

Compensation or Damages as a Remedy for Breaches of Indigenous Rights

by

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I. Introduction

Since at least 2004, Aboriginal law has centered on consultation and accommodation¹. Hundreds of cases, articles, seminars and conferences have been dedicated to this undeniably important topic. Other related Aboriginal law issues have not received as much attention in the courts. One such area is the role of compensatory damages as a potential remedy for impacts on Indigenous rights.²

Outside of the courts, compensation for impacts on Indigenous rights has routinely been raised and addressed in consultations between Aboriginal groups and the Crown as well as with third party resource developers. Generally, the parties have worked out agreements, such as Adverse Effects Agreements (AEA's) or Impact Benefit Agreements (IBA's), that address the impacts of a proposed project in a way that is acceptable to the Aboriginal Group and which allows the project to proceed. Where such an agreement has not been reached, the parties have found themselves in court on issues related to the duty of consultation, not entitlement to compensation.

Clearly compensation is a tool in accommodation but is it an appropriate remedy for breaches. This issue will ultimately come before the courts but in the absence of any significant jurisprudence, the concept of compensatory damages for impacts on Indigenous rights raises a host of difficult issues, which do not have ready answers. Some of the issues include:

1. Who is liable for infringements on Indigenous rights? Is it only the Crown or can third parties be liable?

¹ The Duty of Consultation and Accommodation (the "Duty") arose out of the "Consultation Trilogy" *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida*"); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 ("*Taku*") and *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388 ("*Mikisew*"). The Duty is a Crown obligation to consult and, where appropriate, accommodate concerns raised by Aboriginals (i.e. First Nations, Inuit, or Métis people) when the Crown contemplates an action (such as granting a permit to a resource developer) that may adversely impact an Aboriginal group's Indigenous rights (i.e. Aboriginal rights, Aboriginal title, or Treaty rights). There is no need for the Aboriginal group to prove their Indigenous right in court before the Duty can apply. All the Aboriginal group need show is that they have a case for an Indigenous right. The obligation on the Crown depends on the nature of the impact on the Indigenous right and the strength of the claim to an Indigenous right. The Crown's obligation can range from providing notice of a proposed decision to an Aboriginal group to something "deeper." The full extent of the Duty is not yet known, but can include a special Aboriginal consultation process away from other regulatory processes and the requirement to provide reasons to an Aboriginal group when the Crown decides to issue a permit or do any action that may impact Indigenous rights.

² We use the term "Indigenous Rights" to mean all of Aboriginal rights, Aboriginal Title, and Treaty Rights.
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2. What is the cause of action? Are there common law causes of action that can be asserted as a basis for damages for impacts on Indigenous rights, which are *sui generis* (or of their own kind)? Will a new cause of damage action evolve?
3. Who has standing to bring an action for impacts on collective rights and, if compensatory damages are awarded, how are they allocated?
4. How does one quantify compensatory damages for impacts on collective, *sui generis* rights?

These are only some of the general issues that the compensation question raises. There are many more issues and sub-issues but surprisingly, with one notable exception (Robert Mainville's text on compensation),³ the commentary on issues of compensation for infringements on Indigenous rights has been almost non-existent.

This paper does not purport to provide definitive answers, but hopefully will be able to identify and discuss some of the more significant issues in a way that will assist others, in the context of specific factual situations, to consider the potential of compensatory damages as a remedy. In exploring this topic, this paper discusses the following:

1. In Part II, the paper examines the current role of compensation in addressing impacts on Indigenous rights through AEA's or IBA's.
2. In Parts III and IV, the paper examines two theories on liability for compensation. Part III examines American law and Part IV describes Mainville's theory.
3. In Part V, the paper considers these approaches and how they might be applied by our courts in the future. It also considers the appropriateness of compensatory damages as a remedy.
4. In Part VI, the paper considers the issue of quantifying compensatory damages.

Our analysis is predicated on there being an impact on an Indigenous right. For purposes of this paper, there are basically four general types of Indigenous rights that need to be considered because the answer to the questions will vary depending on which type of right is being considered. Those four basic types are:

1. Impacts on Crown land where there is asserted but unproven Aboriginal title;
2. Impacts on land where the Aboriginal group has proven Aboriginal Title;

³ The only author to give detailed consideration of the compensation issue is Robert Mainville (now Justice Mainville) in *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach*, (Saskatoon: Purich, 2001).

3. Impacts on Reserve land; and
4. Impacts on the exercise of Aboriginal or Treaty rights on unoccupied Crown lands.

This last category of Indigenous rights encompasses a broad spectrum of activities which would vary from place to place, from treaty to treaty and from Aboriginal group to Aboriginal group. For example, in British Columbia, a member of the Heiltsuk Band can have an Aboriginal right to sell herring spawn on kelp (i.e. a commercial right);⁴ in Ontario, a Métis person can have a right to hunt for food in Central Ontario (i.e. a domestic right);⁵ in the Maritimes, a First Nation can have the right to harvest timber.⁶

II. Addressing Impacts on Indigenous Rights Through Proponent or Developer Driven Processes: A Brief Exploration of Adverse Effects or Impact Benefit Agreements

A) Why are Project Proponents and Developers Working with Aboriginal Groups to Address Predicted Impacts on Indigenous rights?

