The Crown's Duty to Consult and Accommodate

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THE CROWN'S DUTY TO CONSULT AND ACCOMMODATE

The Supreme Court of Canada Decisions in:

Haida Nation v. British Columbia (Minister of Forests)

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

And the Federal Court of Appeal Decision in:

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)
(S.C.C. Decision Pending)

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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 provide 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. These decisions are also significant for practitioners of administrative law given the Supreme Court's reliance upon administrative law principles.

In the spring of 2005, the Supreme Court of Canada heard an appeal from the Federal Court of Appeal decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2004] 3 F.C. 436, 2004 F.C.A. 66 ("*Mikisew Cree*"). The decision from the Supreme Court of Canada is still pending. This decision has the potential to be equally significant as it may clarify the extent of the duty to consult in a post-treaty context.

The purpose of this paper is to summarize the above cases, examine the subsequent jurisprudence that has considered the decisions, and to comment on some of their implications for practitioners of administrative law.

I. *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.

The Court found that the duty to consult rested solely with the Crown and did not extend to Weyerhaeuser.

II. *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).

III. *Haida* and *Taku* and Administrative Law

The following section attempts to distill from the *Haida* and *Taku* decisions the essential points that would be of interest to practitioners of administrative law.

(a) Duty to Consult and the Standard of Review

The Supreme Court of Canada decision in *Haida* discussed the applicable standards of review, despite the fact that it was not reviewing the result of a process established to discharge the duty to consult and accommodate.

> "Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process." (paragraph 60)

The Court went on to discuss the standard of review, in any event, based on general principles of administrative law. In summary, the process by which the duty to consult is discharged by the Crown would likely be examined on a standard of reasonableness, while the government assessment of the seriousness of the claim or impact of the infringement would be judged on a standard of correctness.

(i) The Process – Standard of Reasonableness

The process by which the Crown discharges its duty to consult will be judged by whether the government has made reasonable efforts to inform or consult.

> "The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required ... The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty." (*Haida* at paragraph 62)

(ii) The Scope and Content of the Duty to Consult and Accommodate – Standard of Correctness

The scope and content of the duty to consult and accommodate varies with the circumstances. The Supreme Court of Canada found that in general terms, "the scope of the duty 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 upon a right or title claimed" (*Haida* at paragraph 39). The kind of duties that may arise in different situations fall upon a "spectrum".

> "At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to that notice. ...
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required.
>
> Between these two extremes of the spectrum just described will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake." (*Haida* at paragraphs 43-45)

Government efforts at making these assessments will be judged by a standard of correctness.

> "Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness." (*Haida* at paragraph 63)

Given the higher standard of review, government assessments of the seriousness of the claim or impact of infringement might usefully err on the conservative side (towards greater consultation)—at least until the boundaries are more clearly defined. One commentator has suggested that, in circumstances where the claim is weak, but the impact of the potential infringement is strong, it is in the Crown's best interests to *assume* the claim is strong—given that this determination will be held to the correctness standard—and consult accordingly. (See T. Issac et. al., "The Crown's Duty to Consult and Accommodate Aboriginal Peoples: The Supreme Court of Canada Decision in *Haida*" in *The Advocate*, Vol. 63, Part 5, September 2005 page 671 at 678.) While this approach may ensure that consultation decisions are less vulnerable to challenge on judicial review, it may increase the odds of a lengthy consultation period, given the finite capacity of government to undertake consultation. The effect of such delay may not be directly felt by the government decision-makers, but acutely felt by those third parties waiting on the decision. It also complicates the issue of accommodation, which would also be affected by an assessment (or assumption) that the claim is strong. Such drawbacks will need to be weighed against the risk of more frequent judicial review applications.

(b) 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 of Appeal's application of the duty to a private party (which was rejected) first had to overcome the challenge of issuing such an order against a private party in the context

of a judicial review proceeding. This aspect of the Court of Appeal judgement merits closer scrutiny for the administrative law issues it raises.

(i) Judicial Review Against Private Citizens

All three Judges of the Court of Appeal in *Haida #2* addressed the issue of whether an order could be made against a private party under the British Columbia *Judicial Review Procedure Act*. Lambert J.A. stated:

> "I add that the *Judicial Review Procedure Act* does not say that its remedies are only available against government bodies or officers. If private bodies or persons are exercising statutory powers or statutory powers of decision then the Act, in its terms, would apply to them with respect, at least, to the remedies of declaration and injunction. Indeed, as the interface between government functions and private functions is eroded by the concept of privatization, I would not place arbitrary limits on the nature of the persons or bodies amenable to orders in the nature of the former prerogative writs." (paragraph 35)

Finch C.J.B.C. (concurring in the result with Lambert J.A.) focused less upon the terms of the *Judicial Review Procedure Act* and more upon the discretionary power in the *Court of Appeal Act* which provided that the Court may "make or give any additional order that it considers just."

