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EXTERNALIZING THE DUTY: A CAUSE OF ACTION WHERE CROWN FAIL- URE TO CONSULT FIRST NATIONS RESULTS IN THIRD PARTY LOSS

ASHLEY B. AYLIFFE[†]

The decision-making process underlying Crown authorization of natural resource industry activity may trigger an obligation on the part of the Crown to consult First Nations. Consultation must accord with constitutional standards. Non-compliance can result in restriction of previously authorized third party undertakings. This can be costly and harmful to the industry. This paper assesses the prospects of a cause of action against the Crown in negligence as a potential avenue of compensation for third parties who suffer loss as a result of inadequate Crown consultation. The analysis incorporates relevant facts from several recent cases regarding 'Haida motions' and concludes that, in certain circumstances, such an action could succeed.

INTRODUCTION

The activities of the Canadian natural resource industry are necessarily intertwined with Aboriginal and treaty rights. Section 35 of the *Constitution Act, 1982* [*Constitution Act, 1982*]¹ obligates the Crown, represented by the federal and provincial governments, to consult and potentially accommodate First Nations where authorized activities may affect their asserted Aboriginal rights. This duty to consult and accommodate was affirmed by the Supreme Court of Canada in the landmark decisions of *Haida v. British Columbia (Minister of Forests)* [*Haida*]² and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [*Taku*].³ Lower courts have subsequently applied the Court's rationale in *Haida* when handling First Nation applications for declarations that the Crown has failed to discharge its duty to consult and accommodate. These applications are called '*Haida motions*.'

A successful *Haida* motion can suspend or restrict private party operations carried out under a Crown authorization insofar as the operations affect asserted Aboriginal or treaty rights.⁴ Such restraint is costly and therefore significant to industry. This raises the issue that is the subject of this paper - whether the Crown is liable in negligence to third parties for damages incurred as a result of inadequate consultation. An analysis of the elements of the tort suggests that such liability could arise. However, suing the Crown in tort raises unique issues and a straightforward negligence analysis is inappropriate. Nevertheless, it will be shown that, in the right circumstances, these issues do not ultimately bar a private party from obtaining compensation from the Crown for losses incurred as a result of inadequate consultation.

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¹ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² [2004] 3 S.C.R. 511, 245 D.L.R. (4th) 33 [*Haida*].

³ [2004] 3 S.C.R. 550, 245 D.L.R. (4th) 193 [*Taku*].

⁴ See, for example, *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* (2005), 251 D.L.R. (4th) 717, 2005 BCCA 128 [*Musqueam*].

In order to illustrate the significant potential for damage to third parties resulting from a successful *Haida* motion, Part I gives a brief description of the circumstances that trigger the duty to consult and the extent of the Crown's obligations where the duty is engaged. It will be shown that natural resource industry activities frequently trigger this duty and that it carries extensive consultation obligations for the Crown with resultant risks for private parties who are themselves not responsible for consultation.⁵ Part II summarizes the facts in one successful *Haida* motion, *Blaney v. British Columbia (Procureur General)* [*Blaney*],⁶ to exemplify the inequity to third parties that can result when the duty to consult is not recognized or adequately handled by the Crown. This inequity, it is argued, can be addressed by the tort of negligence. However, negligence is not the only possible avenue for recovery, a fact acknowledged in Part III which notes the potential applicability of breach of contract, the tort of misfeasance in a public office and restitution. Part IV works through the elements of Crown liability in negligence to third parties for damage incurred due to Crown failure to consult. To better explain the arguments on both sides, the analysis incorporates relevant facts from *Blaney*, *Haida*, *Taku* and another *Haida* motion case, *Première Nation de Betsiamites c. Canada* [*Betsiamites*].⁷

I. THE DUTY TO CONSULT

Third party loss resulting from a successful *Haida* motion can arise only where a consultation duty is triggered but not discharged. This duty arises from s. 35 of the *Constitution Act, 1982*⁸ and has been defined in a line of Supreme Court of Canada authorities.⁹ Where First Nations assert¹⁰ or hold rights pursuant to s. 35 and these rights may be affected by government action or decision, an obligation to consult arises as a product of the Crown's honour.¹¹ The Supreme Court of Canada has been unequivocal in its assertion that this duty lies with the Crown, not private parties.¹²

The duty to consult is triggered where two requirements are met. The first is that the Crown (1) must possess real or constructive knowledge of the possible existence

5 *Supra* note 2 at paras. 53, 56. "[T]he ultimate legal responsibility for consultation and accommodation rests with the Crown. Third parties are under no duty to consult or accommodate Aboriginal concerns."

6 [2005] 39 B.C.L.R. (4th) 263, 2 C.N.L.R. 75, 2005 BCSC 283 [*Blaney* cited to B.C.L.R.].

7 [2005] R.J.Q. 1745, 4 C.N.L.R. 1 (C.Q.) [*Betsiamites*].

8 *Supra* note 1 at s. 35. Section 35 states that:

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

(2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired

9 The justification test for Crown interference was established in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385. Legal justification was held to require consultation. The duty to consult was expanded to interference with Aboriginal title in *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193. *Haida* and *Taku*, *supra* notes 2, 3, expanded the Crown duty to consult to cases where there is an asserted, not just a proven claim of Aboriginal or treaty rights.

10 *Supra* note 2 at para. 25. Aboriginal rights held pursuant to treaties and potential rights held pursuant to Aboriginal claims were held to be protected by s. 35. Potential interference with all s. 35 rights carries a consultation and potential accommodation requirement.

11 *Supra* note 2 at para. 27. For an explanation of the Crown's honour as a source of the duty to consult, see Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 Sup. Ct. L. Rev. 433.

12 See note 4.

of Aboriginal right or title. Secondly, the Crown must become involved in a decision-making process that has the potential to adversely affect that right or title.¹³

In *Taku*, the provincial assessment of a proposed private party undertaking (the re-opening of a mine) pursuant to the British Columbian *Environmental Assessment Act*¹⁴ involved a decision about whether to approve a road through traditional Taku River Tlingit First Nation [TRTFN] territory. These circumstances were held to implicate an ongoing treaty negotiation process and trigger a duty to consult. The first requirement was met because the TRTFN had made their claims known to the Crown through the B.C. Treaty Commission.¹⁵ The second requirement was also met because the environmental assessment involved the Crown in a decision-making process that had the potential to adversely affect Aboriginal rights. The reasonable apprehension of adverse effects on TRTFN rights lay in the fact that the proposed road was to cut through claimed territory which was otherwise pristine.

In *Haida*, the British Columbia provincial Crown decision to replace a private party tree farm licence pursuant to the provincial *Forest Act*¹⁶ on land to which the Haida Nation claimed title likewise triggered the duty to consult. The Crown was held to have had real or constructive knowledge of the possible existence of Aboriginal title because the Haida had claimed title to the land for over one hundred years. Further, the Crown's decision to replace the licence was an action that would result in the cutting of trees on the claimed territory – an adverse effect on Haida resources and rights.

The scope of the duty to consult will vary from case to case. *Haida* set out two factors that determine this scope: the strength of the Aboriginal claim, and the gravity of the possible negative effect on the claimed rights.¹⁷ The Court envisaged a spectrum of increasingly burdensome consultation requirements, varying positively with these factors.¹⁸ For example, the scope of the duty in *Haida* was held to be measurable to a standard of “significant accommodation.”¹⁹ This was because of the Haida's strong claim to the right to harvest cedar and the direct interference with this right that logging would cause.²⁰ The scope of the duty in *Taku* was also quite large. The TRTFN's asserted claim was relatively strong by virtue of their involvement in an ongoing treaty negotiation process. The proposed road also created great potential for adverse effects on traditional land use activities. Consequently, the TRTFN were entitled to “something significantly deeper than minimum consultation and to a level of responsiveness to concerns that can be characterized as accommodation.”²¹

13 *Haida*, *supra* note 2 at para. 64.

