Implications of the Recent Supreme Court of Canada Decision in: *R. v. Marshall; R. v. Bernard*

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Implications of the Recent Supreme Court of Canada Decision in:

R. v. Marshall; R. v. Bernard

With additional comments on:

Haida Nation v. British Columbia (Minister of Forests)

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)

With a Particular Emphasis on Implications for the Oil and Gas Industry and Impact/Benefit Agreements

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Introduction

Aboriginal rights, title and treaty issues are one of the most significant legal issues currently facing the oil and gas industry in Western Canada. This paper provides an overview of the current legal context respecting aboriginal rights, title and treaty issues in Western Canada and its impact on the oil and gas industry. It also includes some comments on one commonly used means to reduce uncertainty in relation to consultation issues, namely, impact and benefit agreements.

Recent Aboriginal Caselaw and Potential Impacts on the Oil and Gas Industry

I. Marshall and Bernard

In a decision released July 20, 2005[1] the Supreme Court of Canada overturned Court of Appeal decisions from New Brunswick and Nova Scotia finding that Mi'kmaq people have a treaty right to harvest timber for commercial purposes. In so doing, the Court also provided guidance on how to assess aboriginal title claims. The decision is therefore of significance to the oil and gas industry.

The *Bernard* and *Marshall* cases arose out of the aftermath of the Supreme Court's decisions in *Marshall 1*[2] and *Marshall 2*.[3] In those decisions, the Supreme Court held that "peace and friendship" treaties entered into between the British and the Mi'kmaq in 1760 and 1761 conferred on the Mi'kmaq the treaty right to engage in commercial fishing activities sufficient to earn a reasonable livelihood. Members of Mi'kmaq communities in New Brunswick and Nova Scotia believed that *Marshall 1* and *Marshall 2* meant that they had commercial rights to harvest other resources as well, including timber on Crown land. To establish that right, they commenced logging activities on Crown lands in locations in New Brunswick and Nova Scotia without seeking permits from the provincial governments. They were arrested and charged by the provincial governments with violating provincial forestry laws.

At trial in both cases, the Mi'kmaq relied on *Marshall 1* and *Marshall 2* as a defence to the charges, arguing that they had a treaty right to cut and sell timber. They argued that they also had aboriginal title to the lands on which they had cut the trees, and, therefore, did not need the permission of the

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[1] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43.

[2] *R. v. Marshall*, [1999] 3 S.C.R. 456.

[3] *R. v. Marshall*, [1999] 3 S.C.R. 533.

provincial government to harvest the timber. In both cases, these arguments failed and the Mi'kmaq were convicted. However, upon appeal to the courts of appeal in New Brunswick and Nova Scotia, the convictions were overturned. The governments of New Brunswick and Nova Scotia appealed those decisions to the Supreme Court of Canada.

In unanimously overturning the two Court of Appeal decisions, the Supreme Court upheld the trial courts' decisions finding that there was no treaty right to harvest trees for commercial purposes, and that aboriginal title had not been established at the locations in question.

On the treaty right issue, the Court held that, while the treaty did protect some rights to harvest and dispose of certain commodities, commercial logging was not protected. Although treaty rights are not frozen in time, a claim to a modern treaty trading right must represent a logical evolution from a traditional trading activity at the time the treaty was made. In these cases, the trial courts held that, on the evidence before them, commercial logging was not one of the traditional trading activities that the treaties were intended to protect. In fact, the Supreme Court noted that commercial logging likely would have been seen as in conflict with the Mi'kmaq's traditional way of life, due to its potential to interference with fishing.

The Supreme Court then went on to consider the Mi'kmaq's alternative claim, that they had aboriginal title to the lands on which the logging occurred and therefore did not need governments' permission to cut the trees. The test for establishing aboriginal title was set out in the Court's 1997 *Delgamuukw* decision,[4] which required exclusive occupation of land by an aboriginal community at the time of British sovereignty, with continuity to the present day. In *Bernard* and *Marshall*, the key aspects of the *Delgamuukw* test for aboriginal title were the meaning of exclusive occupation, how nomadic or semi-nomadic peoples could establish exclusive occupation, and continuity of occupation.

The Court held that exclusive occupation need not require proof that the aboriginal group physically excluded all others from the lands in question. Rather, the group had to demonstrate that it had "effective control" of the land — the ability to exclude others if it had chosen to do so.