> "It is not disputed that a direct declaration can properly be made against the Crown [under the *Judicial Review Procedure Act*]. But as is apparent from what I have said above, a declaration against the Crown alone is no remedy at all. Justice cannot be done in these proceedings without a declaration against Weyerhaeuser as well. That is, in my view, an order within the discretionary powers conferred by s.9(1)(c) of the *Court of Appeal Act*." (at paragraph 128)

The dissenting Judge, Low J.A., stated:

> "Judicial review remedies are available against public officials and public bodies only, not against private citizens. Weyerhaeuser exercises no statutory power. The Minister of Forest exercised the statutory power in granting the TFL [Tree Farm Licence] to Weyerhaeuser and its predecessor. In pursuing its rights under the TFL, Weyerhaeuser exercises only contractual rights. Therefore, it seems to me, it was open to the appellant, in the form of proceedings it chose, to seek a remedy against the public official only. Weyerhaeuser had to be added as a respondent because any remedy obtained against the Crown would affect its contractual rights. However, if the appellant wished to seek a remedy directly against Weyerhaeuser, it would be compelled to do so in an ordinary action." (at paragraph 134)

(ii) Duty to Consult for Private Citizens

Justice Lambert of the Court of Appeal went on to conclude that Weyerhaeuser had a duty to consult the Haida, and that the duty came from a number of sources. Firstly, s.35(1) of the *Forest Act* provides a clear statutory obligation on the holder of a tree farm licence to consult with persons who use the Tree Farm area for purposes other than timber production. This requirement was also reflected in the terms of the tree farm licence. Secondly, the duty was based on the constructive trust principles of 'knowing receipt'. Weyerhaeuser held its title to the tree farm licence as a constructive trustee and, as a result, owed a third party fiduciary duty to the Haida. Finally, in the Lambert J.A.'s opinion, Weyerhaeuser had an obligation to justify the *prima facie* infringement of the Haida's Aboriginal rights and/or title. Being both a party to the Crown's *prima facie* infringements, as well as an independent infringer at the level of activities and operations, Weyerhaeuser was obligated to justify the infringements in which it was participating.

The Supreme Court firmly rejected all of these reasons and found that the Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests. 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.

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 *Haida* and *Taku* decisions 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).

(c) Consultation Through Regulatory Processes

In *Taku*, the Supreme Court confirmed that the Province was not required to establish a separate consultation process to address Aboriginal concerns. The Court confirmed that the B.C. *Environmental Assessment Act* process, which provides for direct First Nation participation in project reviews, was a suitable process for Crown consultation with Aboriginal groups regarding overall project approvals.

> "The Province was not required to develop special consultation measures to address TRTFN's [Taku River Tlingit First Nation's] concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples." (paragraph 40)

The Court noted the extensive (although not consistent) participation of the Taku River Tlingit in multiple stages of the review and concluded that, by the time the

assessment was concluded, the concerns of the First Nation were well understood and had been meaningfully discussed. Thus, the Court concluded that the Province "had thoroughly fulfilled its duty to consult" (paragraph 41).

The Court noted that further, more detailed consultations would occur through the project permitting phase, as well, allowing the Crown to continue to discharge its obligation to consult and, where necessary, accommodate Aboriginal concerns.

(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) Case Study: The Mackenzie Gas Project – Regulatory Review by the National Energy Board[1]

The National Energy Board had issued a Memorandum of Guidance ("MOG") on Consultation with Aboriginal Peoples in March 2002. Following the decision of the Supreme Court of Canada in *Haida* and *Taku*, the Board determined that its former MOG did not accurately reflect the law as stated in these two cases. As a result, the Board withdrew its MOG for "reconsideration and review" on August 3, 2005. The Board stated that it intended to continue to monitor legal and policy developments and to engage with Aboriginal groups, industry representatives and government departments prior to issuing any further guidance document on this matter. To date, no further guidance has been forthcoming, nor does any appear to be imminent.

Meanwhile, the regulatory role of the National Energy Board and the obligation of the Crown to consult continue. The National Energy Board frequently includes consideration of adequacy of Aboriginal consultation as part of its list of issues for new project applications. For example, the list of issues for the Mackenzie Gas Project (Hearing Order GH-1-2004) includes the following:

> "The appropriateness of the Applicant's public consultation program and the adequacy of Aboriginal consultation."

In response, the federal government has established a project-specific team known as the Crown Consultation Unit. Several departments, including Environment Canada, Fisheries and Oceans Canada, Indian and Northern Affairs Canada, National Resources Canada, and Transport Canada committed to work together to coordinate their consultation activities to avoid overlap and duplication. The government, in

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[1] In the interest of full disclosure, it should be noted that the author is co-counsel to the Government of the Northwest Territories in the NEB GH-1-2004 proceeding.

correspondence with the National Energy Board, also stated that it was "mindful of the need to minimize 'consultation fatigue' in the communities".