It is clear that only the Crown owes the duty of consultation, not third parties. However, it is equally clear that third parties are engaging in consultation with Aboriginal groups themselves, often independent of the Crown. Depending on the size and nature of a proposed project, there may be legal requirements under environmental legislation for third parties' developers to consult, but even when there are no such legal requirements, third parties are undertaking such consultation out of good planning practices and practical reality. Consultation with Aboriginal people is undertaken by private developers to assess the risks and benefits of resource development.

Dialogue with potentially affected Aboriginal groups can serve to identify ways of addressing concerns-- concerns that would likely arise in a public regulatory process. For example, if an Aboriginal group is concerned about the impacts of a mine on caribou migrations, the private party and Aboriginal group can find methods of addressing the concern (through fencing or tracking caribou migrations). The solution, if backed by an Aboriginal group, can go a long way in satisfying concerns of a regulator. Ultimately, it is the private party that has the most at stake in the resource development. Identifying issues early can lead to practical solutions that benefit both sides and can go to satisfying the Crown when they consult or environmental regulators when they scrutinize a project.

⁴ See *R. v. Gladstone*, [1996] 2 S.C.R. 723.

⁵ See *R. v. Powley*, [2003] 2 S.C.R. 207

⁶ See *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220. In that case, the Supreme Court rejected treaty or Aboriginal title based arguments for a right to harvest timber. However, in other cases on different facts, a right to harvest timber may arise. A successful timber based case is *R. v. Sundown*, [1999] 1 S.C.R. 393. In that case, a Cree person in Saskatchewan, pursuant to Treaty No. 6, was found to be able to cut trees in a provincial park in order to create a base of operations for domestic hunting.

Fear of the unknown is a very real issue. Feelings of exclusion and a sense of being disrespected can create very significant negative attitudes. If there is no private party consultation, Aboriginal groups may become concerned and possibly hostile towards the development, simply because they do not know what is being proposed and because they have been excluded from the process. This hostility can make the Crown-Aboriginal consultation difficult and can slow the regulatory process and lead to litigation. All of this will lead to delays in the project and can affect the profitability of a given project. As opposed to leaving consultation with the Crown, private parties can consult and take control of the process.

Ultimately, third parties engage Aboriginal groups in consultation out of enlightened self-interest. A third party may examine a situation and consider it to be economically more advantageous to gain the support of an Aboriginal group than to avoid the Aboriginal group and create grassroots animosity to the project and create the risk of costly delay. For the third party, reaching a deal with an Aboriginal group is a business decision driven by business factors.

B) Why are Aboriginal Groups Consulting with Third Parties?

A fundamental threshold decision for an Aboriginal group is whether to support or reject a given project. Some projects simply may not be supported by an Aboriginal group; thus no AEA or IBA can ever be reached with a third party. For example, an Aboriginal group may categorically refuse to accept a gold mine that would have the effect of desecrating a sacred site. However, in our experience, where a respectful relationship is developed with the Aboriginal group and where the concerns of the Aboriginal group about impacts are addressed in a reasonable way and where they perceive there will be some benefits, Aboriginal groups are interested in seeing development proceed and they are prepared to support development.

Economic opportunity is not the only benefit that Aboriginal groups may seek in consulting with third parties. There can also be a self-government objective. For example, a First Nation may wish to consult in order that the First Nation, as a government, can monitor and control the use of First Nation resources. In many ways, Aboriginal groups have a unique and special connection to and responsibility for the environment. As a steward of the environment, entering into agreements with third parties can go a long way in ensuring that development within a group's traditional territory is done in a way that is satisfactory to the Aboriginal group.

The decision by an Aboriginal group to enter into consultations and potentially an agreement with a third party is a subjective one, which is ultimately driven by the subjective interests of that Aboriginal group. However, as indicated above, the success of such a process almost always depends on it being respectful, on its ability to address impacts and on the availability or prospect of benefits for both parties.

Each of these three elements is important, but of most relevance to this paper is the second point, namely, that the Aboriginal group is satisfied that its concerns about impacts have been reasonably addressed. We recognize that there may be some overlap between each of these elements. The opportunity for great benefit may lessen concern about impacts or a respectful relationship may be destroyed if the benefits offered do not meet expectations. However, since compensation, and particularly compensatory damages, relate to impacts, we will consider the element of addressing impacts as an isolated topic.

C) Matching the Interests of the Parties: Compensation in AEA's and IBA's

In our view the best practices approach to dealing with forecast or projected impacts of a development or an activity is consistent with the priorities set out below.

1. Avoidance - where reasonably possible or practical, modify the proposed project or activity to avoid causing the impact.
2. Mitigation - where an impact cannot be avoided, use remedial works or programs to offset the impact or lessen the severity of the impact.
3. Compensate in kind - to the extent that an impact cannot be avoided, compensate for any losses in kind, that is, by replacing what will be lost.
4. Monetary compensation - providing money as a way to compensate for losses arising from impacts that cannot be avoided, mitigated or compensated in kind.

Monetary compensation or compensatory damages is the least desirable approach to address impacts of any kind and certainly impacts on Indigenous rights.

When a third party and an Aboriginal group sit down to explore the possibility of reaching an agreement on a project, there are at least five topics that are raised:

1. Project Description: How can the project be constructed and operated in a manner that is profitable for the third party and sensitive to the interests of an Aboriginal group?
2. Employment: What jobs opportunities are available for Aboriginal people in the project and what skills are required for Aboriginal people to thrive in the jobs?
3. Business: Can an Aboriginal controlled business gain contracts to do work on the project? Will work packages be scoped to meet capacity? Will funding to increase capacity be available?