The Court commented that nomadic or semi-nomadic groups may be able to establish aboriginal title to lands that they used. The Court noted that, at common law, possession of land does not

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[4] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

require continuous physical occupation. In an aboriginal title context, the question is whether a nomadic group enjoyed sufficient physical possession to give them title to the land. Each case will turn on whether an aboriginal group can establish a degree of physical occupation or use equivalent to common law title.

On the question of continuity, the Court held that modern-day claimants of aboriginal title must establish a connection with the pre-British sovereignty group upon whose use and occupation of the land the aboriginal title claim is based. This can be done by showing that the claimant group has maintained a substantial connection with the land since sovereignty.

While the Supreme Court recognized that the aboriginal perspective was important in assessing whether aboriginal title has been established, and that it was important to take into account oral histories and other traditional knowledge of aboriginal groups in making that assessment, aboriginal title is at root a common law right. Proof of aboriginal title must therefore be sensitive to aboriginal perspectives, but must meet common law standards for proof of title. Based on this approach, the Supreme Court held that the trial courts applied the right standard in deciding that aboriginal title had not been made out by the Mi'kmaq, and criticized the Courts of Appeal for applying lower standards of proof. As a result, the Supreme Court upheld the trial courts' decisions to convict the Mi'kmaq.

Although this decision arises out of cases in New Brunswick and Nova Scotia, it will have important implications for the oil and gas and other resource industries in western and northern Canada. The Supreme Court has indicated that common-law standards for establishing title to land also apply to aboriginal title. While courts must be open to considering aboriginal perspectives on aboriginal title, and take a flexible approach to evidence supporting the claims, the standard for proof of aboriginal title must meet the common-law standard. This suggests it may be more difficult for aboriginal groups in non-treaty areas of western and northern Canada to establish aboriginal title to land.

In particular, the decision indicates that very strong evidence of occupation of land will be required to establish aboriginal title. Particularly in the *Bernard* case, there was compelling evidence pertaining to Aboriginal title. The cutting site was approximately 15 kilometres from the oldest Mi'kmaq village in New Brunswick. It was in an area of numerous archaeological sites and was a place where Mi'kmaq families historically would camp in the winter. However, there was no evidence of occupation or use of the specific cutting site. The Court's finding that such evidence fell short of establishing aboriginal title shows that the bar has been set high. In the decision, the Court suggests

that there may be a lower threshold for establishing aboriginal rights to gathering, hunting, trapping and fishing than for establishing aboriginal title to the lands and resources on which those rights are based.

Finally, the decision suggests that the Supreme Court will continue to take a cautious approach to determining whether treaties confer commercial rights on aboriginal groups. Since the controversy created by the Court's 1999 *Marshall 1* decision, the Court has shown a greater sensitivity to the economic consequences of its decisions. Although the decision dealt specifically with forest resources, we believe that the Court's reasoning should apply with equal force in the context of the commercial exploitation of other natural resources including oil and gas. The decision will make it more difficult for aboriginal groups to convince courts that they have aboriginal title to resources or treaty rights to exploit resources which were unknown or not being exploited at the time that treaties were signed.

II. Vintage Petroleum

Consultation and accommodation obligations in the specific context of the oil and gas industry in British Columbia were recently considered in *Apsassin et al v. B.C. Oil and Gas Commission et al.*[5] At the Supreme Court level, Mr. Justice Cohen dismissed the Saulteau First Nation's ("SFN") application to quash a decision by the OGC, granting Vintage Petroleum Canada, Inc. ("Vintage") permission to construct an exploratory well site along with associated roads and other infrastructure in the traditional territory of SFN. The Court of Appeal dismissed SFN's appeal and the Supreme Court of Canada refused leave. The key issue in the BCSC application turned on the SFN's position that the OGC had a legal obligation to accommodate the SFN's request to complete a "cumulative effects assessment" before granting the well authorization. Mr. Justice Cohen noted the following facts in holding that the OGC met its constitutional obligations to the SFN:

- The SFN did not identify any direct or indirect impacts on plants, fish, birds or wildlife from Vintage's activities;

- OGC staff reported there was no concern from a land and habitat point of view;

[5] 2004 BCSC 92, 2004 BCCA 286, leave to appeal refused [2004] S.C.C.A. No. 341.

