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NATIVE LAW

JACK WOODWARD, Q.C.

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path to remedying deficiencies is not clear, however, courts may be able to do no more than to identify the deficiencies, and to require the federal government to take appropriate remedial decisions to eliminate them.

[11] To the extent that the goal of this litigation was to resolve all disputes between the parties over fishing rights, it was a goal that was unattainable. All that could realistically be accomplished in this litigation was to determine that certain aspects of the regulatory scheme unjustifiably fail to respect the plaintiffs' rights, and to compel Canada to make changes to those aspects of the regulatory scheme. Specific issues could be resolved, and the court was able to provide guidance to assist the parties (or, if necessary, the courts) to resolve remaining difficulties.

IV. DUTY TO CONSULT AND ACCOMMODATE

A. PURPOSE OF THE DUTY; INTERIM PROTECTION OF RIGHTS

§ 5:33 Purpose of the Duty

[Para. 5.1190] The purpose of the duty is reconciliation. The Supreme Court of Canada identified as the overarching purpose of s. 35: reconciliation between aboriginal peoples and the Crown.[1] The duty to consult and accommodate obliges the Crown and First Nations to engage in a dialogue about the protection of s. 35 rights and the Crown's other objectives, and it encourages them to reach a mutually agreeable resolution of their issues, which in turn furthers the reconciliation process. The B.C. Court of Appeal appeared to resist this encouragement, or at least tempered its idealism, with the following words:

> [T]he chambers judge stated that "[c]onsultation, accommodation, and negotiation are without doubt the preferred routes of reconciliation of Aboriginal rights with the assertion of Crown sovereignty". One cannot argue with this sentiment, but parties cannot be forced to negotiate a settlement if one of them insists that the dispute be resolved by the court.[2]

[Section 5:33]

[1]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 14 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para 1; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 34 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation]; *Delgamuukw v. British Columbia*, 1997 CarswellBC 2358, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 186. It is interesting to note that this "reconciliation" objective is explained somewhat differently from case to case. For example, in *Delgamuukw*, Chief Justice Lamer the purpose as being "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (para. 186). More recently, Justice Binnie opened the *Mikisew* decision with the following statement: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions" (at para. 1).

[2]*Thomas v. Rio Tinto Alcan Inc.*, 2015 BCCA 154, 2015 CarswellBC 925 (B.C. C.A.)

Nevertheless, the Supreme Court of Canada has strongly emphasized the primacy of negotiated reconciliation over litigation:

> . . .judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process. . . . No one benefits—not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities—when projects are prematurely approved only to be subjected to litigation.[3]

In light of this forceful re-statement of the central position of negotiations, one may assume that a party who refuses to engage in meaningful out-of-court processes will be receiving a frosty reception if the matter ends up in court.

[Para. 5.1192] The duty to consult is in the public interest. The duty to consult is a constitutional imperative, and a government action that does not protect aboriginal rights cannot serve the public interest.[4] In a regulatory system, the duty to consult is a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest.[5]

[Para. 5.1195] The protective purpose of the duty. In *Rio Tinto* the Supreme Court of Canada emphasized the protective purpose of the duty to consult and accommodate, noting that the duty is grounded in the need to protect Aboriginal rights and to preserve the future use of resources claimed by Aboriginal peoples.[6] The duty to consult has a strong environmental component, but the consultative inquiry is not primarily into environmental protection for its own sake, but rather, it inquires into the impact of a project on the aboriginal or treaty *right* itself.[7]

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at para. 78.

[3]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 24.

[4]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 40.

[5]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 40.

[6]*Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, (*sub nom.* Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council)) [2010] 2 S.C.R. 650 (S.C.C.) at paras. 33-34, 41, 50, 53 and 83 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation]. This aspect of *Rio Tinto* was recited in *Ktunaxa Nation Council v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, 2014 CarswellBC 901 (B.C. S.C.) at para. 190, affirmed on other grounds 2015 BCCA 352, 2015 CarswellBC 2215 (B.C. C.A.), affirmed on other grounds 2017 SCC 54, 2017 CarswellBC 3020, [2017] 2 S.C.R. 386 (S.C.C.).

[7]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 45.

§ 5:34 Interim Protection of Rights

[Para. 5.1200] Why protection for unproven rights is needed. In 2004, the Supreme Court of Canada's *decision in Haida Nation v. British Columbia (Minister of Forests)*[1] fundamentally altered the practical significance of s. 35 of the *Constitution Act, 1982*. Prior to the *Haida* decision, an aboriginal group asserting a s. 35 right which stood to be negatively impacted by a proposed Crown decision or an activity on the land had very limited options: it needed to either prove that right in court in order to be in a position to protect it, or at least begin such litigation and obtain an interlocutory (*i.e.*, temporary) injunction to halt any activities that were threatening the right. Of course, proving a s. 35 right, and in particular aboriginal title, often requires an expensive, multi-year trial, and thus as a practical matter, many aboriginal groups lack the resources to undertake such litigation. Indeed, even an aboriginal group with a *proven* aboriginal or treaty right may not have the resources or the time to seek court protection where that right is threatened by a proposed activity.

[Para. 5.1210] Injunctions to protect unproven rights. Moreover, a trial judgment months or years down the road will be of little or no value if the asserted right is in immediate jeopardy, and so for any urgent situation, aboriginal groups were compelled to begin an action to prove their s. 35 rights and obtain an injunction. However, for a variety of reasons, aboriginal groups have had very limited success in obtaining injunctions to halt development or activities on the land in order to protect as yet unproven aboriginal or treaty rights.[2]

[Para. 5.1212] Three requirements for an injunction: serious issue, irreparable harm, and balance of convenience. Many cases have re-stated the three-part test for a court to grant an injunction. The party seeking an interlocutory injunction must prove:

i) there is a serious issue to be tried;
ii) irreparable harm would result if an injunction is not granted; and

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[Section 5:34]

[1]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.); the companion case was *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 CarswellBC 2654, 2004 SCC 74 (S.C.C.) [interveners included the Doig River First Nation].

[2]This fact was acknowledged by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 14 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]. There are exceptions: see *MacMillan Bloedel Ltd. v. Mullen*, 1985 CarswellBC 729, [1985] 2 C.N.L.R. 26 (B.C. C.A.) [applicants included the Clayoquot Band and the Ahousaht Band]; *Snuneymuxv First Nation v. British Columbia*, 2004 CarswellBC 301, 2004 BCSC 2004 (B.C. S.C.) (where the Court granted a limited injunction); and *Tāseko Mines Limited v. Tsilhqot'in National Government*, 2019 BCSC 1507, 2019 CarswellBC 2594 (B.C. S.C.), leave to appeal refused *William v. Taseko Mines Limited*, 2019 BCCA 479, 2019 CarswellBC 3923 (B.C. C.A.).

iii) the balance of convenience, considering all the circumstances, favours granting the order.[3]

The test is conjunctive, and all three criteria must be satisfied to obtain interlocutory injunctive relief.[4]

[Para. 5.1213] Serious issue. The first test has a "relatively low threshold".[5] In determining whether there is a serious question to be tried, a court does not undertake an extensive review of the merits.[6] In a case of alleged infringement of treaty rights the Blueberry River First Nations "pointed to evidence that may be relied on at trial to support that claim, including calculations and measurements by experts and observations and experience of its members". On the strength of that evidence the British Columbia Supreme Court had "no hesitation" in concluding that the first branch of the RJR-MacDonald test had been satisfied.[7] Where a party has made previous concessions regarding the strength a First Nation's *prima facie* claim to Aboriginal rights, even in a separate proceeding, the court may consider those concessions in determining whether there is a serious issue to be tried.[8]

[Para. 5.1215] Irreparable harm. The applicants must prove that the alleged irreparable harm is real and substantial, and the evidence required to prove irreparable harm must be clear, not speculative; it is not sufficient to speculate that irreparable harm is "likely" to be suffered.[9] In British Columbia, "irreparable harm" is sometimes treated as a factor in the balance of convenience, resulting in a two-part test, but the practical effect of the two approaches is the same.[10] "Irreparable harm" is harm which either cannot be quantified in monetary terms or cannot be cured because one of the parties cannot collect damages from

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[3]*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120, [1994] 1 S.C.R. 311 (S.C.C.) at para 43.

[4]*Ahousaht First Nation v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 253, 2015 CarswellNat 573 (F.C.) at para. 19.

[5]*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120, [1994] 1 S.C.R. 311 (S.C.C.) at 342 [S.C.R.].

[6]*Yahey v. British Columbia*, 2015 BCSC 1302, 2015 CarswellBC 2110 (B.C. S.C.) at para. 36.

[7]*Yahey v. British Columbia*, 2015 BCSC 1302, 2015 CarswellBC 2110 (B.C. S.C.) at paras. 38 and 39. Similarly in the subsequent application for an injunction in *Yahey v. British Columbia*, 2017 BCSC 899, 2017 CarswellBC 1455 (B.C. S.C.) at para. 45.

[8]*Taseko Mines Limited v. Tsilhqot'in National Government*, 2019 BCSC 1507, 2019 CarswellBC 2594 (B.C. S.C.), leave to appeal refused *William v. Taseko Mines Limited*, 2019 BCCA 479, 2019 CarswellBC 3923 (B.C. C.A.) at paras. 47-48.

[9]*Ahousaht First Nation v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 253, 2015 CarswellNat 573 (F.C.) at para. 22; *Ahousaht First Nation v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 253, 2015 CarswellNat 573 (F.C.) was followed in *Sipekne'katik v. Nova Scotia (Minister of Environment)*, 2016 NSSC 178, 2016 CarswellNS 593 (N.S. S.C,) at para. 69.

[10]See discussion in *Yahey v. British Columbia*, 2017 BCSC 899, 2017 CarswellBC 1455 (B.C. S.C.) at paras. 34 and 35.

the other.[11] In a case of an alleged infringement of a constitutionally protected right the court was prepared to assume the alleged harm to be irreparable.[12] Evidence of irreparable harm on an interlocutory application need not *guarantee* that there will be harm, as that would be too high a standard, rather, evidence from members of the First Nation will help the court predict the likely outcome of a detrimental effect on rights for the purposes of the application.[13]

[Para. 5.1216] Failure to consult may constitute irreparable harm. The Federal Court has found that that the failure of Canada to consult meaningfully with the Haida Nation concerning the opening of a roe herring fishery constitutes irreparable harm, and that Canada's unilateral action compromises, rather than encourages, the reconciliation process.[14]

[Para. 5.1218] Balance of convenience. Court are called upon to weigh the "balance of convenience", taking into account the public interest. This test gives much discretion to the court, and tends to introduce political and social judgement calls that are not normally considered judicial. In one case, the court said that a First Nation's conduct in refusing to participate in consultation when there were opportunities to do so was taken into account in finding that the balance of convenience "heavily" favoured the proponent of a project (Manitoba Hydro).[15] In a cumulative effects case the court said that the strength of the connection between the conduct the First Nation seeks to enjoin,

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[11]*Yahey v. British Columbia*, 2015 BCSC 1302, 2015 CarswellBC 2110 (B.C. S.C.) at para. 40.

[12]*Yahey v. British Columbia*, 2015 BCSC 1302, 2015 CarswellBC 2110 (B.C. S.C.) at paras. 44 and 45. See also *Bande des Atikamekw d'Opitciwan c. Procureure générale du Québec*, 2017 QCCS 3947, 2017 CarswellQue 7542 (C.S. Que.), at para. 42, where Davis JCS found that forestry activities likely to negatively impact fauna, and therefore the plaintiff's hunting and trapping practices, could not be remedied monetarily: "It may be added that this is a prejudice that can hardly be remedied by monetary compensation. The destruction of part of the place where applicants engage in this activity [i.e. hunting and trapping] affects not a commercial activity of the applicants, but rather an activity that is part of their culture. It is primarily this culture that the duty to consult seeks to protect that the Crown must respect." [original in French, translation by the author]. See also *Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334, 2018 CarswellNat 1867 (F.C.), a fishing rights case in which the Federal Court found (at para. 93) that the following all constituted proof of "a real and non-speculative likelihood of irreparable harm": 1) the complete lack of consultation by the Minister regarding a transfer of Atlantic salmon into the territory, notwithstanding a previous acknowledgment of a strong claim to Aboriginal fishing rights in that territory; evidence of the salmon fishery being of fundamental importance to the Applicant's culture and way of life; that fishery being at serious risk, given the depleted wild salmon populations in the territory; and the recent science establishing a risk of disease and mortality in connection with the transferred salmon.

[13]*Yahey v. British Columbia*, 2017 BCSC 899, 2017 CarswellBC 1455 (B.C. S.C.) at paras. 86, 87, 88.

[14]*Haida Nation v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 290, 2015 CarswellNat 521 (F.C.) at para. 54.

[15]*Sapotaweyak Cree Nation v. Manitoba*, 2015 MBQB 35, 2015 CarswellMan 107 (Man. Q.B.) at para. 260.

and the cumulative negative effect of past activity, affects the balance of convenience.[16] In context, this decision is not about the relationship between past and future harm, but about size and scope—what the plaintiffs were asking for was so small in comparison to the scale of damage that it wouldn't have enough impact to alter the balance of convenience.[17] Where there is a material risk of irreparable harm to both parties, courts will sometimes favour the status quo. Where construction on a mine had already commenced and protesters sought to block access to it, the status quo favoured the mining operation.[18] However, in a case where authorizations had been granted but operations had not yet commenced, the status quo favoured leaving the landscape intact.[19]

[Para. 5.1219] The undertaking as to damages. No undertaking as to damages was required from the successful First Nations when the Meares Island injunction was granted.[20] The Federal Court has relieved aboriginal applicants from the requirement that they post an undertaking as to damages.[21] In a case where an aboriginal group is seeking to protect a natural resource they obtain no financial gain if the injunction is granted, a factor which is taken into account by the court.[22]

[Para. 5.1220] Protection for unproven rights may include accommodation. Recognizing that s. 35 is meant to provide real protection to aboriginal and treaty rights but that the existing legal framework too often failed to deliver on this promise, the Supreme Court of Canada made the following ruling in *Haida:* where the Crown is contemplating a course of action or a decision that could have a negative effect on asserted aboriginal rights, it must consult with the relevant aboriginal groups and, if appropriate, seek to achieve a reasonable accommodation of those rights. In other words, the Crown must give aboriginal groups

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[16]*Yahey v. British Columbia*, 2015 BCSC 1302, 2015 CarswellBC 2110 (B.C. S.C.) at para. 56.

[17]As becomes clear with the second injunction application in the same proceedings, *Yahey v. British Columbia*, 2017 BCSC 899, 2017 CarswellBC 1455 (B.C. S.C.), where a much broader injunction would probably have been granted if the application was not heard so close to the trial date.

[18]*Red Chris Development Co. v. Quoch*, 2014 BCSC 2399, 2014 CarswellBC 3848 (B.C. S.C.) at para. 69. In this case, the mining company was seeking an injunction to restrain Indigenous protesters from interfering with operations, but presumably the same reasoning would apply where a First Nation sought an inunction against a project proponent.

[19]*Taseko Mines Limited v. Tsilhqot'in National Government*, 2019 BCSC 1507, 2019 CarswellBC 2594 (B.C. S.C.), leave to appeal refused *William v. Taseko Mines Limited*, 2019 BCCA 479, 2019 CarswellBC 3923 (B.C. C.A.) at paras. 112 and 117-118.

[20]*MacMillan Bloedel Ltd. v. Mullin*, 1985 CarswellBC 66, [1985] 2 C.N.L.R. 58 (B.C. C.A.) at para. 88.

[21]*Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2014 FC 197, 2014 CarswellNat 2428 (F.C.); *Haida Nation v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 290, 2015 CarswellNat 521 (F.C.) at paras. 64 to 66.

[22]*Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2014 FC 197, 2014 CarswellNat 2428 (F.C.) at para. 42; *Haida Nation v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 290, 2015 CarswellNat 521 (F.C.) at para. 66.

the opportunity to express their concerns about their asserted s. 35 rights, and depending on the situation, the Crown may need to adjust the proposed course of action in order to accommodate those rights.

[Para. 5.1240] The practical need for the duty prior to proof of the rights. As a practical matter, the *Haida* framework may be as integral to aboriginal rights law as the *Sparrow* framework. The *Sparrow* framework guides the assessment of whether a government measure or act infringes a s. 35 right and if so, whether the Crown can justify that infringement. Thus, if an aboriginal group proves the existence of a s. 35 right in court and alleges that the Crown has passed a law or is engaged in a course of action that infringes this right, the court will proceed to apply the *Sparrow* framework to determine whether there is an infringement and if so, whether that infringement is lawful.[23] But before an aboriginal group proceeds to court to prove that its rights are being infringed, *Haida* provides a framework for dialogue between aboriginal groups and the Crown about s. 35 rights that may be implicated by a potential Crown decision. The *Haida* framework therefore obliges the Crown to take those rights into account *before* it makes a final decision that could have a negative impact on s. 35 rights.[24]

[Para. 5.1245] Consultation not based on s. 35 distinguished. First Nations may have an enforceable legitimate expectation that they will be consulted before significant changes are made to federal services[25] but this is not based on s. 35 rights, but rather, on common law principles.[26]

B. BASIC FEATURES OF DUTY

§ 5:35 Origins of duty

[Para. 5.1250] Both legal and constitutional origin.[1] The duty to consult and accommodate is both a legal obligation[2] and a constitutional one.[3] The duty pre-dates s. 35 of the *Constitution Act, 1982;* it "is

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[23]In some cases, the Crown may lack the authority to infringe the right (*e.g.*, *R. v. Morris*, 2006 CarswellBC 3120, 2006 SCC 59 (S.C.C.) [appellants were members of the Tsartlip Band; intervenors included Eagle Village First Nation (Migizy Odenaw), and Red Rock Indian Band]), in which case there will be no need to consider whether the infringement can be justified.

[24]A more detailed review of the difference between the *Haida* framework and the Sparrow framework is found below at § 5:58 (para. 5.2380) and following.

[25]*Simon v. Canada (Attorney General)*, 2013 FC 1117, at para. 151.

[26]Derived from *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, [1999] 2 S.C.R. 817 (S.C.C.).

[Section 5:35]

[1]The Supreme Court of Canada referred to the first sentence of this paragraph of *Native Law* with approval in *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26, 2013 CarswellBC 1158 (S.C.C.) at para. 28.

[2]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 10.

[3]*Tzeachten First Nation v. Canada (Attorney General)*, 2007 CarswellBC 402, 2007

grounded in the honour of the Crown,"[4] *i.e.*, the principle that "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably."[5]

[Para. 5.1251] The duty does not always lead to a right. The Supreme Court of Canada has emphasized that while the honour of the Crown is a constitutional principle[6] which is always at play, and while the duty to consult is a constitutional duty, the duty to consult does not translate into a constitutional right of consultation.[7]

[Para. 5.1252] The two aims of the duty to consult and accommodate: balancing and honour of the Crown. The duty to consult is intended to advance two aims: First is "the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests".[8] Second is the need to "recognize that actions affecting unproven Aboriginal title or rights or Agreement rights can have irreversible [adverse] effects that are not in keeping with the honour of the Crown".[9]

[Para. 5.1254] The first aim of the duty to consult and

BCCA 133 (B.C C.A.) at para. 48 [respondents/plaintiffs included the Skowkale First Nation and Yakweakwioose First Nation]; *R. v. Kapp*, 2008 CarswellBC 1312, 2008 SCC 41 (S.C.C.) at para. 6. The Supreme Court of Canada confirms that the duty to consult has "both a legal and constitutional character" in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[4] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 16 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; affirmed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 32 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[5] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 17 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[6] *Little Salmon / Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at para. 42 [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

[7] *Little Salmon / Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at paras. 43 and 71 (per Binnie J.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

[8] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.) at para. 50, cited in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 2015 CarswellNat 20, 379 D.L.R. (4th) 737 (F.C.A.) at para. 82.

[9] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.) at para. 46, cited in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 2015 CarswellNat 20, 379 D.L.R. (4th) 737 (F.C.A.) at

accommodate: balancing. The duty to consult is intended to advance the aim of protecting Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples, while balancing countervailing Crown interests.[10] Accommodation does not give Aboriginal groups a veto over projects; rather, it balances their interests with broader political or societal ones.[11]

[Para. 5.1256] The second aim of the duty to consult and accommodate: the honour of the Crown. The duty to consult aims to recognize that actions affecting unproven Aboriginal title or rights or Agreement rights "can have irreversible adverse effects that are not in keeping with the honour of the Crown".[12] The Supreme Court of Canada said this in Haida:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of [Agreement] negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.[13]

[Para. 5.1260] Origin of the duty in treaty lands. The Crown holds a duty to act honourably towards aboriginal peoples because these peoples used and controlled the lands and resources that now fall within Canadian boundaries before the arrival of Europeans. The Crown asserted sovereignty over these lands, but did not conquer the aboriginal peoples. Instead, the Crown acquired much of the land that makes up Canada through treaties, and in those treaties it made specific promises to the aboriginal signatories, including commitments that they could continue to hunt, trap and fish, and that certain lands would be protected for their benefit. Before the Crown makes decisions that stand to negatively affect these historical treaty rights, it must consult about and, where appropriate, seek to reasonably accommodate those rights in

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para. 82.

[10] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.) at para. 50, cited in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 2015 CarswellNat 20, 379 D.L.R. (4th) 737 (F.C.A.) at para. 82.

[11] *Athabasca Chipewyan First Nation v. Canada (Minister of the Environment)*, 2014 FC 1185, 2014 CarswellNat 6063 (F.C.) at para. 66, making reference to *Haida* at para. 48.

[12] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.) at para. 46, cited in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 2015 CarswellNat 20, 379 D.L.R. (4th) 737 (F.C.A.) at para. 82.

[13] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 2004 CarswellBC 2656, [2004] 3 S.C.R. 511 (S.C.C.) at para. 27.

order to fulfill its end of the bargain under the treaties and ensure that these promises remain meaningful in the modern day.[14] As the Supreme Court of Canada stated in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, "the honour of the Crown infuses every treaty and the performance of every treaty obligation."[15]

[Para. 5.1270] Origin of the duty in non-treaty lands. In other cases, including in most of British Columbia, the Crown did not enter into treaties with the aboriginal peoples, and thus most of those Nations maintain claims of aboriginal rights and title.[16] The Crown also has legal obligations with respect to these asserted s. 35 rights:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[17]

Thus, the Crown must consult about ongoing land and resource use decisions and, where appropriate, accommodate asserted rights, in order to respect legitimate aboriginal rights and title claims.

[Para. 5.1280] Whether it is a fiduciary duty. The Supreme Court of Canada has expressly confined the basis of the duty to consult and accommodate to the honour of the Crown and has not described the obligation as fiduciary in nature. In *Haida*, the Court stated that there could not be a fiduciary obligation with respect to unproven rights because unproven rights are "insufficiently specific."[18] *In Mikisew*, a case involving established Treaty 8 rights, the Court also expressly declined to

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[14]It is important to note that in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 2005 CarswellNat 3756 (S.C.C.), the case which stands for this proposition, the treaty harvesting rights were going to be negatively affected but not actually infringed, because the Crown was authorized by the treaty itself to take up lands used for the exercise of the harvesting rights. Presumably the Crown must meet the more onerous *Sparrow* framework in order to justify infringements of treaty rights. The relationship between the *Sparrow* framework and the *Haida* framework is discussed below in this chapter.

[15]*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 FCC 69 (S.C.C.) at para. 57.

[16]There are also many aboriginal groups in northern Canada that never entered into historical treaties. Some of these groups maintain aboriginal title claims, but many have entered into comprehensive modern treaties which, amongst other things, settle those land claims.

[17]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 25 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[18]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 18 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

characterize the duty to consult and accommodate as fiduciary in nature, stating that it was "not necessary" to do so.[19] This might be because there did not appear to be a potential infringement of the Treaty 8 rights in that case: the Supreme Court of Canada interpreted Treaty 8 as allowing the Crown to take up land, at least up to a point, and there was no suggestion in *Mikisew* that the proposed taking up, a winter road, was going to go so far as to *"infringe"* the Treaty 8 harvesting rights. One would expect the courts to characterize the duty to consult and accommodate as fiduciary where the proposed decision or course of action has the clear potential to infringe an established aboriginal or treaty right.

§ 5:36 When the duty applies

[Para. 5.1290] The duty arises when the rights are either "established" or "reasonably asserted". The duty to consult and accommodate applies when either reasonably asserted or established s. 35 rights are at stake. Established rights include proven aboriginal rights as well as historical treaty rights, where the nature and scope of the treaty right are not in dispute.[1] With respect to unproven rights, the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it".[2]

[Para. 5.1300] Application to modern treaties. The duty to consult plays a role in the context of modern treaty rights, but one that will vary with the circumstances.[3] The key principle is the need to respect the intention underlying the treaty itself with respect to consultation. The courts will respect that intention as long as it maintains the honour of the Crown.[4] In some circumstances the agreement of the parties to a modern land claims agreement can eliminate the duty to consult:

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[19]*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para. 51.

[Section 5:36]

[1]For example, while there is no doubt that the Douglas Treaties on Vancouver Island include a fishing right, the existence of a commercial dimension to that right remains in dispute.

[2]*Ktunaxa Nation Council v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, 2014 CarswellBC 901 (B.C. S.C.) at para. 191 (quoting *Haida*, para. 35), affirmed on other grounds 2015 BCCA 352, 2015 CarswellBC 2215 (B.C. C.A.), affirmed on other grounds 2017 SCC 54, 2017 CarswellBC 3020, [2017] 2 S.C.R. 386 (S.C.C.). See § 5:36 (para. 5.1321).

[3]The leading case on this matter is *Little Salmon / Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

[4]*Little Salmon / Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at paras. 54 and 67 (per Binnie J.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government]; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, 2010 CarswellQue 4341 (S.C.C.) at paras. 7 and 118.

[125] In my view, the terms of the Agreement exclude any additional common (constitutional) law duty to consult with respect to the Permit application. Given the comprehensive nature of the consultation provisions in the Agreement, and the distinctions carefully drawn between the scope of obligations of the federal and provincial governments, I am satisfied that the parties intended to exclude from the provincial duty to consult any additional common or constitutional law duty to consult with respect to decisions involving specific regulatory permits in the context of an already approved undertaking.[5]

[Para. 5.1301] Special case: When a modern treaty excludes consultation. If a treaty expressly precludes consultation in certain circumstances, the courts will uphold this treaty provision as long as it is consistent with the honour of the Crown.[6] In other words, the Supreme Court of Canada has indicated honour of the Crown does not necessarily require a treaty to preserve the Crown's duty to consult in all circumstances.

[Para. 5.1302] Special case: When a modern treaty does not mention consultation. If a modern treaty does not address the issue of consultation in the circumstances at issue and consultation is required to maintain the honour of the Crown, the courts will apply the duty to consult.[7] However, even if the treaty does not specifically address the issue of consultation, the content of the duty to consult may be affected by terms of the treaty and the underlying intention of the treaty signatories. Thus, for example, the Supreme Court of Canada held in *Little Salmon/Carmacks First Nation* that the Crown's duty to consult was lower than it would have been in the absence of the treaty because the treaty signatories decided not to include consultation provisions in their treaty and because the Crown was proposing to grant lands that the Little Salmon/Carmacks First Nation had expressly surrendered in their treaty.[8]

[Para. 5.1303] Special case: When a modern treaty expressly mentions consultation. If a modern treaty expressly provides for Crown-aboriginal consultation, these treaty provisions will be the starting point for the court's interpretation of the Crown's consultation

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[5]*Nunatsiavut v. Newfoundland and Labrador (Minister of the Department of Environment and Conservation)*, 2015 NLTD(G) 1, 2015 CarswellNfld 2 (N.L. T.D.) at para. 125.

[6]*Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at paras. 46 and 71 (per Binnie J.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

[7]*Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at paras. 38 and 66 (per Binnie J.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

[8]*Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at para. 57 (per Binnie J.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

obligations.[9] The majority's decision in *Little/Salmon Carmacks* strongly suggests that the courts will only draw upon the common law principles of the duty to consult to the extent that they view the common law as helping flesh out the intention of the treaty signatories, or where it is necessary to maintain the honour of the Crown.

[Para. 5.1304] Taking up of treaty lands. The Alberta Court of Queen's Bench has held that when the Crown exercises provisions under a treaty that allow it to take up treaty land, this does not in itself trigger the duty to consult, unless the taking up of land otherwise adversely affects the First Nation's exercise of treaty rights in that area.[10] This was subsequently affirmed and elaborated on by the Alberta Court of Appeal: "The ACFN's position is that any taking up of Treaty 8 land automatically has an adverse effect on Treaty 8 rights because it reduces the total land in the Treaty area available to First Nations to exercise those rights. . . [I]t cannot be presumed that a First Nation suffers an adverse effect by a taking up anywhere in the treaty lands. A contextual analysis must occur to determine if the proposed taking up may have an adverse effect on the First Nation's rights to hunt, fish and trap. If so, then the duty to consult is triggered."[11]

[Para. 5.1310] No constitutional duty to consult where no constitutional rights are implicated. Aboriginal interests and concerns that do not flow from s. 35 rights do not trigger the duty to consult, or the Crown's fiduciary obligation, unless there is another identified Indian interest, such as reserve lands.[12] Thus, while the Crown may be willing to consider these other interests and concerns, and while

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[9] *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at para. 67 (per Binnie J.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government]; *Corp. Makivik c. Québec (Procureur général)*, 2014 QCCA 1455, 2014 CarswellQue 7925 (C.A. Qué.) at paras. 61, 64, 70-85, 109; *First Nation of Nacho Nyak Dun v. Yukon*, 2014 YKSC 69, 2014 CarswellYukon 102 (Y.T. S.C.) at para. 119, and see §§ 21:1 et seq. for "Yukon Umbrella Agreement".

[10] *Athabasca Chipewyan First Nation v. Alberta*, 2018 ABQB 262, 2018 CarswellAlta 678 (Alta. Q.B.) at paras. 71-73, affirmed 2019 ABCA 401, 2019 CarswellAlta 2249 (Alta. C.A.).

[11] *Athabasca Chipewyan First Nation v. Alberta*, 2019 ABCA 401, 2019 CarswellAlta 2249 (Alta. C.A.) at paras. 57 and 61.

[12] *Ta'an Kwacha'an Council v. Yukon*, 2008 CarswellYukon 70, 2008 YKSC 60 (Y.T. S.C.) at paras. 58-59; in *Ahousaht Indian Band v. Canada (Ministry of Fisheries & Oceans)*, 2007 CarswellNat 1597, 2007 FC 567 (F.C.), affirmed 2008 CarswellNat 2961, 2008 FCA 212 (F.C.A.) [applicants included the Ahousaht Indian Band, The Ditidaht Indian Band, The Ehattesaht Indian Band, The Hesquiaht Indian Band, The Hupacasath Indian Band, The Huu-ay-aht Indian Band, The Ka:'Yu:k't'h'/Che:k'tles7et'h' Indian Band, The Mowachaht/Muchalaht Indian Band, The Nuchatlaht Indian Band, The Tla-o-qui-aht Indian Band, The Toquaht Indian Band, The Tseshaht Indian Band, The Uchucklesaht Indian Band, and The Ucluelet Indian Band] the Federal Court states that impacts of proposed Crown decisions to an aboriginal group's modern treaty negotiation process does not trigger the duty to consult (para. 32). Although the matter was not in issue in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) [intervenors included the Mikisew Cree First Nation,

the parties may be able to reach an accommodation agreement about a particular decision by addressing these other issues, the Crown has no constitutional duty to consult unless asserted or proven s. 35 rights are implicated by its proposed decision or course of action.[13]

[Para. 5.1320] Timing: When the duty to consult is triggered. The duty to consult is triggered once the Crown is contemplating a decision or course of action that may have a negative impact on proven or asserted s. 35 rights.[14] Three basic factors determine whether the duty to consult is triggered in any given situation: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[15] Some cases suggest that the duty is only triggered *after* the Crown provides notice

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Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation], the Supreme Court of Canada's explanation of when the duty to consult arises implicitly confines the duty to situations where s. 35 rights are at stake (at paras. 41 and 42); *Roberts v. R.*, 2002 SCC 79, 2002 CarswellNat 3438 (S.C.C.) at paras. 81-85 [appellants were members of Wewaykum Indian Band (also known as the Campbell River Indian Band); respondents were members of Wewaikai Indian Band (also known as the Cape Mudge Indian Band)]; *Foster v. Canada (Attorney General)*, 2015 FC 1065, 2015 CarswellNat 4487 (F.C.) at 48 [applicant wished to be recognized member of Qalipu Mi'kmaq Band].

