriginal fishing right.

In *Lax Kw'alaams Indian Band v. Canada (A.G.)*, 2008 BCSC 447, the Lax Kw'alaams First Nation asserted that, as descendents of the nine tribes of the original Coast Tsimshian tribes of northwest British Columbia, its members held Aboriginal rights to fish commercially in their traditional territory as they had since the days prior to contact with Europeans. The band asserted that its ancestors had traded with other First Nation groups in a commercial-like manner and this trade was integral to the Coast Tsimshian's distinctive Aboriginal culture. The First Nation argued that the Crown had breached its fiduciary duty and honour of the Crown in not permitting the group to fish commercially in priority over others.

The Crown argued that any historical exchange or trade in fish or fish products by the Coast Tsimshian was low in volume, of a personal, opportunistic, irregular nature, and for food, social and ceremonial purposes only, and therefore did not qualify as a commercial Aboriginal fishing right. The Crown also argued that it did not owe an over-arching fiduciary duty to the Coast Tsimshian and that it had a public law duty to administer the fisheries.

Madam Justice Satanove of the Supreme Court of British Columbia began her judgment by setting out the requirements that must be satisfied in order to prove an Aboriginal right protected under s. 35 of the *Constitution Act*. First, the nature of the right being claimed must be identified, and then the following three part test must be met:

1) proof of an ancestral practice, custom or tradition supporting the claimed right;
2) proof that the activity was integral and distinctive to the pre-contact society; and
3) proof of reasonable continuity between the pre-contact practice and the contemporary claim.

Justice Satanove then went through a detailed analysis of the evidence tendered at trial by both parties. She found the Crown's expert witness to be a meticulous and careful witness, and overall found that her testimony was more reliable then the First Nation's expert witnesses. The Crown's expert witness based her opinion primarily on written documents made at the time of contact, like fur trader logs and Hudson's Bay Company records.

The First Nation's expert witnesses also utilized many of the same sources but also relied on oral testimonies from the Coast Tsimshian people themselves as well as oral histories from the Coast Tsimshian, known as "adaawx". Justice Satanove found that there are two distinct forms of oral histories each with a differing level of usefulness and reliability to the court. She found that a "true" adaawx is an oral history that was repeated and witnessed under special ceremonial circumstances, therefore meeting the requirements of usefulness and reliability. She found that the other forms of oral history, whether they be adaawx that were relied upon outside the ceremonial circumstances, myths, legends or testimony offered to ethnographers, are forms of oral history that do not have the same safeguards associated with "true" adaawx and therefore cannot be considered in the same manner or

offered the same weight as "true" adaawx, or as the written evidence. Justice Satanove held that the evidence tendered relating to the Coast Tsimshian adaawx was not "true" adaawx. She concluded that the true adaawx was not widely known by the Tsimshian people due to the loss of language and culture and the influence of colonization.

Justice Satanove did find that the Lax Kw'alaams First Nation members were descendents of the nine tribes of the Coast Tsimshian people of northwest British Columbia and that their ancestors harvested fish for consumption, and that this was integral to their distinctive society. However, she held that the pre-contact Coast Tsimshian people existed primarily within a subsistence economy where there were only loose forms of trade. She held that the First Nation failed to prove that its members' ancestors conducted trade in a commercial manner that was integral to their distinctive culture. She declined to make a finding that the members of the First Nation had a non-commercial Aboriginal right to fish for "Food, Social and Ceremonial" purposes because the original Statement of Claim for the action only sought a declaration for a commercial right, and not a right to fish for "Food, Social and Ceremonial" purposes.

With respect to the First Nation's claim for breach of fiduciary duty, Justice Satanove noted that not all interactions between First Nations and the Crown give rise to a fiduciary duty. She stated that a cognizable Aboriginal interest must be found in order for a fiduciary duty to attach. Since she found that the First Nation had not established an Aboriginal right to fish commercially, she found no cognizable Aboriginal interest. Therefore, she held that the Crown did not owe the Lax Kw'alaams First Nation a fiduciary duty in relation to the fisheries. She also found no dishonourable conduct on the part of the Crown.

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