- An agreement was made to produce pilot studies of wildlife and habitat capability in the area;

- Site specific conditions would be considered to mitigate some of the cumulative effects; and

- SFN's concerns expressed through the consultation process focused on the potential effects of large-scale oil and gas development which would necessarily engage a further approval process with the OGC, including a process of consultation with the SFN.

SFN also generally challenged the constitutionality of the *Oil and Gas Commission Act*, arguing that it is unconstitutional as it grants the OGC an unstructured discretion that risks infringing Treaty 8 rights. The Court disagreed, holding that the Legislative framework provided the OGC with the necessary and constitutionally permissible mandate.

Although *Apsassin* does not vary fundamentally from the views of consultation and accommodation expressed in previous decisions, the case is useful to oil and gas companies as a guide for what the courts may find is reasonable consultation and accommodation in the context of oil and gas approvals granted by the OGC.

III. Haida and Taku

On November 18, 2004, the Supreme Court of Canada released its decisions in *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*, 2004 S.C.C. 73 ("Haida") and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 S.C.C. 74 ("Taku"). These landmark decisions provided a preliminary outline of the parameters of the Crown's duty to consult and, where appropriate, accommodate Aboriginal peoples in circumstances where Aboriginal interests have been asserted, but not proven. The decisions also provide a framework for Aboriginal consultation activity related to potential infringements of Aboriginal rights caused by land and resource development activities. As a result, the two decisions are perhaps the most significant Supreme Court of Canada Aboriginal law decisions since the 1997 decision in Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.

A. Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser

(a) Background and Lower Court Decisions

The *Haida* case involved a judicial review, pursuant to the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, of the Minister's decision to replace and approve the transfer of a tree farm licence. In 1961, the Province of British Columbia issued the tree farm licence to a large forestry company, MacMillan Bloedel, permitting it to harvest trees in an area of Haida Gwaii (the Queen Charlotte Islands). The Minister replaced the licence in 1981, 1995 and 2000. In 1999, the Minister also approved a transfer of the tree farm licence to Weyerhaeuser. The Haida commenced judicial review proceedings in 2000 to challenge these replacements and the transfer, which were made without their consent and, since approximately 1994, over their express objections.

The Chambers Judge, Halfyard J. of the British Columbia Supreme Court, dismissed the Haida's petition (2000 B.C.S.C. 1280). He reasoned that the law could not presume the existence of Aboriginal rights merely from proof of their assertion and proof that there had been no formal surrender or extinguishment of such rights. He found that until the nature and extent of Aboriginal title and right of the Haida had been conclusively determined by legal proceedings, questions of infringement could not be decided with certainty and questions about justification could not be accurately framed or decided in respect of speculative infringement of unproven rights. He concluded that the Crown had only a "moral duty" to consult with the Haida regarding their claims.

The Court of Appeal allowed the appeal—ultimately issuing two judgements on the matter. In the first decision, reported at 99 B.C.L.R. (3d) 209 ("*Haida #1*"), the Court of Appeal held that the Provincial Crown had fiduciary obligations of good faith to the Haida with respect to Haida claims to Aboriginal title and right. Further, it found that the Provincial Crown and Weyerhaeuser were aware of the Haida's claims to all or significant parts of the area covered by the licence and the claims were supported by a good *prima facie* case. In the result, the Court granted a declaration that the Crown *and* Weyerhaeuser had a legally enforceable duty to the Haida to consult in good faith and endeavour to seek workable accommodation between Aboriginal interests of the Haida and objectives to manage the area in accordance with the public interest.

The Court of Appeal's decision in *Haida #1* raised considerable controversy whether private parties could owe a duty to consult to Aboriginal people similar to that owed by the Crown. (The issue had not been argued either at first instance or on appeal.) Counsel for the Crown and Weyerhaeuser

sought clarification and the Court permitted supplementary argument on this point (reported at 2002 BC.C.A. 223). The subsequent Court of Appeal decision, reported at 5 B.C.L.R. (4th) 33, ("*Haida #2*") resulted in a 2-1 decision on August 19, 2002. The majority of the Court of Appeal confirmed that Weyerhaeuser had a legal duty to consult and seek accommodation with the Haida and seek workable accommodations between the Haida and the objectives of the Crown and Weyerhaeuser.

(b) *Haida* -- Supreme Court of Canada Decision

The Supreme Court of Canada, in a unanimous 7-0 decision, dismissed the Crown's appeal, but allowed the appeal of Weyerhaeuser.