4. Profit sharing/Ownership of Project: Is it possible for the Aboriginal group to own the project, in whole or in part, or otherwise share in the profits of the business?
5. Avoidance/Mitigation/Compensation for Infringement: If a project has an adverse impact on Indigenous rights, what measures can be taken to avoid, mitigate or compensate for impacts?

In the consultation or negotiations between the developer and the Aboriginal group, all of these topics depend on the subjective needs and desires of the parties. There is no “right” or “wrong” answer as to how many members should be employed or whether an Aboriginal group should be a part owner of or share in the profits from a project or how much monetary compensation should be paid to address impacts that cannot be avoided or mitigated. Certainly in the process, there will be justifications for the positions being advanced but the bottom line is what is necessary to satisfy the Aboriginal group on the one hand and what is practical and can be accommodated by the project on the other. If the cost renders the project uneconomic or perhaps more appropriately economically less desirable than other opportunities, then the project will simply not proceed.

The need to have a “right” answer (or at least a compelling argument supporting that what has been done is not the “wrong” answer) is when other parties such as the public, other Aboriginal Groups, other developers and, perhaps most importantly, the regulators or courts become involved.

As discussed later in this paper there are rational ways to approach or justify the quantum of compensation for impacts on Indigenous rights, but because they are *sui generis* there are really no set rules that can be applied. One lawyer suggested that, in his experience, IBA’s see Aboriginal groups getting either 3-5% of project costs or 10% of the profits of the project.⁷ The lawyer could not explain why this was the case, and only noted that this was his experience. As many agreements between third parties and Aboriginal groups are not public, it is impossible to test this proposition-- it could be more, it could be less.

In sum, reaching an agreement for compensation in an AEA or IBA is, to a large extent, a product of finding a deal that is subjectively acceptable to the parties. Legal principles, to the extent they can be found, offer only general guidance. Perhaps this is a good thing. The Supreme Court has made it abundantly clear that the resolution to Aboriginal law issues should be done at the negotiation table, not the court house. The words of Lamer C.J. are apposite:

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of

⁷ Gregory J. McDade, Q.C (Ratliff & Company LLP), “Aboriginal Accommodation: Major Projects Agreements” PowerPoint Presentation, unpublished paper delivered May 8-9, 2006, Insight Information 2nd Annual Western Canada Aboriginal Law Forum (Vancouver, BC).

this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) -- “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.⁸

However, the courts cannot and will not abdicate their responsibility to address compensation when it arises. Where a project proceeds without a prior or subsequent agreement on how adverse effects are to be addressed and adverse effects occur and impact an Indigenous right, the court will be called on to determine a remedy. Who will have standing to bring such an action, who will be properly named as a defendant, how the action will be framed, what remedies will be available and, if compensatory damages are part of the remedy, how such damages are quantified will all be on the table and hopefully some of these issues will be clarified

III. Third Party Liability: The American Approach

One jurisdiction to have offered passing consideration to the liability of third parties to Aboriginal people is the United States. The American position, at least in the context of Aboriginal title, is that Aboriginal groups may maintain actions for trespass against third parties for entering upon their land. Other common law causes of action (e.g. nuisance or negligence) would also be available.

A) Compensation and the American Constitution

The liability of third parties must begin with a brief consideration of the liability of the state for breaches of Aboriginal title.⁹ Americans draw a distinction between recognized title and unrecognized or original title. This may in some ways be similar to asserted and proven Aboriginal title. For example, if a statute or a treaty recognizes an interest in land then the interest is recognized aboriginal title. If the interest in land simply arises from an aboriginal group’s historic occupation of the land, without any affirmation by the government, then the land is unrecognized or original aboriginal title.

The distinction is important when it comes to determining if the state has any legal obligation under the Fifth Amendment of the American Constitution to compensate for expropriation of Aboriginal title.¹⁰ Only recognized title gives rise to an obligation of

⁸ *Delgamuukw v. BC*, [1997] 3 S.C.R. 1010 at para 186.

⁹ American Indian law is almost exclusively predicated on aboriginal title. The tenor of American commentary is on title. When Americans do look at something which Canadians would classify as an aboriginal right (e.g. the right to hunt), they consider the issue under the rubric of title. William C. Canby, Jr. in *American Indian Law in a Nutshell*, 4th ed. (St. Paul: West, 2004) at p. 455 writes, “Wholly apart from treaty, a tribe may possess aboriginal rights to hunting and fishing: See *Commonwealth v. Maxim*, ... 708 N.E. 2d 636 (1999). *Like other aboriginal title*, however, it can be extinguished by the federal government [emphasis added].”

¹⁰ The Fifth Amendment reads: “No person shall be held to answer for a capital, or otherwise infamous crime,

compensation on the state.¹¹ The rationale for the distinction was put as follows by Justice Reed of the US Supreme Court in *Tee-Hit-Ton* at p. 279:

It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Reed J. concludes that unrecognized Aboriginal title is not compensable under the Fifth Amendment and notes at p. 284, "This is true, not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." As original Indian title was not protected under the Fifth Amendment, there was no obligation on the government to compensate.

If we transpose the American approach to Canadian law, it would mean this: Only interests in reserve land created by *The Indian Act*, treaty rights, or proven Aboriginal title accepted by the Crown would be compensable if expropriated by the state.