[13]In *Brokenhead First Nation v. Canada (Attorney General)*, 2009 CarswellNat 2922, 2009 FC 982 (F.C.) [applicants included Brokenhead First Nation, Long Plain First Nation, Peguis First Nation, Roseau River Anishinabe First Nation, Sagkeeng First Nation, Sandy Bay Ojibway First Nation, and Swan Lake First Nation], the Federal Court ruled that Canada's duty to consult was triggered by its commitments in Land Entitlement Agreements with Treaty 1 Nations, which promised the aboriginal signatories the right to acquire surplus Crown lands. Technically, these Land Entitlement Agreements do not create s. 35 rights, but the Court recognized that the agreements flowed directly from the Crown's unfulfilled Treaty 1 commitments, and that they therefore trigger the Crown's duty to consult (paras. 22-24). The Federal Court of Appeal has overturned the *Brokenhead* decision and ordered that a new decision be rendered, on the basis of a number of flaws and ambiguities that it identified in the trial judgment: 2011 FCA 148, 2011 CarswellNat 1440 (F.C.A.). Although this particular aspect of the trial judgment was not identified by the Court of Appeal as one of the problematic aspects of the decision, it remains to be seen whether it will stand.

[14]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 35 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; affirmed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 31 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[15]*Ktunaxa Nation Council v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, 2014 CarswellBC 901 (B.C. S.C.) at para. 192 (re-stating *Rio Tinto*, para. 31), affirmed on other grounds 2015 BCCA 352, 2015 CarswellBC 2215 (B.C. C.A.), affirmed on other grounds 2017 SCC 54, 2017 CarswellBC 3020, [2017] 2 S.C.R. 386 (S.C.C.); *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Minister of Energy, Mines and Natural Gas)*, 2015 BCSC 16, 2015 CarswellBC 20 (B.C. S.C.) at para. 226; *Coastal First Nations v. British Columbia (Minister of Environment)*, 2016 BCSC 34, 2016 CarswellBC 41 (B.C. S.C.) at para. 194.

of a proposed decision or course of action and the aboriginal group confirms that one or more of its rights is at stake.[16] However, this approach may be inconsistent with *Haida*, which identifies even the lowest duty of consultation to include a duty to give notice of a proposed decision.[17] Indeed, referrals to aboriginal groups are essential, since they may otherwise have no opportunity to consider the impacts of a proposed decision, and so it makes sense to view the initial notification as part of the constitutional duty to consult.

In *Morton v. Canada (Fisheries and Oceans)*, 2019 FC 143, 2019 CarswellNat 387 (F.C.), the Federal Court held that the federal Department of Fisheries and Oceans (DFO) was not required to consult with First Nations when initially formulating its policies concerning salmon aquaculture and the fish disease PRV, and that the decision to maintain the policy did not constitute a "strategic, higher-level decision" for purposes of triggering the duty to consult.[18] However, curiously, the Court held that in this particular case, the fact that the 'Namgis First Nation had expressly requested consultation with DFO on the subject of PRV triggered "a requirement to respond within DFO's ongoing duty to consult", and that DFO breached this obligation by reconsidering the policy without responding to "Namgis" concerns.[19] This seems to imply that in some circumstances involving an ongoing duty to consult, the duty can be functionally "triggered" by a First Nation requesting consultation, where it would not otherwise apply. The authors are not aware of any other precedent for a duty to consult that must be requested before it can be breached.

[Para. 5.1321] Triggering element 1: Crown knowledge. The first triggering element from *Rio Tinto* is the Crown's "knowledge, actual or constructive, of a potential Aboriginal claim or right". In treaty areas, assessment under the first element is "simple": "[i]n the case of a treaty, the Crown, as a party, will always have notice of its contents".[20] In *Behn v. Moulton Contracting Ltd.*, the S.C.C. observed that the "duty to

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[16]*Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2008 CarswellYukon 62, 2008 YKCA 13 (Y.T. C.A.) at para. 95, affirmed 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

[17]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 43 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[18]*Morton v. Canada (Fisheries and Oceans)*, 2019 FC 143, 2019 CarswellNat 387 (F.C.) at para. 331. At para. 325, the court noted that ". . .in the normal course, it would be impractical for DFO to consult with every First Nation with respect to every fish health policy decision and every transfer license issued to fish farms located within their asserted territories."

[19]*Morton v. Canada (Fisheries and Oceans)*, 2019 FC 143, 2019 CarswellNat 387 (F.C.) at para. 330.

[20]*Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31, 2015 CarswellSask 189, [2015] 2 C.N.L.R. 81 (Sask. C.A.) at para. 36 (citing *Mikisew Cree* (S.C.C.); see also *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014] 3 C.N.L.R. 174, (*sub nom.* Keewatin v. Ontario (Minister of Natural

consult is triggered 'when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.' "[21] In a case where the Crown was unaware that the activities might adversely affect Aboriginal title or rights, no duty to consult was found.[22]

[Para. 5.1323] Triggering element 2: Contemplated Crown conduct. The second "triggering element" from *Rio Tinto* is Crown conduct or a Crown decision that engages a potential Aboriginal right.

[Para. 5.1325] Triggering element 3: Potential of adverse effect. The third triggering element from *Rio Tinto* is "the potential that the contemplated conduct may adversely affect an Aboriginal claim or right". A potential adverse impact—one that is more than speculative—will be proven when the claimant has established that the impugned Crown conduct will have some *appreciable* and *current* potential to adversely impact the substance of a claimed right.[23]

[Para. 5.1326] Triggering element 4: (special case) Duty not inconsistent with Crown obligations to another Treaty Nation. In *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440, 2018 CarswellBC 667 (B.C. S.C.), the Gitanyow asserted a breach of the duty to consult in respect of Aboriginal hunting rights that overlapped with lands assigned to the Nisga'a Nation via the Nisga'a Treaty. Faced with these overlapping Aboriginal interests, the B.C. Supreme Court found it necessary to modify the usual test for the duty to consult by adding a fourth consideration: Would recognizing that the Crown owes a duty to consult one Aboriginal group in respect of asserted but unproven rights be inconsistent with the Crown's duties and responsibilities to another group under a treaty, or the Crown's fiduciary duties to the treaty Nation, in a way that may negatively impact the treaty Nation's rights? If the answer is "yes", the treaty rights must prevail over the duty to consult.[24]

[Para. 5.1327] No statute can erase the constitutional duty to consult. The fact that a statute obliges a Crown official to make a particular decision or do a particular thing does not preclude the duty to consult from applying.[25] This is because "the Crown's duty to consult

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Resources)) 2014 CarswellOnt 9319 (S.C.C.).

[21]*Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26, 2013 CarswellBC 1158, (*sub nom.* Behn v. Moulton Contracting Ltd.) [2013] 2 S.C.R. 227 (S.C.C.) at para. 29, in which the SCC is quoting from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 2004 CarswellBC 2657, [2004] 3 S.C.R. 511 (S.C.C.).

[22]*Northern Superior Resources Inc. v. Ontario*, 2016 ONSC 3161, 2016 CarswellOnt 8472 (Ont. S.C.J.) at para. 97, a case concerning the Sachigo Lake First Nation.

[23]*Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31, 2015 CarswellSask 189, [2015] 2 C.N.L.R. 81 (Sask. C.A.) at para. 90.

[24]*Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440, 2018 CarswellBC 667 (B.C. S.C.) at paras. 224-225.

[25]*Ross River Dana Council v. Yukon*, 2011 YKSC 84, 2011 CarswellYukon 105 (Y.T. S.C.) at paras. 55 and 62. At issue was the statutory obligation of the Yukon's Mining

cannot be boxed in by legislation."[26] Thus, as long as the decision or course of action has the potential to adversely affect reasonably asserted aboriginal or treaty rights, the duty to consult will, as a matter of constitutional law, apply.

[Para. 5.1328] When regulatory agencies' or administrative tribunals' conduct constitutes "Crown conduct". Whether or not a regulatory agency or administrative tribunal is, strictly speaking, "the Crown" or an agent of the Crown, it acts on behalf of the Crown when it makes a "final decision" in respect of a project application. Such a decision therefore constitutes Crown conduct that may trigger the duty to consult.[27] A tribunal makes a final decision when it makes an enforceable order without needing confirmation by another authority, as opposed to when it acts merely in an advisory capacity and makes a recommendation to another authority.[28] The tribunal does not need to have approval authority for the project as a whole—any binding decision is a "final decision", regardless of whether other aspects of the project require approvals from other authorities.[29] (For more on the role of tribunals in consultation, see § 5:38 (para. 5.1440) and following.)

[Para. 5.1329] Application of the duty to non-statutory Crown conduct. The courts have not confined the duty to consult and accommodate to the exercise of *statutory* powers, but rather have recognized its application to other Crown conduct as well. For example, in *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, the Ministry of Forests argued that the consultation record of its attempts to negotiate an interim forestry agreement with the Huu-Ay-Aht First Nation was not an exercise of statutory power and therefore not reviewable under the *Judicial Review Procedure Act*.[30] The British Columbia Supreme Court rejected this position and held that it had the authority to review the Crown's conduct in those negotiations, emphasizing that the courts do not need a formal "decision" by the Crown to be able to review the adequacy of consultation and accommodation.[31] The Supreme Court of Canada affirmed this "generous, purposive" approach in *Rio*

Recorderto record a mineral claim for all applicants who provide the required fee, application and plan locating the mineral claim.

[26]*Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, 2007 CarswellNat 2067, [2007] 4 C.N.L.R. 102 (F.C.) at para. 121.

[27]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470, [2017] 1 S.C.R. 1069 (S.C.C.) at para. 29.

[28]*Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, 2019 NSCA 66, 2019 CarswellNS 560 (N.S. C.A.) at para. 88.

[29]*Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, 2019 NSCA 66, 2019 CarswellNS 560 (N.S. C.A.) at paras. 101-103.

[30]*Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 CarswellBC 1121, 2005 BCSC 697 (B.C. S.C.) at para. 93.

[31]*Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 CarswellBC 1121, 2005 BCSC 697 (B.C. S.C.) at para. 104; the reasoning is affirmed in the more recent case of *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 1764, 2008 BCSC 1139 (B.C. S.C.) at paras. 11-13 [petitioners included Gitanyow]. Similarly, in *Ehattesaht First Nation v. British Columbia (Minister of Forests,*

Tinto Alcan Inc. v. Carrier Sekani Tribal Council.[32] More recently, the Federal Court reviewed Parliament's ratification of an international treaty based on a First Nation's allegation of breach of the duty to consult, expressly confirming that it had the authority to do so.[33] This makes sense: the duty to consult is a constitutional one, and as a general rule, the courts have jurisdiction to review most types of government action for compliance with the Canadian constitution.[34] In *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, 2018 CarswellOnt 22178 (Ont. S.C.J.), the Ontario Supreme Court found that the duty to consult could apply to the Crown's exercise of discretion in implementing a treaty promise, though the Court declined to define the contents of the duty in that particular case.[35] A Crown decision concerning whether to provide funding to a project may trigger the duty to consult independently of the decision concerning whether to approve the project, so long as there is a sufficient nexus between the funding decision and the potential adverse impacts.[36]

Lands and Natural Resource Operations), 2014 BCSC 849, 2014 CarswellBC 1329 (B.C. S.C.) at paras. 37 to 42.

[32]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 43 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[33]*Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2013 FC 900, 2013 CarswellNat 3100 (F.C.) at para. 25. The treaty in question was the *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments.* The Court held that the Crown had not breached its consultation obligations in ratifying the Treaty because the Treaty created no real risks of adverse impacts to the s. 35 rights of the applicant First Nation.

[34]However, in *Cook v. British Columbia (Minister of aboriginal Relations and Reconciliation)*, 2007 CarswellBC 2858, 2007 BCSC 1722 (B.C. S.C.) at paras. 68-72 [petitioners included the Semiahmoo First Nation], the British Columbia Supreme Court ruled that it did not have authority to hear a judicial review application by First Nations brought under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, because it did not concern the exercise of a statutory power. The applicants alleged that they had not been adequately consulted by British Columbia prior to the conclusion of the Tsawwassen First Nation Final Agreement, and they sought an order preventing the Minister of Aboriginal Relations and Reconciliation from signing off on the Agreement. The Court concluded that it did not have the power to hear this judicial review application, because the Minister, in negotiating and eventually signing the Agreement, "was exercising either his prerogative powers or his natural person powers" (at para. 68). The Court ruled that the applicants would need to bring their complaint forward in the form of an action instead and seek declarations and interim relief to protect their interests (para. 71).

[35]*Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, 2018 CarswellOnt 22178 (Ont. S.C.J.) at para. 572.

[36]*Pictou Landing First Nation v. Nova Scotia (Aboriginal Affairs)*, 2018 NSSC 306, 2018 CarswellNS 931 (N.S. S.C.). The Province argued that there could be no duty to consult regarding the funding decision specifically, since the approval decision was already subject to consultation, and the funding decision would not in itself have any further physical impacts on treaty rights (para. 70). Justice Gabriel disagreed—although two different departments would be involved in the two decisions, it would essentially

[Para. 5.1330] Application of the duty to Crown enforcement. The duty to consult may sometimes extend to Crown enforcement actions, depending on the circumstances of each case. In *R. v. Martin*, 2018 NSSC 141, 2018 CarswellNS 462 (N.S. S.C.), two co-accused were charged with fishing in contravention of an Aboriginal Communal Fishing License. The Aboriginal Fishing Strategy Agreement between the Crown and the First Nation (which was itself found to be a justified infringement of the accused's Aboriginal rights) provided for enforcement, but was silent as to enforcement consultation. At the time, the Crown also had a policy statement which included an undertaking to consult with First Nations authorities prior to taking enforcement actions. While the Court found that the policy was not binding on the Crown in its own right, it also found that in the circumstances of the case, the decision to charge the co-accused attracted the supervision of the honour of the Crown and triggered the duty to consult.[37] The Court went on to add the following: "I stop short of endorsing enforcement consultation as a general concept. Given that the honour of the Crown is always at stake in dealings with Aboriginal peoples, such cases will demand an assessment of whether a duty to consult arises, and if so, what it entails in the circumstances. In the context of this assessment, technical and administrative defences are to be discouraged. The ultimate goal of reconciliation should be the focus and a prospective approach is encouraged."[38]

[Para. 5.1331] Parliament's duty to consult about legislation that may affect s. 35 rights. Parliament and the provincial legislatures normally enjoy unfettered supremacy within their jurisdictions, and generally have no legal obligation to consult about legislation they pass (though for political reasons they often do consult widely before passing

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boil down to the Crown (wearing one hat) being called upon to determine whether a project which the Crown (wearing another hat) had funded, passes muster. (Para. 74) The Honour of the Crown requires that even the appearance of sharp dealing is to be avoided, and treaty First Nations are entitled to treat the Crown as though it speaks with one voice. (Para. 75) Moreover, if the Province financed the project, it would have a tangible interest in the proponent's success, which would undoubtedly influence other "strategic, higher level" decision-making. (Paras. 76-78) Thus, there was at least the potential for further adverse effects on the First Nation's rights, including increased likelihood of the new facility being built (in the short term) and of the mill remaining open (in the longer term) prompted by (at least the appearance of) the interest of the Province to either recover its investment or profit from it. (Para. 84) This decision was upheld on appeal (2019 NSCA 75, 2019 CarswellNS 652 (N.S. C.A.)), although the Court of Appeal clarified that a funding decision is not, in itself, a standalone basis for consultation. Rather, on the facts of this case, "the potential impact of the Funding Agreements, including their provisions on funding, contributes incrementally to the impact that generated the existing consultation. Meaningful consultation with PLFN may not occur in a silo that obscures the interdependence of these factors." (Para. 160.). Leave to appeal refused *Her Majesty the Queen in Right of the Province of Nova Scotia, as represented by the Minister of Aboriginal Affairs v. Pictou Landing First Nation*, 2020 CarswellNS 235, 2020 CarswellNS 236 (S.C.C.).

[37] *R. v. Martin*, 2018 NSSC 141, 2018 CarswellNS 462 (N.S. S.C.) at paras. 101 and 108-110.

[38] *R. v. Martin*, 2018 NSSC 141, 2018 CarswellNS 462 (N.S. S.C.) at para. 129.

certain statutes). But when s. 35 rights may be affected by legislation the normal rule of unfettered supremacy may not apply. Pursuant to the principle of separation of powers, the Court cannot intervene into the law-making process to impose procedural constraints upon the Ministers of the Crown acting in their legislative capacity. However, the Federal Court held that a duty to consult can be imposed on the Crown at the time a bill is introduced into Parliament, if the legislation might potentially impact treaty rights.[39]

[Para. 5.1332] Duty to consult about orders in council that affect s. 35 rights. The British Columbia courts have held that the Crown needs to consult prior to adopting orders in council that stand to negatively affect s. 35 rights.[40] The British Columbia Supreme Court stated as follows in *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*: "the duty to consult cannot be ousted on the basis that the exercise of a statutory power became law by the issuance of an order in council."[41]

[Para. 5.1333] Duty to consult when developing legislation and policy. The Federal Court reviewed this issue in detail, and concluded that if there was a duty to consult about the adverse effects of proposed legislation, it cannot trigger judicial intervention until a bill is introduced into Parliament.[42] This decision was upheld on appeal to the S.C.C., with Karakatsanis J. for the majority pronouncing definitively that "the law-making process [which includes the development of legislation] does not constitute "Crown conduct" that triggers the duty to consult."[43] She acknowledged concerns that this could allow the Crown to take actions through legislative means that it could not take through executive means, stating that "[P]ermitting the Crown to do by one means that which it cannot do by another would undermine the endeavour of reconciliation, which animates Aboriginal law." While maintaining that the duty to consult was not the appropriate tool for resolving these issues, the Court suggested without deciding the issue that "Other doctrines may be developed to ensure the consistent protection of s. 35 rights and to give full effect to the honour of the Crown through review of enacted legislation", and that while "legislation cannot be challenged on the basis that the legislature failed to fulfill the

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[39]*Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2014 FC 1244, 2014 CarswellNat 5539 (F.C.).

[40]See, for example, *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, 2005 CarswellBC 472, [2005] 2 C.N.L.R. 212 (B.C. C.A.) and *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2011 BCSC 266, 2011 CarswellBC 440 (B.C. S.C.).

[41]*Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2011 BCSC 266, 2011 CarswellBC 440 (B.C. S.C.) at para. 124, overturned in 2012 BCCA 333, 2012 CarswellBC 2367 (B.C. C.A.), but not on this point.

[42]*Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2014 FC 1244, 2014 CarswellNat 5539 (F.C.) at paras. 37 to 72.

[43]*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 CSC 40, 2018 SCC 40, 2018 CarswellNat 5579, 2018 CarswellNat 5580 (S.C.C.) at para. 2. The S.C.C. was heavily split on this decision, with several dissenting and concurring opinions.

duty to consult. . .if other forms of recourse are available, the extent of any consultation may well be a relevant consideration[.]"[44] Echoing this same theme, the Court offered the following caution (at para. 52):

> I add this. Even though the duty to consult does not apply to the law-making process, it does not necessarily follow that once enacted, legislation that may adversely affect s. 35 rights is consistent with the honour of the Crown. The constitutional principles—such as the separation of powers and parliamentary sovereignty—that preclude the application of the duty to consult during the legislative process do not absolve the Crown of its duty to act honourably or limit the application of s. 35. While an Aboriginal group will not be able to challenge legislation on the basis that the duty to consult was not fulfilled, other protections may well be recognized in future cases. Simply because the duty to consult doctrine, as it has evolved to regulate executive conduct, is inapplicable in the legislative sphere, does not mean the Crown qua sovereign is absolved of its obligation to conduct itself honourably.

The Court also noted that its conclusions here do not apply to the process by which subordinate legislation (such as regulations or rules) is adopted, as such conduct is "clearly executive rather than parliamentary", nor does it affect the enforceability of treaty provisions, implemented through legislation, that explicitly require pre-legislative consultation.[45]

The Alberta Court of Appeal has not yet made a clear determination on the extent to which the Crown must consult about orders in council. In *R. v. Lefthand*, Justice Slatter ruled that orders in council do not attract the duty to consult.[46] In the subsequent case of *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, the Alberta Court of Appeal left the issue open, expressly refusing to decide whether the Crown must consult before adopting an order in council that has the potential to negatively affect s. 35 rights and whether an order in council may be set aside for breach of the duty to consult.[47] Moreover, the Court held that even if the Legislature had no duty to consult with aboriginal groups before adopting legislation (which it defined to include orders in council), the duty to consult could exist at an earlier stage of the legislation's development:

> Accordingly, even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are

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[44]*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, 2018 CarswellNat 5579 (S.C.C.) at paras. 43-49.

[45]*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, 2018 CarswellNat 5579 (S.C.C.) at para. 51.

[46]*R. v. Lefthand*, 2007 ABCA 206, 2007 CarswellAlta 850, [2007] 4 C.N.L.R. 281 (Alta. C.A.) at para. 38 [defendant was a member of Bearspaw Band].

[47]*Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137, 2010 CarswellAlta 804, [2010] 2 C.N.L.R. 316 (Alta. C.A.) at paras. 48 and 51.

charged with making recommendations concerning future policies and actions.[48]

The Court concluded in *Tsuu T'ina* that the Alberta government had a duty to consult with affected First Nations in developing the water management plan that was subsequently adopted via order in council.[49] Therefore, it appears that the Alberta Court of Appeal has now, at a minimum, recognized that the Crown must consult during the development of orders that have the potential to negatively affect s. 35 rights.

[Para. 5.1334] Duty to consult about "legislative action" generally. The Supreme Court of Canada has expressly left open the question of whether "legislative action" triggers the duty to consult.[50] However, the Court did not define "legislative action" and so it is not clear whether this term includes orders in council. As stated above, the fact that the duty to consult is a constitutional obligation means that it should attach to most types of Crown action and be subject to judicial review. Any exceptions should be clearly rationalized and, to date, the courts have not offered any rationale for why orders in council should enjoy a broad immunity from the duty to consult.

[Para. 5.1335] Whether the duty to consult can interfere with the functioning of Parliament or a Legislature. Even more unsettled than the application of the duty to consult to the adoption of orders in council is its application to the passage of statutes and regulations. The Alberta caselaw leaves the matter unresolved. The Alberta Court of Appeal stated in *R. v. Lefthand* that the legislature need not consult prior to adopting such legislation:

> There can. . .be no duty to consult prior to the passage of legislation, even where aboriginal rights will be affected: *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, 2003 CarswellOnt 2773, [2003] 2 S.C.R. 40 (S.C.C.). It cannot be suggested there are any limits on Parliament's right to amend the *Indian Act*. It would be an unwarranted interference with the proper functioning of the House of Commons and the Provincial Legislatures to require that they engage in any particular processes prior to the passage of legislation. The same is true of the passage of regulations and Orders in Council by the appropriate Executive Council. Enactments must stand or fall based on their compliance with the constitution, not based on the processes used to enact them.[51]

[Para. 5.1336] Whether the passage of legislation triggers the duty to consult. However, in the subsequent case of *Tsuu T'ina Nation*

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[48] *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137, 2010 CarswellAlta 804, [2010] 2 C.N.L.R. 316 (Alta. C.A.) at para. 55.

[49] *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137, 2010 CarswellAlta 804, [2010] 2 C.N.L.R. 316 (Alta. C.A.) at para. 57.

[50] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, 2010 CarswellBC 2867 (S.C.C.) at para. 44 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[51] *R. v. Lefthand*, 2007 ABCA 206, 2007 CarswellAlta 850 (Alta. C.A.) at para. 38 [defendant was a member of Bearspaw Band].

v. Alberta (Minister of Environment), the Alberta Court of Appeal expressly left open the question of whether the passage of legislation (including both statutes and orders in councils) can trigger the duty to consult.[52] As is noted above, the Supreme Court of Canada has also left open the question of whether "legislative action" (which presumably includes statutes and regulations) triggers the duty to consult.[53]

[Para. 5.1337] Whether interpretation of legislation triggers the duty to consult. The BC Court of Appeal has suggested in *obiter* that a provincial ministry offering an interpretation of its home statute, outside the context of a statutory decision, did not trigger the duty to consult.[54] The interpretation in question was not an approval of the proposed project, nor was it a "strategic high-level decision" that might influence future approvals. The Court reasoned that "imposing a duty to consult over the interpretation of the Regulation may lead to different interpretations of its meaning applying across different projects, proponents, Aboriginal groups and other stakeholders" (paragraph 124). This, the Court suggested, would be in tension with the general objective of statutory interpretation, to provide a uniform answer to the meaning of an enactment that applies universally to all subject to it.

[Para. 5.1338] Difference between incremental consultation and high level strategic planning. If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed.[55] The Crown is required to engage in consultation from the earliest stage in a project.[56] The Crown cannot defer overall consultation through the granting of incremental approvals such that a project becomes a fait accompli without ever having been subject to comprehensive consultation.[57] However, where the government plays no role in strategic planning it is not required to restructure

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[52]*Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137, 2010 CarswellAlta 804, [2010] 2 C.N.L.R. 316 (Alta. C.A.) at paras. 48 and 51.

[53]*Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, 2010 CarswellBC 2867, [2010] 4 C.N.L.R. 250 (S.C.C.) at para. 44 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[54]*Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2016 BCCA 500, 2016 CarswellBC 3563 (B.C. C.A.), leave to appeal refused *Chief Liz Logan in her own right and on behalf of the Members of the Fort Nelson First Nation v. Executive Director of the British Columbia Environmental Assessment Office, et al.*, 2017 CarswellBC 1597 (S.C.C.) at paras. 124-126.

[55]*Kwikwetlem First Nation v. British Columbia Transmission Corp.*, 2009 BCCA 68, 2009 CarswellBC 341, [2009] 2 C.N.L.R. 212 (B.C. C.A.) at para. 70.

[56]*Stellat'en First Nation v. British Columbia (Energy, Mines and Petroleum Resources)*, 2013 BCCA 412, 2013 CarswellBC 2871 (B.C. C.A.) at para. 106, leave to appeal refused 2014 CarswellBC 468, 2014 CarswellBC 469 (S.C.C.).

[57]*Stellat'en First Nation v. British Columbia (Energy, Mines and Petroleum Resources)*, 2013 BCCA 412, 2013 CarswellBC 2871 (B.C. C.A.) at para. 106, leave to appeal refused 2014 CarswellBC 468, 2014 CarswellBC 469 (S.C.C.).

its statutory duties in such a way as to transform them into higher level decision making.[58]

[Para. 5.1339] There is a duty to consult about "strategic, higher level decisions". Government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights.[59] Meaningful consultation and accommodation at the strategic level should not be supplanted by delegation to operational levels because such higher level decisions may have an impact on operational decisions later on.[60] Examples of such strategic, higher level decisions include the transfer of a tree farm licence to a new owner,[61] the approval of a multi-year forest management plan for a large geographical area,[62] the establishment of a review process for a major gas pipeline,[63] the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission,[64] entering into funding agreements with a pulp mill that

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[58]*Stellat'en First Nation v. British Columbia (Energy, Mines and Petroleum Resources)*, 2013 BCCA 412, 2013 CarswellBC 2871 (B.C. C.A.) at para. 106, leave to appeal refused 2014 CarswellBC 468, 2014 CarswellBC 469 (S.C.C.).

[59]The Supreme Court of Canada cited this passage of *Native Law* with approval in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at paras. 44 and 47 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation]. The passage from *Native Law*, as relied on in *Rio Tinto*, was repeated again in *Gitxaala Nation v. Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 1336, 2012 CarswellNat 4528 (F.C.) at para. 42, and in *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31, 2015 CarswellSask 189 (Sask. C.A.) at para. 44, and in *Stellat'en First Nation v. British Columbia (Energy, Mines and Petroleum Resources)*, 2013 BCCA 412, 2013 CarswellBC 2871, 368 D.L.R. (4th) 44 (B.C. C.A.) at para. 103.

[60]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 71 [petitioners were members of Kwakiutl First Nation]. For a contrary view, see *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA (TGS)*, 2015 FCA 179, 2015 CarswellNat 3750 (F.C.A.) at paras. 98 and 99.

[61]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[62]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) [petitioners were members of Kwakiutl First Nation]; *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 CarswellBC 2587, 2008 BCSC 1642 (B.C. S.C.) [petitioners included Klahoose First Nation].

[63]*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 CarswellNat 3642, 2006 FC 1354 (F.C.), affirmed 2008 CarswellNat 687, 2008 FCA 20 (F.C.A.).

[64]*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C. Utilities Comm.). It should be noted that the British Columbia Utilities Commission decided that it was

was also seeking regulatory approvals,[65] and the negotiation of an agreement in principle for a land claims settlement with an aboriginal group, at least where that agreement includes a promise of treaty settlement lands that will necessarily encroach upon a land base to which another aboriginal group asserts aboriginal rights and title,[66] such as:

- a decision regarding the boundaries of a conservation area where the First Nation had economic interests,[67]
- a decision to return unharvested timber which was subject to cut controls to the owner of the tree farm licence (an "undercut" decision),[68] or
- a decision by the Province to approve an Official Community Plan.[69]

[Para. 5.1340] When a "strategic high level decision" is delegated to a private party. In a case where the province decided that a formal environmental assessment was not needed, because a private proponent of a project submitted plans that were below the technical threshold which would have required such an assessment, the B.C. Supreme Court set aside the decision, reasoning that when the province "accepted without apparent critical evaluation the calculations" of the private party, the province failed to meet its constitutional obligation to consult about a strategic high level decision.[70] However, this decision was overturned by the B.C. Court of Appeal, on the basis that since it is

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not responsible for discharging the Crown's duty to consult in this instance, but that it would aim to provide a meaningful opportunity for First Nation participation in the inquiry process.

[65]*Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation*, 2019 NSCA 75, 2019 CarswellNS 652 (N.S. C.A.) at paras. 154-155, leave to appeal refused *Her Majesty the Queen in Right of the Province of Nova Scotia, as represented by the Minister of Aboriginal Affairs v. Pictou Landing First Nation*, 2020 CarswellNS 235, 2020 CarswellNS 236 (S.C.C.).

[66]*Sambaa K'e Dene Band v. Canada (Minister of Indian Affairs & Northern Development)*, 2012 FC 204, 2012 CarswellNat 570 (F.C.) at para. 112 [applicants included Nahanni Butte Dene Band; respondents included Acho Dene Koe First Nation]. The Crown does not always have a duty to consult about a potential treaty prior to concluding it: in *Cook v. British Columbia (Minister of Aboriginal Relations & Reconciliation)*, 2007 BCSC 1722, 2007 CarswellBC 2858, [2008] 1 C.N.L.R. 1 (B.C. S.C.) [petitioners included the Semiahmoo First Nation], the British Columbia Supreme Court ruled that the Crown did not have a duty to consult about a treaty that the First Nations asserted would adversely affect their rights before initialing that treaty. However, *Cook* is arguably distinguishable on the basis that the First Nations in that case apparently did not articulate specific and inevitable infringements that would result from the impugned treaty: see paras. 149, 150 and 186.

[67]*Da'naxda'xw / Awaetlala First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 620, 2011 CarswellBC 1147, [2011] 3 C.N.L.R. 188 (B.C. S.C.).

[68]*Ehattesaht First Nation v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849, 2014 CarswellBC 1329 (B.C. S.C.).

[69]*Squamish Nation v. British Columbia (Minister of Community, Sport and Cultural Development)*, 2014 BCSC 991, 2014 CarswellBC 1583 (B.C. S.C.) at para. 148.

[70]*Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2015 BCSC 1180, 2015 CarswellBC 1878 (B.C. S.C.) (quoted words from para. 225), reversed 2016 BCCA 500, 2016 CarswellBC 3563 (B.C. C.A.), leave to appeal refused *Chief Liz Logan in her own right and on behalf of the Members of the Fort Nelson First*

the proponent, not the province, that determines whether the statute is applicable to the project, there is no Crown "decision" that could be subject to a judicial review. Though the province had issued correspondence in which it expressed a non-binding opinion that the project did not trigger an assessment, this did not, in the Court's opinion, rise to the level of a reviewable decision.[71] See also § 5:44 (para. 5.1801). The British Columbia Supreme Court has held that an agreement between the province and a third party setting royalty rates for oil and gas production within a First Nation's traditional territories was not a "strategic, high-level decision" for purposes of triggering the duty to consult. While the agreement might affect future strategic decisions of the company, these would not be Crown decisions.[72]

[Para. 5.1341] Impacts that trigger the duty to consult: "actual", "potential", and "speculative". A strategic, higher level decision may have no "actual" impact on rights, but may still trigger the duty to consult, because such higher level decisions have the potential to determine operational decisions later on.[73] The law draws a distinction between harms that are possible, and harms that are speculative.[74] Although the *possibility* of harm may trigger the duty to consult,[75] this is not so with apprehended harm that is merely speculative. The Federal Court of Appeal put it colourfully: "However, the duty to consult is triggered not by imaginings but by tangibilities."[76] The Yukon Territory Supreme Court has held that the duty to consult is triggered by the recording of a mineral claim, because while the recording does not in and of itself have any immediate impacts on s. 35 rights, a recording under Yukon law gives the claim-holder the right to conduct certain types of

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Nation v. Executive Director of the British Columbia Environmental Assessment Office, et al., 2017 CarswellBC 1597, 2017 CarswellBC 1598 (S.C.C.) [chief and members of Fort Nelson First Nation were petitioners].