14 *Environmental Assessment Act*, S.B.C. 1996, c. 119 [EAA].

15 *Taku*, *supra* note 3 at para. 26.

16 *Forest Act*, R.S.B.C. 1996, c. 157.

17 *Supra* note 2 at para. 39.

18 *Ibid.* at paras. 43 and 44. “At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required.”

19 *Ibid.* at para. 77.

20 *Ibid.* at para. 77.

21 *Supra* note 3 at para. 32.

In these two cases the factors which determined the scope of the duty to consult registered on the higher end of the spectrum. Yet, even where factors line up on the lowest end of the spectrum, the duty to consult requires, at the very least, good faith and reasonableness on the part of the Crown.²²

This brief description of the context and content of the duty to consult demonstrates that in the natural resource industry the possible existence of a duty to consult is something to which the Crown must be alert. Where the Crown is not diligent, a First Nation may have a cause of action in the form of a *Haida* motion. A successful *Haida* motion can inflict significant losses on innocent third parties.

II. *BLANEY*: A SUCCESSFUL *HAIDA* MOTION

As previously discussed, a *Haida* motion is an application for a declaration that the Crown has failed to fully discharge its duty to consult and accommodate a First Nation. The remedy sought is a court order requiring the Crown to perform constitutionally adherent consultation and accommodation. On successful *Haida* motions, courts may enjoin the operations of private parties for which government authorization has already been granted.

The *Blaney* decision is an example of the application of an injunctive remedy arising from a successful *Haida* motion in the context of a tangible resource sector situation. In this case, the provincial Minister of Agriculture, Food and Fisheries had granted an existing fish farm proprietor, Marine Harvest Canada, an amendment to its fish farm licence. The amendment, granted pursuant to the provincial *Fisheries Act*,²³ allowed Marine Harvest to add one million Atlantic salmon to its farm, where previously only Pacific salmon had been reared. Marine Harvest had already introduced 700,000 Atlantic salmon smolts when the Homalco Indian Band [Homalco] applied for judicial review of the Ministry's decision to authorize this activity. The Homalco brought a *Haida* motion as part of their suit. At issue was whether the Crown had adequately consulted with them with respect to the authorization of the license amendment.

The British Columbia Supreme Court held that a duty to consult had been triggered and that the Crown had not discharged its duty since it had never met with the Homalco. The scope of the duty was next determined to be mid-spectrum. The Crown was required to meet with the Homalco personally, engage in discussion of their concerns, and provide authentic responses to these concerns.²⁴

The Crown's failure to discharge its duty adversely affected Marine Harvest. Marine Harvest was enjoined from adding the remaining 300,000 Atlantic salmon smolts it had already obtained while the Crown fulfilled its obligation to consult with the Homalco. However Marine Harvest did not have anywhere to house the smolts, and the cost of securing accommodation for them was considerable. Furthermore, Marine Harvest could not be sure of getting its licence amendment even after the Crown had fulfilled its obligation to consult with the Homalco since the Minister

22 *Supra* note 2 at para. 41.

23 *Fisheries Act*, R.S.B.C. 1996, c. 149.

24 *Supra* note 6.

was ordered to “approach the consultation with an open mind and to be prepared to withdraw its approval of the amendment based on the consultation process.”²⁵ Marine Harvest had invested in infrastructure upgrades to accommodate the additional fish, and restriction of its planned expanded activity would reduce its investment to loss. The inequity of this situation is readily apparent. A private party in the position of Marine Harvest deserves compensation.

III. ALTERNATE MODES OF RECOVERY

Negligence is not the only potential recovery mechanism for private parties like Marine Harvest. Although a full consideration of each potential mechanism is beyond the scope of this paper, several potential causes of action warrant mention. Circumstances may allow for private party compensation on the bases of breach of contract, the tort of misfeasance in a public office or restitution.

Where Crown authorization is embodied in a legally enforceable contract and the Crown must breach that contract as a result of an order to consult, standard contractual remedies would be available. For example, there would be a potential action for breach of contract on the facts in cases such as *Musqueam*.²⁶ In this case, the British Columbia Court of Appeal suspended the sale of property by the Crown to a corporation pending consultation (the court found that the Crown had failed to consult in good faith).

The tort of misfeasance in a public office could also provide a mechanism for recovery, but only where a decision to issue an authorization without consultation was made on the basis of a *deliberate* attempt to shirk the duty to consult coupled with an awareness that such an attempt was likely to injure the issuee.²⁷ The negligence analysis is therefore intended to explore a potential mechanism for recovery in circumstances of Crown ignorance or inadvertence falling outside the ambit of the tort of misfeasance in a public office.

There is also the law of restitution. According to Bastarache J., speaking for the Court in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)* [*Kingstreet*], “[r]estitution is a tool of corrective justice. When a transfer of value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions.”²⁸ The relevance of this kind of tool to the inequity identified in this paper is obvious.

Subsequent to the holding in *Kingstreet*, the law of restitution can provide compensation for wrongdoing, unjust enrichment *or* on constitutional grounds.²⁹ The wrongdoing category seems, however, to require bad faith³⁰ and so may not be available to a private party. That is because Crown failure to consult will likely be

25 *Supra* note 6 at para. 127.

26 *Musqueam*, *supra* note 4.

27 *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 70 O.R. (3d) 253, 2003 SCC 69 at para. 26. “[M]isfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office.”

28 [2007] (SCC) 1 at para. 32 (CanLII).

29 *Ibid.* at para. 33.

30 *Ibid.* “The first category [of restitution for wrongdoing] is not readily applicable here since, in the case of *ultra vires* taxes enacted in good faith, it cannot be said that the government was acting as a ‘wrong-doer’.”

the result of inadvertence rather than malice. Unjust enrichment is also of limited application. One of the basic requirements of the tort, enrichment of the defendant and corresponding deprivation of the plaintiff,³¹ can probably only be met in limited circumstances where the failure to consult results in restraint of private party undertakings. Excepting any application fees paid out by the private party to the Crown, there is no retention of value on the part of the Crown obtained as a result of its authorization.

Kingstreet is perhaps most pertinent for the principle that where third party loss results from unconstitutional taxation, the requirements for restitution are far less restrictive than they would be for unjust enrichment.³² *Kingstreet* may create the basis for private party recovery of damage experienced as a result of Crown issuance of unconstitutional authorization without the need to resort to circumscribed private law principles. The objective is the same - restoring the party to the position it was in before the Crown's unconstitutional activity. The underlying rationale also corresponds: "...the central concern must be to guarantee respect for constitutional principles."³³ It is a constitutional principle that the government shall not levy taxes without constitutional authority. The honour of the Crown is also a constitutional principle and creates a duty to consult in accordance with the meaning of s. 35 of the *Constitution Act, 1982*. Ultimately, Crown non-compliance with either principle undermines the rule of law. The law of restitution may thus be of some use where the duty to consult causes third party loss, but the extent of its application is somewhat unclear.

