



The Crown's Duty to Consult and Accommodate

By

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Aboriginal Consultation: Best Practices and Leading Edge Strategies
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TO CONSULT AND ACCOMMODATE**

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Aboriginal Consultation: Best Practices and Leading Edge Strategies
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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.

On November 24, 2005, the Supreme Court of Canada delivered its decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 S.C.C. 69 (“*Mikisew*”) which affirmed the existence of a duty to consult in a post-treaty context. The Court ruled that whereas governments have the power to exercise their treaty rights, those rights are subject to a duty to consult in situations where the exercise of those treaty rights would have an adverse effect on Aboriginal treaty rights.

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.

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 address 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. 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.

(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.

(i) Duty to Consult for Private Citizens

Justice Lambert of the Court of Appeal concluded 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. While to date there has not been an updated MOG published by the National Energy Board, they have given some indication as to the expectations it has concerning the evidence to be included in project applications to the

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 National Energy Board GH-1-2004 proceeding.

Board. In addition to the Generic Information Request and the Filing Manual Section 3.3.3, applications for project approval to the Board, the applicant must also include:²

- Identification of all the First Nations communities that may be affected by the project and how they were identified;
- When and how they were contacted and who was contacted;
- Evidence that the applicant has provided potentially affected Aboriginals with a project overview that clearly explains the nature of the project, its routing, proposed construction periods and possible environmental and socio-economy impacts and information regarding the applicant's proposed measures to minimize such impacts;
- Documentation and summaries of any meetings with those potentially affected Aboriginal people. Confidential discussions need not be revealed but the evidence should include enough detail to enable the Board to understand the general issues discussed;
- Information as to the concerns raised by Aboriginal people, and whether or not those concerns are still outstanding or have been addressed by the applicant;
- An analysis of the potential impacts of the project on the exercise of traditional practices such as hunting, fishing, trapping and gathering; and,
- Any other matters that may be relevant to the application, e.g. information about discussions provincial or federal government departments or agencies may have had with Aboriginal groups potentially affected by the project.

In relation to one particular project, the Mackenzie Gas Project, 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 correspondence with the National Energy Board, also stated that it was “mindful of the need to minimize ‘consultation fatigue’ in the communities”.

² This information was provided in a letter dated February 10, 2006 to Senior Legal Counsel for Terasen Pipelines Inc. from the Secretary of the National Energy Board.

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.

“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 in the Context of Assented but Unproven Rights and Title?

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 (*Gitksan and other First Nations v. British Columbia (Minister of Forests)*, 2002 B.C.S.C. 1701), Tysse 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.” (*Gitksan*, paragraph 81)

The *Gitksan* 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. The courts have also had to consider whether a duty to consult with Aboriginal groups exists with respect to private land.

(i) R. v. Badger

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.

(ii) *Hupacasath First Nation v. British Columbia*

In *Hupacasath First Nation v. British Columbia*, [2005] BCSC 1712, the Supreme Court of Canada considered an application for judicial review of two decisions by the Minister of Forests granting Weyerhaeuser's requests to remove privately owned land from Tree Farm Licence 44 and to determine a new allowable annual cut under the licence. The Hupacasath First Nation argued that the Minister had breached the Crown's duty to consult in allowing the requests. In response, the Minister of Forests and Brascan corporation, subsequently renamed Brookfield Asset Management Inc. (who had since purchased the private land from Weyerhaeuser) argued that the land was privately owned and accordingly, there was no duty to consult on the part of the Crown.

After concluding that the Minister had prior knowledge of the existence of potential Aboriginal rights on the private land and surrounding Crown land, Madame Justice Smith contemplated whether there could be Aboriginal rights on the private land in question and if so, whether the Crown had contemplated conduct that might adversely affect those rights. Madame Justice Smith concluded:

“...that existing aboriginal and treaty rights, for example to hunt or fish, may be exercised on unoccupied private land if the activity is permitted by statute or common law and is not prohibited by the private landowner.”(paragraph 180)

After concluding that there was reason to believe that potential Aboriginal rights existed on the private land in question, the Court considered whether the actions of the Crown might have adversely affected those rights. The Court concluded that sale of the private land could lead to development that was inconsistent with Aboriginal rights and as such, the Minister ought to have known that the contemplated conduct had the potential to adversely affect the Hupacasath First Nation's Aboriginal rights. Consequently, the Court concluded that in reaching its decision to accept or deny Weyerhaeuser's requests, the Crown had a duty to consult the Hupacasath First Nation.