(i) Consultation Obligation Applies Where Rights Are Asserted

The Court found that the source of the duty to consult and accommodate is grounded in the "honour of the Crown" (paragraph 16). In circumstances where the Aboriginal rights and title have been asserted, but not defined or proven, the Aboriginal interest is insufficiently specific to impose a fiduciary duty on the Crown (paragraph 18). The Court stated that the duty to consult and accommodate arises where the Crown has knowledge of the potential existence of an Aboriginal right or title, whether or not that right or title has been legally established, and contemplates conduct that may adversely affect it (paragraph 35).

The nature and scope of the duty to consult and accommodate will vary with the circumstances. In general terms, the scope of the duty is proportionate to a preliminary assessment of the strength of the asserted right or title, and the seriousness of the potential impact on it (paragraph 39). This produces a spectrum of consultation. In some cases, mere notice and an opportunity to discuss the proposed decision may be required. In other cases, "deep consultation" may be required where there is a strong claim to the Aboriginal right or title, or where the risk of non-compensable damage to the right or title is high (paragraphs 43-44).

(ii) Accommodation

Good faith consultation efforts by the Crown and affected Aboriginal groups may, in turn, lead to an obligation to accommodate Aboriginal concerns. Where a strong *prima facie* case exists and the consequences of a proposed decision would affect it in a significant way, addressing Aboriginal concerns may require "taking steps to avoid irreparable harm or to minimize the effects of

infringement, pending final resolution of the underlying claim" (paragraph 47). The accommodation required is a process of "seeking compromise in an attempt to harmonize conflicting interests" (paragraph 49).

(iii) No Obligation to Obtain Aboriginal Consent

The Supreme Court confirmed that the final decision regarding balancing of Aboriginal and societal interests rests with the Crown. While the Crown is obligated to consult in good faith with the affected Aboriginal group, Aboriginal consent is not required. The court emphasized that Aboriginal groups do not have a veto over government decisions made pending final proof of their asserted rights or title. The Crown is not required to act in the best interests of the Aboriginal group, as a fiduciary, in exercising discretion.

(iv) Third Parties Not Under Duty to Consult or Accommodate

The Supreme Court firmly rejected the Court of Appeal's finding that the duty to consult and accommodate extended to Weyerhaeuser. The Supreme Court held that the duty to consult rests solely with the Crown — provincial and federal. The Court did acknowledge that the Crown can delegate "procedural aspects of consultation" to third parties. The Court suggested that the terms of the tree farm licence that mandated Weyerhaeuser to specify measures it would take to identify and consult with "Aboriginal people claiming an Aboriginal interest in or to the area" was merely an example of such delegation. Ultimate legal responsibility for consultation and accommodation rests with the Crown.

The Court also rejected the application of the trust law doctrine of "knowing receipt". The Court found that the duty to consult is distinct from the fiduciary duty owed in relation to particular Aboriginal interests. The Court noted that there was a distinction between the "trust-like" relationship between the Crown and Aboriginal peoples and a true "trust" and found there was no reason to import the doctrine of knowing receipt into the special relationship between the Crown and Aboriginal peoples (paragraph 54).

Finally, the Court also rejected the notion that imposition of a duty to consult on private individuals may be necessary to provide an effective remedy, which had been suggested by Finch C.J.B.C. The Court stated, "the remedy tail cannot wag the liability dog" and noted that the Province retains significant and ongoing powers (including control by legislation), which give it a powerful tool to respond to its legal obligations (paragraph 55). As a result, third parties are under no legal duty to

consult or accommodate Aboriginal concerns and cannot be held liable for the Crown's failure to consult.

B. Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)

(a) Background and Lower Court Decisions

The *Taku* case, like *Haida*, involved a judicial review pursuant to the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Redfern Resources applied in 1994 for approval from the British Columbia government to reopen, and to build a road to, the old Tulsequah Chief mine, which had previously been operated in the 1950's. In 1998, a project approval certificate was granted for the road over the objections of the Taku River Tlingit, following an extensive three-and-a-half year environmental review process.