B) Original Aboriginal Title and Third Parties

From *Tee-Hit-Ton* it was clear that the state had to recognize its obligations to compensate for the taking of Aboriginal title before it could be said to have a constitutional obligation to compensate. The question which arose from *Tee-Hit-Ton* was whether third parties had any obligation to pay for infringements of unrecognized Aboriginal title. Could it be said that third parties had to pay for infringing unrecognized Aboriginal title

unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

¹¹ See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

when there was no constitutional requirement on the state to compensate for the taking of such title?

The answer to this question came in *Edwardsen v. Morton*, 369 F. Supp. 1359 (1973). The United States District Court considered *Tee-Hit-Ton* in the context of the liability of third parties who were drilling for oil on unrecognized (i.e. original) Indian title lands. Various Alaskan Aboriginal groups sued the Secretary of the Interior for unlawfully transferring the Arctic Slope to the State of Alaska and in authorizing third parties to enter the land for the purposes of oil extraction. The Aboriginals contended that the land was subject to their Indian title. The defendant moved for summary judgment.

The Court first considered the nature of unrecognized Indian title by considering *Tee-Hit-Ton*. The Court wrote at p. 1371:

Thus, until Congress has acted to extinguish Native title in land claimed on the basis of use and occupancy, any third parties coming onto the land without consent of those rightfully in possession are mere trespassers. This status is unaffected by any mistaken belief on the part of the intruders that they are entitled to enter the land, so long as such a belief is not induced by those in possession of the land. Restatement of Torts 2d, §164 (1965). Neither can such intruders escape liability by asserting that officers of the United States gave them permission, so long as those officers lacked the necessary statutory authority. *Cramer v. United States*, 261 U.S. 219, 234... Indeed, the officers are themselves liable in trespass if their actions caused third parties to enter the land [emphasis added, footnotes omitted].

The Court held that though original Indian title was a possessory right, Aboriginal people would be able to maintain an action for trespass and recover the value of resources actually extracted from the lands by the trespassing third parties.¹² In a footnote, the Court goes on to assert, "The Court is, of course, aware of the fact that Native use and occupancy rights are in some respects *sui generis*, and cannot always be fully accommodated within the traditional structure of common law doctrine in the areas of tort and real property. However, if the protection against intrusion which the *Tee-Hit-Ton* Court recognizes is to mean anything, it surely must mean that Natives have the right to prevent their lands from being mined or otherwise wasted by unauthorized third parties and to recover damages if such waste occurs."¹³

The Court indicated that while Aboriginals would have a cause of action for the taking of minerals in original Indian title lands, the Aboriginals would not have any legal

¹² *Edwardsen* at p. 1371.

¹³ *Edwardsen* at footnote 23.

interest in the profits third parties receive for selling the minerals. In American law as in Canadian law, Aboriginals have no alienable interests in Indian title lands. Aboriginal interests can only be surrendered to the Crown or State, not to private parties. The Court wrote, "Native possessory rights as defined by the *Tee-Hit-Ton* Court guarantee the occupants protection from intrusions rather than a share in vendable interests in the lands."¹⁴

The important issue for the Aboriginal people was whether their title interest in the Artic Slope was extinguished by the *Settlement Act*. The claim by the Aboriginals that the transfer of the Artic Slope to the State was invalid was rejected. The Act retroactively validated all transfers when it extinguished Aboriginal rights in the area.¹⁵ Though Aboriginal rights were extinguished, the Aboriginals claimed compensation for trespasses before the Act was passed. The Court held that these actions could succeed in law and thus the defendant's motion for summary judgment on this point was rejected. The Court wrote:

If plaintiffs were in fact disturbed in their use and occupancy by trespassers i.e., by any parties coming onto the land except for those entering under Congressional authorization, then there accrued a cause of action in tort against the trespassers and a cause of action for trespass and breach of fiduciary duty against federal officers authorizing such trespasses.¹⁶

It was held that *Tee-Hit-Ton* said nothing on whether actions based on breaches of original Indian title land could be extinguished without regard for the Fifth Amendment and for compensation. While there was no action against the government for extinguishing title, there could be action against the government for failing to prevent trespass and for breach of fiduciary duty.¹⁷

C) Recognized Aboriginal Title and Compensation

Recognized Aboriginal title can also be protected by common law causes of actions. In the case of *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985),¹⁸ the Oneidas sued the counties of Oneida and Madison, New York on the basis that land the counties occupied was, in reality, Oneida land. The Oneidas sued the counties for unlawful possession and claimed damages only for a specified two-year period.

In this case, the Oneidas entered into treaties with the United States in 1784,

¹⁴ *Edwardsen* at p. 1372.

¹⁵ *Edwardsen*. at p. 1377-8.

¹⁶ *Edwardsen* at p. 1378-9.

¹⁷ *Edwardsen* at p. 1379.

¹⁸ This case is referred to as *Oneida II*. This case was first heard by the US Supreme Court in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661(1974) on a civil procedure issue (could the action against state counties be heard in federal court).

1789, and 1794 wherein the Oneidas were promised that they would be secure "in the possession of the lands on which they are settled." The Oneidas possessed land in what is now New York State. In 1793, Congress passed an act which stipulated that any purchase of Indian lands had to be done with the consent of the federal government. New York ignored the act and purported to enter into a land purchase deal with the Oneidas for the lands in question. The Oneidas contended that the purchase was contrary to the 1793 Act. The legal question was whether the Oneidas had any cause of action arising from the deal with New York.