[71]*Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2016 BCCA 500, 2016 CarswellBC 3563 (B.C. C.A.), leave to appeal refused *Chief Liz Logan in her own right and on behalf of the Members of the Fort Nelson First Nation v. Executive Director of the British Columbia Environmental Assessment Office, et al.*, 2017 CarswellBC 1597, 2017 CarswellBC 1598 (S.C.C.) at paras. 29 and 45.

[72]*Blueberry River First Nations v. British Columbia (Minister of Natural Gas Development)*, 2017 BCSC 540, 2017 CarswellBC 884 (B.C. S.C.) at paras. 76-77.

[73]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 70 [petitioners were members of Kwakiutl First Nation].

[74]This distinction is clearly outlined in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 2015 CarswellNat 20, 379 D.L.R. (4th) 737 (F.C.A.) at paras. 99 to 105.

[75]*Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2014 FC 1244, 2014 CarswellNat 5539 (F.C.) at paras. 92 and 93. This aspect of *Mikisew* was commented on by the Federal Court of Appeal in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 2015 CarswellNat 20, 379 D.L.R. (4th) 737 (F.C.A.) at para. 99.

[76]*Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 2015 CarswellNat 20, 379 D.L.R. (4th) 737 (F.C.A.) at para. 121. Followed by *Coastal First Nations v. British Columbia (Minister of Environment)*, 2016 BCSC 34, 2016 CarswellBC 41 (B.C. S.C.) at para. 202.

exploratory work without notifying or obtaining authorization from the Crown.[77] In contrast, the Saskatchewan Court of Queen's Bench held that an oil sands exploratory permit that did not allow for physical entry on the land without a further application did not trigger a duty to consult. The Court observed that "the duty to consult may well be engaged when a permit holder applies. . .for authorization to go on to the land for exploration."[78] Whether or not the proposed Crown decision or action one that will have immediate impacts on the land, there must be a real potential for s. 35 rights to be adversely affected in order to trigger the Crown's duty to consult. The courts are to take a "generous, purposive approach" in determining whether a proposed decision or action stands to adversely affect s. 35 rights, but "speculative impacts" do not suffice.[79] Moreover, the Supreme Court of Canada has stated that

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[77]*Ross River Dena Council v. Yukon*, 2011 YKSC 84, 2011 CarswellYukon 105 (Y.T. S.C.) at para. 73. However, the Court concluded that for practical reasons, the duty to consult only arises after the claim is recorded and that, in the absence of proposed exploration, the duty to consult consists only of a duty to notify the aboriginal group of the recording (para. 74). If this is correct, the more significant question is whether the Crown has a duty to consult about the exploration work that can, under the Yukon law, proceed without any notice to or approval from government once the claim is recorded. Technically there is no Crown action at all related to that exploratory work since it takes place without the Crown's knowledge, and Crown action is normally the trigger for the duty to consult. However, such exploratory work may in some cases have adverse impacts on s. 35 rights; indeed, it is because of these potential adverse impacts that the Court in *Ross River* held that the duty to consult arose in respect of the Crown's recording of the mineral claim. There is a problem if the Crown could avoid the constitutional duty to consult by simply choosing not to oversee private activity on Crown lands.

[78]*Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2014 SKQB 69, 2014 CarswellSask 187 (Sask. Q.B.) at para. 41. Upheld on appeal *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31, 2015 CarswellSask 189, [2015] 2 C.N.L.R. 81 (Sask. C.A.). Followed by *Coastal First Nations v. British Columbia (Minister of Environment)*, 2016 BCSC 34, 2016 CarswellBC 41 (B.C. S.C.) at para. 203.

[79]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal* Council, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 45 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation]. For examples of cases where the courts have concluded that the potential adverse impacts cited by the aboriginal group are speculative, see *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379, 2012 CarswellBC 2884 (B.C. C.A.) at para. 78 and *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2012 BCCA 333, 2012 CarswellBC 2367 (B.C. C.A.) at para. 70; *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2013 FC 900, 2013 CarswellNat 3100 (F.C.) at para. 59; *Mi'kmaq of P.E.I v. Province of P.E.I. et al.*, 2019 PECA 26, 2019 CarswellPEI 94 (P.E.I. C.A.) (leave to appeal refused *Mi'kmaq of Prince Edward Island, et al. v. Her Majesty the Queen in Right of the Province of Prince Edward Island, et al.*, 2020 CarswellPEI 26, 2020 CarswellPEI 27 (S.C.C.))—a conveyance of Crown land subject to a claim of aboriginal title does not itself cause any change to a property. The Crown's loss of control over the land may mean that there is no longer any protection against future changes in use, but on the particular facts of this case, that concern was found to be speculative. The land was a golf course and there was no indication of another planned use that might desecrate or denude the property, and the Mi'kmaq had not identified any historic inter-

proposed decisions or actions that carry no potential for fresh adverse effects on a right do not attract a duty to consult:

> The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right.[80]

Thus, in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, the Supreme Court of Canada held that a British Columbia Crown corporation did not have a duty to consult prior to entering into a hydro power purchase agreement with a company because the purchase agreement would have no impacts on the territory and rights of the Carrier Sekani. Specifically, the Court held that the hydro project was already in operation and that those operations would continue regardless of whether the Crown corporation purchased the power;[81] moreover, it concluded that the purchase agreement would have no impacts on the management of the hydro resource that could adversely affect any aboriginal rights.[82]

[Para. 5.1342] Examples of Crown actions that do and do not

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est in or attachment to that particular property that should make it an object of protection. Contrast with *Morton v. Canada (Fisheries and Oceans)*, 2019 FC 143, 2019 CarswellNat 387 (F.C.)—while the Department of Fisheries and Oceans (DFO) had determined, based on its assessment of the science, that fish diseases PRV and HSMI posed a low risk to wild salmon and therefore to the 'Namgis First Nation's rights, there was sufficient uncertainty in the science, as evidenced by DFO's continued reconsideration of its policies, that the court was unable to conclude that the risk of adverse impacts was merely speculative (paras. 316-318).

[80] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, *(sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 49 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation]. This statement is affirmed in *Upper Nicola Indian Band v. British Columbia (Minister of Environment)*, 2011 BCSC 388, 2011 CarswellBC 730 (B.C. S.C. [In Chambers]) at para. 119:

> In my opinion *Carrier Sekani* explains *Haida Nation SCC.* It does not support the position that consultation must go beyond *contemplated conduct* and address the ongoing impacts of past decisions. *Carrier Sekani* confirms that consultation is to be directed at the potential effects of contemplated conduct, not the past, existing, ongoing or future impacts of past decisions or actions. . . .

For a case where a court strongly suggests that the Crown has no duty to consult about the renewal of a mining permit that would involve no new mining activities and no further taking up of land, see *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2010 FC 948, 2010 CarswellNat 3440 (F.C.) at paras. 218-229 [applicants included the Fond du Lac Denesuline First Nation, Black Lake Denesuline First Nation, and Hatchet Lake Denesuline First Nation].

[81] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at paras. 83 and 86 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[82] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at paras. 83 and 87-92 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo

trigger the duty to consult. The British Columbia Supreme Court drew a distinction between, on the one hand, the Province entering into an agreement that had a thin thread of connection to possible adverse impacts, and on the other hand, the failure of the Province to enter consultation (or cancel the agreement) upon learning that the aboriginal people had serious concerns about adverse impact. British Columbia had entered an agreement delegating the provincial environmental assessment of the proposed Northern Gateway Pipeline to a joint review process with Canada. The Court did not find that there was a duty to consult about merely entering into that agreement.[83] However, upon learning that the First Nations along the B.C. Coast had concerns which were not substantially addressed by the joint review process, the duty of British Columbia to consult was triggered.[84] (Apart from the point about the triggering event for consultation, the consequence of the court's decision is significant: Because the court held that the province was beyond its statutory powers to enter into an agreement with Canada to conduct a joint review process, the province must now consult on the Northern Gateway Project itself, and not merely on whether to enter into or terminate the agreement with Canada.) In *Watson v. Canada*, 2020 CF 129, 2020 FC 129, 2020 CarswellNat 145, 2020 CarswellNat 146 (F.C.), the Federal Court held that the Crown owed a duty to consult with two historic bands prior to amalgamating their membership and reserve interests (para. 292).

[Para. 5.1343] Prematurity. During an environmental review process where the Crown has a duty to engage in deep consultation, it may not be necessary for the decision-making panel to invite the First Nation to participate in the work of a technical committee preparing evidence for presentation at the hearing, if opportunities for cross-examination and further consultation with the Crown are still open.[85] Similarly, when the decision-making panel is authorized to make recommendations about the accommodation of aboriginal interests that would enable the Crown to discharge its obligation to consult, it is premature for the First Nation to seek an order quashing an interlocutory decision of the review panel concerning the panel's jurisdiction to consider the sufficiency of Crown consultation.[86] This finding was made despite the fact that the review panel was making final decisions, including whether the project was in the public interest.[87] In a case where the Governor in Council approved and authorized two hydro-electric plants on the Chur-

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Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[83]*Coastal First Nations v. British Columbia (Minister of Environment)*, 2016 BCSC 34, 2016 CarswellBC 41 (B.C. S.C.) at para. 204.

[84]*Coastal First Nations v. British Columbia (Minister of Environment)*, 2016 BCSC 34, 2016 CarswellBC 41 (B.C. S.C.) at paras. 205-213.

[85]*Gitxaala Nation v. Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 1336, 2012 CarswellNat 4528 (F.C.) at para. 46.

[86]*Métis Nation of Alberta Region 1 v. Alberta (Joint Review Panel)*, 2012 ABCA 352, 2012 CarswellAlta 1961 (Alta. C.A.) at para. 18.

[87]*Métis Nation of Alberta Region 1 v. Alberta (Joint Review Panel)*, 2012 ABCA 352,

chill River, but consultation on the details was not finished and the final licensing stage had not been reached, the Federal Court of Appeal agreed with the Federal Court trial judge that a judicial review was premature.[88]

[Para. 5.1344] Tension between "early consultation" and "prematurity". Despite the need for early consultation (*e.g.*, duty to consult about higher level, strategic decisions, or in some cases, the duty to consult about what the consultation process will look like), courts have dismissed a number of consultation claims on the basis of prematurity, particularly in the context of lengthy environmental assessments. For example, a joint review panel reviewing a proposed oil sands project and providing recommendations to the federal and provincial governments to assist them in deciding whether to approve the project and if so, on what terms, ruled that it would be premature for the Panel to decide whether the Crown had discharged its consultation obligations towards the First Nation.[89] The Alberta Court of Appeal affirmed the Panel's reasoning that such a ruling would be premature because the Panel's process would serve to inform the Crown's subsequent consultation and accommodation efforts with the First Nation, prior to final decision-making.[90] In another case, the Federal Court dismissed a claim for breach of the duty to consult that was based on the federal government's exclusion of the First Nation from a technical review committee that was preparing an expert report for a joint review panel hearing.[91] Although the Court affirmed Canada's duty of deep consultation towards the First Nation and questioned the wisdom of excluding the First Nation from the technical review committee, Court ruled that Canada still had the opportunity to discharge its consultation obligations towards the First Nation through the upcoming joint review panel hearing and in direct consultations scheduled to occur after the joint review panel issued its recommendations.[92]

[Para. 5.1345] Tension between "further opportunities after final approval" and "prematurity". In *Conseil des Innus de Ekuanitshit v. Canada (Procureur général)*, the Federal Court ruled that a judicial review challenging a final decision by the federal Crown approving a project under the *Canadian Environmental Assessment Act, 1992* was premature, on the basis that there would be further opportunities

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2012 CarswellAlta 1961 (Alta. C.A.) at para. 5.

[88]*Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, 2014 CarswellNat 3248 (F.C.A.) at paras. 107 and 108.

[89]See *Métis Nation of Alberta Region 1 v. Alberta (Joint Review Panel)*, 2012 ABCA 352, 2012 CarswellAlta 1961 (Alta. C.A.). The Panel also ruled that, in any event, it lacked jurisdiction to answer this question.

[90]*Métis Nation of Alberta Region 1 v. Alberta (Joint Review Panel)*, 2012 ABCA 352, 2012 CarswellAlta 1961 (Alta. C.A.) at paras. 12-14.

[91]*Gitxaala Nation v. Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 1336, 2012 CarswellNat 4528, [2013] 1 C.N.L.R. 69 (F.C.).

[92]*Gitxaala Nation v. Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 1336, 2012 CarswellNat 4528, [2013] 1 C.N.L.R. 69 (F.C.) at paras. 45, 51-54; appeal dismissed *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, 2014 CarswellNat 3248 (F.C.A.) at paras. 107-110.

for consultation at the permitting stage.[93] This decision is out of step with the authorities. The duty to consult extends to consulting about whether a project should be approved *at all*, and the opportunity for such dialogue is necessarily lost once the Crown formally approves a project. Indeed, in *White River First Nation v. Yukon (Minister of Energy, Mines and Resources)*, the Yukon Supreme Court expressly rejected the Crown's argument that a challenge to one of its approvals was premature because it would consult further with the First Nation at the permitting stage: "Shortcomings in the consultation process at this stage cannot be addressed on the basis that there will be further consultation. The Decision Document is the basis for future decisions and not simply a recommendation."[94] However, the FCA has held that it is permissible for a decision-maker to approve a project subject to conditions requiring further consultation at later stages, where that further consultation relates to the decision-maker's ongoing regulatory oversight and supervision of the project, so long as the decision-maker still has sufficient information to make a recommendation with respect to the project and any terms and conditions to which it should be subject.[95]

[Para. 5.1346] Unfairness resulting from the doctrine of "prematurity". In short, the timing of a duty to consult claim can be very tricky for Aboriginal groups. On the one hand, a claim brought prior to final decision-making risks being rejected as premature. On the other hand, a claim that is commenced after a final decision has been rendered risks becoming moot (if the decision is implemented shortly after approval and the Aboriginal group cannot afford to apply for an injunction or fails in that application). The second risk with bringing a claim post-decision is that if the claim succeeds, the court might be unwilling to provide as strong a remedy out of concern for the now crystallized third party interests.[96] In short, the window between premature litigation and litigation that comes too late may be very narrow, with a high danger of unfairness.

[Para. 5.1347] Consultation is more than a hollow "opportunity". It is not sufficient for the Crown to merely offer an adequate *opportunity* to identify, understand and address the potential risks of the proposal. The Crown must identify the asserted Aboriginal right and address it in good faith. In a case where the Crown did not treat the First Nation's claims seriously, and "steadfastly maintained" that there was no duty to consult, it was no answer for the Crown to say that an opportunity to consult had been provided anyway.[97]

[Para. 5.1350] The duty arises from additional impacts of the

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[93]*Conseil des Innus de Ekuanitshit v. Canada (Procureur général)*, 2013 FC 418, 2013 CarswellNat 1164, [2013] 3 C.N.L.R. 145 (F.C.) at para. 112.

[94]*White River First Nation v. Yukon (Minister of Energy, Mines and Resources)*, 2013 YKSC 66, 2013 CarswellYukon 89, 79 C.E.L.R. (3d) 276 (Y.T. S.C.) at para. 127.

[95]*Bigstone Cree Nation v. Nova Gas Transmission Ltd.*, 2018 FCA 89, 2018 CarswellNat 2148 (F.C.A.) at paras. 55-59.

[96]Remedies are discussed in § 5:42.

[97]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central*

same type, not just novel impacts. It should not be necessary for the potential adverse impact from a proposed Crown decision or action to be "novel", and that any real potential *additional* impact should suffice to trigger the duty to consult. For example, if Crown officials are considering an application to extend the duration of a project (e.g., a mine, or the use of undeveloped land as a military training base), and the project extension will delay the ability of an aboriginal group to resume exercising its rights within the project area, the impacts may not be *novel* but the extended duration of the interference will constitute *additional* adverse effects on the s. 35 rights. The case of *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada* supports this reasoning: in that decision, the Federal Court held that the renewal of aquaculture licences allowing aquaculture operations to continue for an additional time period triggered the Crown's duty to consult because "in the absence of the renewed licence, the commercial activity authorized by that licence would have to come to a halt."[98] If there was no consultation on the initial approval of the project, or if that consultation did not address a possible project extension, the general rationale for Crown-aboriginal consultation should apply in this context as well.

[Para. 5.1351] The duty arises to protect the economic component of aboriginal title. The British Columbia Supreme Court has held that the Crown's duty to consult and accommodate may arise in situations where it is considering making a decision that would preclude a First Nation from pursuing an economic activity, where the First Nation reasonably asserts aboriginal title to the area in question: "I do not interpret *Haida Nation* as establishing a duty to consult only for the purpose of preserving land from development."[99] In that case, the First Nation supported a proposed run-of-the-river hydro-electric development, and the Crown had refused to amend the boundaries for a conservancy area so as to allow an investigative permit to be issued for the hydro project.

[Para. 5.1352] Duty to consult may properly include consultation and accommodation in relation to spiritual practices. The B.C. Supreme Court has held that the Crown acted properly in considering a First Nation's representations concerning the potential adverse

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Coast Forest District), 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 79 [petitioners were members of Kwakiutl First Nation].

[98]*Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 FC 517, 2012 CarswellNat 2082 (F.C.) at para. 110. See also *Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation*, 2019 NSCA 75, 2019 CarswellNS 652 (N.S. C.A.) at paras. 161-162, leave to appeal refused 2020 CarswellNS 235, 2020 CarswellNS 236 (S.C.C.): a pulp mill would be required to cease emissions as of a set date unless regulatory authorizations were renewed. Therefore, contaminants discharged after this date were considered as a "novel impact", not a "continuing breach".

[99]*Da'naxda'xw/Awaetlala First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 620, 2011 CarswellBC 1147 (B.C. S.C.) at para. 139 (see also paras. 130 and 142).

impacts of a run-of-river project on the Nation's spiritual bathing practices, and did not offend s. 2(a) of the *Charter* by doing so.[100]

§ 5:37 The "spectrum" of Crown obligations, from "low" to "high"

[Para. 5.1360] The content of the duty varies with the circumstances. The Supreme Court of Canada has described consultation and accommodation duties as lying on a "spectrum."[1] In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right.[2] The scope of the Crown's duty varies along this spectrum and essentially depends on the level of risk which the proposed decision carries for s. 35 rights. The two key risk factors are (a) the strength of the s. 35 rights claim, and (b) the severity of the potential harm to the right.[3] The more substantiated the asserted aboriginal or treaty right which might be affected by the decision, the more onerous the Crown's duty to consult and, if appropriate, accommodate. Similarly, the more serious the potential harm to the s. 35 right from the proposed decision, the more onerous the duty to consult and, if appropriate, accommodate.[4]

[Para. 5.1361] The "lower" duty may result from the terms of a

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[100]*Redmond v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561, 2020 CarswellBC 932 (B.C. S.C.) at paras. 54-57 and 71-75.

[Section 5:37]

[1]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 43 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; *Sambaa K'e Dene Band v. Canada (Minister of Indian Affairs & Northern Development)*, 2012 FC 204, 2012 CarswellNat 570, (*sub nom.* Sambaa K'e Dene Band v. Duncan) [2012] 2 C.N.L.R. 369 (F.C.) at paras. 115-118 [applicants included Nahanni Butte Dene Band; respondents included Acho Dene Koe First Nation]; *Ktunaxa Nation Council v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, 2014 CarswellBC 901 (B.C. S.C.) at para. 193, affirmed on other grounds 2015 BCCA 352, 2015 CarswellBC 2215 (B.C. C.A.), affirmed on other grounds 2017 SCC 54, 2017 CarswellBC 3020, [2017] 2 S.C.R. 386 (S.C.C.).

[2]*Tsilhqot'in Nation v. British Columbia*, [2014] 3 C.N.L.R. 362, (*sub nom.* Xeni Gwet'in First Nations v. British Columbia) 2014 CarswellBC 1814 (S.C.C.) at para. 79; *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, 2014 CarswellNat 3248 (F.C.A.) at para. 91.

[3]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 39 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; affirmed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal* Council, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 36 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[4]The final two sentences of this paragraph in *Native Law* were quoted with approval by Mr. Justice Crawford of the British Columbia Supreme Court in *Stellat'en First Nation v. British Columbia (Energy, Mines and Petroleum Resources)*, 2011 BCSC

modern treaty. The Supreme Court of Canada has indicated that where a modern treaty right stands to be adversely affected by a government decision, the level of consultation might also be affected by the terms of the treaty. That is to say, the duty might be expressly excluded (which the courts will respect as long as the exclusion maintains the honour of the Crown),[5] or the level that would have been dictated by the common law might be altered by the terms of the treaty.[6]

[Para. 5.1362] Treaty claims usually occupy the high end of the spectrum. In a case involving an 1851 Treaty, the B.C. Court of Appeal said: "Treaty claims rightly occupy the high end of the spectrum of claims demanding deep consultation."[7]

[Para. 5.1370] Content of the "lower" duty. At the lower end of the consultation/accommodation spectrum, the Crown's duties will be "to give notice, disclose information, and discuss any issues raised in response to the notice."[8] The Crown may not need to offer an accommodation, particularly if the aboriginal group's only accommodation proposal is that the Crown reject a proposed activity or land use.[9] At the higher end of the spectrum, the Crown will need to work with the aboriginal group to try to find a satisfactory way of accommodating the group's reasonable concerns.

[Para. 5.1375] Content of the "medium" duty: When the obligation is a "medium" duty to consult, the requirement on the Crown is "giving of notice, disclosure of information, responding to concerns raised, meeting and discussing" the concerns with the First Nations involved, "taking the concerns into meaningful consideration, and advis-

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1070, 2011 CarswellBC 2065, 338 D.L.R. (4th) 658 (B.C. S.C.), affirmed 2013 BCCA 412, 2013 CarswellBC 2871, 368 D.L.R. (4th) 44 (B.C. C.A.).

[5]*Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at paras. 46 and 71 (per Binnie J.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

[6]The Court held that the duty to consult was implicitly modified in *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at para. 57: Justice Binnie, writing for the majority, held that the duty lay on the lower end of the spectrum because the First Nation had expressly surrendered the lands at issue, and because the parties to the treaty had made a decision not to include any treaty provisions on the duty to consult for the situation that had arisen in this case.

[7]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 72 [chief and members of Kwakiutl First Nation were respondents and appellants on cross-appeal].

[8]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 43 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[9]See, for example, *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at paras. 14 and 15 (per Binnie J.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

ing as to the course of action taken and why."[10] An example of the middle range of the spectrum is described by Justice Grauer of the B.C. Supreme Court as follows:

> The parties did not merely talk together for mutual understanding, nor did the Crown limit itself to giving notice, disclosing information and discussing issues. The DTFN [Dene Tha' First Nation] made extensive and wide-ranging submissions. Each party prepared and exchanged Traditional Use Reports. The DTFN commissioned and submitted its MSES [MSES Inc. (Management and Solutions in Environmental Science) of Calgary] Rate of Disturbance Report. The MEM [Ministry of Energy and Mines] prepared and disclosed its Preliminary Assessment. A great deal of information, economic, environmental, scientific and speculative, was exchanged. The DTFN was not engaged in the actual decision-making process, but processes were put in place to involve the DTFN in ongoing development decisions that could give rise to potential adverse impacts on its treaty rights.[11] [explanation of abbreviations added by author]

[Para. 5.1376] Content of the duty at the "extreme high end" of the spectrum. In a case where the Aboriginal group had established treaty rights to hunt and harvest marine mammals which were important for their economic, cultural, and spiritual well-being, the Supreme Court of Canada held that the duty owed falls at the highest end of the spectrum.[12] When no accommodation of the right is possible if the project proceeds, and the aboriginal group asserts a veto over the project, the duty is at the extreme high end of the spectrum. In such cases the aboriginal group must make its position know to the Crown at an early date.[13]

[Para. 5.1377] Deep consultation may be required without proof of adverse effects. Deep consultation may be appropriate even in respect of high level decisions. In such a case, the operational plans may not be available, and there may be little evidence of adverse effects. Despite such evidence, deep consultation may be required.[14]

[Para. 5.1378] Deep consultation founded on historic treaties.

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[10] *Long Plain First Nation v. Canada (Attorney General)*, 2012 FC 1474, 2012 CarswellNat 5020 (F.C.) at paras. 74 and 75 [applicants included the Long Plain First Nation, Peguis First Nation, Roseau River Anishinabe First Nation, Sagkeeng First Nation, Sandy Bay Ojibway First Nation, and Swan Lake First Nation]. Upheld on appeal: *Canada (Attorney General) v. Long Plain First Nation*, 2015 FCA 177, 2015 CarswellNat 3463 (F.C.A.).

[11] *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977, 2013 CarswellBC 1633 (B.C. S.C.) at para. 117.

[12] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at paras. 43-44.

[13] *Ktunaxa Nation Council v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, 2014 CarswellBC 901 (B.C. S.C.) at para. 208, affirmed on other grounds 2015 BCCA 352, 2015 CarswellBC 2215 (B.C. C.A.), affirmed on other grounds 2017 SCC 54, 2017 CarswellBC 3020, [2017] 2 S.C.R. 386 (S.C.C.).

[14] *Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 74 [petitioners were members of Kwakiutl First Nation].

In contrast with modern treaties (see § 5:37 (para. 5.1361)) a claim founded upon historic treaty rights starts from a relatively firm footing. Treaty claims rightly occupy the high end of the spectrum of claims demanding deep consultation.[15]

[Para. 5.1380] Not a duty to reach agreement, but to reasonably attempt to accommodate. It is important to note that the duty to accommodate is really an obligation held by the Crown *to seek to reasonably accommodate the relevant s. 35 rights.* As the Supreme Court of Canada put it in *Haida*, "there is no duty to agree."[16] A court may decide that the Crown's accommodation proposal was reasonable even though the aboriginal group rejected it.[17] Thus, while the duty is generally referred as one of "accommodation", this is really shorthand for a duty to try to reach a reasonable agreement with an aboriginal group on how to accommodate its asserted or proven rights.

[Para. 5.1381] Not a duty to negotiate. There is neither a duty to negotiate, nor is there a duty to make a reasonable offer of settlement.[18] The court in *Tsilhqot'in Nation v. British Columbia*, [2014] 3 C.N.L.R. 362, (*sub nom.* Xeni Gwet'in First Nations v. British Columbia) 2014 CarswellBC 1814 (S.C.C.) did not create a new principle of general application compelling negotiation in all aboriginal litigation.[19]

[Para. 5.1390] The duty requires good faith on the part of the Crown. Whether the Crown's obligations lie on the low or high end of the spectrum, the Crown must engage in consultation with the goal of substantially addressing the aboriginal group's concerns.[20] The Crown cannot discharge its constitutional duty by engaging in consultation

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[15]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 72 [petitioners were members of Kwakiutl First Nation].

[16]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 42 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]. See also *Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at para. 120; *Prophet River First Nation v. British Columbia (Minister of Environment)*, 2015 BCSC 1682, 2015 CarswellBC 2679 (B.C. S.C.) at para. 156 [petitioners were Prophet River First Nation and West Moberly First Nations]; *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA (TGS)*, 2015 FCA 179, 2015 CarswellNat 3750 (F.C.A.) at para. 47.

[17]See *Tzeatchen First Nation v. Canada (Attorney General)*, 2008 CarswellNat 3001, [2008] 4 C.N.L.R. 293 (F.C.), affirmed 2009 CarswellNat 3804, 2009 FCA 337 (F.C.A.), leave to appeal refused (2010), 2010 CarswellNat 1094 (S.C.C.) [respondents/plaintiffs included the Skowkale First Nation and Yakweakwioose First Nation].

[18]*Sam v. British Columbia*, 2014 BCSC 1783, 2014 CarswellBC 2804 (B.C. S.C.).

[19]*Sam v. British Columbia*, 2014 BCSC 1783, 2014 CarswellBC 2804 (B.C. S.C.) at para. 19

[20]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 42 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para. 67.

while steadfastly denying claims worthy of consideration.[21] The Crown may not simply provide the aboriginal group with the opportunity to "blow off steam,"[22] as "responsiveness is a key requirement of both consultation and accommodation."[23] Put differently, consultation requires "an exchange or dialogue that gives the First Nation some meaningful input into the decision-making process."[24] See § 5:46 (para. 5.1890) and following.

[Para. 5.1400] Legislation cannot constrain the full duty to consult. Not only is the Crown prevented from erasing the duty to consult through legislation (§ 5:36 (para. 5.1321)), but the Crown cannot unreasonably constrain the full benefit of the duty to consult through legislation. Therefore "the Crown's duty to consult cannot be boxed in by legislation."[25] In other words, legislation may establish a decision-making process, but the fact that Crown decision-makers adhered to this process does not in and of itself mean that they met their consultation obligations towards any affected aboriginal groups. Ultimately, the content of the Crown's consultation duties flow from constitutional obligations, not the requirements set out in a regulatory scheme.[26] Similarly, the Crown must ensure that the officials engaged in consultation have the authority to consider all of the relevant issues raised by the aboriginal group: this is because "the Crown's duty to consult lies upstream of the statutory mandate of decision makers."[27]

[Para. 5.1410] Further information. A more extensive discussion of

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[21]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 84 [petitioners were members of Kwakiutl First Nation].

[22]*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para. 67.

[23]*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 CarswellBC 2654, 2004 SCC 74 (S.C.C.) at para. 25 [interveners included the Doig River First Nation]. See also *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, 2008 CarswellBC 1764, [2008] 4 C.N.L.R. 315 (B.C. S.C.) at para. 178 [petitioners included Gitanyow] and *Sambaa K'e Dene Band v. Canada (Minister of Indian Affairs & Northern Development)*, 2012 FC 204, 2012 CarswellNat 570, [2012] 2 C.N.L.R. 369 (F.C.) at para. 89 [applicants included Nahanni Butte Dene Band; respondents included Acho Dene Koe First Nation].

[24]*White River First Nation v. Yukon (Minister of Energy, Mines and Resources)*, 2013 YKSC 66, 2013 CarswellYukon 89, 79 C.E.L.R. (3d) 276 (Y.T. S.C.) at para. 112.

[25]*Chicot v. Canada (Attorney General)*, 2007 CarswellNat 2067, 2007 FC 763 (F.C.) at para. 121 [applicants included Ka'a'Gee Tu First Nation]; see also *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 CarswellBC 1821, [1999] 4 C.N.L.R. 1 (B.C. C.A.) at para. 177.

[26]However, there are strong indications in *Little Salmon/Carmacks First Nation* that the courts will uphold consultation processes that are established in a modern treaty or related legislation, unless the aboriginal group can show that the process fails to maintain the honour of the Crown: *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at paras. 54 and 67 (per Binnie J.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

[27]*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 2011 CarswellBC 1238 (B.C. C.A.) at para. 106 (per Finch C.J.).

the content of the duty to consult and the duty to accommodate is found below, in Section 5 (Content of Duty to Consult in Detail).

§ 5:38 Who holds the duty

[Para. 5.1420] The duty to consult attaches to the Crown. The duty to consult and accommodate is held by the Crown, both federal and provincial. Once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away.[1] Because it is a constitutional duty, Crown decision-makers (ministers, designated public servants) must fulfill it even if the legislative scheme pursuant to which they are exercising their powers is silent on the matter.[2] In such cases, the duty must either be read into the statute or regulation, or else the statute or regulation will be unconstitutional.

[Para. 5.1425] Whether consultation requires involvement of both Crowns—Canada and a province. It is possible that some situations would require participation by both Canada and a province to effectively carry out the obligation to consult. However, even in a case where Canada's involvement would be desirable, as a procedural matter an order is not available from the Courts forcing a province to engage Canada in the consultation process.[3]

[Para. 5.1426] Whether Canada must be part of the consultation. A First Nation cannot obtain a Court order directing the Provincial Crown to engage the Attorney General of Canada in consultation, nor can it require that such engagement is subject to the Court's supervision.[4]

[Para. 5.1429] Distinction between the Crown duty to consult, and whether the Crown is a proper party to a judicial review (B.C.). The B.C. Supreme Court has held that the proper party to name on judicial review is the Attorney General or the decision-maker, and not the Crown itself, even though it is the Crown who holds the duty to consult.[5] This is a procedural finding under the British Columbia practice

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[Section 5:38]

[1]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470(S.C.C.) at para. 29.

[2]*Brown v. Sunshine Coast Forest District (District Manager)*, 2008 CarswellBC 2587, 2008 BCSC 1642 (B.C. S.C.) at para. 131 [petitioners included Klahoose First Nation]; *Gitxaala Nation v. R.*, 2016 FCA 187, 2016 CarswellNat 2576 (F.C.A.) at para. 313.