Unlike the governmental decision at issue in *Haida,* the decision-making process reviewed in *Taku* followed a recommendation resulting from an established regulatory scheme. When the application was first made, the governing legislation was the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, which, in 1995, was replaced by the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. (The *Environmental Assessment Act* was subsequently amended again, S.B.C. 2002, c. 43.) One of the purposes of the *Environmental Assessment Act* (as it read at the time), set out in former section 2(e), was "to provide for participation, in an assessment under this Act, by… first nations …". Under the Act, a "project committee" had to be established and a number of groups had to be invited to nominate members to the committee, including "any first nation whose traditional territory includes the site of the project or is in the vicinity of the project" (former section 9(2)(d)).

The Taku River Tlingit were invited and agreed to participate in the project committee, as well as sub-committees formed to deal with Aboriginal concerns and issues around transportation options. The primary concern of the Taku River Tlingit concerned the 160-kilometre access road from the mine, which traversed a portion of their traditional territory. They took the position that the road ought not to be approved in the absence of a land use planning strategy and that the matter should be dealt with at the treaty negotiation table. The Taku River Tlingit were advised that these issues were outside the scope of the environmental assessment process, but were referred to other provincial agencies and decision-makers. A consultant was engaged to undertake traditional land use studies and addressed issues raised by the First Nation. The consultant's report was included in the Project Report prepared by the proponent. The consultant was also engaged to prepare an

addendum report addressing additional concerns raised by the First Nation following their review of the initial consultant's report.

The majority of the project committee members agreed to refer the application for a project approval certificate to the Ministers for decision. The committee prepared a written recommendations report. The Taku River Tlingit disagreed with the recommendations contained in the report and prepared a minority report stating their concerns with the process and the proposal. In March 1998, the Ministers issued the Project Approval Certificate, approving the proposal, subject to detailed terms and conditions.

In February 1999, the Taku River Tlingit challenged the Minister's decision to issue the Project Approval Certificate by way of judicial review proceedings on both administrative law grounds and on grounds based on the Taku River Tlingit's Aboriginal rights and title. The issue of determining its rights and title was severed from the judicial review proceeding and referred to the trial list (1999 CanLII 5674 (B.C.S.C.)), leave to appeal denied, June 25, 1999 (1999 B.C.C.A. 442); application to review refusal of leave dismissed, September 22, 1999 (1999 B.C.C.A. 550).

In the judicial review proceedings, the Chambers Judge, Kirkpatrick J., concluded that the Ministers should have been mindful that their decision might infringe on Aboriginal rights, and they had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the Taku River Tlingit's concerns. She also found for the Taku River Tlingit on administrative law grounds (2000 B.C.S.C. 1001).

The British Columbia Court of Appeal dismissed the Province's appeal in a 2-1 decision. Both the majority and the dissent appeared to conclude that the decision complied with administrative law principles (see paragraph 18 of the reasons of Madam Justice Southin, which, on the administrative law grounds, appears to be accepted by the majority (2002 B.C.C.A. 59)). The majority held that the Province had failed to meet its duty to consult and accommodate the Taku River Tlingit. The dissenting judge, Southin J.A., found that the consultation undertaken was adequate on the facts.

(b) *Taku* – Supreme Court of Canada Decision

The Supreme Court of Canada allowed the appeal. It found that the Province was under a duty to consult with the Taku River Tlingit in making the decision to reopen the mine. The Province was aware of the Taku River Tlingit's claims by virtue of its involvement in the treaty negotiation process, and also knew that the decision to reopen the mine had the potential to adversely affect the

substance of the Taku River Tlingit's claims, which, on the basis of the principles established in *Haida*, meant that the Province was under a duty to consult with the Taku River Tlingit (paragraphs 23-28).

In considering the scope and extent of the Province's duty to consult and accommodate (which is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect of the right or title claimed), the Court found that acceptance of the Taku River Tlingit's title claim for negotiation under the B.C. Treaty Commission Process established a *prima facie* case in support of its Aboriginal rights and title. The Court clarified that an Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. However, the Court suggested that acceptance of a title claim for negotiation establishes a *prima facie* case in support of Aboriginal rights and title (paragraph 30). Regarding the seriousness of the potential impact, the Supreme Court also found that, while the proposed road would occupy only a small portion of the territory over which the Taku River Tlingit asserts title, the potential for negative derivative impacts on the Taku River Tlingit's claims was high. The Court concluded that the Taku River Tlingit were "entitled to something significantly deeper than minimal consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation" (at paragraph 32). The Court concluded that the consultation provided by the Province was adequate (paragraph 39).