Justice Powell held that there was a cause of action at common law arising from this land deal. He wrote:

Numerous decisions of this Court prior to *Oneida I* recognized at least implicitly that Indians have a federal common law right to sue to enforce their aboriginal land rights. In *Johnson v. McIntosh, supra*, the Court declared invalid two private purchases of Indian land that occurred in 1773 and 1775 without the Crown's consent. Subsequently in *Marsh v. Brooks*, 8 How. 223, 232 (1850), it was held: "That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question. This is the result of the decision in *Johnson v. McIntosh*." More recently, the Court held that Indians have a common-law right of action for an accounting of "all rents, issues and profits" against trespassers on their land. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). Finally, the Court's opinion in *Oneida I* implicitly assumed that the Oneidas could bring a common-law action to vindicate their aboriginal rights. Citing *United States v. Santa Fe Pacific R. Co., supra*, at 347, we noted that the Indians' right of occupancy need not be based on treaty, statute, or other formal Government action. 414 U.S., at 668 - 669. We stated that "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.*, at 674 (citing *United States v. Forness*, 125 F.2d 928 (CA2), cert. denied sub nom. *City of Salamanca v. United States*, 316 U.S. 694 (1942)).

The Supreme Court found that recognized Indian title could give rise to a cause of action against a county.¹⁹ In light of this case, it stands to reason that one could sue a third party for infringements on "recognized" title.

¹⁹ We note that four judges dissented, but not on the common law cause of action point; rather on whether the claim was barred by laches.

D) Conclusion

Insofar as Aboriginal title is concerned, the American authorities indicate:

1. Unrecognized or recognized Aboriginal title is an interest which may be protected against third parties by such common law actions as trespass—*Edwardsen* and *Oneida Nation*.
2. Third party trespassers on unrecognized aboriginal title may only escape liability if they are acting pursuant to statutory authority—*Edwardsen*.

IV. Mainville's Theory on Third Party Liability

As noted above, Robert Mainville is one of the few people to have given the issue of compensation for infringements on Indigenous rights serious and thorough consideration. He outlines six principles on the subject, of which one is "compensation is generally the responsibility of the Crown but may, in appropriate circumstances, be assumed by third parties."²⁰

Mainville sees three situations in which a third party could be liable to an Aboriginal group:

1. an infringement of indigenous rights is done by a third party without Crown authorization or statutory approval ("Unlawful Infringement");
2. an infringement is done pursuant to a law which does not meet the justification test set forth in *R. v. Sparrow*, [1990] 1 S.C.R. 1075²¹ ("Unjustified Infringement"); or

²⁰ Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach*, (Saskatoon: Purich, 2001) at p. 128. The remaining five principles he outlines are as follows: (1) "compensation is to be determined in accordance with a methodology that takes into account the principles of fiduciary law;" (2) "relevant factors in determining compensation include the impacts on the affected Aboriginal community and the benefits derived by the Crown and third parties from the infringement;" (3) compensation is to be determined in accordance with federal common law and will thus be governed by rules that apply uniformly throughout Canada;" (4) "compensation may be provided through structured compensation schemes or through a global monetary award;" (5) "compensation is normally to be awarded for the benefit of the affected Aboriginal community as a whole;" see p. 128.

²¹ To recall, the breaches of aboriginal or treaty rights may be justified by the Crown. The general approach set forth in *Sparrow* and later in *R. v. Gladstone*, [1996] 2 S.C.R. 723 is as follows:

- 1) The government must demonstrate that it was acting pursuant to a valid legislative objective.
- 2) The government must demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples. This may include "whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented."

3. an infringement is done pursuant to a justified law, but “where compensation is nevertheless required under the doctrine of Aboriginal rights and to meet the justification test”²² (“Justified Infringement”).

The basis for his theory lies in the fiduciary duty owed by the Crown to Aboriginal people, which he extends to apply to third parties.²³ Mainville writes at p. 120:

Although third parties are not usually bound by this fiduciary relationship, it seems logical that the rules governing their responsibilities should be similar. It would be inappropriate and unprincipled to burden Aboriginal people with different legal rules, depending on whether the infringement resulted from the operations of a third party acting on government authorization or from direct government action. From the Aboriginal perspective, the infringement is the same.

Mainville asserts that there is no cogent reason why third parties should not be liable in a situation of Unlawful Infringement. He cites the US Supreme Court decision in *Oneida Indian Nation* and asserts, “Justice Powell stated that numerous decisions of the Supreme Court of the United States recognize that Indians have a federal common law right to sue to enforce their Aboriginal land rights, including a common law right of action for an accounting of all rents, issues and profits against trespassers on their land. The Oneida Indians could therefore bring a common law action against third parties to vindicate their Aboriginal land rights.”²⁴ Mainville then relies upon *Fairford First Nation v. Canada*, [1999] 2 F.C. 48 (T.D.) for the proposition that Aboriginal peoples may sue others to enforce their rights. He concludes that “Where the infringement is carried out by a third party without any Crown authorization, compensation will be owed by that party directly for the resulting infringement of the Aboriginal or treaty right at issue.”²⁵

In the case of Unjustified Infringement, Mainville sees no difference from a situation of Unlawful Infringement. He makes a policy argument: “It would be contrary to the nature of Aboriginal rights to ignore or tolerate third-party interferences with them or not to hold third parties accountable for infringing on these rights.”²⁶ Further, he writes, “If Aboriginal and treaty rights are to be taken seriously, then third-party responsibilities for the unjustified infringement of these rights is a necessary corollary to the existence of these rights at common law and to the affirmation and recognition of these rights under the Constitution.”²⁷

Mainville frames the issue of Justified Infringement in an interesting way. He

²² Mainville at p. 116.