[3]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at paras. 86 to 100 [chief and members of Kwakiutl First Nation were respondents and appellants on cross-appeal].

[4]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at paras. 86 to 100 [petitioners were members of Kwakiutl First Nation].

[5]*William v. British Columbia*, 2018 BCSC 1425, 2018 CarswellBC 2252 (B.C. S.C.) at paras. 56-63, affirmed 2019 BCCA 74, 2019 CarswellBC 396 (B.C. C.A.), affirmed

regarding judicial review; it does not challenge the basic doctrine that the duty to consult is held by the Crown.[6]

[Para. 5.1430] The duty of Crown entities to consult. Entities that are closely affiliated with the Crown share the Crown's duty to consult and accommodate. Examples of such entities include the Oil and Gas Commission of British Columbia,[7] the British Columbia Lottery Corporation,[8] the British Columbia Hydro and Power Authority,[9] and the British Columbia Utilities Commission.[10]

[Para. 5.1435] The duty of the Governor General to consult. The Federal Court has ruled that the Governor General does not owe a duty to consult when granting royal assent to legislation. The granting of royal assent is part of the legislative process and is a matter solely within the purview of Parliament, and is therefore non-justiciable.[11] For the same reason, the Governor General is not obligated to independently assess the constitutionality and legality of bills before granting royal assent, nor to exercise the royal prerogative to warn government when proposed legislation would infringe treaty rights.[12]

[Para. 5.1440] The duty of administrative tribunals to consult. If the duty to consult has been triggered, a tribunal may only proceed to approve a project if consultation is adequate. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the National Energy Board.[13] The role of administrative tribunals[14] in Crown-aboriginal consultation will

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(2019), 2019 CarswellBC 1698 (S.C.C.).

[6]Indeed, the B.C. Supreme Court cited Supreme Court of Canada cases which affirm that the duty to consult is an obligation of the Crown (para. 58).

[7]*Saulteau First Nation v. British Columbia (Oil & Gas Commission)*, 2004 CarswellBC 168, [2004] 4 C.N.L.R. 284 (B.C. S.C. [In Chambers]), affirmed 2004 CarswellBC 1276, [2004] 4 C.N.L.R. 340 (B.C. C.A.), leave to appeal refused (2005), 2005 CarswellBC 459, 2005 CarswellBC 460 (S.C.C.).

[8]*Musqueam Indian Band v. Richmond (City)*, 2005 CarswellBC 1714, [2005] 4 C.N.L.R. 228 (B.C. S.C.).

[9]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal* Council, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 81 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[10]*Kwikwetlem First Nation v. British Columbia Transmission Corp.*, 2009 BCCA 68, 2009 CarswellBC 341, [2009] 2 C.N.L.R. 212 (B.C. C.A.) at para. 8.

[11]*Onion Lake Cree Nation v. Canada*, 2017 FC 1049, 2017 CarswellNat 6620 (F.C.) at paras. 36-39.

[12]*Onion Lake Cree Nation v. Canada*, 2017 FC 1049, 2017 CarswellNat 6620 (F.C.), at paras. 40 and 47-48.

[13]*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 36.

[14]The term "administrative tribunals" lacks a precise definition and is not defined by the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal* Council, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.), the case that establishes the role of

vary because their powers and responsibilities depend on their legislative mandate:

> Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.[15]

In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, the leading case on the role of administrative tribunals in consultation, the Supreme Court of Canada stated that depending on their statutory powers, administrative tribunals may have a duty to consult with aboriginal groups, a duty to determine the adequacy of the Crown's consultation efforts, both of these duties, or neither of them.[16] The Crown always holds ultimate responsibility for ensuring consultation is adequate.[17] If the duty is delegated to a tribunal, that fact must be made clear to the aboriginal group.[18] The statutory mandate of an administrative tribunal in relation to consultation may be explicit or implicit.[19]

[Para. 5.1450] The power to decide questions of law always includes the power to review the adequacy of consultation. Tribunals may be empowered with both the power to carry out the Crown's duty to consult and the ability to adjudicate on the sufficiency of consultation.[20] Where legislation confers upon a tribunal the power to decide questions of law, this power will normally implicitly empower the

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administrative tribunals in consultation. The authors assume that the ruling in *Rio Tinto* refers to bodies that are established by federal or provincial statute and that make decisions which have the potential to adversely affect s. 35 rights.

[15]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal* Council, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 55 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[16]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at paras. 56-58 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation]. The environmental assessment process under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, can fulfill the procedural requirements of the duty to consult: *Nunatsiavut v. Canada (Department of Fisheries and Oceans)*, 2015 FC 492, 2015 CarswellNat 1465 (F.C.) at para. 198 and following.

[17]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 22.

[18]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 23. But see § 5:47 (para. 5.1942).

[19]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 60 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[20]*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, 2017 CarswellNat 3468 (S.C.C.) at para. 34.

tribunal to determine whether the Crown has discharged its duties of consultation in relation to the matter that is before the tribunal, because that is a question of constitutional law:

> The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power. . .[21]

Applying this reasoning to the British Columbia Utilities Commission, the Supreme Court of Canada held that the Commission had the power to determine the adequacy of Crown consultation prior to deciding whether to approve an energy purchase agreement between the British Columbia Hydro and Power Authority and a private company.[22]

[Para. 5.1460] The power to decide questions of law does not bind that tribunal to consult. In contrast, the power to decide questions of law does not imply a power to engage in consultation, because "consultation itself is not a question of law".[23] Whether an administrative tribunal has a duty to consult will depend on what the Supreme Court of Canada calls the "remedial powers" of the tribunal, namely, the ability to provide not only for consultation, but also accommodation.[24] The tribunal's enabling legislation must be examined to see whether the tribunal is charged with doing things that serve to advance the Crown-aboriginal consultation process.[25]

[Para. 5.1465] Power to review adequacy of consultation may

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[21]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 69 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[22]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 73 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation]. The Court also considered more specific provision under which the Commission was making its decision and concluded that a review by the Commission of the adequacy of Crown consultation was consistent with those provisions (at para. 73).

[23]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 60 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[24]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 30; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 60 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[25]The Supreme Court of Canada held that the British Columbia Utilities Commission was not empowered to engage in consultation: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal* Council, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British

arise where impacts to Aboriginal interests are relevant to the decision at hand. In addition to a general power to decide questions of law, a tribunal's jurisdiction to review the adequacy of consultation may also flow from the factors that the tribunal is required to consider as part of its statutory mandate. In *Carrier Sekani*, the S.C.C. held that a statutory mandate to consider "any other factor that the commission considers relevant to the public interest" was broad enough to include consideration of adequate consultation with Aboriginal groups, as "[t]he constitutional dimension of the duty to consult gives rise to a special public interest".[26] Commenting on this decision, the Nova Scotia Court of Appeal added that a statutory mandate to consider the public interest is not a requirement for a tribunal to have jurisdiction to review adequacy of consultation—the question is whether the potential adverse impact on Aboriginal interests is "relevant to the question at hand", and statutory authority to consider the public interest is but one avenue to such relevance.[27]

[Para. 5.1470] Pre-2010 decisions about the role of tribunals and the duty to consult. It is clear that the Crown's constitutional obligation to consult does not disappear when the Crown acts to approve a project through a regulatory body such as the National Energy Board.[28] However, prior to 2010 a number of decisions had reached the opposite conclusion: The Ontario Energy Board has addressed its jurisdiction in relation to consultation a number of times: it appears to assume that it has no duty to engage in consultation with aboriginal groups.[29] Moreover, it concluded that it held a very limited jurisdiction review the adequacy of Crown consultation before deciding whether to grant leave to an application to construct an electricity transmission line,[30] and it decided that it had jurisdiction to assess the adequacy of Crown consultation prior to approving a Integrated Power System Plan (a 20 year plan for managing Ontario's electricity system submitted to it by the Ontario

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Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 74 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[26]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, 2010 CarswellBC 2867, [2010] 2 S.C.R. 650 (S.C.C.) at para. 70.

[27]*Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, 2019 NSCA 66, 2019 CarswellNS 560 (N.S. C.A.) at para. 111.

[28]*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.), for example, at para. 36.

[29]Ontario Energy Board decision EB-2007-0050 (Hydro One Networks) at para. 64; *Hydro One Networks Inc., Re* (2008), 2008 CarswellOnt 8804 (Ont. Energy Bd.) at para 233.

[30]EB-2007-0050 at para. 255. Specifically, the Board ruled that it was empowered to assess the adequacy of the Crown's consultation to the extent that consultation was relevant to the factors that the Board was authorized by statute to consider in deciding whether to grant leave to construct the transmission line.

Power Authority).[31] The Alberta Court of Appeal has stated that the Alberta Energy and Utilities Board (now the Energy Resources Conservation Board) holds no duty to consult with aboriginal groups[32] or to review the Crown's consultation efforts[33] in the course of deciding whether to issue approvals. The Federal Court of Appeal ruled that the National Energy Board holds neither a duty to consult with aboriginal groups[34] nor to review the adequacy of Crown consultation[35] before issuing certificates of public convenience and necessity for pipeline projects.

[Para. 5.1480] The role of tribunals—enabling legislation is the starting point. The Federal Court has ruled that the Mackenzie Valley Land and Water Board has a duty to determine whether the Crown has discharged its duty of consultation before issuing a land use permit under the *Mackenzie Valley Resource Management Act*.[36]

[Para. 5.1481] The role of tribunals—different types of decision may give rise to different duties. Second, a tribunal entrusted with a range of responsibilities might have different roles to play in consultation depending on the type of decision it is making: if its statutory powers and responsibilities differ from decision to decision, its role in consultation may differ as well. This possibility reinforces the need to carefully review all relevant provisions of a tribunal's enabling legislation.

[Para. 5.1482] The role of tribunals—when the tribunal lack sufficient powers under the enabling legislation. Third, a tribunal that makes decisions carrying the potential to adversely affect s. 35 rights may have no consultation powers at all, or it may be missing some of the powers it needs to fully discharge the Crown's duties of consultation and accommodation. For example, a tribunal responsible for approving projects that will render land unavailable for the exercise of rights may have the power to develop mitigation measures to reduce

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[31]EB-2007-0707.

[32]*Dene Tha' First Nation v. Alberta (Energy & Utilities Board)*, 2005 CarswellAlta 203, 2005 ABCA 68 (Alta. C.A.) at para. 24, leave to appeal refused (2005), 2005 Carswell Alta 1133, 3005 CarswellAlta 1134 (S.C.C.).

[33]*Dene Tha' First Nation v. Alberta (Energy & Utilities Board)*, 2005 CarswellAlta 203, 2005 ABCA 68 (Alta. C.A.) at para. 28.

[34]*Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.* (2009), 2009 CarswellNat 3493, [2010] 1 C.N.L.R. 371 (F.C.A.) at para. 34, leave to appeal refused (2010), 2010 CarswellNat 4504 (S.C.C.). However, it should be noted that in *Brokenhead Ojibway Nation v. Canada*, 2009 CarswellNat 1339, [2009] 3 C.N.L.R. 36 (F.C.) at para. 42 [applicants included Brokenhead Ojibway Nation, Long Plain First Nation, Swan Lake First Nation, Fort Alexander First Nation, also known as "Sagkeeng First Nation", Roseau River Anishinabe First Nation, Peguis First Nation, and Sandy Bay First Nation], the Federal Court described the National Energy Board as engaging in consultation with aboriginal groups.

[35]*Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.* (2009), 2009 CarswellNat 3493, [2010] 1 C.N.L.R. 371 (F.C.A.) at paras. 39-43, leave to appeal refused (2010), 2010 CarswellNat 4504 (S.C.C.).

[36]*Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25; *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 CarswellNat 4374 (F.C.) at paras. 78-79 [applicants included Lutsel K'e Dene Band].

the environmental impacts of the project, but no power to provide compensation to an affected aboriginal group or to ensure that other parts of the group's land base are protected so that members can continue to exercise their rights elsewhere in their territory. A tribunal's lack of consultation mandate or limited consultation mandate will probably not be a problem if the legislature has provided another, or an additional, forum for consultation, and the Crown no doubt enjoys a fair bit of discretion in deciding who in

government (*i.e.*, which ministry, which official, which agency) is responsible for consulting and working toward reasonable accommodations. However, if there is a gap in the Crown's ability to fully discharge its consultation and accommodation obligations in respect of a particular decision, the aboriginal group will need to seek redress for this matter in court.[37]

[Para. 5.1483] Political decisions are not determinations of rights. A decision to approve a project by Ministers under the *Environmental Assessment Act* is not a decision about infringement of rights because is it purely political, and is not based on evidence and legal analysis. The B.C. Supreme Court said:

> The *EAA* does not provide the Ministers with the powers necessary to determine the rights of the parties interested in the project under consideration. The Ministers have no power to compel testimony, hear legal submissions from the parties or require production of documents. The procedures set out in the *EAA* are simply inadequate to permit determination of the issues framed by the petitioners in this proceeding. In addition, it is obvious that the Ministers have no particular expertise with respect to those issues.[38]

[Para. 5.1485] Ontario Municipal Board: consultation, aboriginal title. When a city in Ontario has a duty of consultation regarding s. 35 rights, the Ontario Municipal Board (OMB) will review the evidence to determine whether the city has appropriately acknowledged the existence of the duty and whether the duty has been discharged.[39] The OMB will review the question of whether consultations were appropriate in light of the Provincial Policy Statement dated April 30, 2014.[40] Furthermore, the determinations by the OMB may be challenged on a question of law before the Ontario Divisional Court.[41] However, free

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[37]For an example of a case where an aboriginal group did this successfully, see *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 CarswellNat 3642, 2006 FC 1354. (F.C.) at paras. 112-113 and 127, affirmed 2008 CarswellNat 687, 2008 FCA 20 (F.C.A.).

[38]*Prophet River First Nation v. British Columbia (Minister of Environment)*, 2015 BCSC 1682, 2015 CarswellBC 2679 (B.C. S.C.) at para. 130 [petitioners were Prophet River First Nation and West Moberly First Nations].

[39]*Cardinal v. Windmill Green Fund LPV*, 2016 ONSC 3456, 2016 CarswellOnt 8284 (Ont. Div. Ct.) at para. 27.

[40]*Cardinal v. Windmill Green Fund LPV*, 2016 ONSC 3456, 2016 CarswellOnt 8284 (Ont. Div. Ct.) at para. 23

[41]*Cardinal v. Windmill Green Fund LPV*, 2016 ONSC 3456, 2016 CarswellOnt 8284

standing assertions of aboriginal title do not fall within the purview of the land use planning jurisdiction of the Ontario Municipal Board (OMB).[42]

[Para. 5.1490] Whether municipal governments have a duty to consult. In *John Voortman & Associates Ltd. v. Haudenosaunee Confederacy Chiefs Council*, the Ontario Superior Court of Justice assumed, without any discussion, that the Haldimand County municipal government had a duty to consult with affected aboriginal people prior to approving a proposed subdivision.[43] Ontario amended its Provincial Policy Statement, issued under s. 3 of the *Planning Act*,[44] to require that decisions relating to land use planning and development "be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in s. 35 of the *Constitution Act, 1982*."[45]

[Para. 5.1491] Cases and arguments against a municipal duty to consult. The British Columbia courts have ruled that municipal governments do not share the Crown's constitutional duty to consult and accommodate. In *Neskonlith Indian Band v. Salmon Arm (City)*, the British Columbia Court of Appeal based this conclusion on a few reasons: first, the Supreme Court of Canada has ruled that the Crown may only delegate procedural aspects of the consultation process and remains responsible for discharging the duty to consult; second, municipalities are not equipped to grant the remedies that may be required to discharge the Crown's consultation obligations; third, municipalities lack the resources to consult and accommodate.[46] The Court also provided a further reason for ruling that municipal governments do not share the Crown's duty to consult:

> Finally, I consider that the "push-down" of the Crown's duty to consult, from the Crown to local governments, such that consultation and accommodation would be thrashed out in the context of the mundane decisions regarding licenses, permits, zoning restrictions and local bylaws, would be completely impractical. These decisions, ranging from the issuance of business licences to the designation of parks, from the zoning of urban areas to the regulation of the keeping of animals, require efficiency and certainty. Daily life would be seriously bogged down if consultation—including the required "strength of claim" assessment—became necessary whenever a right or interest of a First Nation "might be" affected. In the end, I doubt that it would be in the interests of First Nations, the Crown or the ultimate

(Ont. Div. Ct.) at para. 7.

[42]*Cardinal v. Windmill Green Fund LPV*, 2016 ONSC 3456, 2016 CarswellOnt 8284 (Ont. Div. Ct.) at para. 15.

[43]*John Voortman & Associates Ltd. v. Haudenosaunee Confederacy Chiefs Council* (2009), 2009 CarswellOnt 1753 (Ont. S.C.J.) at paras. 68 and 69, additional reasons (2009), 2009 CarswellOnt 3425 (Ont. S.C.J.).

[44]R.S.O. 1990, c. P.13.

[45]Ontario, Ministry of Municipal Affairs and Housing, Provincial Policy Statement Under the Planning Act (Queen's Printer for Ontario), s. 4.3.

[46]*Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379, 2012 CarswellBC 2884 (B.C. C.A.) at paras. 66-71.

goal of reconciliation for the duty to consult to be ground down into such small particles, obscuring the larger "upstream" objectives described in *Haida*.[47]

In *Squamish Nation* the B.C. Supreme Court quashed the approval of an Official Community Plan, applying *Neskonlith*, and saying:

> The approval process of the OCP by the Minister may be the only opportunity the First Nations have for consultation with the Crown on potential infringements of their s. 35 rights. . . .the duty to consult with First Nations does not apply to municipalities.[48]

[Para. 5.1492] Arguments in favour—analogy with *Charter* obligations. Local governments derive all of their authority from the provincial Crown, they have the authority to make decisions that can impact s. 35 rights, and, like the provincial and federal governments (and unlike private third parties), they are charged with making decisions in the public interest that often involve balancing competing interests and rights. The courts have determined that municipalities share the obligation of provincial governments to comply with the *Canadian Charter of Rights and Freedoms*, a key component of Canada's constitutional law, because they exercise delegated provincial powers.[49] This same logic arguably should apply to the duty to consult, which is also a constitutional obligation.

[Para. 5.1493] Arguments in favour—consultation is practical at the municipal level. On the practical level, which is the foundation of the British Columbia Court of Appeal's *Neskonlith* decision, most municipal decisions will have no potential to adversely affect s. 35 rights, and so even if the Court of Appeal had affirmed that local government decisions could in principle trigger the duty to consult, most would not do so. More importantly, *Haida Nation* clearly establishes that the duty to consult is triggered where the contemplated Crown decision or course of action has the potential to adversely affect s. 35 rights. A general principle that the duty to consult will not be triggered where its discharge would be impractical would completely undermine the duty to consult, which was deliberately adopted by the Supreme Court of Canada to change how the Crown conducts business and ensure a balancing of aboriginal concerns with other societal concerns in Crown decision-making. Contrary to what the Court of Appeal states, it would certainly harm reconciliation to deny dialogue with aboriginal groups on decisions that stand to adversely affect their asserted s. 35 rights on the basis that it is not practical for government to take their concerns into account in Crown decision-making.

[Para. 5.1494] Court procedure where municipal government

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[47]*Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379, 2012 CarswellBC 2884 (B.C. C.A.) at para. 72.

[48]*Squamish Nation v. British Columbia (Minister of Community, Sport and Cultural Development)*, 2014 BCSC 991, 2014 CarswellBC 1583 (B.C. S.C.) at para. 143.

[49]See, for example, *Godbout c. Longueuil (Ville)*, 1997 CarswellQue 883, [1997] 3 S.C.R. 844 (S.C.C.).

does not consult. The practical effect of the *Neskonlith* decision, at least in British Columbia, is that where an aboriginal group is concerned about the potential impacts of a local government decision or course of action on its asserted or established s. 35 rights and cannot resolve the matter satisfactorily with the local government, a legal claim founded on the constitutional duty to consult with aboriginal peoples will need to be pursued against the provincial Crown rather than the local government.

§ 5:39 Who must be consulted

[Para. 5.1500] "Peoples" under s. 35. The Crown must consult with the aboriginal group who holds the asserted or proven s. 35 right(s) that stand to be affected by the proposed decision or course of action.[1] Since s. 35 protects the rights of First Nations, Métis and Inuit peoples, the Crown's duty to consult and accommodate applies *vis-à-vis* all of these peoples.[2]

[Para. 5.1510] Individuals. The duty to consult exists to protect the collective rights of Aboriginal peoples and is owed to the Aboriginal group that holds them.[3] Individuals may represent the aboriginal group for the purpose of asserting s. 35 rights, but only if authorized to do so. If there is no authorization for an individual to represent the aboriginal group, the individual cannot assert a breach of the duty to consult on his or her own, as that duty is owed to the Aboriginal community.[4] An injunction will be granted against individuals involved in a blockade who are not authorized to speak on behalf of the aboriginal group,

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[Section 5:39]

[1]Consultation is always with a group of some kind because s. 35 rights are collective rights, not individual rights. The Supreme Court of Canada confirmed that consultation is owed to the aboriginal group whose rights stand to be adversely affected, rather than to the particular aboriginal individuals who will be affected by the decision, in *Little Salmon / Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at para. 35 [intervenors included the Kwanlin Dün First Nation, and Tlicho Government]. The text of this paragraph and this footnote was endorsed by the Supreme Court of Canada in *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26, 2013 CarswellBC 1158, 357 D.L.R. (4th) 236 (S.C.C.), at para. 30 [intervenors included the Fort Nelson First Nation and Moose Cree First Nation].

[2]Consultation cases involving the Inuit and Métis remain few and far between. Two examples of agreements accommodating *asserted* Métis harvesting rights are found in the cases of *R. v. Kelley*, 2007 CarswellAlta 68, 2007 ABQB 41 (Alta. Q.B.) at para. 64, and *R. v. Laurin*, 2007 CarswellOnt 3780, 2007 ONCJ 265 (Ont. C.J.) at para. 27.

[3]The Supreme Court of Canada referred to the first sentence of this paragraph of *Native Law* with approval in *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26, 2013 CarswellBC 1158 (S.C.C.) at para. 30: "The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature: *Beckman*, at para. 35; Woodward, at p. 5-55" (note: the page number in the reference to *Native Law* refers to an earlier version of this text.)

[4]*Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26, 2013 CarswellBC 1158, 357 D.L.R. (4th) 236 (S.C.C.) at paras. 30 and 31 [intervenors included the Fort Nelson First Nation and Moose Cree First Nation].

because "self-help remedies such as blockades undermine the rule of law and the administration of justice. The Supreme Court of Canada has made it clear that such conduct amounts to a repudiation of the mutual obligation of Aboriginal groups and the Crown to consult in good faith, and therefore should not be condoned."[5]

[Para. 5.1520] Indian bands. The duty to consult with First Nations is not necessarily owed to the Indian band recognized under the *Indian Act*. Consultation is owed to the aboriginal group that holds the s. 35 rights. While some of the bands operating under the *Indian Act* correspond to the original aboriginal groups which existed when any aboriginal rights or historic treaty rights crystallized, this is not always the case: some Indian bands are amalgamations of distinct aboriginal groups, and some aboriginal groups have been splintered into two or more Indian bands over time. Aboriginal rights as well as most historic treaty rights exist independently of the aboriginal group's status under the *Indian Act*.[6] Aboriginal and treaty rights do not depend on the existence of a recognized band to be recognized by a court. For example, the Peerless Trout Nation was formally recognized by Canada on May 19, 2010, upon the division of the *Bigstone Cree Nation*. Master Schlosser of the Alberta Court of Queen's Bench said this:

> 34 The aboriginal rights of the Peerless Trout Nation did not come into existence with the formal recognition of the Band by the Federal Government on May 19, 2010 or on the date of the settlement agreement, December 18, 2009. Nor did those rights result only from Treaty 8. These rights stretch back to before Confederation and first contact with European people. *These rights are a continuous expression and recognition of the special culture, history and way of life that present Peerless Trout Nation members share with their ancestors.*
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> . . .
>
> 47 Thus, while a Band does not 'hold' the aboriginal rights of an aboriginal community, it may be the appropriate vehicle for the protection, exploration, and expression of those rights.[7] (emphasis added)

[Para. 5.1530] Mixed traditional and statutory systems. That being said, the reality of Indian governance varies from nation to nation. Some aboriginal groups now operate exclusively under the *Indian Act* governance system, with the chief and council making all decisions on

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[5]*Red Chris Development Co. v. Quock*, 2014 BCSC 2399, 2014 CarswellBC 3848 (B.C. S.C.) at para. 44, citing *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227, [2013] 3 C.N.L.R. 125 (S.C.C.). Costs were awarded against the blockaders: *Red Chris Development Co. v. Quock*, 2015 BCSC 589, 2015 CarswellBC 1038 (B.C. S.C.). See also § 5:40 (para. 5.1605). This paragraph was quoted and followed by Madam Justice Lucie A. LaVigne in *Martin v. New Brunswick*, 2016 NBQB 138, 2016 CarswellNB 303 (N.B. Q.B.) at para. 48.

[6]Some support for the statements in this paragraph is found in *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 FC 517, 2012 CarswellNat 2082 (F.C.) at para. 91.

[7]*Orr v. Alook*, 2013 ABQB 86, 2013 CarswellAlta 2948, 557 A.R. 193 (Alta. Q.B.), upheld with specific approval of these passages in *Orr v. Alook*, 2015 ABQB 101, 2015 CarswellAlta 216 (Alta. Q.B.). See also § 1:23 (para. 1.422).

behalf of the group, while others have maintained a traditional governance system—which may be the same as in the past or which may have evolved into a new form—to make decisions that relate to traditional matters such as aboriginal and/or treaty rights.

[Para. 5.1540] Sub-groups, families and clans. The question of which group the Crown must engage in consultation may also become complicated when there is uncertainty as to the *level* at which aboriginal rights are held within the aboriginal society. In particular, sub-groups of the First Nation, such as family groups, houses, or clans may assert that it is they rather than the larger Nation that hold harvesting rights or even aboriginal title. Depending on how rights were held at the time the right in question crystallized, this may be correct.

[Para. 5.1550] Problems consulting with sub-groups. Governments may be understandably reluctant to consult with sub-groups of a First Nation, as this can become administratively challenging and costly, and may also generate legal controversy down the road. They may also face an immediate disagreement between an aboriginal group and a sub-group as to who holds the s. 35 rights and is entitled to consultation and accommodation.

[Para. 5.1560] Resolving problems of sub-group consultation. Ideally, aboriginal groups should reach internal agreement as to the level at which rights are held, and present a unified position to the Crown on this matter. Furthermore, even if the broader group takes charge of consultation, it is good practice on the part of that aboriginal group to include the sub-groups or individuals who stand to be most affected by the proposed Crown decision or course of action in the consultation process.

[Para. 5.1570] Corporations and agents. So far, it appears that aboriginal groups are free to entrust a corporate entity with their consultation, as long as that entity is clearly and properly set up for that purpose. The Newfoundland Court of Appeal upheld this approach in *Labrador Métis Nation v. Newfoundland & Labrador (Minister of Transportation & Works)*,[8] as did the Federal Court in *Native Council of Nova Scotia v. Canada (Attorney General)*.[9] These decisions accord with the practical reality that there are corporate aboriginal entities across Canada who consult on behalf of aboriginal group. However, there are also decisions from various Canadian jurisdictions which hold that corporate entities cannot bring actions to prove s. 35 rights on behalf of

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[8]*Labrador Métis Nation v. Newfoundland & Labrador (Minister of Transportation & Works)*, 2007 CarswellNfld 376, 2007 NLCA 75 (N.L. C.A.), leave to appeal refused 2008 CarswellNfld 142, 2008 CarswellNfld 143 (S.C.C.) at para. 46.

[9]*Native Council of Nova Scotia v. Canada (Attorney General)*, 2005 CarswellNat 4406, 2005 FC 1739 (F.C.). See also *Enge v. Canada (Indigenous and Northern Affairs)*, 2017 FC 932, 2017 CarswellNat 5618 (F.C.), particularly at paras. 100-104 and 193-197. The Federal Court noted at para. 193 that "It is not appropriate to try to set out a set of guiding principles that should be taken into account in determining whether a specific organization purporting to represent a Métis collective is entitled to be consulted in a particular case. This is a fact-driven question that must instead be addressed on a case-by-case basis."

aboriginal groups.[10] Thus, the question of whether corporate entities can challenge consultation and accommodation processes in court is not yet an entirely settled question.

[Para. 5.1580] Deference to First Nation preferences. As for the Crown, the suggestion made here is that unless it has good reasons for doubting the aboriginal group's position or it is facing conflicting demands for consultation, the Crown should respect the position of the aboriginal groups and engage with them at the level requested by the groups themselves.[11] Similarly, in the case of Indians, the Crown should be open to consulting with representatives other than Chief and Council, unless of course it has good reason to question the legitimacy of the authority of the other representatives to speak for the rights-holding group.

[Para. 5.1590] Deference to claim that there is an aboriginal group, without proof. It might not always be apparent whether there even is a true aboriginal group within the meaning of s. 35 for the Crown to consult with or what the ethnic identity of that group is: in the unusual case of *Labrador Métis Nation v. Newfoundland & Labrador (Minister of Transportation & Works)*,[12] the claimants, a group of 6,000 members living in 24 different communities, argued that they held s. 35 rights *either* as Métis or Inuit people. The Newfoundland government denied that it held a duty to consult with this group on the basis that the group was neither. The Newfoundland Court of Appeal rejected that the claimants needed to *prove* that they were an aboriginal group within the meaning of s. 35 in order to secure consultation rights: "it was sufficient in the present case to assert a credible claim that the claimants belong to an aboriginal people within s. 35(1) of the *Constitution Act, 1982*."[13] This ruling is consistent with the reasoning in *Haida* that the duty to consult and accommodate arises from the *real possibility* that s. 35 rights exist and stand to be negatively impacted by a Crown decision.

[Para. 5.1595] Groups residing outside of Canada. Indigenous groups need not be citizens or residents of Canada in order to hold s. 35 rights, so long as they are the modern-day successors of Aboriginal soci-

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[10]This caselaw is discussed in detail in M. Macaulay's Aboriginal & Treaty Rights Practice, looseleaf (Toronto: Carswell) in Chapter 1.2(e).

[11]This proposition is supported by *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2011 BCSC 266, 2011 CarswellBC 440 (B.C. S.C.) at paras. 40-41, overturned in 2012 BCCA 333, 2012 CarswellBC 2367 (B.C. C.A.), but not on this point.

[12]*Labrador Métis Nation v. Newfoundland & Labrador (Minister of Transportation & Works)*, 2007 CarswellNfld 376, 2007 NLCA 75 (N.L. C.A.), leave to appeal refused 2008 CarswellNfld 142, 2008 CarswellNfld 143 (S.C.C.).

[13]*Labrador Métis Nation v. Newfoundland & Labrador (Minister of Transportation & Works)*, 2007 CarswellNfld 376, 2007 NLCA 75 (N.L. C.A.) at para. 36, leave to appeal refused 2008 CarswellNfld 142, 2008 CarswellNfld 143 (S.C.C.). The Court also found that the claimants had provided the Crown with sufficient information to establish that they had a credible claim based on either Métis or Inuit rights and that the Crown had therefore erred in failing to consult with them (para. 40).

eties that occupied Canadian territory at the time of European contact.[14] However, the fact that they reside outside of Canada may have implications for how the duty to consult applies to them. Given the long history of Crown-Aboriginal relations in Canada, the Crown will often be aware of the existence of Aboriginal groups within Canada and may have some sense of their claims. The situation is different when it comes to Aboriginal groups outside of Canada. In the absence of some historical interaction with them, the Crown may not know, or have any reason to know, that they exist, let alone that they have potential rights within Canadian territory. There is no freestanding duty on the Crown to seek out Aboriginal groups, including those outside Canada, in the absence of actual or constructive knowledge of a potential impact on their rights. In the absence of such knowledge, the Crown is free to act. It is for the groups involved to put the Crown on notice of their claims. Once the Crown is put on notice, however, it has to determine whether a duty to consult arises and, if so, what the scope of the duty is.[15] Residence outside of Canada may also have implications for the scope of the duty to consult.[16]

C. ROLE OF THE COURTS

§ 5:40 Introduction

[Para. 5.1600] Judicial review. If an aboriginal group is not satisfied with the Crown's refusal to consult with it, the Crown's approach to consultation, or the resulting accommodation or lack thereof, it may seek relief for that alleged failing in court. This is normally done through an application for judicial review.