Once triggered, Madame Justice Smith went on to consider the extent of the duty to consult required:

“The Crown’s duty with respect to alleged aboriginal rights on the Removed Land is at a low level and does not require “deep consultation”. It does require informed discussion between the Crown and the HFN in which the HFN have the opportunity to put forward their views and in which the Crown considers the HFN position in good faith and where possible integrates them into its plan of action. The Crown has not met that duty.” (paragraph 274)³

The *Hupacasath* decision extended the Crown’s duty to consult to private land in situations where the Crown’s contemplated actions might adversely affect Aboriginal rights and title. However, the requirements needed to fulfill the duty to consult may be less in instances involving private land than in instances involving Crown land.

While this decision has the potential to initiate significant change in consultation where private lands are involved, a recent decision by the Court of Appeal of Alberta in *Paul First Nation v. Parkland (County)*, 2006 ABCA 128 has the potential to limit its application.

(iii) *Paul First Nation v. Parkland (County)*

The Alberta Court of Appeal case *Paul First Nation v. Parkland (County)* involved an application by the Paul First Nation for leave to appeal a decision by the Subdivision and Development Appeal Board of Parkland County (SDAB) approving the development of a gravel pit by Burnco Rock Producers Ltd. (Burnco). In deciding whether or not to uphold the decision granting the permit, the SDAB held a public hearing and gave notice to adjacent landowners. A representative of the Paul First Nation attended the hearing and made representations, but otherwise there was no consultation on the development between the SDAB and the Paul First Nation. As was there were no consultations between Burnco and the Paul First Nation. As part of their argument, the Paul First Nation argued that the SDAB had a duty to ensure that Burnco had consulted with the Paul First Nation.

³ The Court concluded that the duty with respect to Crown land was higher: “The duty on the Crown with respect to the effect of the removal decision on aboriginal rights asserted on Crown land is higher, and requires something closer to “deep consultation”/ On the evidence, the Crown did not meet that duty.” (paragraph 275)

In rendering their decision the Alberta Court of Appeal recognized the *Hupacasath* decision that developments on private land could give rise to a duty to consult. However, the Court distinguished the *Hupacasath* case from the case at bar saying that this was not one of those situations as there was no extensive involvement of the government in the development. In speaking of the *Hupacasath* decision, Justice Ritter clarified that:

“...any such duty must be restricted to the facts of that case as it involved an operative transfer of the lands into a publicly funded government program followed by an attempt to transfer the lands out of that program. The extensive involvement of the government was the primary factor that precipitated the duty to consult in that instance.” (paragraph 14)

Justice Ritter’s decision appears to be an attempt to distinguish the *Hupacasath* case into obscurity. However, with respect, the distinction drawn by Justice Ritter does not seem to withstand scrutiny. It is not the “extensive involvement” of the government that is the controlling factor, but the potential for a government decision to adversely impact Aboriginal or treaty rights. It is not difficult to imagine a situation where the government is not “extensively involved” but is tasked with making decisions (e.g. granting approvals) that have the potential for serious adverse impact on Aboriginal interests. The existence of a duty to consult in relation to matters on private lands appears to be a judicial issue that we have not heard the last of.

(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.⁴ 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 phrase “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.

⁴ 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.

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).

In the aftermath of the decision, the Crown had originally filed an appeal. The appeal was eventually dropped and instead a revised template called the Interim Agreement on Forest & Range Opportunities was adopted by the provincial government. The government claimed that the new agreement reflected the *Huu-Ay-Aht First Nation* decision and provided for greater consultation.

(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 Band 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 were 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.

A similar approach to remedies was taken in *Hupacasath First Nation v. British Columbia* 2005 B.C.S.C. 1712. Despite the finding of a duty to consult and a breach of that duty, the British Columbia Supreme Court decided that the Minister's decisions should not be quashed or set aside:

“In light of the substantial prejudice to third parties which could flow from quashing or suspending the removal decision, compared with the lesser prejudice which could befall the HFN if the removal decision is left in effect, I have concluded that the removal decision should not be quashed or set aside.” (paragraph 317)

Instead, the Court found an appropriate remedy to be the order of a completion of consultations and accommodation.

V. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*

(a) Background and Lower Court Decisions

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.

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.

(i) *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.”