²³ Mainville at p. 116.

²⁴ Mainville at p. 117-8.

²⁵ Mainville. at p. 118.

²⁶ Mainville at p. 119.

²⁷ Mainville at p. 119.

does not address a situation where an infringement of an Indigenous right is justified without any need to compensate. All he notes is that where a court finds that an infringement *would be* justified if compensation is paid then the infringement is unjustified until payment is made (a “Contingent Justification”).²⁸ In this instance, Mainville sees no problem in requiring third parties to pay. Mainville does concede that compensation may be payable only by the Crown.²⁹

V. Towards a Theory of Third Party Liability

The American authorities and Mainville’s theory indicates that third parties may be liable to compensate Aboriginal people for breaches of their Indigenous rights. However, the theoretical basis for why third parties may be liable differs. Under the American theory, third party infringements of Indigenous rights are compensable because there is a negative impact on property rights. Under Mainville’s theory, third party liability is based heavily on the fiduciary duty owed to Aboriginal people. For Mainville, a fiduciary based theory of liability is crucial in order to justify his approach to compensation. It allows Mainville to support the application of equitable remedies such as disgorgement of profits and compensation for “injurious affection,” which may not be available under a common law (property) based approach to liability.³⁰

A) The Problem with the Fiduciary Duty Theory for Third Party Liability

Since Mainville’s book in 2001, there have been significant changes of view in Aboriginal law relating to the fiduciary duty owed by the Crown to Aboriginal people. Relying on cases such as *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *Sparrow*, it has commonly been said that the Crown owes a fiduciary duty to Aboriginal people. This lead to assertions that the entire relationship between Aboriginals and the Crown is fiduciary in nature.

In the years after Mainville’s book, the Supreme Court has narrowed the application of the fiduciary duty significantly. Further, the Supreme Court has replaced the fiduciary duty as the overarching theory for Aboriginal law and with the concept of the “Honour of the Crown.”

Limits to the applicability of the fiduciary duty became apparent in the case of *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245. After a thorough review of *Guerin*, *Sparrow*, and other cases, Binnie J. held at para 81 & 83:

The appellants seemed at times to invoke the “fiduciary duty” as a source of plenary Crown liability covering all aspects of

²⁸ Mainville at p. 123.

²⁹ Mainville a p. 124.

³⁰ Mainville 104-109.

the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River* (“the lands occupied by the Band”), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the Constitution Act, 1982.

...

I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

Wewaykum was expanded in the Consultation Trilogy. In creating the doctrinal basis for the duty to consult, the Supreme Court did not use the fiduciary duty, but instead applies the doctrine of “The Honour of the Crown.” In *Haida* the Chief Justice held at para 18:

The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown’s other, broader obligations. However, the duty’s fulfilment requires that the Crown act with reference to the Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake.

...

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

The "Honour of the Crown" concept was used to justify why third parties do not owe a duty of consultation to Aboriginal people. It was contended that third parties should be obligated to consult if a third party seeks to rely on the *Sparrow* justification test to excuse its conduct. In *Sparrow*, Dickson CJ and La Forest J wrote:

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.³¹

In *Haida*, McLachlin CJ rejected this contention and wrote at para 53:

It is suggested (per Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the

³¹ *Sparrow* at p. 1119.

Crown cannot be delegated.

The Chief Justice added at para 55:

Finally, it is suggested (per Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result.

In essence, the duty of consultation, noted in *Sparrow*, can only be a Crown duty, not a third party duty. The Honour of the Crown is based on nation to nation interaction in which “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown” is the aim.³² As private parties are not nations, they have no legal role to play when the Honour of the Crown is at stake. In our view, *Haida* eliminates the possibility of basing a theory of third party liability on the fiduciary duty or the Honour of the Crown.

B) Indigenous Rights as Property Rights

In light of the Chief Justice’s comments in *Haida*, noted above, that “The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests,” it is arguable that third parties should never be directly liable to Aboriginal people for infringements. They may become liable to the Crown in an action brought by the Crown but not liable directly to the Aboriginal people.

That is generally the case in relation to Reserve land. It is Canada as the holder of legal title, not the First Nations as the holder of the beneficial interest, that would pursue those remedies and would be liable to the First Nations under fiduciary obligations to take such actions. In fact, the offending party would be at risk of having to pay twice if it did try to compensate the First Nation and not Canada as the legal owner of the reserve land.

With asserted Aboriginal title in Crown land, it is difficult to see how a First Nation could maintain an action directly against some third party unless and until its Aboriginal title was proven. The Crown could certainly pursue such an action if the third party acted without Crown authority and the First Nation may have a cause of action against the Crown, if the third party was acting under Crown authorization and the Crown had failed to properly consult and accommodate the issue of its asserted Aboriginal title. But it seems doubtful that the First Nation could itself proceed against a third party unless and until it proved its Aboriginal title.

³² See *Haida* at para 17.

Where Aboriginal title is proven, then depending on how title is held, the First Nation may well have rights the same as, or at least analogous to, those of owners of fee simple title in relation to trespass, nuisance and other torts related to its land. If such land automatically vests in the Federal Crown then it would presumably be treated much like reserve land where there are clear fiduciary obligations on Canada as the legal owner to protect the interests of the First Nation as the beneficial owner.