[Para. 5.1601] When a trial is necessary. In some cases a full trial may be necessary. For example, the B.C. Supreme Court said that a claim of infringement of rights would involve establishing the boundaries of the traditional territory, the extent to which specific species were exploited within the territory and the relative impact of the Project on the traditional rights of the petitioners. "These matters would have to be proven by admissible evidence accepted by the court. They cannot appropriately be resolved on a summary hearing pursuant to the *Judicial Review Procedure Act.*"[1]

[Para. 5.1602] The special body of law applicable to consultation cases. The Federal Court of Appeal has said: "To date, the Supreme Court has developed the law concerning the scope and nature of the

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[14]*R. v. Desautel*, 2021 CSC 17, 2021 SCC 17, 2021 CarswellBC 1185, 2021 CarswellBC 1186 (S.C.C.) at para. 23.

[15]*R. v. Desautel*, 2021 CSC 17, 2021 SCC 17, 2021 CarswellBC 1185, 2021 CarswellBC 1186 (S.C.C.) at paras. 72-76.

[16]*R. v. Desautel*, 2021 CSC 17, 2021 SCC 17, 2021 CarswellBC 1185, 2021 CarswellBC 1186 (S.C.C.) at para. 76.

[Section 5:40]

[1]*Prophet River First Nation v. British Columbia (Minister of Environment)*, 2015 BCSC 1682, 2015 CarswellBC 2679 (B.C. S.C.) at para. 143 [petitioners were Prophet River First Nation and West Moberly First Nations].

duty to consult as a special body of law, divorced from normal administrative law principles. To me, however, administrative law remains relevant and the special body of law developed by the Supreme Court is consistent with it."[2]

[Para. 5.1603] Whether existence of duty should be determined independently of breach. In *Aroland First Nation v. Transcanada Pipelines Limited*, 2018 ONSC 4469, 2018 CarswellOnt 12534 (Ont. S.C. J.), two First Nations brought a motion for partial summary judgment asking the Court to determine whether a duty to consult existed in the circumstances, while splitting off the issue of whether said duty had been breached for another time. W. Matheson J. declined to do so: "Most importantly, I am not persuaded that the seemingly narrow issue raised on this motion can be fairly and justly decided using this process. It is too thin a slice of the duty to consult analysis to do justice to the position of either side within the partial summary judgment process. To bifurcate the single issue raised on this motion could result in a failure of justice."[3]

[Para. 5.1605] Self-help. Resorting to self-help remedies such as a blockade, and failing to take advantage of court processes such as judicial review, may amount to an abuse of process which would prevent the aboriginal group from raising a breach of treaty rights as a defence in a tort action.[4] The self-help remedy of an aboriginal road block is so pervasive that the Crown's Timber Sale Licences in British Columbia include a "Dissatisfaction" clause which protects the Province from claims for third party losses suffered as a result of "an act or omission of a person who is not a party to the [TSL]" (which would include "any First Nations expressing dissatisfaction") including an act "disrupting, stopping or otherwise interfering with the Licensee's operations. . .by road blocks or other means" (and including threats to carry out such acts).[5] In a case where individuals mounted a blockade, rather than asserting their aboriginal rights through lawful means, and knowing that their actions were illegal given their past experience with blockades and the resulting court orders, costs were awarded against the blockaders.[6]

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[2]*Canada (Attorney General) v. Long Plain First Nation*, 2015 FCA 177, 2015 CarswellNat 3463 (F.C.A.) at para. 107 [respondents included the Long Plain First Nation, Peguis First Nation, Roseau River Anishinabe First Nation, Sagkeeng First Nation, Sandy Bay Ojibway First Nation, Swan Lake First Nation].

[3]*Aroland First Nation v. Transcanada Pipelines Limited*, 2018 ONSC 4469, 2018 CarswellOnt 12534 (Ont. S.C.J.) at paras. 50 and 77.

[4]*Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26, 2013 CarswellBC 1158, (*sub nom.* Behn v. Moulton Contracting Ltd.) [2013] 3 C.N.L.R. 125 (S.C.C.) at para. 42 [intervenors included the Fort Nelson First Nation and Moose Cree First Nation].

[5]*Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89, 2015 CarswellBC 446 (B.C. C.A.) at para. 101.

[6]*Red Chris Development Co. v. Quock*, 2015 BCSC 589, 2015 CarswellBC 1038 (B.C. S.C.).

§ 5:41 Standard of review

[Para. 5.1610] Two possible standards of review. As with any judicial review application, the court must decide how critically to review the conduct or decision of the Crown decision-maker. The chosen level of scrutiny is known as the "standard of review." Where the court reviews a decision very closely, and is essentially making its own decision on the appropriate outcome, the standard of review is known as "correctness." If the court is willing to show more deference towards the original decision-maker, it will simply assess whether the original decision was "reasonable."[1]

[Para. 5.1620] On facts relied upon by the Crown whether a duty is owed, the standard is correctness, but some deference to the Crown owed. In *Haida*, the Supreme Court of Canada directed the courts to review the Crown's assessment of the strength of the aboriginal rights claim and the potential extent of the infringement on a standard of correctness.[2] However, the Supreme Court of Canada also stated that the courts must show deference towards findings of fact made by the Crown actor.[3] These two statements seem somewhat contradictory, since a decision as to whether any consultation is owed, and if so, decisions as to the strength of the consultation claim and the severity of the potential infringement will generally require findings of fact. Perhaps the best way to reconcile these statements is to say that the courts will generally show some deference towards the Crown's understanding of the *facts* that are relevant to whether and what level of consultation is required, but that the courts will readily impose their own judgment about *what those facts mean* for the existence and scope of the duty to consult.[4]

[Para. 5.1622] Questions of mixed fact and law decided on the

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[Section 5:41]

[1]There was previously a third standard of review, "patent unreasonableness", and potentially an even wider range of standards of review, but the Supreme Court of Canada eliminated it in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 CarswellNB 124, 2008 SCC 9 (S.C.C.) at para. 34. Since *Dunsmuir* there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law—*Gamblin v. Norway House Cree Nation Band Council*, 2012 FC 1536, 2012 CarswellNat 5049 (F.C.) at para. 25.

[2]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 63 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[3]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 61 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; affirmed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal* Council, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 64 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[4]This sentence from Native Law was cited with approval by the Saskatchewan Court of Appeal: *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31, 2015 CarswellSask 189, [2015] 2 C.N.L.R. 81 (Sask. C.A.) at para. 29.

standard of reasonableness. When a Court is reviewing the **adequacy** of consultation, as opposed to whether there is a duty to consult, the questions before the court may be matters of "mixed fact and law". In such a case, the court will review the adequacy of consultation on the standard of reasonableness. In a case where the Court addressed the question "If the City was subject to a duty to consult, was that duty discharged in this case?", the B.C. Court of Appeal said: "[The question,] the sufficiency of the process of consultation, involves a largely factual component and was also said in *Haida* to be subject to a reasonableness standard."[5] *Neskonlith* was applied in *West Moberly*, where the Court said: "The fact-driven analysis at the center of the matter leads me to employ the approach our Court of Appeal adopted in *Neskonlith*, above, and take reasonableness as the governing standard of review."[6]

[Para. 5.1630] On process of accommodation, the standard is reasonableness. Although the courts may determine the *existence* and *scope* of the consultation duty at least partly on a correctness standard, they will be more deferential in deciding whether the Crown successfully discharged those obligations. The Crown's approach to consultation and accommodation need not be perfect, but only reasonable.[7]

> It is perhaps trite, but clearly important, to remember that when a reasonableness standard is to be employed, the reviewing court is to be more deferential to the statutory decision makers, and is not to approach the matter as if it is was considering it at first instance. Whether a court would have reached a different decision at first instance is not what governs.[8]

In other words, the court is not going to decide whether the consultation process unfolded perfectly, or whether the most appropriate accommodation was offered to the aboriginal group. Rather, the court will decide whether, overall, the process and the accommodation, if any, were satisfactory.

[Para. 5.1631] Application to modern treaty rights. Where the court is reviewing a Crown decision-maker's determination of whether consultation is owed in relation to modern treaty rights and the adequacy of the consultation process, the correctness standard applies. If the issue is not the scope of the decision-maker's consultation obliga-

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[5]*Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379, 2012 CarswellBC 2884, [2012] 4 C.N.L.R. 218 (B.C. C.A.) at para. 60.

[6]*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2014 BCSC 924, 2014 CarswellBC 1450 (B.C. S.C.) at para. 9.

[7]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 62 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2330, 2008 BCSC 1505 (B.C. S.C.) at 187; *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 CarswellNat 3642, 2006 FC 1354 (F.C.) at para. 94; *Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at para. 91.

[8]*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2014 BCSC 924, 2014 CarswellBC 1450 (B.C. S.C.) at para. 10.

tions in relation to a modern treaty right but rather the outcome of the consultation process, the standard of review is reasonableness.[9]

[Para. 5.1632] An administrative tribunal is held to the standard of correctness, both for existence and scope. Where the court is reviewing a decision by an administrative tribunal as to the tribunal's role in Crown-aboriginal consultation (*i.e.*, whether the tribunal is responsible for consulting with aboriginal groups, for reviewing the adequacy of the Crown's consultation efforts, both, or neither), it will normally apply the standard of correctness.[10] This is because a tribunal's role in consultation is a matter of jurisdiction, and the courts typically review jurisdictional decisions by tribunals on the strictest standard.

[Para. 5.1633] Application: When "correctness"; when "reasonableness": If the question for determination is whether a duty to consult has arisen, it is, as a point of law, reviewable for correctness. But if the question is whether the framework established for consultation is sufficient, (*i.e.*, meaningful), it must be assessed on the reasonableness standard.[11]

[Para. 5.1640] When facts are in dispute. Finally, as with factual matters generally, the courts will avoid passing judgment on scientific controversies. If the Crown and the aboriginal group disagree about the potential environmental impacts of a proposed activity, they should not expect a court to take sides with either of them in a judicial review.[12] That being said, the extent to which one party's position about environmental impacts is supported by the record will presumably influence the court's views as to the reasonableness of that party's position in the consultation process.

§ 5:42 Remedies for breach of duty

[Para. 5.1650] Strongest remedy: Setting aside the decision. The courts may choose from a variety of remedies if they conclude that the Crown has breached its duty to consult and/or accommodate. First, they can set aside the decision that was made in breach of the duty, *i.e.*,

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[9]*Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at para. 48 [intervenors included the Kwanlin Dün First Nation, and Tlicho Government]. We acknowledge that this paragraph in *Little Salmon* is somewhat difficult to interpret.

[10]*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal* Council, 2010 SCC 43, (*sub nom.* Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)) 2010 CarswellBC 2867 (S.C.C.) at para. 67 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation]; *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 CarswellNat 4374 (F.C.) at para. 65 [applicants included Lutsel K'e Dene Band].

[11]*Gitxaala Nation v. Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 1336, 2012 CarswellNat 4528 (F.C.) at para. 39.

[12]*Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 CarswellBC 438, 2005 BCSC 283 (B.C. S.C.) at para. 34; *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 FC 517 at para. 115.

quash the approval for a project,[1] or quash the grant of a licence or a permit.[2] A court might be unwilling to grant this remedy where the rights of private parties will be prejudiced,[3] or where such a decision would "invite chaos" in governmental affairs.[4] However, several decisions have suggested that as a general rule, where a decision affecting Aboriginal or treaty rights is made without compliance with the duty to consult, quashing will be the appropriate remedy.[5]

[Para. 5.1660] Other remedy: Suspending the decision. Secondly, the court might make an order suspending the implementation of a Crown decision or approval to allow for proper consultation to occur. Thus, for example, in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, the British Columbia Court of Appeal suspended for two years a land sale which the British Columbia government had approved in order to give the Musqueam Band and the Crown time to consult about the transaction.[6] In *Klahoose v. British Columbia (Minister of Forests)*, the British Columbia Supreme Court suspended the implementation of the Forest Stewardship Plan which the Ministry of Forests had approved in order to give the Ministry time to pursue further consultations with the Klahoose First Nation about the plan.[7] In *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, the British Columbia Court of Appeal stayed the implementation a mining exploration program pending further

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[Section 5:42]

[1]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 32. See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para. 69.

[2]See for example *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 CarswellNat 4374 (F.C.) at para. 115 [applicants included Lutsel K'e Dene Band]; *Gitxaala Nation v. R.*, 2016 FCA 187, 2016 CarswellNat 2576 (F.C.A.) at para. 333.

[3]See *Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2002 CarswellBC 2928, 2002 BCSC 1701 (B.C. S.C.) at para. 104; *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 CarswellBC 2936, 2005 BCSC 1712 (B.C. S.C.) at para. 317; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359, 2010 CarswellBC 651 at para. 78, affirmed 2011 BCCA 247, 2011 CarswellBC 1238 (B.C. C.A.).

[4]*Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2011 BCSC 266, 2011 CarswellBC 440 (B.C. S.C.) at para. 208, overturned in 2012 BCCA 333, 2012 CarswellBC 2367 (B.C. C.A.), but not on this point.

[5]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 CSC 40, 2017 SCC 40, 2017 CarswellNat 3470, 2017 CarswellNat 3471, [2017] 1 S.C.R. 1069 (S.C.C.) at para. 24; *The Fort Nelson First Nation v. BC Oil and Gas Commission*, 2017 BCSC 2500, 2017 CarswellBC 3790 (B.C. S.C.) at paras. 81-84.

[6]*Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 CarswellBC 472, 2005 BCCA 128 (B.C. C.A.) at para. 101.

[7]*Brown v. Sunshine Coast Forest District (District Manager)*, 2008 CarswellBC 2587, 2008 BCSC 1642 (B.C. S.C.) (the Court did allow one amendment to the Forest Stewardship Plan, but this amendment was in keeping with the relief sought by the Klahoose Nation) [petitioners included Klahoose First Nation].

consultations between the Crown and the claimant First Nations.[8] Similarly, an order staying the operation of a wells project pending consultation was upheld by the B.C. Court of Appeal.[9]

[Para. 5.1670] Other remedy: Declaration. Third, the courts may issue declarations. They may declare that the Crown has breached its duty to consult and/or accommodate,[10] or that a particular approach to consultation and accommodation fails to meet the Crown's legal duty to consult and accommodate.[11]

[Para. 5.1671] A declaration will not usually direct a particular form of accommodation. Courts will generally avoid granting declarations that dictate the form of accommodation to be provided.[12] Justice Adair of the B.C. Supreme Court said: "it is rare for the court to direct a particular form of accommodation, since that can impair further consultation".[13]

[Para. 5.1672] Declaration of an "ongoing duty". It is common for the Courts to issue a declaration stating that the Crown has an ongoing duty to consult and seek to reach a reasonable accommodation.[14] Despite this body of law, and without mentioning it, the B.C. Court of Appeal has cast doubt on the availability of this kind of declaration. In a case where the trial judge issued a declaration "that the Provincial Crown

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[8]*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 2011 CarswellBC 1238 (B.C. C.A.) at para. 167 (per C.J. Finch). For another example of the court suspending the implementation of a decision or Crown approval, see *Halalt First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 945, 2011 CarswellBC 1846 (B.C. S.C.) at para. 753.

[9]*Thomas v. North Cowichan (District)*, 2011 BCCA 544, 2011 CarswellBC 3725 (B.C. C.A. [In Chambers]) [petitioners included Halalt].

[10]See *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 CarswellNat 3642, 2006 FC 1354 (F.C.) at para. 120; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2530, 2008 BCSC 1620 (B.C. S.C.) at para. 25 [petitioners included Gitanyow].

[11]See *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 CarswellBC 1121, 2005 BCSC 697 (B.C. S.C.) at paras. 1 and 129; *Chicot v. Canada (Attorney General)*, 2007 CarswellNat 2067, 2007 FC 763 (F.C.) at para. 134 [applicants included Ka'a'Gee Tu First Nation].

[12]*Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2530, 2008 BCSC 1620, [2009] 1 C.N.L.R. 359 (B.C. S.C.) at paras. 22 and 23 [petitioners included Gitanyow]. In this case, the British Columbia Supreme Court provides a fairly detailed explanation of its refusal to grant a number of declarations sought by the Gitanyow Nation.

[13]*Da'naxda'xw/Awaetlala First Nation v. British Columbia (Minister of Energy, Mines and Natural Gas)*, 2015 BCSC 16, 2015 CarswellBC 20 (B.C. S.C.) at para. 258.

[14]See *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 CarswellBC 438, 2005 BCSC 283 (B.C. S.C.) at para. 127; *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 CarswellBC 1121, 2005 BCSC 697 (B.C. S.C.) at paras. 1 and 129; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2530, 2008 BCSC 1620 (B.C. S.C.) at para. 25 [petitioners included Gitanyow]. In *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CarswellOnt 2995, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.), the Court issued a declaration stating that the First Nation had a right to ongoing consultation (para. 188), additional reasons 2007 CarswellOnt 3553, [2007] 3 C.N.L.R. 221 (Ont. S.C.J.).

has an ongoing duty to the KFN to consult with them in good faith and endeavour to seek accommodations regarding their claim of unextinguished Aboriginal rights, titles and interests. . .", the Court of Appeal said: "the Court ought not to make a declaration intended to describe the duty to consult in relation to decisions that are not before the Court. To the extent the declaration made in this case describes the law, it is unnecessary. To the extent it does more, it is inappropriate. . .".[15]

[Para. 5.1673] Remedy where breaches have been cured by subsequent adequate consultation. The Ontario Supreme Court has indicated that the completion of adequate consultation will cure previous failures in the consultation process in relation to a particular decision. Where this has occurred, the First Nation's only remedy for the past breaches of the duty to consult lies in a request to the Crown for funding to cover associated costs incurred by the First Nation, a request that the Crown will be obliged to decide reasonably given all the circumstances.[16] However, it should be noted that, per the Yukon Court of Appeal, this applies only to a breach of the duty to consult itself, *i.e.*, to a situation where the sole breach was a failure to negotiate in good faith. Subsequent good faith negotiations will not cure a breach of the underlying constitutional rights that give rise to the duty: "There is no legal basis to conclude that breaches of constitutionally enshrined Aboriginal rights generally can be ameliorated by undertaking good faith negotiations without reaching settlement of those rights."[17]

[Para. 5.1680] Types of orders and declarations frequently granted. The courts may impose a variety of requirements on the parties relating to ongoing consultation, including the following:

- to consult meaningfully[18] or in good faith;[19]
- to discuss particular issues;[20]
- to consider particular types of possible accommodation;[21]

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[15]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at paras. 47 and 62 [chief and members of Kwakiutl First Nation were respondents and appellants on cross-appeal].

[16]*Saugeen First Nation v. Ontario (MNRF)*, 2017 ONSC 3456, 2017 CarswellOnt 10872 (Ont. Div. Ct.) at para. 144.

[17]*Ross River Dena Council v. Canada (Attorney General)*, 2019 YKCA 3, 2019 CarswellYukon 11 (Y.T. C.A.) at paras. 127 and 133.

[18]*Chicot v. Canada (Attorney General)* 2007 CarswellNat 2067, 2007 FC 763 (F.C.) at para. 134 [applicants included Ka'a'Gee Tu First Nation].

[19]*Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 CarswellBC 438, 2005 BCSC 283 (B.C. S.C.) at para. 127.

[20]*Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2330, 2008 BCSC 1505 (B.C. S.C.) at para. 256.

[21]*Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2330, 2008 BCSC 1505 (B.C. S.C.), at para. 256.

- to appoint appropriate representatives to conduct the consultation;[22]
- to appoint a mediator;[23] or
- to enter into a consultation protocol.[24]

These directions are normally framed as declarations, but sometimes they are framed as "orders,"[25] and sometimes the judgments are simply unclear on the

precise form of relief being provided (presumably the formal court orders that result from those judgments are more specific).

[Para. 5.1685] Whether court will declare validity of an aboriginal right in a judicial review. In a Supreme Court of Canada case, the Ktunaxa First Nation asked the court to declare that a planned construction site was sacred to them and that permanent construction was banned from the site. The SCC characterized this as a request "in the guise of a judicial review of an administrative decision, to pronounce on the validity of [the Ktunaxa's] claim to a sacred site and associated spiritual practices." The SCC ruled that "[t]his declaration cannot be made by a court sitting in judicial review of an administrative decision to approve a development. In judicial proceedings, such a declaration can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence, and submissions. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation. To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes."[26]

[Para. 5.1690] Court may retain jurisdiction to supervise consultation. In addition, the courts often retain jurisdiction over the consultation process by ordering that either party may return to the court for further instructions if an impasse is reached.[27]

[Para. 5.1700] Directing a party to keep "an open mind". In

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[22]*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.) at para. 139.

[23]*Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2330, 2008 BCSC 1505 (B.C. S.C.) at para. 255.

[24]In *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.) at para. 188.

[25]See *Chicot v. Canada (Attorney General)* 2007 CarswellNat 2067, 2007 FC 763 (F.C.) at para. 134.

[26]*Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, 2017 CarswellBC 3020 (S.C.C.) at para. 84.

[27]See *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 CarswellBC 438, 2005 BCSC 283 (B.C. S.C.) at para. 127; *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2330, 2008 BCSC 1505 (B.C. S.C.) at para. 257; and *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CarswellOnt 2995, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.) at para. 188, additional reasons 2007 CarswellOnt 3553, [2007] 3 C.N.L.R. 221 (Ont. S.C.J.); *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2011 BCSC

Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries), the British Columbia Supreme Court made the order that the Crown needed to approach the consultation with an open mind, including an openness to withdrawing its approval for the project approval.[28]

[Para. 5.1701] Bare declaration with no remedy. In exceptional cases, the court may decline to order that a breach of the duty to consult must be remedied. In *Corp. Makivik c. Québec (Procureur général)*,[29] aboriginal beneficiaries of the James Bay and Northern Quebec Agreement challenged the Crown's adoption of certain restrictions on recreational caribou hunting. They argued the conservation measures did not go far enough to protect the targeted caribou herds and had been adopted without the required consultation. The Quebec Superior Court agreed that the Crown had breached the consultation requirements established by the Agreement, but refused to order any remedy beyond declaring this fact (which in the circumstances would have no effect since the conservation measures would still stand). The Court stressed that it had reached this conclusion based on a number of special circumstances: the Crown had consulted extensively with the aboriginal treaty beneficiaries at earlier stages of its decision making, and so the spirit of the Agreement was not violated; the Crown could have understandably believed it did not need to consult at the final stage of its decision-making due to the ambiguous wording of a relevant provision in the Agreement; it was urgent that conservation measures of some kind be imposed; the same conservation measures would ultimately have been imposed even if the Crown had consulted in the final stages of its decision-making.[30] The Court expressly ruled that in the circumstances, the honour of the Crown had been maintained despite the breach of the Agreement's consultation requirement.[31]

[Para. 5.1710] Injunctions. The aboriginal group may also seek an injunction in order to prevent an activity from taking place on the land before the court has decided whether the activity was authorized in breach of the Crown's duty to consult. A number of these injunctions have been granted.[32]

[Para. 5.1711] Injunctions—irreparable harm. However, there

266, 2011 CarswellBC 440 (B.C. S.C.) at para. 214.

[28]*Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 CarswellBC 438, 2005 BCSC 283 (B.C. S.C.) at para. 127.

[29]*Corp. Makivik c. Québec (Procureur général)*, 2011 QCCS 5955, 2011 CarswellQue 12177 (Que. S.C.) [plaintiffs included the Naskapi Nation of Kawawachikamach].

[30]*Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 CarswellBC 438, 2005 BCSC 283 (B.C. S.C.), at paras. 127-130.

[31]*Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 CarswellBC 438, 2005 BCSC 283 (B.C. S.C.), at para. 132.

[32]See *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, (2004), 2004 CarswellBC 3191, [2005] 2 C.N.L.R. 63 (B.C. S.C. [In Chambers]) (where the company was enjoined from adding more smolts to a fish farm); *Musqueam Indian Band v. Canada (Governor in Council)*, 2004 CarswellNat 1064, 2004 FC 579 (F.C.) (where Governor in Council, Treasury Board of Canada, and the Minister of

are currently two competing approaches to determining whether an interlocutory injunction is justified pending the adjudication of an aboriginal group's consultation claim. Injunction law requires applicants to prove, among other things, that they will suffer "irreparable harm" if they do not obtain the injunction pending the hearing of their claim and their claim proves to be sound.[33] Some courts identify the irreparable harm from allowing a project to proceed as being the loss by the aboriginal group of the opportunity to consult; in other words, if a government decision proceeds without adequate consultation, this will necessarily cause irreparable harm to the aboriginal group as it will have permanently lost the opportunity for meaningful consultation.[34] In contrast, other courts have ruled that irreparable harm depends on the practical consequences of the proposed Crown decision: irreparable harm will occur if the aboriginal group's consultation and accommodation rights have been breached and it suffers harms from the proposed decision that cannot be readily compensated.[35]

[Para. 5.1712] Injunction—irreparable harm—lost opportunity

Fisheries and Oceans were enjoined from proceeding with a land transfer); *Ta'an Kwacha'an Band v. Yukon*, 2008 CarswellYukon 59, [2008] 4 C.N.L.R. 222 (Y.T. S.C.) (where the Yukon government was enjoined from proceeding with a public tender for Crown land); *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CarswellOnt 4758, [2006] 4 C.N.L.R. 152 (Ont. S.C.J.) (where the company was enjoined from commencing its exploratory drilling for five months); *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 CarswellNat 3642, 2006 FC 1354 (F.C.) at para. 133 (where the Federal Court enjoined the Joint Review Panel from carrying on with certain parts of its environmental assessment pending a final order on remedy); *Qikiqtani Inuit Association v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12 (where Natural Resources Canada was enjoined from conducting seismic testing in Arctic waters); *Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675, 2011 CarswellBC 3478 (B.C. S.C.) (where the company was enjoined from commencing its authorized exploratory mining program for 90 days, so as to allow for further consultation between the Tsilhqot'in Nation and the Crown); *Washgoshig First Nation v. Ontario*, 2011 ONSC 7708, 2012 CarswellOnt 489 (Ont. S.C.J.) (where the company was enjoined from engaging in mineral exploration activities pending consultation between the First Nation, the company and the Crown) (The company subject to this order has been granted leave to appeal: 2012 ONSC 2323, 2012 CarswellOnt 11203 (Ont. Div. Ct.)).

[33]The Supreme Court of Canada defined "irreparable harm" as follows in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120, [1994] 1 S.C.R. 311 (S.C.C.): "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision *(R.L. Crain Inc. v. Hendry* (1988), 1988 CarswellSask 423, 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation *(American Cyanamid Co. v. Ethicon Ltd.*, 1975 UKHL 1, [1975] A.C. 396 (U.K. H.L.)); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined *(MacMillan Bloedel Ltd. v. Mullin*, 1985 CarswellBC 66, [1985] 2 C.N.L.R. 58 (B.C. C.A.) [applicants included the Clayoquot Band and the Ahousaht Band]).

[34]*Ta'an Kwacha'an Council v. Yukon*, 2008 CarswellYukon 59, [2008] 4 C.N.L.R. 222 (Y.T. S.C.) at para. 50; *Musqueam Indian Band v. Canada (Governor in Council)*, 2004 CarswellNat 1064, [2004] 3 C.N.L.R. 252 (F.C.) at para. 44.

[35]*Homalco Indian Band v. British Columbia (Minister of Agriculture, Food &*

to consult. In support of the idea that irreparable harm arises from the lost opportunity to consult, it is noted that the Crown's obligation to consult is a duty to consult *meaningfully*,[36] which in turn requires the Crown to approach consultation with an open mind and a willingness to modify its proposed course of action.[37]

[Para. 5.1720] Injunction—available both in actions and judicial reviews. An injunction is available in both an action and in a judicial review.[38] An injunction may be easier to obtain in a judicial review because judicial reviews tend to conclude far more quickly than trials, meaning that there is a clear end in sight to any interlocutory relief in consultation cases, and less prejudice to third parties. In any event, each injunction application will be judged on its own circum-

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Fisheries) (2004), 2004 CarswellBC 3191, [2005] 2 C.N.L.R. 63 (B.C. S.C. [In Chambers]) at paras. 60 and 61; *Musqueam Indian Band v. Canada*, 2008 FCA 214, 2008 CarswellNat 1894, [2008] 3 C.N.L.R. 265 (F.C.A.) at para. 52; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* [2006] 4 C.N.L.R. 152 (Ont. S.C.J.) at para. 79; *Qikiqtani Inuit Association v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12 at para. 48; *Nunatukavut Community Council Inc. v. Newfoundland & Labrador Hydro-Electric Corp. (Nalcor Energy)*, 2011 NLTD(G) 44, 2011 CarswellNfld 102 (N.L. T.D.) at para. 30 (It should be noted that in *Nunatukavut*, the Court also found, at paras. 41 and 45, that the Crown had thus far discharged its consultation obligations, in which case the aboriginal organization was not suffering any irreparable harm from a lost consultation opportunity); *Sunshine Logging (2004) Ltd. v. Prior*, 2011 BCSC 1044, 2011 CarswellBC 2089 (B.C. S.C.) at para. 30 [respondents included the Musqueam Indian Band and Squamish Nation].

[36]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, [2004] 3 S.C.R. 511 (S.C.C.) at para. 42 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[37]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, [2004] 3 S.C.R. 511 (S.C.C.) at para. 46 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, [2005] 3 S.C.R. 388 (S.C.C.) at para. 54.

[38]One notable exception is in British Columbia judicial review applications in which aboriginal groups challenge the Crown's consultation process for the treaties of other First Nations. The courts have consistently refused to grant such injunctions: *Tseshaht First Nation v. Huu-ay-aht First Nation*, 2007 CarswellBC 1755, 2007 BCSC 1141 (B.C. S.C.); *Saulteau First Nations v. Canada (Attorney General)*, 2007 CarswellBC 734, 2007 BCSC 492 (B.C. S.C.) plaintiffs included the Saulteau First Nations, the Doig River First Nation, the Halfway River First Nation, the Fort Nelson First Nation, the West Moberly First Nations and the Prophet River First Nation; defendants included Lheidli T'enneh Indian Band]; and *Cook v. British Columbia (Minister of Aboriginal Relations & Reconciliation)*, 2007 CarswellBC 2858, 2007 BCSC 1722 (B.C. S.C.) [petitioners included the Semiahmoo First Nation]. Other consultation cases in which preliminary injunctions have been denied include *Musqueam Indian Band v. Canada*, 2008 FCA 214, 2008 CarswellNat 1894, *(sub nom.* Musqueam Indian Band v. Canada (Public Works and Government Services)) [2008] 3 C.N.L.R. 265 (F.C.A.) [respondents included the Musqueam Indian Band and Squamish Nation] and *Nunatukavut Community Council Inc. v. Newfoundland & Labrador Hydro-Electric Corp. (Nalcor Energy)*, 2011 NLTD(G) 44, 2011 CarswellNfld 102 (N.L. T.D.).

stances, including any economic harm that may be experienced by the Crown or any private party if the application is granted.[39]

§ 5:43 Limitation periods

[Para. 5.1755] Alberta—six month deadline for filing applications. *In Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*,[1] the First Nation sought to challenge the failure of the Alberta Crown to consult prior to issuing oil and gas leases on Crown lands lying within the First Nation's Treaty 8 territory and in proximity to a reserve that members use for hunting and fishing. The Alberta Court of Appeal held that the Alberta Crown had no duty to notify the First Nation that it had granted the leases. If the duty to consult does attach to the granting of mineral tenures—and the caselaw to date strongly suggests that it does[2]—the Crown effectively avoided its duty to consult by failing to notify the First Nation of the proposed decisions and the final decisions. It is difficult to see how the honour of the Crown is maintained in these circumstances.

D. ROLE OF PRIVATE PARTIES IN CONSULTATION

§ 5:44 Generally

[Para. 5.1760] Third party involvement, generally. Frequently, the duty to consult is triggered in situations where the Crown contemplates authorizing a private party, normally a company, to engage in some kind of economic activity that has the potential to affect s. 35 rights. What role, if any, does that private party have in the consultation and accommodation process?

[Para. 5.1770] Third party action distinguished from Crown-delegated initiatives. As discussed above, the duty to consult arises

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[39]Cases where the court considers whether the economic interests of third parties will be harmed and if so, the extent of that harm include *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CarswellOnt 4758, [2006] 4 C.N.L.R. 152 (Ont. S.C.J.); *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CarswellOnt 2995, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.), additional reasons 2007 CarswellOnt 3553, [2007] 3 C.N.L.R. 221 (Ont. S.C.J.); *Musqueam Indian Band v. Canada (Governor in Council)*, 2004 CarswellNat 1064, 2004 FC 579 (F.C.); *Nunatukavut Community Council Inc. v. Newfoundland and Labrador Hydro-Electric Corp.*, 2011 NLTD(G) 44 at para. 31.

[Section 5:43]

[1]*Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*, 2009 CarswellAlta 1640, 2009 ABQB 576 (Alta. Q.B.) at para. 74, affirmed (2011), 2011 ABCA 29 (Alta. C.A.).