The Crown Consultation Unit has been assigned the role of coordinating and facilitating consultation activities with Aboriginal groups; documenting identified concerns; and managing information obtained through these consultation processes. It represents the Federal Crown and receives functional guidance from a Federal Advisory Committee, which includes senior representatives from the five departments referred to above. It is also supported by a Staff Working Group and a Legal Advisory Group representing those same federal departments. The federal government's approach was expressly stated to be in response to the Supreme Court's decisions in *Haida* and *Taku*.

It is too early to judge the results. It is notable that the Crown Consultation Unit, while having full intervenor status, did not file full and formal evidence on the deadline assigned for intervenor evidence. They chose to defer filing evidence to just prior to the public hearing.

> "Consultation is an iterative process and will evolve over the course of the review process. The Government of Canada will file further evidence on Crown consultation activities with Aboriginal groups with the NEB at the beginning of Phase 5 of its Public Hearing Process [the oral hearing phase]. The Crown believes that filing its evidence as proposed would ensure that the NEB has a complete record of Crown consultation activities undertaken to that point in time prior to making its decision on the project."

It remains to be seen whether this new model will prove to be effective in fulfilling the Crown's consultation requirements and whether it will meet with approval of Aboriginal and other participants in the regulatory review process. It is an experiment worth watching.

(iii) Guidance for Decision-Makers

In *Haida*, the Court comments, with seeming approval, on the British Columbia Provincial Policy for Consultation with First Nations (October 2002) and states that such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

The British Columbia provincial consultation policy identifies the following stages in the consultation process:

- Pre-Consultation Assessment – Assessing whether an activity requires consultation;
- Stage 1 – Initiate Consultation
    - Stage 1(a) – Consultation Activities – Initial consideration of Aboriginal interests identified or raised by potentially affected First Nations;
    - Stage 1(b) – Considering Aboriginal Interests – Evaluating the "soundness" of Aboriginal interests (i.e. whether they may be subsequently proven to exist);
- Stage 2 – Consider the impact of the decision on Aboriginal interests;
- Stage 3 – Consider whether any likely infringement of Aboriginal interests could be justified in the event those interests were proven subsequently to be existing Aboriginal rights and/or title;
- Stage 4 – Look for opportunities to accommodate Aboriginal interests and/or negotiate resolution bearing in mind the potential for setting precedents that may impact other Ministries or agencies.

(page 22ff of the BC Provincial Consultation Policy)

The Provincial Policy clearly allows broad leeway of interpretation and application. On page 16, the Policy emphasizes that "consistent application of this Policy across government is essential". However, on page 25, it acknowledges that "there are many ways to consult within the four stages of consultation". How to apply a policy "consistently" but "in many ways" has proven to be a challenge. The consideration of precedents (in Stage 4) also opens the possibility that the accommodation offered in any given circumstances may be driven by factors other than the accommodation that such circumstances would suggest is required.

(d) 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.

(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.

(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) Duty to Consult in Respect of Decisions Regarding Private Land

The consultation authorities discussed above all arose in connection with Crown land or Crown tenure. There are currently cases pending before the British Columbia Supreme Court that will consider the duty, if any, to consult with respect to private

land. In *Hupacasath First Nation v. British Columbia (Ministry of Forests)*, the Hupacasath challenge the decision of the Ministry to remove private lands from a tree farm licence. The Court, on an interim injunction application (2005 B.C.S.C. 345), agreed that the issue raised a serious question to be tried (although it denied the application for an injunction based on the balance of convenience). The judicial review application itself is yet to be heard.

In *R. v. Badger*, [1996] 1 S.C.R. 771, the Supreme Court of Canada indicated that treaty rights (in that case, hunting rights) can be exercised on private land where that land is not subject to a visible, incompatible land use. It is similarly arguable that an Aboriginal right to hunt could be exercised on private lands not subject to a visible, incompatible use. If so, then a government decision authorizing an incompatible use (such as subdividing property for residential development) could trigger the duty to consult. This is clearly an area where further litigation is probable.

(d) Appropriate Procedure: Judicial Review or Ordinary Action

In *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 B.C.C.A. 128, the British Columbia Court of Appeal considered an appeal from the dismissal of a judicial review of a decision of the Crown authorizing the sale of lands (an existing golf course) to the University of British Columbia. In the Court of Appeal, Southin J.A. commented that the claims asserted by the First Nations were inapt to the process under the *Judicial Review Procedure Act* because the First Nation did not assert that the transaction in issue was not authorized by statute. In other words, no administrative grounds were asserted (paragraph 16ff). The Musqueam's claim was based on a claim for Aboriginal title to the land in question. Southin J.A. stated the opinion that for an Aboriginal band to invoke the rights conferred upon it by the judgement of the Supreme Court of Canada in *Delgamuukw*

is to bring an action against the Crown asserting Aboriginal title.[2] As discussed below, the vast majority of challenges still proceed by way of judicial review.