The analysis in relation to land seems relatively straight forward because there is little doubt that even *sui generis* interests in land are a form of, or directly analogous to, a property right. But what about other Indigenous rights? Can they similarly be classed and treated as property rights?

If Indigenous rights, not amounting to an interest in land, can be classified as property rights, in addition to the fact that they are unique rights protected by s. 35 of *The Constitution Act, 1982*, a good case could be developed that a third party could be found liable for infringements, just as is the case under American law. However the courts and commentators alike do not equate Indigenous rights to common law property rights. In *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, Iacobucci J wrote at para 43, "First, it is clear that traditional principles of the common law relating to property may not be helpful in the context of aboriginal interests in land." It is equally clear that Indigenous rights are *sui generis*; thus different from common law property rights. That said, the cases do not justify the summary dismissal of the common law from the analysis.

Indigenous rights such as the right to hunt or fish for food, occasional rights to limited commercial harvesting;³³ and rights to conduct ceremonies on property or harvest medicinal plants³⁴ do not easily fall within the rubric of property rights because they are not exclusive and they cannot be alienated.

Nonetheless, these rights have been seen as similar to usufructary rights or *profits à prendre*, which are incorporeal hereditaments. For example, Bruce Ziff suggests that, "The incorporeal hereditament known as a *profit à prendre* is somewhat akin to a positive easement. A profit entitles the holder to enter onto the land of another to take some part of the produce, such as timber, crops, turf, soil, grass, or animals." Ziff contends that Aboriginal and Treaty rights are analogous *profit à prendre*.³⁵ Profits can be "in severalty" which means that the right is held exclusively by an individual or "in common" which means that the right is held by many different people, all of which have the right to do something (e.g. hunt) but cannot exclude other common profit holders from engaging in the right.

³³ See e.g. *Gladstone* (commercial right to sell herring spawn on kelp) or *R. v. Powley*, [2003] 2 S.C.R. 207 (right to hunt for food).

³⁴ See Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000), 79 Can. Bar Rev. 196.

³⁵ Bruce Ziff, *Principles of Property Law*, 3rd ed. (Toronto: Carswell, 2000) at p. 343-4.

A person who holds a profit individually may maintain an action for trespass. As explained in *Atkin's Court Forms*:

What amounts to a direct interference [with a *profit à prendre*] will depend upon the nature of the right, and although grants of profits pass no interest in the soil, they may give the sole right to be upon the soil for a particular purpose, and, as the grantee has an incorporeal hereditament and not a mere licence, it follows that the presence of anyone else on the soil for that purpose is a wrong against the owner of the profit. Thus if a man has a several [i.e. individual] fishery, trespass lies not only against a person taking fish, but also against a person entering upon the fishery and fishing, even if (as in the nature of things may well happen) no fish are taken [footnotes omitted].³⁶

However, common profit holders cannot maintain an action for trespass; only the owner of the land can do so. Depending on how *sui generis* Aboriginal and Treaty rights are, it could be argued that the rights available to individual profit holders be made available to Aboriginal groups so that their rights can be meaningfully protected. Equally, it may be argued that as Aboriginal rights are collective rights, the law on common profit holders is more relevant. Though trespass is only available to an individual profit holder, if the action is brought by the Aboriginal group or the Crown (presuming they hold the title to the land in question) breaches of the right could lead to liability in trespass for a third party.

Both common and several profit holders may maintain an action in nuisance. Again, as explained in *Atkin's Court Forms*, "an interference with the rights of the owner of a several [i.e. individual] fishery by polluting the stream, or any act of the grantor and owner of the land (or, *a fortiori*, of a stranger) which diminishes or deprives the owner of the profit of his enjoyment entitles him to sue; for example, building over a substantial part of the land, or making erections on the river bed to the damage of a several fishery, or making buildings or weirs or other erections which prevent fish from other parts of the river from entering a several fishery."³⁷ Holders of profits in common may sue the land holder or other holders of the common profit for diminishing their enjoyment of the profit. As against strangers, holder of common profits may sue them if the action of the stranger tends to interfere with the commoner's rights. Regardless of the cause of action asserted, the holder of a profit may obtain a declaration of right, an injunction or damages for the breach of the profit.³⁸

Under the law of *profit à prendre* third parties may be held liable in trespass or nuisance for doing such things as erecting weirs which interfere with fish or by preventing a person from accessing a profit or by exercising the profit in competition with

³⁶ *Atkin's Court Forms*, 2nd ed. Vol. 17 (London: Butterworths, 1975) at p. 25.

³⁷ *Atkin's* at p. 26.

³⁸ *Atkin's* at p. 24.

the holder of the profit. As such, if there is an Aboriginal right to fell trees and that right is considered to be a *profit a prendre*, and a logging company enters the land to fell trees, the company may be liable in trespass for taking trees in competition with the Aboriginal group.

Generally however, Indigenous rights on unoccupied Crown lands are not exclusive rights. Access to and enjoyment of Crown land for hunting, fishing, gathering and other temporary activities is normally available to the general public and not exclusively available to Aboriginal peoples. Indigenous rights are also not alienable. An Aboriginal group cannot sell its hunting rights to another party. These features are inconsistent with the concept of a property right and in any event, the courts have rejected classifying such Indigenous rights as *profits a prendre*, or as property rights, preferring instead to treat them as *sui generis*.