IV. NEGLIGENCE

Although other causes of action may exist, this paper identifies and focuses on negligence as a viable cause of action in circumstances where third party loss has resulted from the Crown's failure to consult and accommodate First Nations. Two preliminary matters arise in this regard: the identity of the Crown, and the authority by which tort actions may be brought against it.

The duty to consult and accommodate lies with either the federal or provincial Crown.³⁴ The two are legally distinct.³⁵ A negligence analysis will therefore apply to either or both Crowns, depending on the circumstances. It is also clear that "Crown" refers to the executive and not the legislative branch of government.³⁶ Crown liability therefore results from executive decisions or authorizations. The provincial and federal Crowns have exposed themselves statutorily to liability in negligence by means of the *Crown Proceedings Act* and the *Crown Liability and Proceedings Act*.³⁷ Peter Hogg has noted that it was the *Uniform Model Act of 1950*

31 *Peter v. Beblow* [1993] 1 S.C.R. 980 at 987.

32 *Supra* note 27 at para. 39.

33 *Ibid.* at para. 14.

34 *Supra* note 2 at para. 57. For a discussion of the source of the provincial duty, see Kent McNeil, "Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in Haida Nation and Taku River" (2005) 29 Sup. Ct. L. Rev. 447.

35 See *Liquidators of the Marine Bank v. Receiver General of New Brunswick*, [1892] A.C. 437 (P.C.).

36 Peter Hogg & Patrick Monohan, *Liability of the Crown*, 3d ed. (Toronto: Thomson Canada Ltd, 2000) point out that this principle was established by the Supreme Court of Canada in *Wardle v. Manitoba Farm Loans Association* [1956] S.C.R. 3 at 10, 18, 23.

37 *Crown Proceedings Act*, R.S.B.C. 1996, c. 89, s. 2(c) and *Crown Liability and Proceedings Act*, R.S.C. 1985, c.

framework³⁸ which was enacted to form the tort liability provisions in the provinces.³⁹ The federal Crown has partially enacted this framework.⁴⁰ The provision in the British Columbia statute is less elaborate. It incorporates the general *Uniform Model Act* framework but without the specific list included by the other Provinces.⁴¹ In any event, the provincial and federal statutes purport to expose the Crown to liability in tort as though it were a private person.

In practice, however, the courts have recognized that suing the Crown in negligence raises unique issues. The Crown will not be liable in tort where activities are covered by an express legislative exemption or where damage results from an impugned policy decision. *Just v. British Columbia* [Just] established this.⁴² a decision that has been since cited with approval by the Supreme Court of Canada in *Swinamer v. Nova Scotia (Attorney General)*⁴³ and *Brown v. British Columbia (Minister of Transportation and Highways)*.⁴⁴ The policy/operational dichotomy represents one of the most significant potential barriers to the cause of action at issue. These bases of exclusion are not insurmountable, however, and are addressed below under the heading "Residual Policy Considerations."

In short, armed with statutory authorization and an awareness of the special issues which arise when an action in negligence is brought against the Crown, a private party could employ the common law negligence framework to assert a claim. To succeed, of course, a plaintiff would have to establish legal duty, breach of the standard of care, causation, proximate cause, and damage.⁴⁵ These five elements will be analyzed below in the context of Crown failure to consult and accommodate First Nations with resultant loss to an innocent private party.

C-50, s. 3(a).

38 *Ibid.* at 112. Section 5(1) of the *Uniform Model Act* stated: *the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject,*

- (a) in respect of a tort committed by any of its officers or agents;
- (b) in respect of any breach of those duties that a person owes to his servants or agents by reason of being their employer;
- (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and under any statute, or under any regulation or by-law made or passed under the authority of any statute.

39 *Proceedings Against the Crown Act*, R.S.A. 1980, c. P-18, s. 5. *Proceedings Against the Crown Act*, R.S.S. 1978, c. P-27, s. 5. *The Proceedings Against the Crown Act*, R.S.M. 1987, c. P140, s. 4. *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 5. *Proceedings Against the Crown Act*, R.S.N.B. 1973, c. P-18, s. 4. *Crown Proceedings Act*, R.S.P.E.I. 1988, c. C-32, s. 4. *Proceedings Against the Crown Act*, R.S.N. 1990, c. P-26, s. 5. *Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360, s. 5.

40 *Crown Liability and Proceedings Act*, *supra* note 36.

41 *Crown Proceedings Act*, *supra* note 36.

42 [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689 at 1244 [Just cited to S.C.R.]:

In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions

43 [1994] 1 S.C.R. 445, (1994), 129 N.S.R. (2d) 321; (1994), 112 D.L.R. (4th) 18 [Swinamer cited to S.C.R.].

44 [1994] 1 S.C.R. 420 (1994), 112 D.L.R. (4th) 1; [1994] 4 W.W.R. 194 [Brown cited to S.C.R.].

45 William Charles & David VanderZwaag, "Common Law and Environmental Protection: Legal Realities and Judicial Challenges" in E. Hughes, A.R. Lucas & W.A. Tilleman, eds., *Environmental Law and Policy*, 3d ed. (Toronto: Emond Publications Limited, 2003).

A. Legal Duty of the Crown to Private Parties

The first issue to be addressed is whether the Crown, in issuing a project authorization to a private party, owes a duty of care to that private party where there is an underlying consultation requirement. Such a duty is not currently established in law.⁴⁶ However, the categories of negligence are not closed⁴⁷ and a novel duty of care could be recognized. Drawing on *Anns v. Merton London Borough Council* [*Anns*],⁴⁸ the Supreme Court of Canada in *Kamloops v. Nielsen* [*Kamloops*] laid out a two-stage test for establishing duty of care.⁴⁹

This test was elaborated in *Cooper v. Hobart*⁵⁰ and has since been further refined. Most recently, its development has been encapsulated in *Canada v. Design Services Ltd.*,⁵¹ a case dealing with the liability of Public Works and Government Services Canada to third parties in a tendering process. A duty of care will be found to exist if the following requirements are met: (1) reasonably foreseeable harm; (2) sufficient proximity; (3) policy reasons arising from the particular relationship between the parties which militate in favour of the recognition of a new duty of care, where no existing analogous categories of duty of care exist; and (4) absence of residual policy considerations sufficient to justify restriction of liability.⁵² An application of relevant facts from *Haida*, *Blaney*, *Betsiamites* and *Taku* to the current conceptualization of the *Anns* test will shed light on whether the Crown could be found to owe a duty of care to private parties under similar circumstances.

i. Reasonably Foreseeable Harm

The reasonable foreseeability of harm to a private party flowing from a Crown authorization made without adequate consultation would likely carry two requirements. First, it would have to be reasonably foreseeable that authorization without consultation could, in a general sense, result in a successful *Haida* motion and en-

46 *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, 206 D.L.R. (4th) 193 at para. 36. The Court recognized several established categories, none which deal with the issuance of permits and licenses to a third party where First Nation consultation is a condition precedent. The joint venture category was more recently recognized, although not held to exist on the particular facts, in *Design Services*, *infra* note 50 at para. 67. It is possible that private parties authorized by the Crown to carry out resource extraction activities could be “closely managed” by the Crown in certain cases. Where this is the case, to the extent that the undertaking can be considered a joint venture between the Crown and the private party, the existence of an analogous category is arguable.

47 *McAllister (or Donoghue) v. Stevenson* [1932] A.C. 562, 101 L.J.P.C. 119 aff’d *Cooper*, *ibid.*

48 [1978] A.C. 728 (H.L.) [*Anns*].