(e) 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

[2] In the result, the Court concluded that the consultation process was insufficient (paragraph 94), but found that there was a "fair probability that some species of economic compensation would be likely found to be appropriate for a claim involving infringement of Aboriginal title relating to the land of the type of this long-established public golf course located in the built up area of a large metropolis" (paragraph 98). The Court ordered the suspension of the operational Order-in-Council authorizing the sale for two years in order to provide opportunity for the parties to seek to reach some agreement, failing which, the parties are at liberty to bring the matter back to Court.

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).

(f) 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. Consultation Requirements in the Post-Treaty Context[3]

The discussion above has focused on the decisions of the Courts regarding the duty of the Crown to consult and accommodate the interests of Aboriginal people in the context of *asserted but unproven* claims. The *Haida* and *Taku* cases clarify the scope of the duty to consult and circumstances where Aboriginal rights or title have been asserted, but have not yet been proven or confirmed, either through litigation or through the negotiation of a land claim agreement or treaty.

These cases of potential rights or title should be distinguished from cases such as *R v. Sparrow*, [1990] 1 S.C.R. 1075, in which an Aboriginal right (in that case, the right to harvest fish) was adjudicated and confirmed as an existing right. In such circumstances, the Crown had an obligation to consult and an obligation to meet the test of "justification" for any proposed infringement of the legally confirmed Aboriginal right.

(a) Accommodation vs. Justification

Although the Courts have not yet drawn a specific distinction between "accommodation" and "justification", it is suggested that the concept of "accommodation" is a more flexible one, allowing for a fair balancing of interests, pending final determination of the nature and element of Aboriginal rights or title. In contrast, the concept of "justification" is a more demanding standard, applicable to potential interferences with rights or title that have been established or confirmed--either by the Courts or through agreements such as land claim agreements or treaties.

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[3] An earlier version of this section of the paper was previously presented by Brad Armstrong, Q.C. and Keith B. Bergner, "Consultation Requirements in the Post-Treaty Context", Continuing Legal Education Aboriginal Law Conference, Vancouver, B.C., June 10, 2005.

While the Courts have begun to delineate the application of the concept of consultation and accommodation that apply to asserted claims, it is necessary to consider the application of these concepts to settled claims.

In Canada, there is a patchwork of settled claims, starting with the numbered treaties, through modern land claims agreements and treaties, and the various agreements-in-principle currently under negotiation. Consideration must be given to how and to what extent the concepts of consultation, accommodation and justification may continue to apply with respect to landed resource decisions on Crown land in the post-treaty context.

(b) Consultation Under the Numbered Treaties

Between 1871 and 1923, the federal government, and various Aboriginal people entered into 11 numbered treaties covering most of the provinces of Ontario, Manitoba, Saskatchewan, Alberta, plus the Mackenzie District of the Northwest Territories and the northeast corner of British Columbia. Treaty Number 8 was negotiated in 1899 and was adhered to by a number of bands that lived in what are now Alberta, Saskatchewan, British Columbia and the Northwest Territories.

Treaty Number 8 contains the following clause (which is included in similar terms in most of the other numbered treaties):

> "And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

The numbered treaties did not expressly incorporate the concepts of consultation, accommodation and justification in relation to land that is "required or taken up."[4]

The Courts have specifically considered the question of the duty of the Crown to consult before making land and resource decisions which might affect Aboriginal interests under Treaty Number 8, in the case of *Halfway River First Nation v. B.C. (Ministry of Forests)*, 1999 B.C.C.A. 470 ("*Halfway River*"), and in the case of *Canada (Canadian Heritage) v. Mikisew Cree First Nation*, 2004 F.C.A. 66 ("*Mikisew Cree*"). The *Mikisew Cree* case is under appeal to the Supreme Court of Canada and a decision is pending.

(i) The Halfway River Case

In the *Halfway River* case, the British Columbia Ministry of Forests issued a cutting permit over certain lands within the area of northeast British Columbia covered by Treaty Number 8. The Halfway River First Nation challenged the issuance of the cutting permit through judicial review proceedings on the grounds that, *inter alia*, the Crown had a legal obligation to consult with the Halfway River First Nation before issuing the permit, and that the Crown had failed in meeting that obligation. The Crown and the forest products company that had received the permit argued that the Crown had an independent right under the terms of the treaty to take up lands for lumbering and other purposes, that the rights of hunting, trapping and fishing were consequently limited, and that the issuance of the cutting permit, therefore, did not amount to an infringement, giving rise to the legal obligation to consult.