(i) Reconsidering Regulatory Processes

The Court recognized that government may establish regulatory schemes to address procedural aspects of consultation, and suggested that government could establish dispute resolution processes to handle complex or difficult cases. One manner that the governments, federal or provincial, may choose to move forward is the creation or expansion of regulatory regimes to ensure that the procedural requirements identified by the Court are followed. The Supreme Court clearly invites this approach.

> "It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts." (*Haida* at paragraph 51)

Governments will have to determine whether existing decision-making processes are adequate to facilitate the necessary scope and extent of consultation. Where modification is necessary, government will face a choice between integrating consultation obligations into the duties of

statutory decision-makers or to lay a new process focused exclusively on Aboriginal consultation over a current regulatory structure. There has already been some evidence of governments reconsidering regulatory schemes in response to the Supreme Court decisions.

(ii) Moving Forward

Despite the greater clarity and limits provided by these decisions, they highlight the need for continued development of approaches to consultation with Aboriginal communities. It will likely take some time for governments and Aboriginal groups to respond and adapt to the Court's directions on Aboriginal consultations. Those responses could have important consequences for current government and industry consultation practices, including the negotiation of impact benefit agreements. While the cases underscore that consultation is a Crown responsibility, resource developers and other third parties must continue to take a proactive approach to working with governments and Aboriginal groups to ensure that consultation obligations are properly understood and carried out. The Crown must develop robust accommodation policies and/or regulatory schemes that will fulfil its duty to Aboriginal groups and provide greater certainty to recipients of Crown authorizations.

IV. What's Happened Since?

As the Supreme Court noted in *Haida*:

> "This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate." (paragraph 11)

Since the release of the *Haida* and *Taku* decisions in November 2004, several courts have taken some tentative steps towards filling in the general framework established by the Supreme Court of Canada.

It should be noted that one of the most important developments since the release of the Supreme Court decisions in Haida and Taku has been the Supreme Court of Canada decision in the *Mikisew Cree* case, which discussed how the Crown's obligations to consult and, if necessary, accommodate apply in the context of Treaty 8. On order to avoid overlap, this topic is not pursued in this paper, but readers are directed to the paper by Joanna Mullard (Tab 2 of these materials), which discusses this important case.

(a) Consultation in Respect of Previous Decisions (that were the subject of consultations)

In *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 B.C.S.C. 283, Powers J. of the British Columbia Supreme Court considered an application by the Homalco Indian Band for judiciary review of the decision of the Ministry to approve an amendment to the licence of an aquaculture company (allowing the raising of Atlantic Salmon, as opposed to the original Pacific Salmon). The Ministry argued that their obligation to consult related only to the amendment to the licence, since the existence and location of the site and evidence regarding potential harm to wild salmon stocks or marine life had already been considered in the initial approval. The Ministry concluded that the scope and content of consultation was at the low end of the scale.

Powers J., applying the standard of review of correctness, concluded that the Ministry had not correctly evaluated the potential impact and its response did not amount to the necessary level of consultation.

> "I agree that matters which have been extensively consulted on in the past do not require a full repetition of that consultation. However, that does not mean that these matters do not continue to be the subject of review and further consultation in light of additional knowledge or information." (paragraph 49)

In the result, the application was adjourned to allow the Ministry to continue consultation. As of the date of this paper, the consultations were still ongoing and the parties have not returned to Court.

(b) Consultation in Respect of Previous Decisions (that were not the subject of consultations)

One of the lengthier examples of extended consultation involves the decision of the B.C. Minister of Forests consenting to the change of control of Skeena Cellulose Inc., which was challenged by three Aboriginal groups. When it first came before the Court in the fall of 2002 (*Gitxsan and other First Nations v. British Columbia (Minister of Forests)*, 2002 B.C.S.C. 1701), Tysoe J. found that the Minister had not fulfilled the duty of consultation and accommodation, but declined to quash the decision and adjourned the matter to give the Minister the opportunity to fulfil his duty. In late 2004, the Gitanyow First Nation again sought a declaration that the Minister had failed to provide meaningful and adequate consultation and accommodation and other forms of relief (*Gwasslam v. British Columbia (Minister of Forests)*, 2004 B.C.S.C. 1734). Again, the Court concluded that the Crown had not yet fulfilled its duty of consultation and accommodation with respect to the transfer (paragraph 60).