49 [1984] 2 S.C.R. 2 at 10-11 [*Kamloops*].

50 *Cooper*, *supra* note 45 at para. 30.

At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant’s act? And (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negate the imposition of a duty of care.

51 *Canada v. Design Services Ltd.*, [2006] F.C.J. No. 1141, 2006 FCA 260, leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 350 [*Design Services*]. Refinement of the test: see *Odhavji*, *supra* note 26 at para. 48. See also *Childs*, *infra* note 52 at para. 12. The Supreme Court of Canada clarified the point made in *Cooper* that the *prima facie* prong of *Anns* requires both reasonable foreseeability and proximity. Accordingly, the two analyses are separated here.

52 *Ibid.* at para. 46.

suing private party loss. Based on the reasoning in *Childs v. Desormeaux* [*Childs*],⁵³ however, this fact alone would be insufficient to establish reasonable foreseeability of harm. In *Childs*, the reasonable foreseeability that impaired driving generally can result in a motor vehicle accident and serious third party injury failed to establish that third party injury is necessarily reasonably foreseeable to a social host whose particular guest drinks and drives. The court held that there must be a “finding that the hosts knew, or ought to have known, that the guest who was about to drive was impaired.”⁵⁴ This particularity of focus is the second requirement that would have to be met. Thus, a duty of care will only be found if the Crown could have reasonably foreseen that a *particular* private party authorization triggers a duty to consult.

As noted in Part I, *Haida* and *Taku* clearly articulated the conditions that trigger a duty to consult.⁵⁵ These decisions were rendered on November 18, 2004, so that where the trigger conditions are present after this date, and the Crown is aware or ought to be aware of them, it will be reasonably foreseeable that the Crown has a duty to consult.⁵⁶

The Crown will often have subjective knowledge of the trigger conditions. In *Taku* and *Blaney*, for example, the Crown was found to have real knowledge of the claims asserted by the TRTFN and Homalco because of these groups’ involvement with the B.C. Treaty Commission.⁵⁷ In other cases, the reasonable foreseeability of the duty to consult will be satisfied where it can be shown that the Crown must have known that an authorization would adversely affect Aboriginal rights. In *Haida*, for example, given that the Crown had access to evidence that cedar trees had been of significance to Haida culture for hundreds of years,⁵⁸ a Crown permit authorizing the harvesting of cedar carried both the objective potential for adverse effects and the reasonable foreseeability of adverse effects. The objective potential of adverse effects triggers the duty to consult. The reasonable foreseeability of the adverse effects goes to the reasonable foreseeability that there is a duty to consult in the particular case as required by *Anns*.

The potential existence of an Aboriginal right or title could be said to not always be reasonably foreseeable on the basis that, under the *Haida* test, the Crown may have a duty to consult without having actual knowledge of this duty.⁵⁹ Thus, Crown authorization may adversely affect Aboriginal rights or title without the Crown being subjectively aware of its duty. This difficulty has been noted in the context of the overall workability of the *Haida* test. In particular, the test has been criticized on the basis that “it can fairly be asked how the Crown can be said to have knowledge of

53 *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18 [*Childs*].

54 *Ibid.* at para. 28.

55 *Supra* notes 2 and 3. That is, where “the Crown ha[s] knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplate[s] conduct that might adversely affect it.”

56 This is likely a generous temporal allowance in favour of the Crown, considering the words of Powers J. in *Blaney*, *supra* note 6 at para. 129. “[T]he recognition of the obligation to consult is not a new one and did not arise simply out of the Supreme Court of Canada decisions referred to. The obligation to consult has been recognized by the courts for a considerable period of time, and the British Columbia Court of Appeal decision in *Haida* certainly made it clear that the province had this obligation whether or not they agreed with that decision or were appealing it.”

57 The TRTFN had begun a treaty negotiation process under the B.C. Treaty Commission framework. The Homalco made a submission to the Commission which included information on traditional and current Homalco marine resource use adjacent to Marine Harvest’s fish farm.

58 *Supra* note 2 at para. 65.

59 See note 2, 13. The trigger is real *or* constructive knowledge.

an [a]boriginal right when the existence of the right has not been demonstrated" at law.⁶⁰ However, the constructive knowledge threshold in the *Haida* test probably corresponds with the reasonable foreseeability standard set in the first stage of the *Anns* test. Where knowledge of the asserted claim is constructive, it would still fall within the reasonable foreseeability ambit of *Anns* because constructive knowledge will require facts sufficient to instil a reasonable belief that the claim exists. If it is not reasonably foreseeable that Aboriginal claims have been asserted in relation to a particular area, there can be no constructive knowledge.

Nor does the standard set by the second requirement of the duty to consult (knowledge of a potential adverse effect) offend reasonable foreseeability. If Crown authorization of an activity that is likely to adversely affect Aboriginal rights takes the form of an environmental assessment approval, for example, there is a duty to consult and that duty will be reasonably foreseeable. Due to its specific nature, an authorization in the form of an environmental assessment approval discloses whether an undertaking is likely to adversely affect Aboriginal rights. Pursuant to s. 9 of the *Environmental Assessment Act*,⁶¹ which was the foundation of the impugned Crown decision-making process in *Taku*, a project committee was formed which ordered the proponent to produce a project report describing in detail its proposed undertaking. This report was reviewed and assessed by various qualified working groups of the project committee. There can thus be no argument that the potential effects of the project were unknown. If an approval to carry out an undertaking did not require the Crown to be informed of the nature and extent of that undertaking, it would not be an approval of the undertaking.

It is true that the reasonable foreseeability of adverse effects on Aboriginal rights will not always be as clear-cut as in *Taku* and *Haida*. In *Blaney*, the impugned decision was the amendment of a fish farm licence allowing for the introduction of Atlantic salmon. The Crown took the position that there was no actual risk of infringement of Homalco rights or title claims.⁶² However, this position was based on the lack of conclusive evidence confirming the risk rather than the existence of evidence discounting the risk. It was found that the Crown was contemplating activity which might affect Homalco rights and that therefore there was a duty to consult.

The issue is therefore whether the Crown's failure to consult under such circumstances could give rise to a claim in negligence. The Crown after all had no definitive reason to believe that consultation was necessary. However, in this case, the Homalco did provide enough evidence to meet the reasonable foreseeability threshold. They had communicated the potential risks to the Crown, which included: "Spread of disease; Spread of parasites such as sea lice; Introduction of non-native species, being Atlantic salmon and potential escapements and competition with wild salmon; Destruction of mammals attempting to feed or feeding at the net pens; Pollution from waste feed, excrement, pesticides, antibiotics."⁶³ The Homalco substantiated these risks to varying degrees with evidence proffered before the Ministry made its decision to grant the amendment to the licence. For example, the Homalco supplied a report by a fisheries biologist who concluded that the potential for escaped

60 Slattery, *supra* note 11 at 441.

61 *Supra* note 14.

62 *Supra* note 6 at para. 54.

63 *Blaney* at para. 59.

Atlantic salmon *would* create new environmental risks in the area. So, even where the duty to consult is less obvious, it may be reasonably foreseeable that it exists.

It must be admitted, however, that where the evidence of adverse effect is less clear, a duty to consult may exist without such duty being reasonably foreseeable. Where this is the case, harm to the private party will not be reasonably foreseeable and no duty of care on the part of the Crown to the private party with respect to the consultation requirement will be found.