[2]This is because strategic, higher level decisions that have the potential to adversely affect aboriginal rights attract the duty to consult: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 2004 CarswellBC 2656, [2005] 1 C.N.L.R. 72 (S.C.C.) [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation], and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, 2010 CarswellBC 2867 (S.C.C.) (where this principle was confirmed, though not applied) [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

from the honour of the Crown and s. 35 of the *Constitution Act, 1982.* Private parties do not share this constitutional duty.[1] However, as occurred in one case, the high-level strategic decisions were simply made by a private company without Crown involvement:

> . . .there were no high-level or strategic decisions made by the Crown without consultation. Thompson Creek Metals certainly made high-level strategic decisions. The mine expansion project, however, was not a Crown initiative, nor did it guide the process.[2]

This was not a delegation of the duty to consult, but an apparent avoidance due to the previously issued authorizations to the mining company.

[Para. 5.1780] Court-ordered third party involvement. The courts occasionally order private parties to participate in consultation as part of the relief which they grant to aboriginal groups who succeed in their judicial review or interlocutory injunction application.[3] Furthermore, as a practical matter, the private parties seeking to undertake activities on the land have a strong interest in seeing the Crown discharge its consultation/accommodation obligations, and they may have the ability to provide some or all of the accommodation needed to render their proposed project acceptable to the aboriginal group. This is particularly true where the aboriginal group seeks to secure some economic benefits from the activity that is proposed to take place on its traditional territory, or where it seeks to influence the design of the project so as to mitigate its environmental impacts.

[Para. 5.1790] Private transactions without Crown involvement. Therefore, private parties may want to be involved in the consultation process. Indeed, private parties may want to initiate a dialogue with an aboriginal group and seek its support (or at least, a commitment of non-objection) before even seeking government approval for the project, so that their application process is not delayed or

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[Section 5:44]

[1]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 53 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[2]*Stellat'en First Nation v. British Columbia (Energy, Mines and Petroleum Resources)*, 2013 BCCA 412, 2013 CarswellBC 2871 (B.C. C.A.) at para. 107, leave to appeal refused 2014 CarswellBC 468, 2014 CarswellBC 469 (S.C.C.).

[3]See *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 CarswellBC 438, 2005 BCSC 283 (B.C. S.C.) at para. 127; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CarswellOnt 4758, [2006] 4 C.N.L.R. 152 (Ont. S.C.J.); *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CarswellOnt 2995, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.), additional reasons 2007 CarswellOnt 3553, [2007] 3 C.N.L.R. 221 (Ont. S.C.J.); and *Wahgoshig First Nation v. Ontario*, 2011 ONSC 7708, 2012 CarswellOnt 489 (Ont. S.C.J.) at para. 78. In this injunction case, the Crown had expressly delegated certain aspects of the consultation process to the company, and the company had failed to consult altogether. The Ontario Superior Court of Justice ordered both the Crown and the company to consult with Washgoshig First Nation. However, leave to appeal has been granted in this case: 2012 ONSC 2323, 2012 CarswellOnt 11203 (Ont. Div. Ct.).

thwarted by Crown-aboriginal consultation. Thus, there is room for much positive dialogue and in some cases, even partnerships, between aboriginal groups and private parties seeking to engage in activities on traditional aboriginal territories. The agreements reached between private parties and aboriginal groups in relation to particular projects are often called "Impact Benefit Agreements" or "Development Agreements."

[Para. 5.1800] No delegation of fundamental Crown obligations. At the same time though, the fact that companies do not share in the legal duty to consult means that the Crown cannot wholly delegate its consultation obligations to companies, even if they would be willing to assume those obligations. The Supreme Court of Canada stated in *Haida* that the Crown may delegate "procedural aspects" of its consultation duties but that it cannot abdicate ultimate responsibility for the consultation process.[4]

[Para. 5.1801] Rules for Crown delegation to third parties. The courts have identified certain limits to the Crown's authority to delegate consultation to private parties. If the Crown is delegating any consultation to third parties, it must inform the third party and the aboriginal group of this fact.[5] The Crown must not withhold from the aboriginal group any information that the group needs to engage on a level playing field with the third party.[6] The Crown must inform itself of the aboriginal group's perspective on any communications with the third party, rather than simply take the third party's account of those communications at face value.[7] The B.C. Court of Appeal overturned a decision of the B.C. Supreme Court in a case where the province decided that a formal environmental assessment was not needed because a private proponent of a project submitted plans that were below the technical threshold which would have required such an assessment, and the B.C. Supreme Court had set aside the decision, the B.C. Supreme Court reasoning that when the province "accepted without apparent

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[4]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 53 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]. The Federal Court found that the Crown had abdicated its consultation obligations to the private proponent and had thereby breached its duty to consult in *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 CarswellNat 4374 (F.C.) at paras. 111-114 [applicants included Lutsel K'e Dene Band].

[5]*Halalt First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 945, 2011 CarswellBC 1846 (B.C. S.C.) at paras. 675 and 677.

[6]*Halalt First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 945, 2011 CarswellBC 1846 (B.C. S.C.) at paras. 673-674. In that case, the Environmental Assessment Office knew that the First Nation was consulting with the District about the District's proposed water extraction project and did not tell the First Nation that it had already decided not to approve the project as originally proposed.

[7]*Halalt First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 945, 2011 CarswellBC 1846 (B.C. S.C.) at paras 374 and 677; *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 FC 159, 2010 CarswellNat 4374, [2011] 1 C.N.L.R. 385 (F.C.) at paras. 45 and 112 [applicants included Lutsel K'e Dene Band].

critical evaluation the calculations" of the private party, the province failed to meet its constitutional obligation to consult.[8]

[Para. 5.1810] Legal status of private transactions. Also unclear is the impact of a consultation or accommodation agreement reached between a private party and an aboriginal group, if the aboriginal group then seeks to challenge the Crown for its failure to adequately consult and accommodate. Technically, such agreements do not fulfill the Crown's obligations to consult and accommodate, and they may often state this expressly. However, courts may well consider as relevant any steps which a project proponent took to reduce the impacts of its project on s. 35 rights or an agreement to share with an aboriginal group some of the economic benefits of the project. If an aboriginal group negotiated mitigation measures designed to protect its rights or secured economic benefits which can be understood as compensating it for any infringement, a court might conclude that there is little or nothing more for the Crown to consult about or accommodate. Presumably this issue is context-specific and will be considered by the courts on a case-by-case basis.

[Para. 5.1820] Procedural fairness to third parties. In *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100, 2017 CarswellNat 6942 (F.C.), project proponent Taseko Mines Ltd raised concerns regarding the procedural fairness of allowing First Nations to consult with government concerning a project approval while excluding the proponent from those same consultations. Justice Phelan accepted than in some circumstances, procedural fairness will require that a proponent be made aware of submissions made in the course of consultations with First Nations—specifically, the proponent should be informed if the Crown intends to alter its position or make a decision that is contrary to (e.g.) an Environmental Assessment Review Panel Report due to new concerns raised by a First Nation. Procedural fairness is also engaged if the Crown is considering information arising from the course of a consultation that is substantially new, that the Crown intends to rely on, and that materially affects that proponent.[9] However, the proponent does not have a right to participate directly in consultations between the Crown and a First Nation.[10] Particularly where the relationship between a First Nation and a proponent is acrimonious, reconciliation could be adversely impacted by requiring that every interaction between the Crown and a First Nation be provided to a

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[8]*Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2015 BCSC 1180, 2015 CarswellBC 1878 (B.C. S.C.) (quoted words from para. 225), reversed 2016 BCCA 500, 2016 CarswellBC 3563 (B.C. C.A.) [chief and members of Fort Nelson First Nation were petitioners].

[9]*Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100, 2017 CarswellNat 6942 (F.C.) at paras. 86-88.

[10]*Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100, 2017 CarswellNat 6942 (F.C.), at para. 95.

proponent for comment.[11] Procedural fairness does not always require symmetry, and the Crown's duty to consult First Nations is one circumstance in which fairness may necessitate a degree of asymmetry—Taseko was not entitled to an identical process as the consultation process afforded to the Tsilhqot'in National Government.[12] On appeal, the Federal Court of Appeal upheld Justice Phelan's reasoning and added the following:

> According to the appellant, this approach is flawed; a proponent should have the right to know and to respond to all adverse information provided during consultations with Indigenous groups except when it can be established that providing such information in a given case would violate the duty to consult. I am inclined to think that Taseko's proposal would trivialize the duty to consult and empty it of its true content. It must be remembered that the duty to consult (and accommodate) is part of a process of reconciliation, which itself flows from rights guaranteed by section 35(1) of the *Constitution Act, 1982*, s. 35. . . It could hardly be said that the duty to consult supports and promotes reconciliation and re-affirms the nation-to-nation relationships with the First Nations if the Crown was equally to consult with the proponent and, for that matter, any other interested parties.[13]

E. DUTY TO CONSULT—SOME TOPICS IN DETAIL

§ 5:45 Early consultation

[Para. 5.1860] Ensuring that the momentum of a project does not render consultation meaningless. The Crown must initiate the consultation process early in its decision-making process, before that process has moved too far along.[1] This makes sense, particularly for projects proposed by third parties, which will gain momentum as the proponent begins to interact with government officials, develops the details of the project, and secures financing and preliminary approvals. This fact was recognized by the British Columbia Supreme Court in *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*:

> The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions. Once important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project.[2]

[Para. 5.1870] Ensuring that the process allows for meaningful

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[11] *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100, 2017 CarswellNat 6942 (F.C.), at para. 100.

[12] *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100, 2017 CarswellNat 6942 (F.C.), at paras. 165-166.

[13] *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320, 2019 CarswellNat 7887 (F.C.A.) at para. 43.

[Section 5:45]

[1] *Musqueam Indian Band v. British Columbia*, 2005 CarswellBC 472, 2005 BCCA 128 (B.C. C.A.) at para. 95 (per Justice Hall).

[2] *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 CarswellBC 2379, 2004 BCSC 1320 (B.C. S.C.) at para. 74; affirmed

input. The requirement for early consultation may include the duty to consult about the decision-making process that will be used to decide whether to approve a project. This was held to be the case in *Dene Tha' First Nation v. Canada (Minister of Environment)*, where Canada and Alberta had developed a unique regulatory and environmental review process for the proposed Mackenzie Gas Pipeline, a project of a significant size.[3] Thus, at least in the case of major projects with customized review processes, aboriginal groups who stand to see their s. 35 rights affected by the proposed activity are entitled to help design those processes.

[Para. 5.1880] Ensuring that higher-level decisions do not render later consultation meaningless. The need for "early consultation" also means that the Crown must consult about higher-level strategic decisions. *Haida*[4] and *Gitxan*[5] confirm that strategic decisions include the transfer of ownership of forestry licences; *Wii'litswx*[6] confirms the need to consult about the replacement of forestry licences; *Klahoose*[7] confirms the Crown's duty to consult prior to approving forest stewardship plans (which are currently the longer-term, higher-level forestry planning instrument in British Columbia); *Tsuu T'ina* confirms the Crown's duty to consult in developing a large-scale water management plan.[8] On this logic, other strategic decisions that should attract consultation include mineral tenure grants,[9] oil and gas tenure grants, land use plans, or decisions to lift a moratorium on a particular resource extraction activity, because even if these decisions have no immediate impact on the landscape, they set the stage for further decisions that will have a direct impact on land and resources.[10]

[Para. 5.1885] Cases of urgency. It has been suggested by the

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in *Sambaa K'e Dene Band v. Canada (Minister of Indian Affairs & Northern Development)*, 2012 FC 204, 2012 CarswellNat 570 (F.C.) at para. 165 [applicants included Nahanni Butte Dene Band; respondents included Acho Dene Koe First Nation].

[3]*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 CarswellNat 3642, 2006 FC 1354 (F.C.) at paras. 107-110.

[4]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[5]*Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2002 CarswellBC 2928, 2002 BCSC 1701 (B.C. S.C.) [respondents included the Lax Kw'alaams Indian Band, and the Metlakatla Indian Band].

[6]*Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 1764, 2008 BCSC 1139 (B.C. S.C.) [petitioners included Gitanyow].

[7]*Brown v. Sunshine Coast Forest District (District Manager)*, 2008 CarswellBC 2587, 2008 BCSC 1642 (B.C. S.C.) [petitioners included Klahoose First Nation].

[8]*Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 CarswellAlta 804, 2010 ABCA 137 (Alta. C.A).

[9]In the decision of *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 CarswellOnt 3877, 2008 ONCA 534 (Ont. C.A.), the Ontario Court of Appeal suggests, in passing, that the staking of mineral claims is an activity which should trigger the Crown's duty to consult and accommodate with aboriginal groups whose s. 35 rights may be affected by eventual mining activity (at paras. 61-62).

[10]Indeed, British Columbia Supreme Court has recognized land use planning as an

Alberta Court of Appeal that a factor affecting the extent of the Crown's consultation duty may be the urgency of a decision;[11] that is to say, in a case of emergency, the Crown may not need to consult or may be permitted to abridge the consultation period. This proposition is consistent with statements by the Supreme Court of Canada regarding the application of the *Sparrow* justification framework. The Court has stated that in deciding whether an infringement of an aboriginal right can be justified, courts must consider all of the relevant circumstances, including whether the Crown needed to respond swiftly to an emergency, such as a conservation emergency.[12] However, it does not appear as though the issue of an "emergency" has been a live factor in any consultation or accommodation case so far.

§ 5:46 Duty of good faith

[Para. 5.1890] The meaning of "good faith" in consultation. Both the Crown and aboriginal groups must always engage in consultations in good faith.[1] For the Crown, this will mean sharing all necessary information, giving the aboriginal group the opportunity to respond to that information, listening to the aboriginal group's concerns, and being willing to respond to those concerns and modify the proposed decision or course of action where it is reasonable to do so based on the strength of the rights claim and the severity of the potential infringement.[2] In short, the Crown must intend for the consultation process to be meaningful,

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infringement of aboriginal title in *Xeni Gwet'in First Nation v. British Columbia*, 2007 CarswellBC 2741, 2007 BCSC 1700 (B.C. S.C.) (see paras. 1068, 1096), affirmed in 2012 BCCA 285, 2012 CarswellBC 1860 (B.C. C.A.) at para. 315.

[11]*Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2008 CarswellAlta 1182, 2008 ABQB 547 (Alta. Q.B.) at para. 132, affirmed 2010 ABCA 137, 2010 CarswellAlta 804 (Alta. C.A.). This was an *obiter* remark and the principle was not applied in that particular case. In *R. v. Lefthand*, 2007 CarswellAlta 850, 2007 ABCA 206 (Alta. C.A.) [defendant was a member of Bearspaw Band], Justice Slatter stated in passing that the Crown was excused from having to consult about a fishery closure due to the urgent need for the restriction to be imposed (para. 35). However, this was an infringement case rather than a consultation case, and the infringement/justification analysis did not turn on the lack of consultation as Justice Slatter (and the other judges) agreed that there was no infringement (and therefore there was no justification analysis requiring the Court to consider the adequacy of consultation).

[12]*R. v. Nikal*, 1996 CarswellBC 950, [1996] 1 S.C.R. 1013 (S.C.C.) at para. 110 [intervenors included Sheshaht Band]; *R. v. Marshall*, 1999 CarswellNS 349, [1999] 3 S.C.R. 533 (S.C.C.) at para. 43 [defendant was a member of Membertou Band]. In *Marshall*, the Supreme Court of Canada suggested that urgency would be a reason for abridging the consultation period rather than not consulting at all.

[Section 5:46]

[1]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 42 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[2]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.), at para. 42; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para. 64.

and not just an opportunity for the aboriginal group to "blow off steam."[3] The Crown cannot discharge its constitutional duty by engaging in consultation while steadfastly denying claims worthy of consideration.[4] It must be willing to alter its proposed course of action based on what it hears from the aboriginal group.[5] For similar reasons, the consultation team must have an adequate mandate to engage in meaningful dialogue, and must not limit itself to listening to and recording the concerns of Indigenous peoples before transmitting those concerns to decision-makers.[6]

[Para. 5.1891] Open-mindedness by the Crown. Some courts have confirmed that open-mindedness by the Crown includes being open to the possibility of ultimately saying "no" to a proposed development or activity based on the potential adverse effects to s. 35 rights. In *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, the majority of the British Columbia Court of Appeal found that the Crown had

> based its concept of consultation on the premise that the exploration projects should proceed and that some sort of mitigation plan would suffice. However, to commence consultation on that basis does not recognize the full range of possible outcomes, and amounts to nothing more than an opportunity for the First Nations "to blow off steam".[7]

Similarly, in *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, the British Columbia Supreme Court made the following order:

> The Ministry is to approach this consultation with an open mind and be prepared to withdraw its approval of the amendment if, after reasonable consultation, it determines that it is necessary to do so, or add whatever

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[3]*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para. 54. Paragraph 54 of *Mikisew* was quoted and relied upon in *Squamish Nation v. British Columbia (Minister of Community, Sport and Cultural Development)*, 2014 BCSC 991, 2014 CarswellBC 1583 (B.C. S.C.) at para. 212. The FCA articulated a similar principle in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, 2018 CarswellNat 4685 (F.C.A.), at paras. 558-561 and 564, leave to appeal refused (2019), 2019 CarswellNat 1516 (S.C.C.): The Crown is required to do more than receive and document concerns and complaints. It must engage in a considered, meaningful two-way dialogue. Where deep consultation is required, this dialogue should lead to a demonstrably serious consideration of accommodation.

[4]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 84 [petitioners were members of Kwakiutl First Nation].

[5]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 46; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, 2018 CarswellNat 4685 (F.C.A.), at para. 564.

[6]*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, 2018 CarswellNat 4685 (F.C.A.) at paras. 558-559 and 564, leave to appeal refused 2019 CarswellNat 1516 (S.C.C.).

[7]*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 2011 CarswellBC 1238 (B.C. C.A.) at para. 149 (per C.J. Finch).

conditions appear to be necessary for reasonable accommodation of the concerns of the Homalco.[8]

In *Squamish Nation* the B.C. Supreme Court quashed the Minister's approval of an Official Community Plan, saying:

> Although the Province had no obligation to agree with or accept the Nation's position, the position of the Province, from beginning to the end of the short consultation period remained intransigent.[9]

[Para. 5.1892] Whether "good faith" requires an acknowledgement of the duty to consult. The courts have ruled that it is possible for the Crown to discharge its obligation of meaningful, good faith consultation while taking the position that it does not owe any consultation obligation to the aboriginal group. In other words, the Crown's consultation efforts may themselves be considered adequate even though the Crown engaged on the premise that its consultation efforts were not constitutionally required.[10]

[Para. 5.1900] "Good faith" on the part of aboriginal groups. Aboriginal groups must also engage in the consultation process in good faith. As a general rule, this means responding to the Crown's notice of the proposed decision and actually engaging in the consultation process,[11] sharing relevant information and discussing the proposed decision or course of action with an open mind about the likely impact of the decision and the possible ways of accommodating their s. 35 rights.[12] If an aboriginal group's only objective is to prevent a particular project from being approved, the courts will not normally consider this to be a good-faith effort, because the Supreme Court of Canada has emphasized that the consultation process generally does not give aboriginal groups a

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[8]*Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 BCSC 283, 2005 CarswellBC 438, [2005] 2 C.N.L.R. 75 (B.C. S.C.) at para. 127.

[9]*Squamish Nation v. British Columbia (Minister of Community, Sport and Cultural Development)*, 2014 BCSC 991, 2014 CarswellBC 1583 (B.C. S.C.) at para. 211.

[10]For example, the Crown took the position that it had no legal duty to consult in *Little Salmon/Carmacks First Nation v. Yukon (Director, Agricultural Branch, Department of Energy, Mines & Resources)*, but the Supreme Court of Canada ruled that the Crown had nevertheless fulfilled its consultation obligations: 2010 SCC 53, 2010 CarswellYukon 140, (*sub nom.* Beckman v. Little Salmon/Carmacks First Nation) [2011] 1 C.N.L.R. 12 (S.C.C.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government]. See also *Brokenhead First Nation v. Canada (Attorney General)*, 2011 FCA 148, 2011 CarswellNat 1440, 2011 CarswellNat 2620 (F.C.A.) at paras. 47-48 [applicants included Brokenhead First Nation, Long Plain First Nation, Peguis First Nation, Roseau River Anishinabe First Nation, Sagkeeng First Nation, Sandy Bay Ojibway First Nation, and Swan Lake First Nation].

[11]*Nlaka'pamux Nation Tribal Council v. British Columbia (Environmental Assessment Office)*, 2011 BCCA 78, 2011 CarswellBC 284, 56 C.E.L.R. (3d) 214 (B.C. C.A.) at para. 79.

[12]*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para. 65. Paragraph 65 in *Mikisew* was applied in *Fort McKay First Nation v. Alberta (Minister of Environment and Sustainable Resource Development)*, 2014 ABQB 32, 2014 CarswellAlta 75, [2014] 2 C.N.L.R. 140 (Alta. Q.B.) at para. 19.

veto over Crown decision-making.[13] In a case where the province did not treat the First Nation's claims seriously and steadfastly denied claims worthy of consideration, and accordingly the First Nation refused to participate, the First Nation could not be faulted for refusing to participate; the B.C. Court of Appeal said: "There must be more than an available process; the process must be meaningful."[14]

[Para. 5.1910] Good faith around proven rights or treaty rights. Where an aboriginal group has proven aboriginal title, or where title to an area is not really disputed, the courts may consider it acceptable for the aboriginal group to flatly object to a project that would infringe that right. Infringements of aboriginal title may require the consent of the aboriginal group holding the right.[15] Similarly, if a proposed activity would infringe an established treaty right (modern or historical), it would be entirely reasonable for an aboriginal group to object to that infringement: treaty rights are the product of negotiations and compromise by both parties, and they represent explicit commitments by each party to the other. Infringements of treaty rights therefore amount to a second round of compromise, and a reneging by the Crown on its deliberate promises. Thus, save perhaps in situations of national emergencies or threats to public health or safety, aboriginal treaty signatories should not be subjected to infringements of their treaty rights.[16]

[Para. 5.1920] Good faith where no mitigation proposed. Also, there may be situations where the aboriginal group has reasonable grounds to perceive that a proposed project will be extremely damaging to its rights and where the proponent is not proposing any mitigation measures that could adequately temper the impacts of the project. In that case, where the proponent is unable to propose any middle ground, the aboriginal group may also be justified in taking an equally categorical position. It remains to be seen how the courts will address all of these situations.

[Para. 5.1930] Tension between "good faith" and "hard bargaining". The courts have also stated that both sides may engage in

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[13]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 48 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at paras. 65-66.

[14]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 77 [chief and members of Kwakiutl First Nation were respondents and appellants on cross-appeal].

[15]*Delgamuukw v. British Columbia*, 1997 CarswellBC 2358, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 168. Given that *Delgamuukw* states that aboriginal title is a right to exclusively occupy the land and to use its resources, one would expect aboriginal consent to be required for almost any infringement of this right. Due to the limited litigation regarding proven s. 35 rights, it remains to be seen how high a bar the courts set for justifying the infringement of s. 35 rights.

[16]In some cases, the province may simply be constitutionally prohibited from infringing the treaty right by virtue of s. 91(24) of the *Constitution Act*.

"hard bargaining."[17] This principle is arguably problematic in cases where the balance of power already weighs heavily in the Crown's favour. Where the aboriginal group has no obvious leverage and, in particular, lacks the funds to pursue their rights in court, hard bargaining can essentially amount to a "take it or leave it" approach, which arguably does not uphold the honour of the Crown.

§ 5:47 Clear notification of proposed decision/course of action

[Para. 5.1940] Notice to the aboriginal group. Consultation begins when the Crown notifies the aboriginal group of the proposed decision or course of action. The Federal Court has ruled that general public notice of a proposed decision does not suffice.[1] While an aboriginal group may find out about a proposed decision from publicly available information or from a project proponent, it is in the Crown's own interest to provide notice directly to the aboriginal group, and to do so in writing, so as to foreclose any debate as to whether it met this straightforward obligation.[2]

[Para. 5.1942] Notice that a regulatory body will fulfill the Crown's obligation. Where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying.[3] However, the Supreme Court of Canada is not strict about what is meant

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[17]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 42 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 CarswellBC 2587, 2008 BCSC 1642 (B.C. S.C.) at para. 24 [petitioners included Klahoose First Nation].

[Section 5:47]

[1]*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 CarswellNat 3642, 2006 FC 1354 (F.C.) at para. 116. See also *Saugeen First Nation v. Ontario (MNRF)*, 2017 ONSC 3456, 2017 CarswellOnt 10872 (Ont. Div. Ct.) at para. 49: ". . .where there is a duty to consult, the minimum Crown obligation is notice and the Crown must establish affirmatively that notice has been given. General public notice requirements under the *Aggregates Resources Act* do not include notice to an affected First Nation. Second, there is no evidence that the Project did come to SON's attention as a result of the public notices given by Hayes. Third, it would not be sufficient to show that the Project came to the attention of some member of SON. As noted above, there are hundreds of quarries in the area and dozens of projects under consideration at any given time. A member of SON might hear of a project without realizing that it was not known to the SON Environment Office. . .".

[2]However, the Alberta Court of Queen's Bench ruled, on a preliminary motion about limitation periods, that the Crown had successfully given the First Nation constructive notice of a tenure grant by posting the notice on an Aboriginal website designed to provide information to First Nations, and that the First Nation's notice period to bring its consultation claim began running from that time: *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*, 2009 CarswellAlta 1640, 2009 ABQB 576 (Alta. Q.B.) at para. 74, affirmed (2011), 2011 ABCA 29 (Alta. C.A.). Since this was not a ruling on the merits of the "no consultation" claim, but simply a ruling that the limitation period for bringing the claim had expired, it is unclear whether the Alberta courts would also apply the concept of "constructive notice" to the Crown's duty to notify Aboriginal groups of proposed decisions.

[3]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017

by "made clear". In a case where the Crown did not inform the Chippewas of the Thames that it was relying on the National Energy Board to fulfill the duty to consult, but *circumstances* made that reliance sufficiently clear, the Supreme Court of Canada found that the consultation obligation was met.[4]

[Para. 5.1945] Obligation on Crown to share assessment of existence and scope of duty to consult. Once the Crown has made a determination that it has a duty to consult a First Nation in relation to a decision, or has completed a preliminary assessment of the scope of this duty, it is obligated to advise the First Nation of these conclusions. Failure to do so may constitute a breach of the duty to consult.[5]

§ 5:48 Information-sharing

[Para. 5.1950] Information to be provided by the Crown. The Crown must share available information openly with the aboriginal group concerning the proposed decision/course of action. The Supreme Court of Canada stated in *Mikisew* that the Crown must share all "necessary" information.[1] Information about a proposed decision or activity is necessary if it helps the aboriginal group understand the nature of the proposed decision or activity and/or the possible impacts of the decision or activity on any proven or asserted s. 35 rights. In the case of a proposed activity on the land, this would include details about the timing of the project, its precise location, its duration, the nature of any disruption to the land or resources, the expected environmental impacts,[2] and the volume of any resource that will be harvested. The economics of the proposed project may also be relevant, particularly where the aboriginal group makes a reasonable aboriginal title claim to the land at issue, as aboriginal title includes the right to control and benefit from all economic activities on the land. Aboriginal groups are entitled to know the Crown's information and views concerning the content and strength of their claims so they are able to discuss the subjects on which

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CarswellNat 3470 (S.C.C.) at para. 23.

[4]*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, 2017 CarswellNat 3468 (S.C.C.) at para. 46.

[5]*Saugeen First Nation v. Ontario (MNRF)*, 2017 ONSC 3456, 2017 CarswellOnt 10872 (Ont. Div. Ct.) at para. 61.

[Section 5:48]

[1]*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para. 64. For an example of a case where the Court held that the Crown—specifically, British Columbia's Environmental Assessment Office—had failed in various respects to meet its duty to share information with the First Nation and to share information in a timely fashion, see *Halalt First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 945, 2011 CarswellBC 1846 (B.C. S.C.).

[2]See for example *Moulton Contracting Ltd. v. British Columbia*, 2013 BCSC 2348, 2013 CarswellBC 3886 (B.C. S.C.) at para. 294 [intervenors included the Fort Nelson First Nation and Moose Cree First Nation], where the Court held that the Crown breached its duty to consult in failing to provide the First Nation with information regarding the impacts of the proposed forestry approval on wildlife habitat.

the Crown might have to accommodate, and the extent to which the Crown might have to accommodate.[3]

[Para. 5.1952] The format of information provided must further "mutual understanding". The information which must be shared with the Aboriginal group must be accessible in a practical manner, and must further the goal of mutual understanding. The Supreme Court of Canada found that the duty to consult had not been meet in a case where questions were answered in a 3,926 page electronic document, not translated into the Aboriginal language, delivered months late.[4]

[Para. 5.1960] Sensitive or confidential information from the Crown. A claim by Canada of "Cabinet confidence" will not succeed when the information being withheld is the "strength of claim analysis" being relied upon by the Crown to assess the required depth of consultation.[5]

[Para. 5.1970] Information to be provided by the aboriginal group. Aboriginal groups do not need to share their information with the Crown, but the extent to which they do so will be a large factor in determining the appropriate level of consultation. An aboriginal group that seeks deep consultation and accommodation measures should clearly articulate which rights it considers to be at stake, its basis for asserting those rights, and how it believes that the proposed decision or activity might affect those rights. The more information an aboriginal group can share, and the better it substantiates the existence of its claimed rights and the basis for its concerns about impacts on those rights, the greater the onus on the Crown to address those concerns in the decision-making process. In contrast, the courts will be critical of an aboriginal group's claim that the Crown failed to consult adequately where they conclude that the aboriginal group failed to specify the nature of its concerns to the Crown in the consultation process.[6]

[Para. 5.1980] Sensitive or confidential information from the aboriginal group. Just as the Crown or companies may in some circumstances wish to withhold information because they consider it too sensitive, aboriginal groups may be reluctant to share confidential cultural information, such as the location of burial grounds or the names and purposes of medicinal plants. As just discussed, aboriginal groups may choose not to share all relevant information in the consultation process, but in doing so, they risk that these interests or concerns will not

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[3]*Gitxaala Nation v. R.*, 2016 FCA 187, 2016 CarswellNat 2576 (F.C.A.) at para. 309.

[4]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 49.

[5]*Gitxaala Nation v. R.*, 2016 FCA 187, 2016 CarswellNat 2576 (F.C.A.) at paras. 299 & 305.

[6]*Louis v. British Columbia (Energy, Mines & Petroleum Resources)*, 2011 BCSC 1070, 2011 CarswellBC 2065 (B.C. S.C.) at paras. 199 and 215 [petitioners included Stellat'en First Nation]. See also *Pimicikamak et al v. Her Majesty the Queen in Right of Manitoba et al.*, 2018 MBCA 49, 2018 CarswellMan 166 (Man. C.A.), leave to appeal refused 2019 CarswellMan 6 (S.C.C.).

be taken into account in the decision-making process. In *Chicot v. Canada (Attorney General)*, the Federal Court stated that aboriginal groups must explore whether there are ways that they can share their sensitive information with the Crown and project proponents while still keeping it from becoming public, and that unless they make these efforts, they will not be in a position to complain that their concerns were not taken into account.[7]

[Para. 5.1990] Whether a detailed description of the aboriginal or treaty rights is required. The Crown and aboriginal groups often differ about how specific aboriginal groups need to be in describing *the nature or exercise of their rights.* Some Crown officials seek to know precisely where an aboriginal group hunts or gathers its medicinal plants; they take the position that without such site-specific information, further discussions and accommodation measures are not warranted.

[Para. 5.2000] Completing the documentary record in the consultation file. The question may arise whether sufficient information has been collected, created, considered, or disclosed to a First Nation before the Crown's decision is made. A statutory decision may be found to be unreasonable for being made prior to completion of studies which are under way, or requested. However, in one case the British Columbia Supreme Court found that a particular cultural study was not critical to the reasonableness of the decision under review because the First Nation "failed to demonstrate that the completion of the cultural study was integral to reasonable decisions being made, and the applications being granted".[8] Further, the Alberta Court of Queen's Bench said that documents in the possession of the Crown do not necessarily form part of the record of consultation unless their importance and relevance has been pointed out by the First Nation. The Court said:

> Fort McKay cannot remain silent and rely upon the Crown's duty to inform itself. It must give notice of its concerns and reference the documents and factors they wish considered.[9]

[Para. 5.2010] Matching the degree of specificity to the scope of the project. Logically, however, an aboriginal group should not always need to provide precise, site-specific information in order to establish that the right in question stands to be harmed by a proposed activity, particularly where the right at issue is exercised over a large area rather than in discrete locations. For example, a particular geographical area may represent an aboriginal group's core hunting or trapping grounds.