C) Unlawful, Unjustified, and Justified Infringements and the Proprietary Theory of Liability

Though we have raised some doubts about Mainville's extension of the fiduciary obligation as justification for third party liability, there is much to commend in using Mainville's three categories for liability. Again, they are:

1. Unlawful Infringement: an infringement of Indigenous rights is done by a third party without, or in excess of, Crown authorization or statutory approval.
2. Unjustified Infringement: an infringement is done pursuant to a law which does not meet the justification test set forth in *Sparrow*.
3. Justified Infringement: an infringement is done pursuant to a justified law, but "where compensation is nevertheless required under the doctrine of Aboriginal rights and to meet the justification test."

In the latter two categories, the Crown is directly involved in authorizing the impacting activity. There is no real gap in remedies in those circumstances. On the face of it, the most effective and appropriate way to obtain relief would seem to be against the Crown³⁹. The Crown is the party that granted or assumed the obligations of the right and then without proper justification, authorized a third party to do something that would impact that exercise of that right.

However, in the case of unlawful infringement, the actions of the third party are not authorized by the Crown. Can the Crown be held liable for actions of a third party

³⁹ Although the main action would be against the Crown the third party may need to be added to have effective injunctive relief.

undertaken without, or in excess of, any authority granted by the Crown? Is the Crown required under the doctrine of the Honour of the Crown to take steps to curtail the unlawful actions of the third party? Can the Crown maintain an action for damages against the third party for the impacts on the holder of the Indigenous right? If the Crown succeeds, is it required to pass on any compensation to the Indigenous rights holder?

It is in this area of the unlawful infringement that there appears to be a potential remedy gap. It can be anticipated that the Courts will find a way to address that gap. This could be by providing remedies directly against the Crown, likely founded on the Honour of the Crown, or indirectly against the third party through some form of relator action where the Crown is a named party or possibly by treating the Indigenous right as having a sufficient relationship to a property right to allow direct action on the part of the holder of the Indigenous right against the third party.

From a societal perspective it might well be better if the courts looked to the Crown for the remedy and left the Crown to seek indemnification from the wrong-doing third party. This approach would be more consistent with the doctrine of Honour of the Crown. It would not require the Aboriginal group to undertake the cost and risks of enforcement. It would ensure there is a remedy even where the wrong-doing third party had no resources to satisfy a judgment, it would lessen the potential for societal divisiveness as one segment battles with another over disputed rights and positions and finally, it would not restrict the effective remedies to injunctions and damages.

We have no way of knowing where the courts will go, but we are confident that they will fill the potential remedy gap.

VI. Observations on Quantifying Compensation

Regardless of whether it is the Crown or a third party that is liable for an infringement, what should be the approach to valuing the loss? In the words of Binnie J. in *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 (“*Canfor*”) at para 59:

[In] assessing compensatory damages for environmental loss, the Court ought not to be engaged merely in punishment of the wrongdoer (which is the domain of regulatory offences) or imputing losses based on little more than a generalized desire to mete out rough justice to a tortfeasor. Quantification of the loss must be “fair to both the plaintiff and the defendant ... fairness is best achieved by avoiding both undercompensation and overcompensation”: *Ratych, supra*, at p. 963.

Fairness must drive any approach to quantification of damages.

Infringements on Indigenous rights are difficult to value for the purposes of a damages award because such rights are *sui generis*, they are not alienable, they are collective in nature and there is no market for Indigenous rights. A First Nations person cannot sell to a non-Aboriginal person his/her right to hunt for food. Indigenous rights are collective rights, which can only be alienated to the Crown.⁴⁰ Further, many Indigenous rights have no ordinary commercial value. Mainville wrestles with this issue and contends that common law approaches to damages (e.g. looking for commercial losses) is not appropriate and suggests using equitable remedies, such as constructive trusts or disgorgement of profits, as a way of valuing losses.

The fact is that damages, or monetary compensation for impacts on Indigenous rights, are not only hard to quantify they are in many situations not an appropriate remedy. This is beneficial to parties seeking interim or interlocutory injunctions, but it is a problem when trying to address harm that has already occurred.

That said, the common law is no stranger to valuing things that lack a market value. General damages could potentially be used to compensate for such losses which cannot be readily quantified on a commercial basis. In the context of personal injury actions, the Supreme Court capped general damages awards at \$100,000 (1978 dollars) in recognition of the fact that non-pecuniary damages cannot be readily quantified and are "largely arbitrary." The comments of Dickson J. (as he then was) in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 offers some general assistance at p. 260-261:

Andrews used to be a healthy young man, athletically active and socially congenial. Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this, he is entitled to compensation. But the problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

There are cases dealing with general damages for property impacts. None deal directly with impacts on Indigenous rights. Most of these cases see relatively modest damages awards. Faced with no other option, these cases can be used to structure what is reasonable for a damages award until such time as the Supreme Court steps in and sets out an approach to compensation.

⁴⁰ See Mainville at p 125-7. See also *Delgamuukw v. BC* [1997] 3 S.C.R. 1010 at para 113-115.

VII. Conclusion

At some point, the issue of compensatory damages for impacts on Indigenous rights will come squarely before the courts. The issues a court will face will be difficult. Encouraging dialogue on compensation now, as this paper endeavours to do, will hopefully be of future value when these issue are being brought before and decided in courts.