Another argument can be made that, even where Crown duty to consult is reasonably foreseeable, it may not be reasonably foreseeable that failure to consult could result in damage to a private party. This argument would hinge on the reasonable foreseeability of injunctive relief arising from a successful *Haida* motion. For it is injunctive relief that causes third party loss⁶⁴ yet injunctive relief will not always be ordered on a successful *Haida* motion.⁶⁵ Injunctive relief was, however, granted by the Supreme Courts of British Columbia and Quebec in *Blaney* and *Betsiamites*, and this testifies to the reality that it is reasonably foreseeable that a successful *Haida* motion could result in the restriction of private party activities.⁶⁶ In circumstances where the Crown issues a licence or approval to a private party, the private party that which would be subject to an injunctive order is readily identifiable.

ii. Proximity

As reasonable foreseeability and proximity are distinct requirements of the *Anns* test, the plaintiff would have to demonstrate sufficient proximity.⁶⁷ That is, the claimant would need to show that the Crown “was in a close and direct relationship to [the private party] such that it is just to impose a duty of care in the circumstances.”⁶⁸ Further, “factors giving rise to proximity must be grounded in the governing statute when there is one.”⁶⁹ A close reading of this test indicates that a thorough proximity analysis requires a close and direct relationship and the existence of inter-relational policy issues that support the finding of a duty of care being just in the circumstances. When the Crown issues a specific authorization to a private party pursuant to statute, a legal relationship is formed that goes beyond the relationship the Crown might have with the public at large or even with the natural resource industry in general. This relationship can be sufficiently proximate.

1. Close and Direct Relationship

The proximity of the relationship between private parties and the Crown stems

64 See below, Part IV. E.

65 Interlocutory injunctive relief will only be ordered in exceptional cases as held by the Quebec Court of Appeal in *Kruger inc. c. Première nation des Betsiamites*, [2006] 3 C.N.L.R. 19, 2006 QCCA 569 (CanLII). In *Haida*, *supra* note 2 at para. 14, McLachlin C.J. offered some insight into why this may be:

“the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to “lose” outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns.”

66 Although the safeguard order issued against the private party in *Betsiamites* by the Supreme Court of Quebec was overturned by the Quebec Court of Appeal in *Betsiamites*, *ibid.*, the reality is that courts are willing to grant injunctive relief on *Haida* motions.

67 *Design Services*, *supra* note 50 at para. 45. See also *Cooper*, *supra* note 45 at para. 42.

68 *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80 at para. 10.

69 *Ibid.*

from the specific and direct nature of Crown authorizations. In *Betsiamites*, the Crown had authorized an amendment to a government-issued forest management contract belonging to a private party (Kruger).⁷⁰ Forest management contracts in Quebec are issued pursuant to the *Forest Act*, which states that the contract holder is entitled to supply wood-processing plants with lumber from specified areas in consideration for performance of the conditions of the contract and the *Act*.⁷¹

Kruger may have had a cause of action in contract had the injunction not been lifted on appeal, but this would not have precluded a cause of action in tort.⁷² In fact, the existence of a contract can serve to demonstrate that the relationship between the parties is of sufficient proximity to warrant the imposition of a duty of care. According to the majority in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, the particulars of a contract signify the nature of the relationship in which there is a duty of care.⁷³ Pursuant to the *Forest Act*, the contract in *Betsiamites* described the management area from which Kruger was permitted to harvest trees to supply wood-processing plants. The relationship between parties in such circumstances is likely sufficiently proximate to allow for the imposition of a duty of care, at least with respect to the certifications made by the government in the contract.

Certifications made in non-contractual Crown authorizations also go to the factors identified in *Odhavji* as being salient at this stage of the analysis.⁷⁴ These factors include the expectations of the parties, representations, and reliance.

Natural resource activity authorizations constitute representations that private parties may undertake specified operations in certain named areas. They import reasonable expectations that the necessary conditions precedent have been discharged and result in the level of reliance necessary for the fulfilment of the terms of the authorization. In *Blaney*, the Minister-approved amendment to the existing aquaculture facility licence was not a contract. However, a licence amendment does create a close and direct relationship analogous to the one in *Betsiamites*. The amendments in *Betsiamites* and *Blaney* allowed a specifically identified private company (Kruger, Marine Harvest) to carry out a particular type of activity (logging, Atlantic salmon fish-farming) in a specific area under Crown control. This created a close and direct relationship between the parties.

2. Inter-Relational Policy

The imposition of a duty of care must also be supported by justification in the form of policy reasons arising from the particular relationship between the parties.⁷⁵ The restraint of private natural resource-based activities due to Crown failure to consult effectively shifts the consequences of the Crown's failure to consult onto private parties. However, it is clear from *Haida* and *Taku* that the duty to consult lies solely

70 *Betsiamites* supra note 7.

71 *Forest Act*, R.S.Q., s. 102.3 c. F-4.1.

72 See *Central Trust Co. v. Rafuse*, [1988] 1 S.C.R. 1206. This case stands for the principle that parties may sue in either or both of contract and tort where applicable.

73 [1993] 1 S.C.R. 12, 99 D.L.R. (4th) 577 at 35 [*BG Checo* cited to S.C.R.].

74 *Supra* note 26 at para. 50.

75 *Cooper*, supra note 45.

with the Crown.⁷⁶ The extension of a duty of care is just in these circumstances so that the party with whom no duty lies does not bear the cost of the failure of another party to whom such duty clearly attaches.

The relationship between the parties in *Blaney* exemplifies this inter-relational public policy reason for imposing a duty of care. As a private party, Marine Harvest was relieved by the Supreme Court of Canada of any duty to consult First Nations. Yet it was Marine Harvest that bore the practical consequences of the Crown's failure to consult the Homalco. Furthermore, the Court's declaration made it clear that Marine Harvest's licence to farm Atlantic salmon might very well be revoked permanently rather than just temporarily suspended.⁷⁷ If this happened, the unfairness would be even more obvious. Power J. noted that "Marine Harvest, as a third party, has relied on the decision, and would suffer significant damages if the decision was quashed and the salmon requested to be removed."⁷⁸ Enjoining the activities of a third party who has proceeded in good faith and to its detriment on the basis of a government authorization can cause damage to the private party that is tantamount to indirectly holding the third party jointly liable for the Crown's failure to consult.

iii. Residual Policy Considerations

The second prong of the *Anns* test involves consideration of whether there are legislative or judicial policy reasons external to the relationship of the parties that preclude the establishment of a duty of care. The evidentiary burden at this stage is on the Crown⁷⁹ If the answer is yes, there is no duty of care and therefore, can be no claim in negligence. There are three primary policy considerations, two of which have already been noted as having been identified in *Just*,⁸⁰ which could limit or negate the duty of care: (1) if there is a legislative exemption;⁸¹ (2) if the impugned Crown authorization was a policy decision;⁸² and (3) if the private party has experienced pure economic loss. Each consideration will be analyzed in turn.

None of the cases discussed in this paper (*Haida*, *Taku*, *Betsiamites* and *Blaney*) involve statutes which explicitly exempt the Crown from liability for authorization decisions.⁸³ Other authorizing statutes, however, may contain such an exemption. A decision made on the policy level carries sufficiently compelling public policy considerations to negative a duty of care.⁸⁴ Even if made in error the decision will

76 See *Haida*, *supra* note 2 at para. 56.

77 *Blaney*, *supra* note 6 at para. 127. "The Ministry is to approach this consultation with an open mind and be prepared to withdraw its approval of the amendment if, after reasonable consultation, it determines that it is necessary to do so."

78 *Ibid.* at para. 129.