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[4] Other sections of the numbered treaties do expressly reference consultation. For example, Treaty 8 provides that the Crown is to "set apart such reserves and lands, *after consulting with the Indians* concerned as to the locality which may be found suitable and open for selection." [Emphasis added.]

The British Columbia Court of Appeal (1999 B.C.C.A. 470) found that the Aboriginal right of hunting, trapping and fishing, on the one hand, and the Crown's right to regulate or to take up lands, on the other hand, "cannot be given meaning without reference to one another". The Court found that "the Crown's right to take up land cannot be read as absolute or unrestricted", and that "a balancing of the competing rights of the parties to the Treaty was necessary" (paragraph 134). The Court also found that the enactment of s. 35 of the *Constitution Act*, 1982, "improved the position" of the First Nation signatories to the Treaty by confirming that their rights "cannot be infringed or restricted other than in conformity with constitutional norms" (paragraph 135).

Chief Justice Finch concluded as follows:

> "I respectfully agree with the learned Chambers Judge that any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act*, 1982." (paragraph 144)

The Chief Justice went on to confirm that the approach set out in the *Sparrow* case is therefore applicable in deciding whether infringement of a treaty right is justified, requiring consideration of the following questions (said in *Sparrow* not to be an exhaustive or exclusive list):

1. Whether the legislative or administrative objective is of sufficient importance to warrant infringement;
2. Whether the legislative or administrative conduct infringes the treaty right as little as possible;
3. Whether the effects of infringement outweigh the benefits derived from the government action; and
4. Whether adequate meaningful consultation has taken place.

The Court found that, while the decision of the Ministry of Forests that the harvesting authorized under the cutting permit would have minimal impacts on hunting, fishing or trapping, the Crown had not met the requirements of consultation (paragraph 165).

This interpretation of the treaty uses the adoption of s. 35 in 1982, as a vehicle for modifying the existing Aboriginal and treaty rights, through the imposition of restrictions on the exercise of treaty rights by the Crown. The Court imposed the more demanding standard of "justification" based on the *Sparrow* test, applicable to potential interference, with established rights or title in the absence of any express consultation requirements in the text of the Treaty.

(ii) The Mikisew Cree Case

In the *Mikisew Cree* case, the Federal Court of Appeal reached a different conclusion respecting the interpretation and application of Crown duties and Aboriginal rights under Treaty Number 8. The Minister of Canadian Heritage approved the construction of a winter road through Wood Buffalo National Park, which is located within the boundaries of Treaty Number 8. The Mikisew Cree First Nation challenged the approval of the winter road through judicial review proceedings in the Federal Court on the grounds that, *inter alia*, the approval constituted an infringement of treaty rights, and that the Crown had failed to meet the obligations of consultation and justification. The Mikisew Cree relied on the decision of the British Columbia Court of Appeal in the *Halfway River* case.

The Province of Alberta, an intervenor at the Court of Appeal, argued that the approval of the construction of the winter road was a "taking up" of land as contemplated in the provisions of Treaty Number 8, that the hunting, trapping and fishing rights were expressly "subject to" such taking up of land, and that therefore

there was no infringement of the treaty rights. The Federal Crown did not rely on this argument at the hearing of the appeal (although it did rely on the argument in the court below).

By a majority, the Federal Court of Appeal found that the treaty included a geographical limitation on the existing hunting rights where there was a "visible, incompatible land use". It found that the taking up of land for a winter road, and the prohibition of the use of firearms on or within 200 metres of the road, was such a visible, incompatible land use. The Court noted that s. 35 of the *Constitution Act*, 1982 protected "existing" Aboriginal and treaty rights. The Court found that the intention of the parties to the treaty included the acceptance of settlement and other uses of land that would restrict rights to hunt, "so long as sufficient unoccupied land would remain to allow them to maintain their traditional way of life" (paragraph 17). The Court noted that the land required for the road corridor was only 23 square kilometres out of the 44,807 square kilometres of Wood Buffalo National Park and the 840,000 square kilometres encompassed by Treaty Number 8. It found that this was not a case "where no meaningful right to hunt remains" (paragraph 18).

The majority decision concluded:

> [19] The treaty right to hunt has always been limited by the fact that hunting is not permitted on land that has been taken up. It is the right to hunt on land which is not required for settlement, mining, lumbering, trading or other purposes which obtained constitutional protection when s. 35 came into force.
>
> [20] In *Badger* [[1996] 1 S.C.R. 771], Cory J. recognized the limited nature of the treaty right to hunt. He found that Mr. Badger and Mr. Kiyawasew were hunting on land that was visibly being used. As their treaty right to hunt did not extend to hunting on such land, the hunting limitations set out in the provincial *Wildlife Act* did not infringe

> their existing right and were properly applied to them (paragraph 67). Accordingly, Cory J. did not find a *prima facie* infringement of s. 35 and did not apply the *Sparrow* test to those defendants.
>
> [21] Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of s. 35.