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[7] *Chicot v. Canada (Attorney General)*, 2007 CarswellNat 2067, 2007 FC 763 (F.C.) at paras. 129-130 [applicants included Ka'a'Gee Tu First Nation]. This statement did not determine the outcome of this case because the Court had already ruled that the Crown had breached its duty to consult and accommodate.

[8] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2014 BCSC 924, 2014 CarswellBC 1450 (B.C. S.C.) at para. 114.

[9] *Fort McKay First Nation v. Alberta (Minister of Environment and Sustainable Resource Development)*, 2014 ABQB 32, 2014 CarswellAlta 75, [2014] 2 C.N.L.R. 140 (Alta. Q.B.) at para. 19.

If a proposed development would involve major disruption to those harvesting grounds or a significant part of them, *e.g.*, clear-cut logging or strip mining, it should be apparent that the hunting activities stand to be negatively impacted. The aboriginal group may not have any more specific information to share—other than perhaps the species they prefer to hunt, the location of members' hunting cabins and hunting trails—but its general interest in preserving this core territory for hunting and trapping would still merit consultation and accommodation.

[Para. 5.2020] Onus regarding the degree of environmental impact—situations. The Crown and aboriginal groups may also differ on the degree to which the aboriginal group must detail its concerns about environmental *impacts*. Environmental impacts are normally relevant to Crown-aboriginal consultation because they can affect harvesting rights as well as the ability of the aboriginal group to enjoy its aboriginal title. Some Crown officials seem to expect aboriginal groups to substantiate their concerns about the impact that a particular development will have on wildlife, plants, or the water supply. They might not be willing to take aboriginal concerns about impacts on harvesting rights into account unless they are presented with some evidence to substantiate them. For their part, aboriginal groups generally expect the Crown to provide them with data or studies demonstrating that the proposed activity will *not* be harmful to wildlife, wildlife habitat, or plants; aboriginal groups rarely possess such studies of their own, and in many cases cannot afford to conduct such research projects. Yet often the Crown and the project proponent also lack much concrete information about anticipated environmental impacts.

[Para. 5.2030] Onus regarding the degree of environmental impact—case law. These disagreements about who bears the onus of providing relevant information about environmental impacts, and whether the Crown must obtain certain information about environmental impacts before deciding whether to approve the project can lead to impasses in the consultation process. It is an important topic which requires further judicial consideration.[10]

§ 5:49 Reasonable time for consultation

[Para. 5.2040] Crown must allow time for consultation to run its course. The Crown must give the aboriginal group a reasonable amount of time to respond to a referral and to engage in consultation.[1] The Crown must be prepared to let consultation run its course; it cannot

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[10]In *Saulteau First Nation v. British Columbia (Oil & Gas Commission)*, 2004 CarswellBC 1276, 2004 BCCA 286 (B.C. C.A.), leave to appeal refused (2005), 2005 CarswellBC 459, 2005 CarswellBC 460 (S.C.C.), the British Columbia Court of Appeal rejected the proposition of the Saulteau First Nation that the Oil and Gas Commission needed to ensure the conduct of a cumulative impact assessment before approving a sour gas test well (paras. 22 and 27).

[Section 5:49]

[1]This sentence in Native Law was cited with approval and relied upon in *Squamish Nation v. British Columbia (Minister of Community, Sport and Cultural Development)*,

abort the consultation process because of other time pressures where the aboriginal group is actively engaged in the consultation process, there remain outstanding issues, and there is value to further discussions.[2] There may be exceptions in cases of emergency,[3] though this matter yet to be conclusively decided by the courts.

[Para. 5.2050] "Reasonable time" in light of the aboriginal group's time pressures. A reasonable consultation period is required to give aboriginal groups time to consider the proposed decision, gather any internal information, and seek any outside advice on technical issues. A reasonable time period must also take into account the volume of referrals that the aboriginal group is handling (which in some cases is extremely high) as well as its capacity level (in many cases, there is no person designated to handle referrals due to the group's inability to fund such a position). The British Columbia Supreme Court recognized in *Tsilhqot'in v. British Columbia* that even where an aboriginal group has adequate resources, the volume of referrals may make it impossible for the group to respond in a timely fashion.[4] In *Moulton Contracting Ltd. v. British Columbia*, the British Columbia Supreme Court found that British Columbia breached the duty to consult by failing to extend consultation timelines on a forestry referral in light of the First Nation's inability to handle to the high volume of referrals that it was receiving.[5]

[Para. 5.2060] Situations where the aboriginal group takes too much time. Aboriginal groups cannot deliberately stall the consultation process or be indefinitely unresponsive. If an aboriginal group alleges in court that the Crown moved too quickly in making a decision, it should expect the court to consider whether the aboriginal group failed to engage in consultation in a sufficiently timely manner.[6]

[Para. 5.2070] Early referral is important to allow enough time

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2014 BCSC 991, 2014 CarswellBC 1583 (B.C. S.C.) at para. 214; *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 CarswellNat 3642, 2006 FC 1354 (F.C.) at para. 116.

[2]This sentence in Native Law was cited with approval and relied upon in *Squamish Nation v. British Columbia (Minister of Community, Sport and Cultural Development)*, 2014 BCSC 991, 2014 CarswellBC 1583 (B.C. S.C.) at para. 214; *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 CarswellBC 438, 2005 BCSC 283 (B.C. S.C.) at para. 108; *Eabametoong First Nation v. Minister of Northern Development and Mines*, 2018 ONSC 4316, 2018 CarswellOnt 11572 (Ont. Div. Ct.) at para. 114.

[3]This suggestion is made in *Tsuu T'ina Nation v. Alberta (Minister of the Environment)*, 2008 CarswellAlta 1182, 2008 ABQB 547 (Alta. Q.B.) at para. 108 and in *R. v. Lefthand*, 2007 CarswellAlta 850, 2007 ABCA 206 (Alta. C.A.) at para. 35 [defendant was a member of Bearspaw Band].

[4]*Xeni Gwet'in First Nation v. British Columbia*, 2007 CarswellBC 2741, 2007 BCSC 1700 (B.C. S.C.) at para. 1138, affirmed in 2012 BCCA 285, 2012 CarswellBC 1860 (B.C. C.A.), but not on this point.

[5]*Moulton Contracting Ltd. v. British Columbia*, 2013 BCSC 2348, 2013 CarswellBC 3886 (B.C. S.C.) at para. 293.

[6]Indeed, the Federal Court did this in *Ahousaht First Nation v. Canada (Ministry of Fisheries & Oceans)*, 2007 CarswellNat 1597, 2007 FC 567 (F.C.) at para. 60, affirmed 2008 CarswellNat 2961, 2008 FCA 212 (F.C.A.) [applicants included the Ahousaht Indian

for consultation. The need for a reasonable consultation period is an added reason for the Crown to refer proposed decisions or courses of action to aboriginal groups early on in the Crown's decision-making process: the earlier consultation starts, the more time there is available for dialogue and allowing the consultation process to run its proper course.

§ 5:50 Format for consultation process

[Para. 5.2080] Format of consultation, generally. A process in which there are limited opportunities for participation and consultation will fail to fulfill the Crown's duty to conduct deep consultation.[1] There is no rigid format for consultation processes and the "Crown has discretion as to how it structures the consultation process."[2] Generally speaking, an aboriginal group cannot insist on a particular consultation process, nor can it insist that consultation take place within a particular forum or with particular Crown officials: "First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief."[3] Therefore, the Crown may be allowed to discharge its consultation obligations through a pre-existing decision-making process, such as an environmental assessment process[4] or a review process conducted by an administrative

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Band, The Ditidaht Indian Band, The Ehattesaht Indian Band, The Hesquiaht Indian Band, The Hupacasath Indian Band, The Huu-ay-aht Indian Band, The Ka:'yu:'k'y'h/ Che:k'tles7et'h' Indian Band, The Mowachaht/Muchalaht Indian Band, The Nuchatlaht Indian Band, The Tla-o-qui-aht Indian Band, The Toquaht Indian Band, The Tseshaht Indian Band, The Uchucklesaht Indian Band, and The Ucluelet Indian Band].

[Section 5:50]

[1]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 47.

[2]*Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation)*, 2013 ABCA 443, 2013 CarswellAlta 2585 (Alta. C.A.) at para. 39, leave to appeal dismissed with costs 2014 CarswellAlta 787, 2014 CarswellAlta 788 (S.C.C.).

[3]*Brokenhead Ojibway Nation v. Canada*, 2009 CarswellNat 1339, 2009 FC 484 (F.C.) at para. 42 [applicants included Brokenhead Ojibway Nation, Long Plain First Nation, Swan Lake First Nation, Fort Alexander First Nation, also known as "Sagkeeng First Nation", Roseau River Anishinabe First Nation, Peguis First Nation, and Sandy Bay First Nation]. See also *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 CarswellAlta 804, 2010 ABCA 137 (Alta. C.A) at para. 104.

[4]This was the case in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 CarswellBC 2654, 2004 SCC 74 (S.C.C.) [interveners included the Doig River First Nation], where the Supreme Court of Canada ruled that British Columbia had discharged its consultation obligations through the environmental assessment process (see para. 40 in particular). See also *Yellowknives Dene First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2013 FC 1118, 2013 CarswellNat 4157 (F.C.) at paras. 63-64 [applicants included Lutsel K'e Dene Band]. The case of *Nlaka'pamux Nation Tribal Council v. British Columbia (Environmental Assessment Office)*, 2011 BCCA 78, 2011 CarswellBC 284 (B.C. C.A.) stands for the proposition that British Columbia's Environmental Assessment Office is actually *required to* include aboriginal groups to whom it owes consultation obligations in the environmental assessment process (paras. 97-98). However, the Court also ruled that the EAO had discretion

body pursuant to statute.[5] Indeed, the Supreme Court of Canada cited in detail the level of involvement which the Taku River Tlingit First Nation had in the provincial environmental assessment for a proposed mine in its territory in support of its ruling that British Columbia had consulted adequately with this Nation.[6]

[Para. 5.2081] Inappropriately limited consultation. Despite the Crown's general discretion to determine the format of the consultation process, the Crown may not choose a format or a process which inappropriately limits the scope of necessary consultation. In a case where the province did not treat the First Nation's claims seriously, and steadfastly denied claims worthy of consideration, and accordingly the First Nation refused to participate, the province necessarily failed to meet its constitutional obligation to consult. The Court said: "There must be more than an available process; the process must be meaningful."[7] In another case, the B.C. Oil and Gas Commission offered repeatedly to consult with the Fort Nelson First Nation, but indicated that it would not discuss impacts to caribou or the adequacy of the proponent's caribou mitigation plan. In quashing the Commission's approval, the B.C. Supreme Court held that where the Commission's initial response to the Nation's concerns was to refuse to discuss them, and to indicate that it had predetermined the very issue on which the Nation wished to be consulted, "it cannot be said that the Commission was will-

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in deciding precisely how to involve aboriginal groups in the environmental assessment (para. 99).

[5]*Brokenhead Ojibway Nation v. Canada*, 2009 CarswellNat 1339, 2009 FC 484 (F.C.) at para. 42 [applicants included Brokenhead Ojibway Nation, Long Plain First Nation, Swan Lake First Nation, Fort Alexander First Nation, also known as "Sagkeeng First Nation", Roseau River Anishinabe First Nation, Peguis First Nation, and Sandy Bay First Nation] (The decision in that case was the issuance of a Certificates of Public Convenience and Necessity for the construction of three pipeline projects by the Nuclear Energy Board, and the Federal Court held that in the circumstances of the case, the statutory review process was adequate.); *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2010 FC 948, 2010 CarswellNat 3440 (F.C.) at paras. 19-201 [applicants included the Fond du Lac Denesuline First Nation, Black Lake Denesuline First Nation, and Hatchet Lake Denesuline First Nation] (The decision in that case was the renewal of an operating licence for a uranium mine and mill by the Canadian Nuclear Safety Commission, under the *Nuclear Safety and Control Act*, S.C., 1997, c. 9.).

[6]*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 CarswellBC 2654, 2004 SCC 74 (S.C.C.) [interveners included the Doig River First Nation]. It should be noted that the Taku River Tlingit First Nation was represented on the Project Committee that conducted the environmental assessment at issue in that case. British Columbia's *Environmental Assessment Act*, R.S.B.C. 1996, c. 119 has since been amended and no longer provides for direct participation by First Nations in the *conduct* of environmental assessments. The British Columbia Supreme Court ruled in *Halalt First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 945, 2011 CarswellBC 1846 (B.C. S.C.) at para. 654 that adherence to the amended *Environmental Assessment Act* review process did not suffice to discharge the Crown's consultation obligations in the circumstances of that case.

[7]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 77 [chief and members of Kwakiutl First Nation were respondents and appellants on cross-appeal].

ing to engage in consultation", and the Nation was not at fault for declining to consult on those terms.[8] Furthermore, in cases where the duty to consult falls at the higher end of the spectrum, consultation may be inadequate where the Crown inappropriately limits itself to a "non-interactive" format—for example, where the Crown merely passively requests and receives information from a First Nation, then analyzes that information and issues a result without having engaged in meaningful two-way dialogue or visibly attempting to grapple with the First Nation's stated concerns.[9]

[Para. 5.2083] Whether face-to-face meetings are required. Depending on the facts of the case, the Crown decision-maker may not need to conduct any face-to-face consultation meetings in order to discharge its consultation obligations.[10]

[Para. 5.2084] "Papering the file" is not consultation. Self-serving correspondence between the parties will be viewed skeptically by a reviewing court. In a judicial review, a court's real task is "to determine exactly what project is contemplated by a corporate respondent, and what impact that project will likely have, given where it is located in relation to a petitioner's needs and treaty rights."[11] In doing this "a reviewing court must look beyond what can appear, frankly, as the sometimes self-serving correspondence between the parties, written at least in part, one suspects, to 'paper' the file with a view to a subsequent court challenge."[12]

[Para. 5.2090] Whether existing regulatory processes are adequate. However, any pre-existing decision-making process must allow for meaningful consultation with aboriginal groups who may have s. 35 rights at stake. In particular, the existing regulatory processes may allow for Crown consultation on some issues and for certain types of accommodations, but not others. In such cases, the Crown will need to establish an additional avenue for consultation to address outstanding matters.[13]

[Para. 5.2091] The tension between "efficiency" and constitu-

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[8]*The Fort Nelson First Nation v. BC Oil and Gas Commission*, 2017 BCSC 2500, 2017 CarswellBC 3790 (B.C. S.C.) at paras. 68-71.

[9]*Squamish First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 216, 2019 CarswellNat 3824 (F.C.A.) at paras. 63 and 68-74. At para. 70, the Court wryly observed, "This process may be an effective process for administering fisheries management. It is not, however, a process consistent with the interactive, good-faith give-and-take required in order for meaningful consultation to take place."

[10]*Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at para. 15 [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

[11]*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2014 BCSC 924, 2014 CarswellBC 1450 (B.C. S.C.) at para. 35.

[12]*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2014 BCSC 924, 2014 CarswellBC 1450 (B.C. S.C.) at para. 35.

[13]*Brokenhead Ojibway Nation v. Canada*, 2009 CarswellNat 1339, 2009 FC 484 (F.C.) at paras. 27, 29 and 44 [applicants included Brokenhead Ojibway Nation, Long

tional rights. Although the Crown has discretion in developing a consultation process, it will not normally be free to compromise the duty to consult for the sake of efficiency:

> Like the chambers judge, I have some sympathy for the Project Assessment Director in this case. Faced with competing claims and obvious animosity among the First Nations groups that were demanding consultation, the task of creating an efficient and meaningful consultative process was a daunting one. That said, I cannot agree with the chambers judge's conclusion that the Crown was entitled to "balance its obligation to consult with its obligation to carry out its statutory duty in an effective manner". The Crown's duty to act honourably toward First Nations makes consultation a constitutional imperative. Difficult as it might have been to fulfill, it could not be compromised in order to make the process more efficient.[14]

[Para. 5.2100] Whether public forums are adequate. The courts have also expressly stated that the Crown cannot rely on a consultation forum for the general public to discharge its consultation obligations towards an aboriginal group: "a public forum process is not a substitute for formal consultation."[15] The Aboriginal group must be consulted "as a First Nation" and not "as members of the general public".[16]

[Para. 5.2110] Government complexity and transparency. The British Columbia Supreme Court has also stated that the Crown must ensure that a consultation process does not become so complex that it becomes unclear who within the Crown is ultimately responsible for discharging the duty:

> . . .it is incumbent on the Province to do its best to ensure that the mandate of the specific Ministry or agency with which a First Nation is interacting is made clear, and to ensure that responsibility for consultation and accommodation is not lost in the complexity of (sometimes shifting) governmental structures. The Crown's duty is to carry on a process that is as transparent as possible.[17]

[Para. 5.2120] Whether a consultation protocol is mandatory. In keeping with this approach of leaving the parties (and in particular

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Plain First Nation, Swan Lake First Nation, Fort Alexander First Nation, also known as "Sagkeeng First Nation", Roseau River Anishinabe First Nation, Peguis First Nation, and Sandy Bay First Nation].

[14]*Nlaka'pamux Nation Tribal Council v. British Columbia (Environmental Assessment Office)*, 2011 BCCA 78, 2011 CarswellBC 284, 56 C.E.L.R. (3d) 214 (B.C. C.A.) at para. 68. The Court concluded this paragraph by stating that aboriginal groups cannot insist upon an endless consultation process: "In saying this, I recognize that the right to consultation is not unlimited. The Supreme Court of Canada's decision in *Taku* establishes that, at some point, the duty to consult may be exhausted."

[15]*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 CarswellNat 3642, 2006 FC 1354, [2007] 1 C.N.L.R. 1 (F.C.) at para. 104, affirmed 2008 CarswellNat 687, 2008 FCA 20 (F.C.A.). The Supreme Court of Canada implicitly makes this point in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69, [2006] 1 C.N.L.R. 78 (S.C.C.) at para. 64.

[16]*Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, 2014 CarswellNat 3248 (F.C.A.) at para. 100

[17]*Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2330, 2008 BCSC 1505 (B.C. S.C.) at para. 147.

the Crown) with a fair bit of discretion in establishing the consultation process, it seems that as a general rule, neither side may compel the other to enter into a consultation protocol.[18] However, at least one court which ruled that additional consultation was necessary also ordered that the parties adopt a consultation protocol in order to help facilitate this further consultation.[19]

[Para. 5.2130] Benefits of a consultation protocol. Even if there is no legal requirement for a consultation protocol, such agreements may have benefits, including the following: they may clarify the parameters of the discussion, manage expectations about the process, set a timeline for the consultation process, and clarify the roles of different government officials and/or the project proponent. Moreover, in at least one case, the court identified the development of a consultation protocol as one of the factors demonstrating that the Crown had discharged its obligation of meaningful consultation.[20] Thus, consultation protocols will at times be desirable, particularly where there is a major, complex proposed activity at issue.

[Para. 5.2135] Crown may alter an established consultation process, but must explain why. In *Saugeen First Nation v. Ontario (MNRF)*, 2017 ONSC 3456, 2017 CarswellOnt 10872 (Ont. Div. Ct.), Nordheimer J. held at paras. 124-125 that the Ontario Crown breached its duty to consult by agreeing to a consultation process and then, without explanation, failing to adhere to it: "The failure of the Crown, in this case, is primarily a failure to follow its own processes. . . . Once the Crown establishes a process, if it decides to change that process in a material way, generally it is not reasonable to effect the change without explaining the change, and the reasons for the change, to the First Nation. Here that was not done. That failure was a breach in the Crown's duty to consult." See also *Eabametoong First Nation v. Minister of Northern Development and Mines*, 2018 ONSC 4316, 2018 CarswellOnt 11572 (Ont. Div. Ct.) at para. 110: "I am prepared to accept that the Ministry, for appropriate reasons, has the right to change the course of a consultation process in spite of any expectations that may have been established in that regard by it or its delegate. However, if it does so, it must do so in a way that does not involve compromising the objectives of

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[18]In *Ahousaht First Nation v. Canada (Ministry of Fisheries & Oceans)*, 2007 CarswellNat 1597, 2007 FC 567 (F.C.) at para. 66, affirmed 2008 CarswellNat 2961, 2008 FCA 212 (F.C.A.) [applicants included the Ahousaht Indian Band, The Ditidaht Indian Band, The Ehattesaht Indian Band, The Hesquiaht Indian Band, The Hupacasath Indian Band, The Huu-ay-aht Indian Band, The Ka:'yu:'k'y'h/Che:k'tles7et'h' Indian Band, The Mowachaht/Muchalaht Indian Band, The Nuchatlaht Indian Band, The Tla-o-qui-aht Indian Band, The Toquaht Indian Band, The Tseshaht Indian Band, The Uchucklesaht Indian Band, and The Ucluelet Indian Band], the Federal Court decided that Ahousaht was not entitled to demand a consultation protocol with the Department of Fisheries and Oceans.

[19]This was done in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CarswellOnt 2995, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.) at 188, additional reasons 2007 CarswellOnt 3553, [2007] 3 C.N.L.R. 221 (Ont. S.C.J.).

[20]*Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at para. 112.

the duty to consult—namely, upholding the honour of the Crown by attempting to further the goal of effecting a reconciliation between the Crown and Indigenous peoples."

[Para. 5.2136] Crown must not knowingly allow its delegates to create false expectations concerning consultation process. In *Eabametoong First Nation v. Minister of Northern Development and Mines*, 2018 ONSC 4316, 2018 CarswellOnt 11572 (Ont. Div. Ct.), a mining company had agreed to further consultation measures with a First Nation, including development of a Memorandum of Understanding before any drilling took place. The Ministry took the position that this was contrary to legal requirements and Ministry policy, but issued the permit without advising the First Nation of this position. In quashing the decision to issue the permit, Sachs J. commented that "It cannot be honourable for a government body to allow its delegate to create expectations with an indigenous community (expectations that the government knows about) and then not let the community know that these expectations were 'contrary to legal requirements & MNDM policy'."[21]

§ 5:51 Duty to provide reasons

[Para. 5.2140] Written reasons from the Crown to document consultation. In some cases where a deeper level of consultation is required, the Crown may be obliged to provide written reasons for its decision to proceed with a course of action so as to show how it took the aboriginal concerns into account.[1] Where the Crown rejects the aboriginal group's accommodation proposal, it might need to provide reasons to justify that decision, or else run the risk of a court ruling that there was no meaningful consultation.[2] Even if the decision-maker is the Governor-in-Council, where a requirement of deep consultation exists the Crown is obliged to give reasons. The reasons which must be

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[21] *Eabametoong First Nation v. Minister of Northern Development and Mines*, 2018 ONSC 4316, 2018 CarswellOnt 11572 (Ont. Div. Ct.) at para. 118.

[Section 5:51]

[1] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at paras. 41 and 42; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 44 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[2] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 2011 CarswellBC 1238 (B.C. C.A.) at para. 144 (per C.J. Finch). See also *Squamish First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 216, 2019 CarswellNat 3824 (F.C.A.) at paras. 64 and 75-79—the Squamish First Nation had requested an increase to its annual allocation of sockeye salmon for food, social and ceremonial purposes. In deciding to issue an increase much smaller than the one requested by Squamish, the Crown was required to provide written reasons showing how Squamish's concerns were considered and taken into account.

provided to satisfy the duty to consult may go well beyond the reasons necessary to merely comply with the statute.[3]

[Para. 5.2150] Written reasons, generally. Indeed, Justice L'Heureux-Dubé noted the value of providing reasons in the immigration case of *Baker v. Canada:*

> Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at 146; *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A.), at para. 38. Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at 459-460. I agree that these are significant benefits of written reasons.[4]

This statement is equally applicable to decisions by Crown officials which may affect s. 35 rights.

§ 5:52 Assessment of strength of claim and potential severity of infringement

[Para. 5.2160] Crown assessment of strength of claim. In order for the Crown to meet its obligations, it must develop a regime that provides for consultation commensurate with the nature and strength of the aboriginal rights or title claim and with the extent to which proposed activities may interfere with claimed aboriginal interests.[1] In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right.[2] Aboriginal groups are entitled to know the Crown's information and views concerning the content and strength of their claims so they are able to discuss the subjects on which the Crown might have to accommodate, and the extent to which the Crown might have to accommodate.[3]

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[3]*Gitxaala Nation v. R.*, 2016 CAF 187, 2016 FCA 187, 2016 CarswellNat 2576, 2016 CarswellNat 2577 (F.C.A.) at paras. 311-313 and following.

[4]*Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, [1999] 2 S.C.R. 817 (S.C.C.) at para. 39.

[Section 5:52]

[1]*Ross River Dena Council v. Yukon*, 2012 YKCA 14, 2012 CarswellYukon 122 (Y.T. C.A.) at para. 7, per Groberman J.A.

[2]*Tsilhqot'in Nation v. British Columbia*, [2014] 3 C.N.L.R. 362, (*sub nom.* Xeni Gwet'in First Nations v. British Columbia) 2014 CarswellBC 1814 (S.C.C.) at para. 79; *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, 2014 CarswellNat 3248 (F.C.A.) at para. 91.

[3]*Gitxaala Nation v. R.*, 2016 FCA 187, 2016 CarswellNat 2576 (F.C.A.) at para. 309.

The Crown decision-maker must make an explicit determination on each of these factors and the courts have found fault in the Crown's failure to do so.[4] The Crown must assess the strength of claim and the severity of the potential infringement at the outset of consultation:

> As a matter of law, Halalt [First Nation] was entitled to a timely and transparent assessment of the strength of its claims. A timely assessment was necessary to permit the [Environmental Assessment Office], as the Crown's representative, to correctly assess the nature and scope of the duty to consult with Halalt, and, based on that assessment, create a framework for both the EAO and the District [of Cowichan] to conduct its consultations with Halalt.[5]

[Para. 5.2170] Crown assessment of seriousness of potential infringement. Indeed, in *Haida*, the Supreme Court of Canada suggests that Crown officials must consciously determine both the strength of the right claim and the seriousness of the potential infringement.[6] Naturally, the Crown will have a harder time satisfying the appropriate level of consultation if it fails to assess these factors. However, the Crown will not always be obliged to assess the aboriginal group's strength of claims and the nature and severity of the impacts of the proposed decision. The British Columbia Court of Appeal confirmed in *Adams Lake* that notwithstanding the lack of any assessment of the strength of the asserted s. 35 rights of the aboriginal group, "the [consultation] process was as thorough and as comprehensive as the circumstances required."[7] This ruling was based on the Court's conclusion that no adverse impacts on the asserted s. 35 rights arose from the impugned Crown decision.[8]

[Para. 5.2180] Alternatives to strength of claim assessment. As a practical matter, the real concern is not whether the Crown made a formal and accurate assessment of the appropriate level of consultation but rather whether it actually consulted adequately and, where appropriate, made reasonable efforts to accommodate the s. 35 rights at stake. Thus, for example, the Crown might be willing to *assume*, for the purposes of a consultation, that the aboriginal group holds a particular right, without actually assessing the claim. Alternatively, the Crown

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[4]*Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 1764, 2008 BCSC 1139 (B.C. S.C.) [petitioners included Gitanyow]; *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 CarswellBC 2587, 2008 BCSC 1642 (B.C. S.C.) at para. 18 [petitioners included Klahoose First Nation].

[5]*Halalt First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 945, 2011 CarswellBC 1846 (B.C. S.C.) at para. 640. See also *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 1764, 2008 BCSC 1139 (B.C. S.C.) at paras. 147 and 245 [petitioners included Gitanyow].

[6]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 63 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[7]*Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2012 BCCA 333, 2012 CarswellBC 2367 (B.C. C.A.) at para. 78.

[8]*Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2012 BCCA 333, 2012 CarswellBC 2367 (B.C. C.A.) at paras. 70 and 75.

might take the position that its proposed course of action has no potential to adversely affect any s. 35 rights and on that basis, decline to assess the strength of the asserted rights claims. In either circumstance, the Crown might ultimately satisfy its consultation obligations by taking those positions as long as it shares its views during the consultation process so that the aboriginal group can understand the Crown's position on these key consultation issues and have an opportunity to respond to them.[9]

[Para. 5.2181] Obligation on Crown to share assessment of strength of claim. Where the Crown has assessed the strength of claim and/or the severity of potential infringement, it should be obliged to share its views on these matters with the aboriginal group, particularly where they differ from those advanced by the aboriginal group.[10] Good faith, meaningful consultation is not possible if the Crown withholds from the aboriginal group its perspective on the level of consultation required and its basis for that opinion.[11] Moreover, as a matter of procedural fairness, aboriginal groups should have the opportunity to respond to any Crown evidence or opinions about its rights claims and the extent of potential infringement that differs materially from their own. The obligation to share information about the strength of claim may be a subset of the Crown's general obligation to share any determination made by the Crown that there is a duty to consult a First Nation in relation to a decision. The general obligation is discussed in § 5:47 (para. 5.1945).

§ 5:53 Onus of proving environmental impacts

[Para. 5.2190] Evidence of environmental impacts. It is not yet clear which party, as between the Crown and the aboriginal group, bears the onus of substantiating concerns about the environmental impacts of proposed activities on the land. It remains to be seen how

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[9]It should be noted that in *K'omoks First Nation v. Canada (Attorney General)*, 2012 FC 1160, 2012 CarswellNat 3908 (F.C.), the Federal Court ruled that the Crown did not err in sharing its strength of claim assessment with a First Nation *after* making the decision that the First Nation alleged had been made in breach of the duty to consult. The Court did not find fault in the timing of the Crown's assessment of the strength of claim and simply held that the Crown had an ongoing duty to consult with the First Nation. However, this decision contravenes basic consultation law principles and the purpose of consultation, which is to ensure that the Crown balances aboriginal interests with other societal interests in its decision-making. This balancing of interests cannot occur if the Crown does not complete the appropriate level of consultation prior to decision-making.

[10]This proposition is implied in *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, 2008 CarswellBC 2587, (*sub nom.* Klahoose First Nation v. Sunshine Coast Forest District (District Manager)) [2009] 1 C.N.L.R. 110 (B.C. S.C.) at para. 126 [petitioners included Klahoose First Nation] and is stated expressly in *Halalt First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 945, 2011 CarswellBC 1846 (B.C. S.C.) at para. 641.

[11]This sentence was quoted with approval by the Honourable Madam Justice Goss in *Fort Chipewyan Métis Nation of Alberta, Local 125 v. Alberta (Minister of Aboriginal Relations)*, 2016 ABQB 713, 2016 CarswellAlta 2419 (Alta. Q.B.) at para. 148.

open the courts are to taking at face value aboriginal concerns about the impacts that a proposed activity will have on their harvesting rights, and to what extent they will expect aboriginal groups seeking "deep" consultation to justify their concerns with detailed or scientific evidence. For example, aboriginal groups often express concerns that they will lose hunting and trapping grounds as a result of a proposed development. They may identify particular hunting cabins or trails, but even if they do, their main concern will be with impacts on the larger area in which they exercise their rights. The degree to which the aboriginal groups must identify specific interests, or concerns with specific animal species, before the Crown becomes responsible for accommodating the harvesting rights remains unclear, and this issue is often a source of disagreement between the Crown and aboriginal people.

§ 5:54 Cumulative impacts

[Para. 5.2200] Infringement by accumulated environmental impacts. An aboriginal group is entitled to sue the Crown for failure to take cumulative impacts into account before approving activities that have the potential to affect s. 35 rights.[1] From the aboriginal group's perspective, it may be critical to know the impacts of a proposed project within the context of previous, ongoing, and planned activities on the land, because only then can the overall impact on fish, wildlife, plants and habitat—and by extension, on the group's harvesting rights and/or aboriginal title — be understood. A project which may not seem particularly significant on its own will become far more problematic if it is proposed for one of the last remaining undisturbed portions of an aboriginal group's territory,[2] or if it will put stress on already vulnerable plant, fish or animal populations.

[Para. 5.2210] Assessing cumulative impacts. One approach to assessment of the cumulative impacts of development is described in a British Columbia court case, in which the First Nation prepared a "Rate of Disturbance Report", intended to provide a scientific foundation to answer the question of how much land would be sufficient to exercise traditional rights.[3] However, many Crown approvals are granted without any in-depth understanding of cumulative effects. Some projects do not

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[Section 5:54]

[1]*Lameman v. Alberta*, 2013 ABCA 148, 2013 CarswellAlta 458 (Alta. C.A.) [plaintiffs included the Beaver Lake Cree Nation], affirming 2012 ABQB 195, 2012 CarswellAlta 542 (Alta. Q.B.), in which pleadings were allowed to stand under which Beaver Lake Cree Nation claims that the cumulative effects of oil, gas, forestry, mining and other activities in the treaty territory infringed the right to hunt, fish and trap under Treaty 6.