79 See *Childs*, *supra* note 52 at para. 13. "[O]nce the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it."

80 *Supra* note 41.

81 *Ibid.*

82 *Cooper*, *supra* note 45 at para. 38. "It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered."

83 See *Forest Act*, *supra* note 16; *Environmental Assessment Act*, *supra* note 14; *Forest Act*, *supra* note 69; *Fisheries Act*, *supra* note 22.

84 There is ample authority for the principle: See *Swinamer*, *supra* note 42; *Brown*, *supra* note 43; *Just*, *supra* note 41. "The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion," quoted from *Cooper*, *supra* note 45 at para. 38. "It is at this second stage of the analysis that the distinction between government policy

stand, as long as it was not made in bad faith or for an improper purpose.⁸⁵ The issue at this point, then, becomes whether a Crown authorization of a natural resource-based activity was operational or policy in nature. If an authorization was clearly legislative, akin to the passage of a general by-law, there will be no difficulty characterizing it as a matter of policy.⁸⁶ On the other hand, if a structured statutory schedule governed the decision to authorize, as was the case in *Just* where highway inspections were carried out pursuant to established technical schedules, the decision will be seen to be clearly operational.⁸⁷ The authorizations in *Blaney* and *Betsiamites*, however, were discretionary amendments to an existing licence and contract, and were neither legislative nor clearly governed by a rigid statutory regime.

These Crown decisions to authorize lie in an area where there may be only slight differences between what constitutes policy and what constitutes operation. In such cases, Hogg has suggested that operational decisions can be distinguished on the basis that they are more specific and therefore amenable to scrutiny in relation to a standard of care.⁸⁸ Decisions to authorize must therefore be assessed with this in mind.

In *Blaney*, Marine Harvest was granted an amendment to its aquaculture licence pursuant to s. 13(5) of the *Fisheries Act*. This provision fetters discretion only to the extent that a licence issuance requires payment of the prescribed fee.⁸⁹ This suggests that the decision to grant a licence is general and highly discretionary, for no operational structure or decision-making procedure is provided in the statute. However, the B.C. Ministry of Agriculture, Food and Fisheries' *Marine Finfish Aquaculture Policies and Procedures for Licensing Applications* do state that applications which have the potential to impact Aboriginal rights require consultation in compliance with the "applicable First Nations consultation protocols."⁹⁰ The applicable protocol is the *Provincial Policy for Consultation with First Nations*. Under *Part C: Operational Guidelines* it is stated that:

The Province recognizes the need to streamline existing consultation processes and incorporate the consideration of Aboriginal interests into Provincial land and resource use decision-making. It is essential that consultation activities are well defined and carried out efficiently prior to approvals/authorizations being made.⁹¹

and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operation decisions"; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957 at 970 [*Welbridge* cited to S.C.R.]. "[T]he risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care."

85 *Odhavji*, *supra* note 26. See also *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at paras. 44-46. Rand J. held that directions provided pursuant to statutory authority may give rise to an action for damages where made in bad faith or for an improper purpose as in this case where a liquor license was revoked by a statutory body on the basis of reasons totally unrelated to the liquor licensing process.

86 See, for example, *Welbridge*, *supra* note 82.

87 *Supra* note 41.

88 Hogg and Monohan, *supra* note 35 at 164.

89 *Blaney supra* note 22 at s. 13(5):

A person must not carry on the business of aquaculture at any location or facility in British Columbia or its coastal waters unless the person holds a license issued for that purpose under this Part and has paid the fee prescribed by the Lieutenant Governor in Council

90 Government of British Columbia, *Marine Finfish Aquaculture Licensing Policies and Procedures for Applications* (Victoria: Ministry of Fisheries and Agriculture, 2005) at 2.

91 Government of British Columbia, *Provincial Policy for Consultation with First Nations* (Victoria: Ministry of

The protocol goes on to lay out a detailed stage-by-stage procedure that Crown decision makers are to follow when considering whether to issue authorizations. The direction provided by the protocol is consistent with *Haida*.⁹² McLachlin C.J. also referred to it in *Haida*, stating that “while falling short of a regulatory scheme, [the protocol] may guard against unstructured discretion and provide a guide for decision makers.”⁹³ It is important to note that British Columbia is not the only province which has expressly taken the policy decision to structure ministerial consultation processes.⁹⁴ A strong argument could be made that decisions in Alberta, Saskatchewan and Ontario to issue natural resource industry undertaking authorizations without adequate underlying consultation are also operational, for the same reasons. The reduction of unstructured discretion specifies the nature of the decision in accordance with Hogg’s above-mentioned indicator of susceptibility to judicial scrutiny.

In *Blaney*, then, the decision to authorize may have had policy aspects but the consultation aspect was operational and thus potentially subject to a duty of care. The Crown made a policy decision to impose the protocol on its decision makers. The decision as to whether or not to impose the protocol, however it was made, would escape the duty of care because it was itself policy.⁹⁵ But now that this policy decision to require consultation has been put in place, along with the Operational Procedures to guide the decision-making process, the Crown cannot escape liability by arguing that there is no duty of care.

A decision to issue an authorization without consultation is operational in that it incorrectly applies the protocol.⁹⁶ A final policy factor considers pure economic loss. Private party damage such as that experienced in *Blaney* and *Betsiamites* is likely to be categorized as pure economic loss, which is often held to be non-recoverable.⁹⁷ However courts will inquire into whether pure economic loss may be compensable in negligence by analyzing the particular case with reference to the applicable prin-

Aboriginal Relations and Reconciliation, 2002) at 18.

92 Mark Rappaport, “Bringing Meaning to First Nations Consultation in the British Columbia Salmon Aquaculture Industry” (2005) 14 Dal. J. Leg. Stud. 146 at 153.

93 *Supra* note 2 at para. 51.

94 See Government of Alberta, *The Government of Alberta’s First Nation Consultation Policy on Land Management and Resource Development* (Edmonton: Government of Alberta Ministry of Aboriginal Relations, 2005) at 3. The third Guiding Principle in Alberta’s policy states that, “consultation will occur before decisions are made, where Land Management and Resource Development may infringe First Nations rights and traditional uses.” Alberta’s Policy goes on to describe consultation procedures. See also Government of Saskatchewan, *Government of Saskatchewan Guidelines for Consultation with First Nations and Metis People: A Guide For Decision Makers* (Regina: Ministry of First Nations and Metis Relations, 2006). Based on the current law, the Saskatchewan Guidelines set out constitutionally compliant consultation procedures that Ministries must follow at a minimum when making decisions that may adversely affect First Nation interests. See also Province of Ontario, *Draft Guidelines for Ministries on Consultation with Aboriginal People Related to Aboriginal Rights and Treaty Rights* (Toronto: Ontario Secretariat for Aboriginal Affairs, 2006). Although for general guidance only, the Ontario Guidelines set out an approach for determining how to consult in accordance with constitutional requirements.

95 Although a policy decision not to consult may have been actionable based on the argument that such a decision must have been made in bad faith. See for example Cory J. in *Swinamer*, *supra* note 42 at para. 34.

96 This assertion is grounded in *Just*, *supra* note 41 where the manner in which highway inspections were carried out was challenged by the plaintiff who had sustained damage as a result of a rock falling on his car. It was held that the decisions as to when to inspect were policy but once they had been taken and a plan for inspection had been put in place, the decisions as to whether or not to follow this plan were application of policy and thus operational.