The Court granted a declaration to that effect, but declined the remaining relief sought by the Gitanyow and indicated that the parties should resume negotiations with liberty to return to Court if the negotiations failed (paragraph 65ff).

Notably, in both decisions, the Court looked beyond the potential infringement arising from the immediate decision being contemplated. The Court found that where there are past instances of a failure of consultation, that the government is required to remedy the past defects before a further dealing with the same licence.

> "If a forest tenure licence has been issued in breach of the Crown's duty to consult, the duty continues and the Crown is obliged to honour its duty each time it has a dealing with the licence." (*Gitxsan*, paragraph 81)

The *Gitxsan* decision predated the Supreme Court of Canada's decisions in *Haida* and *Taku*. However, in *Gwasslam*, Tysoe J. concluded that "the same reasoning applies to the duty as founded in the honour of the Crown." (paragraph 43). Thus, even if a decision was not challenged at the time it was made, the permit could be vulnerable upon renewal (or any subsequent "dealing") if there has been a previous, unremedied breach of the Crown's duty to consult and accommodate (Gwasslam, paragraph 46).

If this theory is generally accepted, it introduces potential enormous uncertainty and complication to the consultation process. Given the different standards and approaches of past governments and past generations, it is safe to assume that there were an enormous number of licences, permits and other authorizations issued in the past without any consultation whatsoever. If the logic of Tysoe J. is accepted, any minor amendment, extension or renewal of any of these permits has the potential of reopening the entire history of consultation in relation to that permit. Countless existing permits (which are not subject to present challenges) may have this latent defect.

(c) Challenge to Government "Policy" vs. Government "Decisions"

In *Haida*, the Court stated that the duty to consult will arise when the Crown has knowledge of the potential existence of Aboriginal interests and "contemplates conduct" that may adversely affect it. The phase "contemplates conduct" employed by the Supreme Court of Canada leaves open the possibility that it is more than simply government "decisions" regarding specific authorizations or applications that may be subject to challenge.

In *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 B.C.S.C. 697, the British Columbia Supreme Court was faced with what, in effect, was a challenge to government policy of offering Forest Range Agreements as accommodation for infringement from forestry operations. In March 2003, the BC Ministry of Forests announced its forestry revitalization plan, which included offering Forest Range Agreements as a strategic policy approach to fulfilling the Province's duty to consult with Aboriginal peoples. The program was designed as a "fast-track" program that provided the First Nation with economic accommodation for forestry infringements within its territory, but did not require it to prove the strength of its claim to the asserted territory. The amount was calculated on the registered population of the Indian Band to whom the offer was made. The Huu-Ay-Aht First Nation brought an application for a declaration that the Crown was obliged to consult in good faith with the First Nation regarding forestry permits, and that a population-based formula to determine accommodation under the Forest and Range Agreement was not in good faith and did not fulfil the Crown's obligations.

The Court first addressed the issue of whether it could hear such a challenge in a judicial review application and concluded that it could. The Court noted that most of the cases on this subject have been commenced by petition seeking judiciary review (paragraph 98).

> "It is apparent that the Courts have not been pedantic or overly restrictive in the type of action which it regards as a 'decision' when it comes to declaratory relief following review of whether the Crown has discharged its obligation to consult with First Nations." (paragraph 99)

> "In this case, the FRA initiative is a creature of statute, the *Forestry Revitalization Act* and the *Forestry Act*, which enable the Province to make specific agreements with First Nations regarding forest tenure. The FRA is a vehicle that the Ministry chose to deliver those specific agreements. The concept of 'decision' should not be strictly applied when there is legislative enablement for government initiative that directly affects the constitutional rights of First Nations. … The petitioners are entitled to seek declaratory relief under the JRPA that the FRA policy does not meet the Crown's constitutional obligation to consult the HFN." (paragraph 104)

The Court allowed the application and found that the Crown had a duty to consult with the First Nation. The Crown was obligated to design a process for consultation before operational decisions were made and was ordered to establish a reasonable consultation process for future consultation with respect to economic accommodation for ongoing forestry activity within the territory. The failure of the Crown to consider the strength of the claim or the degree of infringement represented a complete failure to meaningfully consult (paragraphs 116 and 126).

Recently, the BC government announced that it would not pursue its appeal of the decision.

(d) Remedy

As is evident from several of the above decisions (Homolko, Skeena, UBC, etc.), the Courts generally have been reluctant to grant a final remedy and quash a government decision. They have tended, instead, to limit the decision to granting a declaration that the government has a duty to consult and then adjourning the matter (or suspending the operation of the decision) to allow the government and the First Nation the opportunity to continue consultations.