The Honourable Madam Justice Sharlow issued dissenting reasons in which she adopted the reasoning in the *Halfway River* case.

The Supreme Court of Canada heard an appeal in the *Mikisew Cree* case this spring and a decision is pending.

The possible outcomes of the appeal would appear to include:

(i) a finding that "any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s.35 of the *Constitution Act, 1982*." (See paragraph 144 of the *Halfway River* decision; Emphasis in original.); or

(ii) the taking up of land for settlement, mining, lumbering, trading or other purposes does not constitute an infringement under the provisions of Treaty Number 8, unless the taking up of land goes potentially so far that "no meaningful right to hunt remains." (See paragraph 18 of the *Mikisew Cree* majority decision.)

A further potential compromise may be suggested by the *Haida* and *Taku River* decisions. Using the reasoning in those cases, the Court may find that, while the taking up of land by the Crown does not *per se* constitute an infringement which requires the Crown to meet the "justification" test, the Crown might be required to consult and to seek a fair balance or "accommodation" of Aboriginal interests to ensure that the taking up of land does not ultimately subsume the rights of hunting, trapping or fishing.

These cases reflect the difficulty of overlaying the approaches of the Courts to reconciliation and to a balancing of interests, as reflected in the cases decided since the beginning of the 1990's, with treaty provisions which do not expressly provide for consultation, accommodation or justification.

As will be seen below, modern land claim agreements and treaties, particularly those in northern Canada, provide mechanisms for the balancing of these interests that is more in line with the reconciliation approach articulated by the Courts.

(c) Consultation under Modern Land Claims Agreements

Since 1973, 14 comprehensive land claims have been reached in the northern territories (Yukon, the Northwest Territories and Nunavut) and three other comprehensive land claims have been concluded in the rest of Canada, including the Nisga'a Final Agreement ratified in 2000.

A common approach in these agreements, which each contain their own structural and procedural arrangements, is as follows:

(i) a specific tract of land is identified and confirmed as land held by the Aboriginal group in fee simple;

(ii) a larger tract of land is identified as a management area, within which the Aboriginal group, federal government and either territorial or provincial government participate in land use planning and land use permitting and approvals; and

(iii) a larger area within which Aboriginal land use rights, such as hunting, fishing, trapping and gathering, continue to apply. This larger area often overlaps with management areas or other areas within which neighbouring Aboriginal groups have and exercise rights.

Clearly, decisions regarding land and resource projects on the fee simple lands under these agreements are within the control of the Aboriginal group, subject to the laws and regulations of the Aboriginal group, as well as to any generally applicable environmental assessment or environmental protection laws and regulations. The more difficult and nuanced issue is to identify the degree of control exercised by the Aboriginal group on the second and third categories of land identified above.

(i) The Nisga'a Final Agreement

The Nisga'a Final Agreement follows the above model in identifying different categories of land and attempts to identify and clarify the consultation obligations that attach to each category. For example, Chapter 10 of the Nisga'a Final Agreement, which deals with environmental assessment and protection, provides that:

> (i) if a proposed project (physical works or activities) is located on Nisga'a lands, it is potentially subject to Nisga'a laws in respect of environmental assessment, and may be subject to concurrent or coordinated assessments under federal (e.g. CEAA) and provincial (e.g. BCEAA) laws; and
>
> (ii) if a proposed project that will be located off Nisga'a lands (that is, on Crown lands) may reasonably be expected to have adverse environmental effects on residents of Nisga'a lands, Nisga'a lands, or Nisga'a interests set out in this Agreement (e.g. hunting and fishing rights), Canada or British Columbia or both, must ensure that the Nisga'a Nation:
>
> A. receives timely notice of, and relevant available information on, the project and the potential adverse environmental effects;
>
> B. is consulted regarding the environmental effects of the project; and

C. receives an opportunity to participate in any environmental assessment under federal or provincial laws related to those effects, in accordance with those laws, if there may be significant adverse environmental effects (see Chapter 10, paragraph 6).

The Nisga'a Final Agreement defines consultation (such as that referenced in paragraph B, above) as follows:

> "consult" and "consultation" mean provision to a party of:
>
> a. notice of a matter to be decided, in sufficient detail to permit the party to prepare its views on the matter,
>
> b. in consultations between the Parties to this Agreement, if requested by a Party, sufficient information in respect of the matter to permit the Party to prepare its views on the matter,
>
> c. a reasonable period of time to permit the Party to prepare its views on the matter,
>
> d. an opportunity for the Party to present its views on the matter, and
>
> e. a full and fair consideration of any views on the matter so presented by the party.