97 *Kripps v. Touche Ross Co.* (1992), 94 D.L.R. (4th) 284, 69 B.C.L.R. (2d) 62 (C.A.) at 290 [*Kripps* cited to D.L.R.]. Pure economic loss is defined as “loss suffered in circumstances in which there is no personal injury or physical property damage, nor any risk that anyone would suffer either, but loss only to pocket or estate.”

principles under which pure economic loss is recoverable.⁹⁸

Reliance is the principle that should apply to the loss experienced by private parties in cases like *Blaney* and *Betsiamites*. According to the British Columbia Court of Appeal in *Kripps*, pure economic loss may be recoverable where the court can infer there has been an undertaking by the defendant to look after the plaintiff's economic interests.⁹⁹ Such an undertaking will be indicated by (1) a situation in which the defendant had actual or presumed knowledge that the plaintiff might rely on it to look after its economic interests; (2) actual reliance; and (3) reliance that was reasonable in the particular case.¹⁰⁰

In *Betsiamites*, the terms of the forest management contract provided to Kruger by the Crown created such a situation. Pursuant to s. 102.3 of the *Forest Act*,¹⁰¹ the government of Quebec issued an amended forest management contract to Kruger which identified the area from which Kruger would be entitled to harvest timber for one hundred years. Kruger relied on the contract by establishing forestry activities in the management area. It was certainly reasonable to do this because that area was covered under the contract. The *Forest Act* also indicates that the Crown, by providing a forest management contract, shares responsibility for economic development with the recipient of the contract.¹⁰² Under these circumstances the Crown ought to have known that Kruger was relying on the fact that the Crown would not squander Kruger's economic interests under the contract because to do so would be to squander the economic interests of the province of Quebec.

B. Breach of Standard of Care

In the absence of expressed legislative exemption and if the decision to authorize is deemed operational, a duty of care may be established. At this point the analysis conflates with the traditional approach to negligence.¹⁰³ The private party must establish a breach of the applicable standard of care. For these purposes, it is appropriate to adopt the standard of care required by Major J. in *Ryan v. Victoria*, which is that of the ordinary reasonably prudent person in like circumstances.¹⁰⁴ Thus, the standard of care required where the Crown grants a resource activity authorization to a private party will depend on the type of authorization granted and other surrounding circumstances.

The Crown complied with the empowering statutes in issuing the authorizations in *Blaney* and *Betsiamites*. Neither the *Fisheries Act*¹⁰⁵ nor the *Forest Act*¹⁰⁶ was violated and statutory compliance is evidence of reasonable care.¹⁰⁷ It would also appear that

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 *Supra* note 69.

102 *Ibid.*, s. 102 states that in entering into this contract, the Minister would be, "entrust[ing] [Kruger] with the management of forest areas to promote economic development."

103 *Just, supra* note 41 at 1245. "If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered."

104 *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, 168 D.L.R. (4th) 513 at para. 28.

105 *Supra* note 22.

106 *Supra* note 16.

107 *R. in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9 at 222 [*Wheat Pool*

the issuance of an authorization lacking requisite consultation by the federal Crown pursuant to the *Fisheries Act*¹⁰⁸ would not explicitly violate that *Act*. The power of the Minister of Fisheries and Oceans to decide when to issue commercial fishery licences was characterized by the Court in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)* as highly discretionary.¹⁰⁹ Consequently, in a case like this, the Crown could argue that statutory compliance establishes that its conduct did not fall below the applicable standard of care. But statutory compliance is not determinative. The Supreme Court of Canada has held that statutory compliance alone does not preclude a finding of breach of standard of care, especially where a statute is general, discretionary or "where unusual circumstances exist which are not clearly within the scope of the statute."¹¹⁰ The *Fisheries* and *Forest Acts* bestow a general and discretionary power on the Crown regarding issuance of aquaculture licences¹¹¹ and forest management contracts respectively.¹¹²

Further, these *Acts* do not address the special circumstances created where an authorization carries an underlying duty to consult. Statutory compliance will not evidence reasonable care where the legislative standards do not govern the particular facts.¹¹³ If intentional or negligent failure to comply with a statutory duty is evidence of breach of standard of care¹¹⁴ then, surely, failure to comply with a constitutional duty is even stronger evidence. Although the duty to consult is not a statutory duty, it is a legal duty,¹¹⁵ and one that arises from the *Constitution Act, 1982*.¹¹⁶ A strong argument could be made that Crown failure to comply with a legal duty arising from the 'supreme law of the land' is a failure which brings Crown authorization of private party activity without adequate consultation below the standard of care.

Haida and *Taku* clearly articulate what the Crown must do to comply with its constitutional duty to consult. The applicable standard of care with respect to the scope of required consultation might well coincide with the *Haida* and *Taku* framework. On successful *Haida* motions, courts order consultation that is consonant with these cases. In *Blaney* it was held that "[e]ach of the parties to the consultation can take direction respecting rights and obligations from these decisions."¹¹⁷ In all cases, then, the standard of care should require a good faith attempt by the Crown to consult in accordance with its duty to do so prior to the authorization of a private party undertaking.¹¹⁸

The type of consultation required of the Crown when making decisions to authorize

cited to S.C.R.].

108 *Fisheries Act*, R.S.C., 1985, c. F-14, s. 7.

109 [1997] 1 S.C.R. 12, 142 D.L.R. (4th) 193 at 30 [*Comeau* cited to S.C.R.]. "It is only after a licence has been issued that the *Fisheries Act* imposes limits upon the Minister's discretion."

110 *Ryan*, *supra* note 101 at para. 40.

111 See note 86 and accompanying text.

112 *Supra* note 16, 68. Section 102 of the *Forest Act* provides only this minimal guidance:

The Minister may, on such conditions as he may determine, enter into a contract by which he entrusts a person with management of forest areas to promote economic development.

113 *Ryan*, *supra* note 101.

114 See *Wheat Pool*, *supra* note 104.

115 *Haida*, *supra* note 2 at para. 10.

116 *Ibid.*

117 *Supra* note 6 at para. 129.

118 *Haida*, *supra* note 2 at para. 41.

private party activity in the context of the British Columbia aquaculture industry is indicative of the applicable standard of care in that context. Many First Nations in British Columbia can make a strong claim to a right to fish for wild salmon and the potential risk to this right posed by offshore aquaculture facilities is substantial.¹¹⁹ Under these circumstances, it has been suggested that the Crown's obligation is to mitigate the adverse effects of interference with asserted Aboriginal rights.¹²⁰ This is the level of positive action required for the Crown to fulfil its constitutional obligation to consult. This should also calibrate the standard of care required of the reasonably prudent Crown prior to issuing an authorization to an aquaculture facility operator.

In reality, the scope of the duty set out by the *Haida* framework is no more onerous than the common law standard of reasonable prudence. *Haida* makes it clear that it is not perfect consultation, just reasonable consultation that is required.¹²¹ Where the Crown has attempted to consult and does not do so adequately, a *Haida* motion will only be successful if the Crown's attempt falls well below the standard of reasonable prudence. It is likely, then, that where a Crown authorization is invalidated on a *Haida* Motion, the Crown has been negligent.