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. This consideration by the Courts has recently culminated in the decision from the Supreme Court of Canada in *Mikisew Cree*. However, in order to fully frame the issues at stake in this decision, it may be useful to briefly examine two Court of Appeal decisions that preceded the Supreme Court’s decision, namely the BC Court of Appeal’s decision in the case of *Halfway River First Nation v. B.C. (Ministry of Forests)*, 1999 B.C.C.A. 470, and the Federal Court of Appeal’s decision (which was the subject of the appeal to the Supreme Court of Canada) in *Canada (Canadian Heritage) v. Mikisew Cree First Nation*, 2004 F.C.A. 66.

(ii) *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 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.

The British Columbia Court of Appeal 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" (see paragraph 134 of the decision). The Court also found that the enactment of s. 35 of the Constitution Act in 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" (see paragraph 135 of the decision).

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. (See paragraph 144 of the decision) [Emphasis added.]

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):

- I. *Whether the legislative or administrative objective is of sufficient importance to warrant infringement;*
- II. *Whether the legislative or administrative conduct infringes the treaty right as little as possible;*
- III. *Whether the effects of infringement outweigh the benefits derived from the government action; and*
- IV. *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:

. . . namely to provide in a timely way information the aboriginal group would need in order to inform itself on the effect of the proposed action, and to ensure that the aboriginal group had an opportunity to express their interests and concerns. (See paragraph 165 of the decision)

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.

(iii) *The Federal Court of Appeal Decision in 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 case arose out of a proposal to re-establish a winter road through Wood Buffalo National Park for winter access from four communities in the Northwest Territories to the highway system in Alberta. The Mikisew Cree First Nation, a Treaty 8 signatory based in Fort Chipewyan, Alberta, objected to the proposed road on the grounds that it would infringe on their hunting and trapping rights under Treaty 8.

Parks Canada had provided a standard information package about the road to the First Nation, and the First Nation was invited to informational open houses along with the general public. Parks Canada did not consult directly with the First Nation about the road, or about means of mitigating impacts of the road on treaty rights, until after important routing decisions had been made.

The First Nation challenged the decision of the Minister of Canadian Heritage, the Minister responsible for Parks Canada, to authorize the construction of the road on the grounds that the Minister had not adequately consulted the First Nation about the road. The Mikisew Cree relied on the decision of the British Columbia Court of Appeal in the *Halfway River* case.

The First Nation's challenge was successful at trial, but on appeal the Federal Court of Appeal held, in a 2-1 split decision, that no Crown consultation obligation was triggered by the approval of the winter road.

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". (See 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". (See paragraph 18.)

The majority decision⁵ 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.

...

[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.

(b) *Mikisew Cree* - Supreme Court of Canada Decision

On November 24, 2005, the Supreme Court of Canada handed down its decision in the case of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.⁶ In the decision, the Supreme Court confirmed that, while governments have the power under treaties to authorize land uses which infringe on treaty rights, the exercise of that power imposes on governments a duty to consult where the taking up of land adversely affects those rights.

Consistent with other recent Supreme Court of Canada decisions which have emphasized the need for ongoing reconciliation of aboriginal interests into government decision-making, the Supreme Court overturned the Federal Court of Appeal's decision, and crafted a decision that balances governments' need to manage lands and resources in the broader public interest with proper consideration of impacts on treaty rights in governments' decision-making processes. The Supreme Court found that, because the taking up adversely affected the First Nation's treaty right to hunt and trap, Parks Canada was required to consult with the Mikisew Cree before making its decision. As Parks Canada had failed to do so, the Supreme Court set aside the Minister's approval of the winter road, and sent the matter back to the Minister for reconsideration in accordance with the decision.

⁵ The Honourable Madam Justice Sharlow issued dissenting reasons in which she adopted the reasoning in the *Halfway River* case.

⁶ 2005 SCC 69.

(i) *Power to Take Up Land Confirmed*

The first point in the decision, and perhaps the most fundamental, is the Supreme Court's recognition that the purpose of Treaty 8 and other post-Confederation treaties was to open up lands in Canada for settlement and development. The treaties were not a guarantee to First Nations that their hunting, trapping and fishing activities would remain as they were in 1899. Rather, the treaties put First Nations on notice that lands would be taken up over time for other uses.

While Treaty 8 lists a number of purposes for which lands may be taken up by governments, the Supreme Court emphasized that this list — “settlement, mining, lumbering, trading or other purposes” — should not be read restrictively. This is important for resource activities such as oil and gas development, which are not included in the list of purposes but which are very important purposes for which lands are taken up for development today.

In the *Badger* decision, the Supreme Court had held that Treaty 8 hunting rights were circumscribed by geographic limits and by specific forms of government regulation. In *Mikisew Cree*, the Supreme Court held that Treaty 8 rights are further limited by the Crown's right to take up lands, subject to the consultation obligations set out in the decision.