With respect to the obligation to ensure that the Nisga'a Nation receives an opportunity to participate in any environmental assessment, Chapter 10, paragraph 7 provides as follows:

> If Canada or British Columbia establishes a board, panel, or tribunal to provide advice or make recommendations with respect to the environmental effects of a project on Nisga'a Lands or a project off Nisga'a Lands that may reasonably be expected to have adverse environmental effects on residents of

> Nisga'a Lands, Nisga'a Lands, or Nisga'a interests set out in this Agreement, the Nisga'a Nation will:
>
> a. have standing before the board, panel, or tribunal; and
>
> b. be entitled to nominate a member of the assessment board, panel or tribunal, unless the board, panel, or tribunal is a decision-making body, such as the National Energy Board.

The general provisions of the Nisga'a Final Agreement contain the following provision on consultation:

> CONSULTATION
>
> 28. When Canada and British Columbia have consulted with or provided information to the Nisga'a Nation in respect of any activity, including a resource development or extraction activity, in accordance with their obligations under this Agreement and federal and provincial legislation, Canada and British Columbia will not have any additional obligations under this Agreement to consult with or provide information to the Nisga'a Nation in respect of that activity.

Accordingly, the Nisga'a Final Agreement specifically addresses the extent and nature, as well as the limits, of consultation obligations in relation to land and resource projects on Crown land in circumstances where those projects may have an impact on Nisga'a residents, Nisga'a lands or Nisga'a interests.

(ii) The Tlicho Agreement

As indicated above, 14 land claim agreements have been reached between the federal government and Aboriginal groups in the three northern territories.

The most recent of these is the Tlicho Agreement. The federal legislation ratifying this agreement received royal assent on February 15, 2005 and will come into force on a date to be set by proclamation.

The Tlicho Agreement follows the general structure of identifying and confirming Tlicho lands which are held in fee simple, a larger tract of land known as Wek'èezhìi, within which the Tlicho people participate directly in land use planning and the issuance of land and water permits and licences, and a broader area of land known as Mowhì Gogha Dè Niitlèè within which the Tlicho people have rights such as hunting, fishing and trapping.

Proposed projects on Tlicho lands are within the general control of the Tlicho government.

Proposed projects outside of the Tlicho lands, but within Wek'èezhìi or Mowhì Gogha Dè Niitlèè are, with some similarities to the Nisga'a Final Agreement, subject to consultation with the Tlicho government and subject to environmental assessment and review by the Mackenzie Valley Environmental Impact Review Board, on which the Tlicho people will have direct representation, and the Mackenzie Valley Land and Water Board (of which the Wek'èezhìi Land and Water Board is a local panel), again with direct participation of the Tlicho people.

Specific consultation requirements are provided for in the Tlicho Agreement under Chapter 23, which addresses subsurface resources.

Sections 23.2, 23.3 and 23.4 provides as follows:

23.2 CONSULTATION

23.2.1 Any person who, in relation to Crown land wholly or partly in Mowhì Gogha Dè Niitlèè (NWT) or Tlicho lands subject to a mining right administered by government under 18.6.1, proposes to

(a) explore for or produce or conduct an activity related to the development of minerals, other than specified substances and oil and gas, if an authorization for the use of land or water or deposit of waste is required from government or a board established by government to conduct these activities; or

(b) explore for or produce or conduct an activity related to the development of oil or gas,

shall consult the Tlicho Government.

23.2.2 The consultations conducted under 23.2.1 shall include

(a) environmental impact of the activity and mitigative measures;

(b) impact on wildlife harvesting and mitigative measures;

(c) location of camps and facilities and other related site specific planning concerns;

(d) maintenance of public order including liquor and drug control;

(e) employment of Tlicho Citizens, business opportunities and contracts, training orientation and counselling for employees who are Tlicho Citizens, working conditions and terms of employment;

(f) expansion or termination of activities;

(g) a process for future consultations; and

(h) any other matter agreed to by the Tlicho Government and the person consulting that government.

23.2.3 The consultations conducted under 23.2.1 are not intended to result in any obligations in addition to those required by legislation.

23.2.4 No consultation is required under 23.2.1 where negotiations have been conducted in accordance with 23.4.1.

23.3 OIL AND GAS EXPLORATION RIGHTS

23.3.1 Prior to opening any lands wholly or partly in Mowhì Gogha Dè Niitlèè (NWT) for oil and gas exploration, government shall consult the Tlicho Government on matters related to that exploration, including benefits plans and other terms and conditions to be attached to rights issuance.

23.4 MAJOR MINING PROJECTS

23.4.1 Government shall ensure that the proponent of a major mining project that requires any authorization from government and that will impact on Tlicho Citizens is required to enter into negotiations with the Tlicho Government for the purpose of concluding an agreement relating to the project. This obligation comes into effect one year after the effective date. In consultation with the Dogrib Treaty 11 Council or the Tlicho Government, government shall, no later than one year after the effective date, develop the measures it will take to fulfil this obligation, including the details as to the timing of such negotiations in relation to any governmental authorization for the project.