In *Musqueam Indian Bank v. Richmond (City)* 2005 B.C.S.C. 1069, Brown J. of the British Columbia Supreme Court considered a challenge to the decision of the B.C. Lottery Corporation (an agent of the Crown) to move and expand a casino to lands which it knew where subject to Musqueam claims. The Crown did not consult prior to this decision. The Court found that the Crown's contemplated move of the casino to the claimed lands triggered a duty to consult and that consultation did not take place at the earliest stages, before irrevocable steps had been taken. However, in considering the appropriate remedy, the Court concluded that because the harm suffered by the Musqueam, failure to consult and potentially accommodate, is compensable, it was not appropriate to set aside the decision, close the casino and cause consequential damage. The Court issued a declaration that the Crown had a duty to consult and suggested that the parties can assess the strength of the claim and the appropriate scope and content of the duty to consult and accommodate and invited them to return to the Court if they could not agree.

V. Impact/Benefit Agreements

It has become increasingly common for industrial proponents of development projects to rely on direct communications and consultations with Aboriginal groups, and agreements resulting from those consultations, as a means to manage project risks associated with governments' failure to consult, or consult adequately, with Aboriginal groups about the proposed project or development. The increased clarity resulting from the decisions discussed above may reduce, but not eliminate, risks associated with the adequacy of Crown consultations. While the Supreme Court has clarified that third parties cannot be liable to Aboriginal groups for the Crown's breach of duty, the permits, licences and other authorizations granted by the Crown remain subject to legal challenge, which can have an equally significant impact upon the recipients of such Crown authorizations. Thus, third parties will still have an interest in seeing that the government properly discharges its duty (and in the least time possible). In addition, industrial proponents are likely to continue to rely on direct

negotiations/consultations with Aboriginal groups to reduce the risk of challenges to its Crown authorizations (as well as to comply with any statutory or contractual consultation obligations).

The often-short development and production timelines in the oil and gas industry present a particular challenge to the obligations to consult. As noted in argument in *Relentless Energy*[6], Treaty 8 First Nations may be inundated with consultation requests during the drilling season. While the case law emphasizes the Crown's primary role in discharging constitutional consultation obligations with aboriginal groups, industry nonetheless faces increasing pressure from government to consult with aboriginal groups, in part to assist in ensuring that these obligations have been met. Consultations with affected stakeholders have long been industry practice, in part to meet regulatory requirements and in part due to corporate policy. However, industry can expect to be increasingly involved in constitutional consultation processes between the Crown and aboriginal groups.

Although the decisions discussed above have provided some much-needed clarification around the parameters and responsibilities for aboriginal consultations respecting infringements of aboriginal rights and title, it is unlikely that they will cause developers to change their consultation practices in the short term. This is because developer's consultation activities with aboriginal communities have not been driven by the need to justify infringements of rights.

Oil and gas developers consult with aboriginal communities (and others affected by their activities) for three main reasons:

- it is their corporate policy to consult with aboriginal groups and other stakeholders;
- they are required to consult with aboriginal communities and other stakeholders by statute, regulations, or terms of their tenures from government; or
- they have entered into agreements with the aboriginal communities which provide for ongoing consultations.

In recent years, oil and gas developers have also relied on direct consultations with aboriginal groups, and agreements resulting from those consultations, as a means of managing project risks associated with governments' failure to consult, or consult adequately, with aboriginal groups about those projects. The increased clarity provided by the decisions discussed above has perhaps reduced

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[6] *Relentless Energy Corp. v. Davis*, 2004 1492, Vancouver Registry No. S046193

project risks related to adequacy of Crown consultations, but has not reduced the need for companies to consult to discharge statutory and regulatory obligations, corporate policy requirements or contractual obligations.

In the longer term, the impact of the decisions on developers will depend on how provincial and federal governments respond to the direction provided by the Supreme Court. The recent decisions have made it clear that governments have the power to make land and resource use decisions necessary to maintain the health of provincial and national economies, even in the face of disagreement from aboriginal groups. At the same time, the Supreme Court was very clear in placing the onus on government to ensure adequate consultation and accommodation occurs around those decisions, and has given government the legal tools needed to develop or adapt consultation practices as required.

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