(ii) *Honour of Crown Requires Consultation Where Taking Up Infringes Treaty Rights*

The Supreme Court recognized that there is an “uneasy tension” between governments' power to take up lands under treaties and the treaties' promises of continued hunting, trapping and fishing. To balance governments' powers against the need to protect treaty rights, the Court stated that, while the right to hunt and trap under the treaties is limited by the governments' power to take up lands, in exercising that power governments must inform themselves of the potential impact of that taking up on the exercise of treaty rights. Where treaty rights are infringed, a government must discharge its obligation to consult and, if appropriate, accommodate First Nations' interests *before* reducing the geographic area over which treaty rights may be exercised. The Court held that Treaty 8 confers on the Mikisew

Cree substantive rights (hunting, trapping, and fishing) along with the procedural right to be consulted about infringements of the substantive rights.

(iii) Not Every Taking Up of Land is an Infringement

At the same time, the Court held that not every taking up of land under the treaty will trigger the Crown's duty to consult. The Court rejected conclusions of the BC Court of Appeal in *Halfway River* that *any* taking up of land would constitute an infringement of treaty rights. However, the Court indicated that a low threshold would apply to trigger Crown consultation obligations, consistent with the standards set out in the *Haida Nation* and *Taku River Tlingit* decisions. Governments are required to consult before taking up land where that taking up "might adversely affect" the exercise of treaty rights. Given that a taking up of land by definition removes that land from the exercise of treaty rights, it is difficult to envision circumstances where the duty to consult would not be triggered. In this case, the Court held that the taking up of land for the construction of the winter road would adversely affect the treaty hunting and trapping rights of the Mikisew Cree.

(iv) Sliding Scale for Content of Consultation Obligation

While a low threshold applies to trigger Crown consultation obligations, the degree of consultation and, in some cases, accommodation required will depend on the degree to which the taking up of land will affect treaty rights. The Court noted that the same sliding scale of consultation obligations applied in a treaty context as in a non-treaty context, stating that "adverse impact is a matter of degree, as is the extent of the Crown's duty" to consult.⁷ In this case, the Court held that, while the winter road would affect Mikisew Cree treaty hunting and trapping rights, this was a fairly minor road that was built on lands surrendered by the Mikisew Cree when they signed Treaty 8. As a result, the lower end of the consultation spectrum was engaged. This meant Parks Canada should have provided notice to the Mikisew Cree, and should have engaged them directly to solicit their views and to

⁷ At ¶ 55.

attempt to minimize adverse impacts on their rights. As Parks Canada had unilaterally determined important matters like road alignment before meeting with the Mikisew Cree, the Court held that the Crown's duty to consult had not been adequately discharged.

Consistent with its *Haida Nation* and *Taku River Tlingit* decisions, the Supreme Court held that there is a reciprocal onus on the Mikisew Cree to carry their end of the consultation process by making their concerns known, responding to governments' attempts to address concerns and suggestions, and trying to reach a mutually satisfactory solution. The Court emphasized that the Mikisew Cree did not have a veto over the alignment of the road, and noted that consultation efforts would not always lead to agreement on appropriate accommodation measures to address their concerns.

(v) *Crown Obligation to Consult Tied to Traditional Lands*

The decision also helped to clarify an important area of uncertainty about the geographic scope of the Crown's duty to consult in a treaty context. Treaty hunting rights can be exercised by members of signatory First Nations throughout the area covered by the treaty. In the prairie provinces, the geographic scope of hunting rights was extended to apply throughout each province by the Natural Resources Transfer Agreement. Theoretically speaking, therefore, land use decisions in southern Alberta could affect the exercise of treaty rights by the Mikisew Cree.

However, in *Mikisew Cree*, the Supreme Court held that the duty to consult under Treaty 8 does not mean that "whenever a government proposes to do anything in the Treaty 8 surrendered area it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact".⁸ The Court indicated that treaty rights to hunt are not determined on a treaty-wide basis, but rather on the basis of the lands over which the First Nation traditionally hunted, fished and trapped and continues to do so today. This suggests that the Crown's duty to consult First Nations is tied to activities only within lands traditionally and

⁸ At ¶ 55.

currently used by First Nations for treaty harvesting rights, and, more importantly, that the Crown is not required to consult with a First Nation about activities located outside those lands.