C. Causation

Sufficiency of the causal link between the negligence of the Crown and damage constitutes the next element. The "but for" test is the applicable standard. Although there has been some obfuscation in the jurisprudence as to whether this is so, the recent holding of the Supreme Court of Canada in *Resurfice Corp v. Hanke* [Hanke] clarifies the point that, even in multi-cause scenarios, "the basic test for determining causation remains the 'but for' test. The plaintiff bears the burden of showing that 'but for' the negligent act or omission of each defendant, the injury would not have occurred."¹²²

Common sense dictates that, but for the Crown's failure to carry out its legal duty to consult, the damage experienced by Marine Harvest in *Blaney* would not have occurred. And "ordinary common sense" is the mechanism for drawing causal inferences in this context.¹²³ Notwithstanding the invalidity of the authorization due to the failure to consult, Marine Harvest had taken all required measures to allow for the addition of the smolts. Indeed, most of the smolts had already been added and the rest were simply waiting.

It must be admitted that the causation requirement does place limits on the extent

119 Rappaport, *supra* note 90 at 154, 157-158. The salmon fishery was central to First Nation economy and culture. Scientific discoveries suggest the risks to wild salmon presented by open-system salmon farming are significant and include escapees, sea lice and competition with native species.

120 *Ibid.* at 161.

121 *Haida*, *supra* note 2 at para. 62. "The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty."

122 *Resurfice Corp v. Hanke*, 2007 SCC 7 at para. 21 [Hanke]. There is no reason to expect that an exception to the basic test would be permitted where a private party brings an action against the Crown for damage resulting from a negligently issued authorization. The first requirement of such an exception as noted in *Hanke* is that, "it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the (but for) test" (at para. 25). As is noted in the ensuing analysis, the Crown permit is the root cause of the private party damage. Without the permit, the damage could never occur.

123 See *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at para. 16 [Athey].

of compensable damage. In *Blaney*, for example, if good faith consultation between the Crown and the Homalco results in a withdrawal of the permit, not all projected damages will be caused by the Crown's negligence. Certainly the cost of removing the 700,000 smolts (\$300,000) will be caused by the Crown's failure to consult because the smolts would not have been added but for the negligently issued permit. However, the resulting loss in potential earnings (estimated at \$15,000,000) will likely go unrecovered based on the "essential purpose of tort law, which is to restore the plaintiff to the position he would have enjoyed but for the negligence of the defendant."¹²⁴ If the Crown had never issued the permit those potential earnings would not have been actualized anyway.

There is no room at the causation stage for the objection that the failure of a private party to inspect permits for requisite consultation negates causation. This would amount to an argument of comparative blameworthiness at the causation stage – an approach squarely rejected in *Hanke*.¹²⁵ Comparative blameworthiness does not enter the analysis until the causation threshold is met, at which point it is subsumed into any applicable contributory negligence assessment.

However, a private party permit inspection argument, even if properly handled under contributory negligence, should ultimately fail in reducing the quantum of liability. To hold otherwise would require reversal of the established principle that "[i]f the defendant's conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant's liability."¹²⁶ In *Kamloops* the defendant City had a legal duty to enforce the prohibition of occupancy of a home that did not meet the foundational integrity requirements of the relevant by-law.¹²⁷ Due to the fact that inspections were the responsibility of the City, it was held that there was no obligation on the plaintiff to verify the integrity of the foundation. Similarly, in the duty to consult cases, it has been stressed that the duty lies not with private parties but with the Crown and it is not the responsibility of private parties to ensure that Crown authorizations carry the requisite consultation.

D. Proximate Cause

Crown liability for damages will be limited if the proximate cause cannot be established. The test for injunctive relief on a *Haida* motion distances the act of Crown authorization from the loss experienced by the private party as a result of a restriction of activities. Injunctive relief on a *Haida* motion is far from a guaranteed result. Restriction of private party operations is a remedy that is only granted after a careful balancing of inconvenience.¹²⁸ It could be argued that the decision of a First Nation to initiate a *Haida* motion coupled with a Court's decision to grant such an application are intervening forces rendering the Crown's failure to consult too remote.

This argument is met by the principle, established in *Overseas Tankship (U.K.) Ltd v. Morts Dock & Engineering Co. Ltd.*, that "the essential factor in determining liability

124 *Hanke supra* note 118 at para. 19.

125 *Ibid.* at paras. 15-17, 21.

126 *Athey, supra* note 119 at para. 12.

127 *Ibid.*

128 *Haida, supra* note 2 at para. 14.

is whether the damage is of such a kind as the reasonable man should have foreseen" rather than the presence or absence of directness.¹²⁹ *Haida* lays out for all to see the circumstances that create a duty to consult and the possible consequences of a failure to comply with this duty. As a result of *Haida* principles, injunctive relief on a successful *Haida* motion caused damage to private parties in *Blaney* and initially in *Betsiamites*. In the wake of the Supreme Court of Canada and the British Columbia Court of Appeal¹³⁰ decisions in *Haida*, the chain of events that resulted in damage to Marine Harvest and, initially, Kruger, cannot be considered unusual. The outcome in both cases was the logical result of Crown authorization without consultation and it can be expected to occur again where the Crown fails to consult.

E. Damage

Plaintiffs alleging negligence must demonstrate damage.¹³¹ A successful *Haida* motion may result in an injunction against resource-based activities and various losses warranting compensation. It would be reasonable to expect cessation or delay of natural resource-based activities to lead to stand-by costs for equipment and workers, deterioration of allocated natural resources, and losses for breach of contractual obligations to secondary manufacturers. In overturning the interlocutory injunction in *Betsiamites*, the Quebec Court of Appeal acknowledged the obvious damage to Kruger that would result if its operations were enjoined for any significant period of time (the project had required very large investments).¹³² In *Blaney*, the successful *Haida* motion resulted in a partial injunction.¹³³ Marine Harvest was forced to transport fish to other fish farms at a cost. Enjoined businesses in similar positions would have little difficulty meeting the damage requirement

CONCLUSION

As lower courts refine the *Haida* framework through application, inequity is emerging. The cost of the Crown's duty to consult and accommodate First Nations is being externalized onto innocent third parties. Such parties have not asserted sovereignty over the land yet they bear the consequences of the Crown having done so. This paper makes the qualified assertion that a cause of action in negligence against the Crown may exist when third parties suffer loss due to Crown failure to adequately consult and accommodate First Nations.

For such an action to succeed, the Crown's authorization of the third party activity in question will likely need to have occurred after *Haida* and *Taku*, for these decisions rendered the duty to consult reasonably foreseeable in most cases. Further, any licences, permits or approvals granting permission to the private party to carry out resource extraction activities will have to be specific and clearly defined so that a sufficiently close and direct relationship may be established. The Crown's

129 [1961] A.C. 388, 1 All E.R. 404 (P.C.).

130 *Haida Nation v. British Columbia (Minister of Forests)* (2002), 216 D.L.R. (4th) 1, 2002 BCCA 462. The Court of Appeal was even more demanding than the Supreme Court of Canada in terms of its view of the Crown's duty to consult.

131 *Vile v. Von Wendt* (1979), 26 O.R. (2d) 513 at 517. Damage is a "head of loss for which compensation will be awarded."

132 *Supra* note 64 at para. 88.

133 *Supra* note 6 at para. 127.

authorization will need to have been executive and operational rather than legislative. The enabling legislation cannot contain a preclusive exemption. Additionally, where damage to the third party is in the form of pure economic loss, reliance should be demonstrable.

If Crown-authorized private activities are enjoined due to the Crown's failure to make a reasonable attempt at discharging its clearly defined constitutional duty then the Crown may have been negligent. This is particularly so on the facts in cases like *Blaney*, where the Crown, having ignored its clearly defined constitutional obligation, is ordered by a court to go back and comply while an innocent third party suffers loss.