23.4.2 The Tlicho Government and the proponent may agree that negotiation of an agreement under 23.4.1 is not required.

The term "consultation" is defined in Chapter 1 of the Tlicho Agreement as follows:

> "consultation" means
>
> (a) the provision, to the person or group to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that person or group to prepare its views on the matter;
>
> (b) the provision of a reasonable period of time in which the person or group to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the person or group obliged to consult; and
>
> (c) full and fair consideration by the person or group obliged to consult of any views presented.

Accordingly, the Tlicho Agreement contains specific obligations on, and limitations to, consultation in relation to land and resource projects on Crown land which may have impacts upon the Tlicho people, Tlicho lands, or Tlicho interests.

(iii) Consultation under Agreements-in-Principle in British Columbia

While no treaties have been finalized under the British Columbia Treaty Commission process, agreements-in-principle provide some indication of the potential requirements for consultation in relation to land and resource projects on Crown land.

For example, the Lheidli T'enneh Agreement-in-Principle (LTAIP) dated July 26, 2003 provides some guidance on these issues. The Wildlife chapter under the LTAIP confirms that the Lheidli T'enneh will have the right to harvest wildlife for food,

social and ceremonial purposes in the Lheidli T'enneh Area in accordance with the final agreement.

Paragraphs 9, 10 and 11 of the Wildlife chapter addresses the issue of Crown land disposal as follows:

> 9. The Crown may authorize use of or Dispose of Crown Land, and any authorized use or disposition may affect the methods, times and locations of harvest in Wildlife under the Final Agreement, provided that the Crown ensures that those authorized uses or dispositions do not deny Lheidli T'enneh Citizens the reasonable opportunity to harvest Wildlife under the Final Agreement.
>
> 10. The Lheidli T'enneh right to harvest Wildlife will be exercised in a manner that does not interfere with other authorized uses or dispositions of Crown Land existing as of the Effective Date or authorized in accordance with paragraph 9.
>
> 11. Prior to the Final Agreement, the Parties will negotiate and attempt to reach agreement on the factors to be considered in determining whether the reasonable opportunity to harvest Wildlife would be denied under paragraph 9.

These provisions in the LTAIP provide only a broad outline of the potential structure of Crown land use decisions, environmental impact reviews and consultation requirements which would be applicable under a final agreement reached within the British Columbia Treaty Commission process. Generally similar provisions appear in other agreements-in-principle.

All of the existing AIPs include a definition of consultation. The AIPs of the Lheidli T'enneh, Maa-nulth First Nation and Sliammon essentially duplicate the definition

found in the Nisga'a Final Agreement (reproduced above). The Tsawwassen First Nation Agreement-in-Principle contains a definition that is only slightly revised from that found in earlier agreements:

> "consult" and "consultation" mean provision to a Party of:
>
> a. notice of a matter to be decided;
>
> b. sufficient information in respect of the matter to permit the party to prepare its views on the matter,
>
> c. a reasonable period of time to permit the party to prepare its views on the matter,
>
> d. an opportunity for the party to present its views on the matter, and
>
> e. a full and fair consideration of any views on the matter so presented by the Party.

In addition, the four AIP's all contain a limiting provision similar to that in the Nisga'a Final Agreement. The Tsawwassen AIP states:

> CONSULTATION
>
> 50. Where Canada and British Columbia have Consulted or provided information to Tsawwassen First Nation as required by the Final Agreement, Canada and British Columbia will have no additional Consultation obligations under the Final Agreement.

While there are still no final agreements under the BC Treaty Commission process, the above definitions of consultation and attendant limiting language appear to be becoming standard features of AIP's.

VI. Conclusion

Recent case law from the Supreme Court of Canada (*Haida* and *Taku*) has confirmed that the Crown has a duty to consult, and if necessary, accommodate Aboriginal interests when it has knowledge, real or constructive, of the *potential* existence of an Aboriginal right or title and contemplates conduct that might adversely affect it. Subsequent decisions of lower courts have begun to fill in the general framework outlined by the Supreme Court of Canada.

Pending case law from the Supreme Court of Canada (*Mikisew Cree*) will clarify the extent to which the concept of consultation will continue to apply with respect to land and resource decisions on Crown land in the context of the historic numbered treaties. Modern treaty and land claim settlements (and agreements currently under negotiation) opt to expressly identify the circumstances in which consultation is required.

While the continued application of the concepts of "accommodation" and "justification" in the post-treaty context is less clear, the author suggests that the two concepts should be distinguished. The Courts have clarified that the duty to accommodate applies in the context of asserted but unproven rights. Given the tendency of modern treaties to more expressly identify and define rights, the resulting rights under land claims agreements may be subject to the arguably more demanding standard of justification.

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