(vi) Risks of Inadequate Consultation Underscored

Finally, the *Mikisew Cree* decision underscores the potential consequences for a project proponent where the Crown fails to discharge its duty to consult. In this case, even though the road at issue would have only minor impacts on treaty rights — the decision characterizes it as a “fairly minor winter road located on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the “taking up” limitation”⁹ of Treaty 8 — and even though the Court held that the Crown’s duty to consult lay at the lower end of the consultation spectrum, the Court nevertheless set aside the Minister’s decision to approve the winter road and sent the matter back to the Minister for reconsideration in accordance with the decision.

VI. What’s Happened Since in the Context of Consultation Requirements in the Post-Treaty Context?

While the Mikisew Cree were the successful party in the appeal, thus far the decision has not had significant practical implications. The federal and provincial governments had already been gearing up for consultation activities with treaty First Nations in anticipation of this decision. The decision’s balancing of governments’ power to manage lands and resources with protection of treaty hunting, fishing and trapping rights is consistent with the theme of prior Supreme Court decisions emphasizing the need for reconciliation of Aboriginal interests with the broader public interest. The decision will provide further impetus for the federal and provincial governments to develop and implement appropriate processes for Crown consultations with Aboriginal groups affected by governmental land and resource use

⁹ At ¶ 64.

decision-making. As the Court noted, “consultation is key to achievement of the overall objective of the modern law of treaty and Aboriginal rights, namely reconciliation.”¹⁰

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 in line with the reconciliation approach articulated by the Courts.

VII. 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

¹⁰ At ¶ 63.

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.

(a) 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 (eg. CEAA) and provincial (eg. BCEAA) laws; and
- II. if a proposed projects 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 (eg. 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:

- i. notice of a matter to be decided, in sufficient detail to permit the party to prepare its views on the matter,

- ii. 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,
- iii. a reasonable period of time to permit the party to prepare its views on the matter,
- iv. an opportunity for the party to present its views on the matter, and
- v. 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.

(b) 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.

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'èezhii, 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'èezhii 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'èezhii 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.

Section 23.2 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 Nùtlèè (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

- i. 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;
- ii. 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

- iii. 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.

VIII. 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.

Paragraph 9 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.

(a) The Definition of Consultation

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:

- i. notice of a matter to be decided;
- ii. sufficient information in respect of the matter to permit the party to prepare its views on the matter,
- iii. a reasonable period of time to permit the party to prepare its views on the matter,
- iv. an opportunity for the party to present its views on the matter, and
- v. 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.

IX. The Parallels Between Consultation under Modern Land Claims Agreements and the Numbered Treaties

The numbered treaties differ dramatically in form from modern land claims agreements. This is not surprising given the lengthy period of time separating their creation and the widely differing social and legal context.

However, there seems to be the beginnings of a convergence in the requirements for consultation under these very different agreements. The modern land claims agreements identified above expressly define consultation to generally require:

- i. Notice
- ii. Adequate information
- iii. Time and an opportunity to express concerns
- iv. Serious consideration of concerns

This definition of consultation incorporated into modern land claim agreements (and contemplated by the Agreements in Principle under the BC Treaty Commission process) appears, at first blush, to stand in sharp contrast to the silence of the numbered treaties. However, the Supreme Court has now clarified that the numbered treaties contain a similar

requirement. In *Mikisew*, the Supreme Court agreed with the following statement of Finch J.A. (now C.J.B.C.) in *Halfway River* at paras. 159-160:

“The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, whenever, possible, demonstrably integrated into the proposed plan of action.”

The ultimate resulting consultation may not appear as different as the treaties that require it.

X. Summary and Conclusion

Earlier case law (*Haida* and *Taku*) confirmed that the Crown has a duty to consult, 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.

The numbered treaties, concluded between 1871 and 1923, did not expressly incorporate the concepts of consultation, accommodation and justification in relation to land that is “required or taken up.” The recent decision from the Supreme Court of Canada in *Mikisew Cree* clarifies that the duty of consultation is triggered when Crown decisions or land use authorizations permit a potential interference with treaty rights.

Modern land claims agreements (and agreements currently under negotiation) opt to expressly identify the circumstances in which consultation is required and to define the requirements of consultation. These agreements generally include limiting language to clarify that, once the consultation requirements of the agreements have been met, the federal, provincial or territorial government will have no additional consultation obligations under the agreements.

Thus, the concept of consultation will continue to apply with respect to land and resource decisions on Crown land in the post-treaty context—whether historic numbered treaties or modern land claim agreements. While the numbered treaties differ dramatically in form from modern land claim agreements, there appears to be convergence on the requirements of the Crown’s duty to consult.

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