[2]The Federal Court recognizes this in passing in *Brokenhead Ojibway Nation v. Canada*, 2009 CarswellNat 1339, 2009 FC 484 (F.C.) at para. 28 [applicants included Brokenhead Ojibway Nation, Long Plain First Nation, Swan Lake First Nation, Fort Alexander First Nation, also known as "Sagkeeng First Nation", Roseau River Anishinabe First Nation, Peguis First Nation, and Sandy Bay First Nation].

[3]*Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)*, 2013

trigger any cumulative impact assessment. In other cases, an environmental assessment is carried out, but its parameters are such that it will not consider all of the cumulative impacts being experienced on the aboriginal group's territory or in its key harvesting areas, or the analysis of environmental impacts is not sufficiently rigorous or impartial to reassure aboriginal groups that the impacts of the proposed project are truly understood.

[Para. 5.2211] Litigation concerning cumulative impacts, generally. Litigation concerning the cumulative impact of bitumen extraction in Northern Alberta has raised this question on a preliminary motion, where the cumulative effect on treaty rights was upheld by the Alberta Court of Appeal as a valid cause of action that could proceed to trial.[4]

[Para. 5.2212] Situations where cumulative impacts are not taken into account. The Supreme Court of Canada has ruled in *Rio Tinto Inc. v. Carrier Sekani Tribal Council* that the Crown's duty to consult is only triggered by a new proposed decision or action carrying the potential for new potential adverse impacts on s. 35 rights, and that such consultation does not open the door to consultation on all prior impacts of the larger project:

> *Haida Nation*. . .confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.[5]

In other words, the *Haida* framework might not the appropriate framework under which to seek redress for past adverse effects in, or infringements of, s. 35 rights.[6] The attempt of the Saulteau First Nation to secure a cumulative impact assessment for a sour gas test well was unsuccessful,[7] as was the attempt of Dene Tha' First Nation to secure a cumulative impact assessment prior to the Crown sale of 21 oil and gas tenures in Dene Tha's territory.[8] A difficult situation arose in the *Stellat'en* case. The B.C. Court of Appeal held that there were no high-

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BCSC 977, 2013 CarswellBC 1633 (B.C. S.C.) at paras. 49 through 54.

[4]*Lameman v. Alberta*, 2013 ABCA 148, 2013 CarswellAlta 458 (Alta. C.A.) [plaintiffs included the Beaver Lake Cree Nation].

[5]*Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, 2010 CarswellBC 2867, (*sub nom.* Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council) [2010] 4 C.N.L.R. 250 (S.C.C.) at para. 53 [intervenors included the Mikisew Cree First Nation, Moosomin First Nation, Upper Nicola Indian Band, Standing Buffalo Dakota First Nation, Duncan's First Nation, and Horse Lake First Nation].

[6]*Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, 2010 CarswellBC 2867 (S.C.C.) at para. 49; affirmed in *Adams Lake Indian Band v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2013 BCSC 877, 2013 CarswellBC 1374, [2013] 4 C.N.L.R. 1 (B.C. S.C.) at para. 95.

[7]*Saulteau First Nation v. British Columbia (Oil and Gas Commission)*, 2004 CarswellBC 168, [2004] 4 C.N.L.R. 284 (B.C. S.C.), affirmed 2004 CarswellBC 1276, [2004] 4 C.N.L.R. 340 (B.C. C.A.), leave to appeal refused (2005), 2005 CarswellBC 459, CarswellBC 460 (S.C.C.).

[8]*Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)*, 2013

level or strategic decisions made by the Crown without consultation, because Thompson Creek Metals themselves made the high-level strategic decisions based on previously-issued authorizations. The Court added that the mine expansion project was not a Crown initiative, nor did it guide the process. However, the Court also refused to require the Crown to include those past authorizations in the consultation process. In the result, the First Nation was left without a remedy.[9]

[Para. 5.2213] Situations where cumulative impacts are taken into account. It is impossible to understand the impacts of a proposed activity on s. 35 rights without considering the context in which it would take place, and cumulative impacts might be a critical contextual factor.[10] For example, other things being equal, the negative impact of a development on aboriginal harvesting will be far greater if it would take place in one of the last undeveloped areas that are reasonably accessible to the aboriginal group or if it would adversely affect a vulnerable wildlife population that the aboriginal group harvests or is waiting to resume harvesting once the population recovers. The British Columbia Court of Appeal recognized this fact in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*:

> I do not understand *Rio Tinto* to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt.
>
> The amended permits authorized activity in an area of fragile caribou habitat. Caribou have been an important part of the petitioners' ancestors' way of life and cultural identity, and the petitioners' people would like to preserve them. . . .
>
> To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.[11]

That said, a majority of the Court of Appeal in *West Moberly* also ruled that the Crown's duty to accommodate does not extend to address-

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BCSC 977, 2013 CarswellBC 1633 (B.C. S.C.).

[9]*Stellat'en First Nation v. British Columbia (Energy, Mines and Petroleum Resources)*, 2013 BCCA 412, 2013 CarswellBC 2871 (B.C. C.A.) at paras. 107 and 115, leave to appeal refused 2014 CarswellBC 468, 2014 CarswellBC 469 (S.C.C.).

[10]This sentence in Native Law was relied on by the Supreme Court of Canada in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 42. The Court said: "That said, it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context (J. Woodward, Native Law (loose-leaf), vol. 1, at pp. 5-107 to 5-108)."

[11]*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 2011 CarswellBC 1238, [2011] 3 C.N.L.R. 343 (B.C. C.A.) at paras. 117-119 (per Finch C.J.), with concurrence on this point from Hinkson J. (para. 181) and Garson J. (para. 239).

ing the cumulative impacts of past decisions. Specifically, the Court ruled on the facts of *West Moberly* that while the Crown should consider not allowing further development in the habitat of the threatened caribou, the Crown had no legal duty to develop a strategy to augment the herd's population, as the herd's decline resulted from previous development decisions.[12]

[Para. 5.2214] Recognition of the existing state of affairs. Ultimately, a balance must be struck between a forward and backward looking approach to consultation. On the one hand, the law clearly establishes that the trigger for consultation is a *proposed* Crown decision or action carrying the potential for new impacts on s. 35 rights, and there may be practical policy reasons for not opening those consultations to direct consideration of all the previous impacts of previous, related Crown decisions and actions. On the other hand, where the potential impacts of the proposed Crown decision or action turn in part on previous adverse impacts on the implicated rights, the context of cumulative impacts is entirely relevant to the consultation, as well as to formulating effective accommodation measures. If relevant cumulative impacts are ignored, the Crown risks proposing accommodation that has no prospect of substantially addressing the aboriginal group's concerns, thereby defeating the primary purpose of consultation. Justice Grauer of the British Columbia Supreme Court essentially makes point in summarizing the *West Moberly* decision:

> *West Moberly First Nations* confirms the forward looking nature of the consultation process. . .as well as the appropriateness of taking into account the cumulative impact in the sense of recognising the existing state of affairs in order to address the consequences of what may result from the proposed programs (paras. 117-119).[13]

§ 5:55 Funding for consultation

[Para. 5.2220] Duty to fund consultation. There is no general right to consultation funding, even where an Aboriginal group demonstrably lacks adequate capacity to consult.[1] However, the Supreme Court of Canada noted the lack of participant funding as one of the factors which led to a finding that the duty to consult had not been met.[2] In *Tsilhqot'in Nation v. British Columbia*:

> It must be borne in mind that it is a significant challenge for aboriginal groups called upon in the consultation process to provide their perspectives

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[12]*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 2011 CarswellBC 1238, [2011] 3 C.N.L.R. 343 (B.C. C.A.) at paras. 181-184 (Hinkson J.) and Garson J. (para. 239).

[13]*Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977, 2013 CarswellBC 1633 (B.C. S.C.) at para. 134.

[Section 5:55]

[1]See for example *Moulton Contracting Ltd. v. British Columbia*, 2013 BCSC 2348, 2013 CarswellBC 3886 (B.C. S.C.) at para. 293.

[2]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 47.

> to government representatives. There is a constant need for adequate resources to complete the research required to respond to requests for consultation. Even with adequate resources, there are times when the number and frequency of requests simply cannot be answered in a timely or adequate fashion.[3]

Accordingly, in some cases the honour of the Crown will require the proponent or the Crown to provide the aboriginal group with capacity funding.

[Para. 5.2225] Taking into account the capacity of the First Nation. The British Columbia Court of Appeal found that there was inadequate consultation in a case where, among other things, there was evidence of financial hardship that precluded the First Nation from seeking independent advice.[4] The British Columbia Supreme Court ruled that British Columbia failed to maintain the honour of the Crown in forestry consultations with a First Nation that it knew to be overwhelmed with referrals because "knowing the limitations facing the [Fort Nelson First Nation] Lands Department, BCTS [British Columbia Timber Sales] could have done much more than it did",[5] including extending the consultation period and exploring the availability of Crown resources (other than consultation funding) to assist the First Nation with consultation. This decision suggests that the Crown must be more proactive and accommodating of delays when engaging with an Aboriginal group that it knows or ought to know is challenged in its capacity to consult.

[Para. 5.2230] Funding by consent. In *Platinex*, the Ontario Superior Court imposed upon the parties a consultation protocol, under which the Ontario government was obliged to provide reasonable consultation funding to the Kitchenuhmaykoosib Inninuwug First Nation.[6] The consultation protocol did not fix a particular level of funding (the parties were left to negotiate this) and Ontario had offered to make this commitment as part of the consultation process, and therefore this ruling did not compel Ontario provide consultation funding against its will. However, Justice Smith commented that "[t]he issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a 'level playing field'."[7] Since capacity funding is often a

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[3]*Xeni Gwet'in First Nation v. British Columbia*, 2007 CarswellBC 2741, 2007 BCSC 1700 (B.C. S.C.) at para. 1138, affirmed in 2012 BCCA 285, 2012 CarswellBC 1860 (B.C. C.A.), but not on this point.

[4]*Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2015 BCCA 345, 2015 CarswellBC 2113 (B.C. C.A.) at para. 85 [petitioners were members of Kwakiutl First Nation].

[5]*Moulton Contracting Ltd. v. British Columbia*, 2013 BCSC 2348, 2013 CarswellBC 3886 (B.C. S.C.) at para. 293.

[6]*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CarswellOnt 3553, [2007] 3 C.N.L.R. 221 (Ont. S.C.J.), additional reasons to 2007 CarswellOnt 2995, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.).

[7]*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CarswellOnt 3553, [2007] 3 C.N.L.R. 221 (Ont. S.C.J.) at para. 27, additional reasons to 2007

live issue in consultation processes, we can expect the courts to consider this issue further in due course.[8]

§ 5:56 Determination of whether duty to consult is triggered

[Para. 5.2240] Crown departments, servants and agents require no express statutory authorization to determine whether duty is triggered. Crown departments act as the Crown's servants or agents in carrying out consultation, and do not require any statute formally empowering them to discharge the Crown's duty to consult, including by making a determination of whether the duty to consult has been triggered.[1]

[Para. 5.2245] Crown may not rely exclusively on consultation maps. The Crown may rely on consultation maps as one tool among many in determining whether the duty to consult is triggered in a particular case, but should not rely on them exclusively without giving consideration to the specific circumstances of a given project.[2]

[Para. 5.2250] Procedural fairness applies to determination of whether duty is triggered. A duty of procedural fairness is engaged when a branch of the Crown determines if the duty to consult has been triggered.[3] However, it should not be applied "too strictly" at this stage—"It could ultimately derail the conciliatory approach that should occur between the Crown and First Nations if the decision whether a duty is triggered or not turns into a process similar to the trial model of adjudicating rights".[4]

[Para. 5.2260] Content of procedural fairness when Crown and First Nation disagree over whether duty is triggered. When a "contested triggering decision" arises (*i.e.*, when it is apparent that the Crown and a First Nation disagree over whether the duty to consult has been triggered), procedural fairness may require: 1) that the Crown notify the First Nation that it will be making a final determination as to

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CarswellOnt 2995, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.).

[8]Crown funding of a consultation process may also help the Crown establish that it engaged in meaningful consultation and help it overcome an aboriginal group's claim that the Crown breached that duty: *Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at para. 112.

[Section 5:56]

[1]*Athabasca Chipewyan First Nation v. Alberta*, 2018 ABQB 262, 2018 CarswellAlta 678 (Alta. Q.B.) at para. 68, affirmed 2019 ABCA 401, 2019 CarswellAlta 2249 (Alta. C.A.).

[2]*Athabasca Chipewyan First Nation v. Alberta*, 2018 ABQB 262, 2018 CarswellAlta 678 (Alta. Q.B.) at paras. 88 and 91-92, affirmed 2019 ABCA 401, 2019 CarswellAlta 2249 (Alta. C.A.).

[3]*Athabasca Chipewyan First Nation v. Alberta*, 2018 ABQB 262, 2018 CarswellAlta 678 (Alta. Q.B.) at paras. 105 and 107, affirmed 2019 ABCA 401, 2019 CarswellAlta 2249 (Alta. C.A.).

[4]*Athabasca Chipewyan First Nation v. Alberta*, 2018 ABQB 262, 2018 CarswellAlta 678 (Alta. Q.B.) at para. 110, affirmed 2019 ABCA 401, 2019 CarswellAlta 2249 (Alta. C.A.).

whether the duty has been triggered; 2) that the Crown outline what procedure it will undertake in making its determination, what evidence is required to meet the trigger test, and any deadlines applying to the Crown's procedure; and 3) that the Crown provide reasons for its decision that show that it fully and fairly considered any information and evidence submitted by the First Nation. Once the Crown has communicated the information in step 2 to the First Nation, the responsibility lies with the First Nation to bring forward evidence to establish that the trigger test is met.[5]

F. DUTY TO ACCOMMODATE IN DETAIL

§ 5:57 Generally

[Para. 5.2270] Crown must propose accommodation in some, but not all situations. While the Crown always has a duty to initiate consultation with aboriginal groups whose rights might be affected by a proposed decision or course of action, whether it will also need to accommodate any s. 35 rights will depend on the strength of the aboriginal rights claim and the severity of the potential infringement.

[Para. 5.2280] Range of possible measures to accommodate. If the right at issue is proven or reasonably asserted, and the proposed decision or course of action has a real potential to negatively affect the right, the Crown should probably be looking to accommodate the right (subject, in the case of a modern treaty right, to any relevant treaty terms that limit or exclude the duty to accommodate and that are consistent with the honour of the Crown.)[1] However, even at that point, the appropriate nature and level of accommodation will vary significantly from case to case. The following are some general types of accommodations that may be reasonable in the circumstances:

- Measures designed to mitigate the environmental impacts of a project (and, by extension, the impact on s. 35 rights), such as the rerouting of a proposed road, authorizing construction for time periods when there will be reduced impacts on wildlife, reducing the size of a project, creating wildlife corridors, adopting wildlife

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[5]*Athabasca Chipewyan First Nation v. Alberta*, 2018 ABQB 262, 2018 CarswellAlta 678 (Alta. Q.B.) at paras. 115-117, affirmed 2019 ABCA 401, 2019 CarswellAlta 2249 (Alta. C.A.).

[Section 5:57]

[1]In *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government], the Supreme Court of Canada held that the Crown did not have a duty to accommodate the First Nation prior to granting a piece of Crown land that was used by First Nation members for harvesting activities. A number of factors led the Court to this conclusion, and two of these related to the terms of the First Nation's modern treaty: (1) the First Nation had surrendered the land at issue in its modern treaty; and (2) the parties had chosen not to include treaty provisions requiring consultation for the particular Crown decision at issue in that case (see para. 57, per Binnie J.).

habitat restoration measures, or developing a plan to rehabilitate a threatened species.[2]

- Funding for a traditional practices program that helps support traditional land use activities.[3]
- Economic accommodation, either in recognition of an aboriginal title right (which includes the right to derive economic benefits from the resources in the aboriginal title area), or to compensate for negative impacts on s. 35 rights; economic accommodation may come in many forms, including land grants, revenue sharing, compensation payments, employment opportunities in a proposed project or investment opportunities in proposed project.
- Environmental monitoring to assess the ongoing impacts of a project and ensure that its impacts do not exceed any pre-agreed environmental thresholds.[4]
- A right on the part of the aboriginal group to play a role in decision-making that will affect its traditional territory, such as an opportunity to co-manage a park with government, to co-manage a project or part of a project, or to have a seat on a land use committee.

By no means is the above list meant to be exhaustive. Indeed, it is suggested here that the Crown and aboriginal groups should be creative in trying to reach mutually acceptable settlements.

[Para. 5.2281] The role of broader social interests and the need to compromise. The Supreme Court of Canada stated in *Haida* that in formulating a reasonable accommodation proposal, the Crown must take into consideration "other societal interests".[5] In considering accommodation options, the Crown may take into account how those accommodations would affect other interests and public policy objectives, because

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[2]The British Columbia Supreme Court ordered the Crown to develop, in consultation with the West Moberly First Nations, a plan to rehabilitate a threatened caribou herd: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359, 2010 CarswellBC 651, [2010] 2 C.N.L.R. 354 (B.C. S.C.). However, the British Columbia Court of Appeal overturned this particular order, holding that the proper remedy was further consultation, without specifying any specific accommodation outcome: 2011 BCCA 247, 2011 CarswellBC 1238 (B.C. C.A.) at para. 167 (per C.J. Finch).

[3]*Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at para. 113.

[4]See, for example, *Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at paras. 62-63 and 113.

[5]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 2004 CarswellBC 2656, [2005] 1 C.N.L.R. 72 (S.C.C.) at para. 50 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, 2004 CarswellBC [2005] 1 C.N.L.R. 366 (S.C.C.) at para. 2 [interveners included the Doig River First Nation]; affirmed in *Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at para. 120.

"[compromise is inherent to the reconciliation process."[6] The duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions; rather, proper accommodation stresses the need to balance competing societal interests with Aboriginal and treaty rights.[7]

[Para. 5.2282] The difference between interim accommodation and final settlement. The Federal Court has stated in one case that aboriginal groups seeking accommodation based on asserted rights should not expect the same level of accommodation that they would obtain from a final resolution of their rights claims:

> The duty to consult is not intended to provide Aboriginal people immediately with what they could be entitled to, if and when they prove their claims or settle them through treaty. Otherwise, there would be no incentive for Aboriginal people to negotiate treaties or seek to prove their claims. The duty to consult, therefore, is not meant to be an alternative to comprehensive land claims settlements, but a means to ensure that the land and the resources that are the subject of the negotiations will not have been irremediably depleted or alienated by the time an agreement is reached.[8]

While the authors agree that accommodation is meant to deal with rights on an interim basis and therefore will not normally provide aboriginal groups with the same level of rights protection and benefits as a settlement relating to a proven or otherwise recognized right, we suggest that the Court's closing summary of the purpose of consultation and accommodation is unduly narrow. Preventing the irremediable depletion or alienation of resources is one of the purposes of the duty, but not the only one. As the Supreme Court of Canada stated in *Haida*, it is dishonourable of the Crown "to unilaterally exploit a claimed resource" and thereby deprive the Aboriginal group claiming rights in relation to that resource *"of some or all* of the benefit of the resource"[9] (emphasis added). The Court also stated in *Haida* that "addressing the Aboriginal concerns may require taking steps to avoid irreparable harm *or to minimize the effects of infringement*, pending final resolution of the underlying claim (emphasis added).[10] Thus, it is not only irreparable harm to land or resources that may trigger the Crown's duty to accommodate.

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[6]*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, 2004 CarswellBC 2654, [2005] 1 C.N.L.R. 366 (S.C.C.) at para. 2 [interveners included the Doig River First Nation].

[7]*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, 2017 CarswellNat 3468 (S.C.C.) at para. 59.

[8]*Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at para. 123.

[9]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 2004 CarswellBC 2656, [2005] 1 C.N.L.R. 72 (S.C.C.) at para. 27 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[10]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 2004 CarswellBC 2656, [2005] 1 C.N.L.R. 72 (S.C.C.) at para. 47 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[Para. 5.2290] Accommodation may include rejection of the project. A Crown agency may require accommodation by exercising its discretion to deny an authorization or by reserving its decision pending further proceedings.[11] The Crown must consult with an open mind to the possibility of not approving a proposed activity,[12] which implies that rejecting a proposed activity or development in order to protect s. 35 rights can in some cases be a reasonable accommodation.[13]

[Para. 5.2291] Whether accommodation should address historical or cumulative impacts. Cumulative effects of an ongoing project and historical context may inform the scope of the duty to consult.[14] In *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, consultation about a proposed mining exploration program focused on the impacts that further development would have on a threatened caribou herd, and the reasonable measures to be taken in response to this threat. The herd had been decimated decades ago, and at the time of the appeal hearing, it counted only 11 members. The trial judge had ordered the Crown to accommodate the Treaty 8 hunting rights of the West Moberly First Nations by developing a caribou recovery strategy. The British Columbia Court of Appeal overruled this particular order, and a majority of the judges agreed that the Crown did not need to develop measures to rehabilitate the caribou herd, because the decimated population resulted from past decisions, not the proposed exploration program.[15]

[Para. 5.2292] Failure to accommodate the economic component of asserted aboriginal title—judicial review denied. The extent of the Crown's duty to consult about and offer economic accommodation remains unsettled. The British Columbia Supreme Court stated as follows in *Adams Lake Indian Band v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*: "Judicial review proceedings are not the appropriate avenue to consider whether First Nations should be compensated for adverse impacts to asserted

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[11]*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CarswellNat 3470 (S.C.C.) at para. 32. See also *Redmond v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561, 2020 CarswellBC 932 (B.C. S.C.), in which the B.C. Supreme Court upheld a Crown decision to reject a run-of-river project on the basis that it would adversely impact Indigenous spiritual bathing practices and that proposed mitigation measures were not adequate.

[12]*Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries)*, 2005 BCSC 283, 2005 CarswellBC 438, [2005] 2 C.N.L.R. 75 (B.C. S.C.) at para. 127; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 2011 CarswellBC 1238 (B.C. C.A.) at para. 149 (per C.J. Finch).

[13]In addition, there may be cases where a Province lacks the jurisdiction to infringe a treaty right by virtue of s. 91(24) of the *Constitution Act*.

[14]*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, 2017 CarswellNat 3468 (S.C.C.) at para. 42.

[15]*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 2011 CarswellBC 1238 (B.C. C.A.) paras. 181-184 (per Hinkson J.) and at para. 239 (Garson J.).

rights and title."[16] This statement seems problematic. Aboriginal title includes a right by the title holder to derive economic benefits from the land and resources, and a successful consultation process should lead to Crown proposals to accommodate reasonably asserted Aboriginal title. Depending on the circumstances, reasonable accommodation may include economic compensation for impacts on the asserted Aboriginal title right. The Crown's legal duty on this front should be reviewable in judicial review proceedings, or else it becomes a hollow one. Thus, while the courts will no doubt tend to accord deference in assessing the Crown's economic accommodation proposals, they should not completely immunize refusals to provide economic accommodation from judicial review.

[Para. 5.2293] Failure to accommodate the economic component of asserted aboriginal title—judicial review allowed. Other cases have recognized that the duty to consult may include the duty to consult about economic accommodation. For example, in the British Columbia Supreme Court decision of *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Minister of Environment)*,[17] the Court ruled that the Province had failed to adequately consult with a First Nation about its Aboriginal title claim and the economic interests arising from that claim. In that case, the Crown had decided not to amend the boundaries of a protected area in response to the First Nation's pursuit of an economic opportunity (a run of the river hydro project) within the protected area. The Court held that the First Nation asserted a reasonable Aboriginal title claim, and that the Crown had to consult about this claim before deciding whether to amend the boundaries of the protected area.

[Para. 5.2300] The spirit of reconciliation requires flexibility. As with the consultation process generally, the Crown should be flexible in the accommodation measures that it considers. In *Wii'litswx v. British Columbia (Minister of Forests)*,[18] the British Columbia Supreme Court was critical of the fact that the Ministry of Forests' position on accommodation remained mostly unchanged during an extensive consultation process with the Gitanyow First Nation, particularly given that the duty to consult in that case lay on the higher end of the *Haida* spectrum. This no doubt factored into the Court's conclusion that the Crown had failed to propose a reasonable accommodation.

[Para. 5.2310] Standardized approaches are not generally acceptable. One question is whether it is acceptable for the Crown to adopt a standard approach to accommodation on a particular issue *vis-à-vis* the different aboriginal groups affected. The British Columbia

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[16]*Adams Lake Indian Band v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2013 BCSC 877, 2013 CarswellBC 1374, [2013] 4 C.N.L.R. 1 (B.C. S.C.) at para. 95.

[17]*Da'naxda'xw/Awaetlala First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 620, 2011 CarswellBC 1147, [2011] 3 C.N.L.R. 188 (B.C. S.C.).

[18]*Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 1764, 2008 BCSC 1139 (B.C. S.C.) at paras. 243-244 [petitioners included Gitanyow].

Supreme Court ruled in *Huu-Ay-Aht*[19] that the Crown must take the unique situation of each aboriginal group into account when consulting and accommodating. In particular, the Crown must consider the strength of the individual nation's aboriginal title claim and the severity of the potential infringement for the particular Nation in deciding how deeply to consult and how extensively to accommodate the claimed rights.[20]

[Para. 5.2320] Exception: The Crown may standardize monetary accommodation. But while *Huu-Ay-Aht* states that the Crown should not adopt a completely "one-size-fits-all" approach to consultation and accommodation, the British Columbia Supreme Court indicated in a more recent forestry case, *Wii'litswx*, that the Crown "may be justifiably wary of dealing with revenue sharing on an individualized basis," at least until it has had the opportunity to consider the broader financial implications of committing to the revenue-sharing approach proposed by the aboriginal group.[21] This too is understandable, because once the Crown adopts new principles for providing economic accommodation, other aboriginal groups may seek accommodation based on those principles as well.

[Para. 5.2330] Standardized monetary accommodation must take place in context. Thus, it seems fair to conclude that the Crown may adopt standard principles for setting economic accommodation for a particular type of decision (such as forestry activity), but that the economic accommodation itself must correspond to the extent of the accommodation owed by the Crown to the particular aboriginal group (which in turn depends primarily on the strength of the s. 35 claim and the severity of the potential infringement).

[Para. 5.2340] Standardized accommodation in the B.C. Treaty process. The issue of standardized accommodation is particularly controversial in the modern treaty process. Comprehensive modern treaties can be viewed as the most ambitious form of accommodation, as they reconcile most or all of the rights, interests and concerns of the aboriginal group and government. However, in the British Columbia Treaty Process, both Canada and British Columbia have taken fixed positions on a number of key issues, such as the status of reserve lands under a modern treaty or the impact of the modern treaty on existing s. 35 rights. The Crown, understandably, has a strong interest in not becoming bound by a series of modern treaties that differ too widely

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[19]*Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 CarswellBC 1121, 2005 BCSC 697 (B.C. S.C.). This case concerned the negotiation of an interim consultation and accommodation agreement between the Huu-Ay-Aht First Nation and the Ministry of Forests. The latest interim agreement had expired, and the Ministry of Forests wanted Huu-Ay-Aht to enter into the standard "Forest and Range Agreement" (FRA), which it had already concluded with several First Nations in the province. In terms of economic accommodation, the FRA offered monetary payments based strictly on the population of the First Nation (*i.e.*, an across-the-board formula).

[20]*Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 CarswellBC 1121, 2005 BCSC 697 (B.C. S.C.), at paras. 126-127.

[21]*Wii'iitswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 1764, 2008 BCSC 1139 (B.C. S.C.) at para. 239 [petitioners included Gitanyow].

from one another so as to ensure that they do not become too expensive or challenging to administer. However, many aboriginal groups consider the level of standardization in the British Columbia Treaty Process to be unfair, if not bad faith bargaining. Thus, this issue may eventually be litigated.

[Para. 5.2350] Aboriginal groups with asserted but unproven rights. Aboriginal groups also hold obligations in trying to secure an accommodation of their s. 35 rights. They must be flexible in discussing accommodation options and be reasonable at all times. In rejecting a First Nation's argument that the Crown should have taken particular steps to accommodate the First Nation's concerns about the impact of salmon aquaculture operations on its aboriginal rights, the Federal Court stated: "Inherent in the concept of the honour of the Crown in consultation cases is the issue of balance and compromise."[22] The Supreme Court of Canada stated in *Haida* that aboriginal groups who have not yet proven their s. 35 rights do not have a veto in the consultation process,[23] and many subsequent cases have affirmed that principle.[24] Aboriginal groups whose only accommodation proposal is that the Crown reject a proposed project or land use risk not being accommodated at all.[25] However, as discussed above, it is suggested here that if an aboriginal group has a well-substantiated aboriginal rights claim and the proposed development will unavoidably have very negative effects on the exercise of the claimed right, it might be reasonable for the group to oppose that project.

[Para. 5.2360] Aboriginal groups with proven aboriginal or treaty rights. The Supreme Court of Canada said:

> After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of the land cannot proceed unless the Crown has discharged its duty to consult

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[22]*Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 FC 517, 2012 CarswellNat 2082 (F.C.) at para. 124.

[23]*Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) at para. 48 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

[24]See, for example, *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 1764, 2008 BCSC 1139 (B.C. S.C.) at para. 9 [petitioners included Gitanyow]; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CarswellOnt 4758, [2006] 4 C.N.L.R. 152 (Ont. S.C.J.) at para. 132, and *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at para. 15 [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

[25]The fact that the First Nation's only accommodation proposal was that the Crown reject a Crown land grant application appears to have been a factor leading to the Supreme Court of Canada's conclusion that the First Nation was not entitled to any accommodation in *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) at paras. 14 and 15 [intervenors included the Kwanlin Dün First Nation, and Tlicho Government].

and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982.*[26]

Tsilhqot'in Nation is an aboriginal title case, but the reasoning undoubtedly applies to aboriginal rights as well. One might take the above quote and simply substitute words as follows:

> After Aboriginal or treaty rights have been established by court declaration or agreement, the Crown must seek the consent of the rights-holding Aboriginal group to uses of the land that would substantially impair the rights. Absent consent, uses of the land that would substantially impair the rights cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on rights under s. 35 of the Constitution Act, 1982. [substituted words are underlined]

Mikisew concerned undisputed Treaty 8 harvesting rights, but the reasoning of that case was premised on the understanding that the proposed development, the construction of a winter road, would not actually infringe those rights, since Treaty 8 itself allows for the Crown to take up land.[27]

[Para. 5.2370] Court review of accommodation—the standard of reasonableness. It can be seen from all of this discussion that the nature of duty to accommodate will vary tremendously from case to case. Moreover, it is important to remember that any court challenge by an aboriginal group to the adequacy of the accommodation proposed by the Crown will be reviewed on a standard of reasonableness, not correctness, with some leeway normally being accorded to the Crown in framing its accommodation proposal.[28] Indeed, even where the courts find that the Crown has breached the duty to accommodate, they generally avoid ordering any particular type of accommodation, and instead order that the parties make further efforts to reach agreement on the matter.[29]

G. RELATIONSHIP BETWEEN *HAIDA* FRAMEWORK AND *SPARROW* FRAMEWORK

§ 5:58 Introduction

[Para. 5.2380] The purpose of the two frameworks is similar.

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[26]*Xeni Gwet'in First Nations v. British Columbia*, 2014 SCC 44, 2014 CarswellBC 1814 (S.C.C.) at para. 90 [intervenors included Gityanow, Tsawout First Nation, Tsartip First Nation, Snuneymuxw First Nation, Kwakiutl First Nation, Okanagan, Adams Lake, Neskonlith, Splatsin Indian Bands, and Gitxaala Nation].

[27]Presumably there is a point at which any further taking up would infringe the Treaty right because the aboriginal group would lose the ability to meaningfully exercise its rights. This is implied in paragraph 48 of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) but this issue has yet to be fully explored.

[28]*Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2530, 2008 BCSC 1620, [2009] 1 C.N.L.R. 359 (B.C. S.C.) at para. 23 [petitioners included Gitanyow].

[29]See, for example, *Halalt First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 945, 2011 CarswellBC 1846 (B.C. S.C.) at para. 754; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 2011 CarswellBC 1238, [2011] 3 C.N.L.R. 343 (B.C. C.A.) at paras. 167-168.

The *Haida* framework and the *Sparrow* framework both serve to facilitate the recognition and protection of s. 35 rights as well as the striking of a fair balance between s. 35 rights and broader societal interests.

[Para. 5.2390] The two frameworks are used in different situations. The *Sparrow* framework is used to determine whether an aboriginal or treaty right is infringed, and whether any infringement of an aboriginal or treaty right is justified.[1] The *Haida* framework governs the consultation process before the Crown makes any decision having the potential to negatively impact s. 35 rights.[2] So far, it appears that the *Haida* framework applies to *asserted* s. 35 rights (*i.e.*, an aboriginal right not yet proven under the *Sparrow* framework, or a treaty right where the existence of the treaty, the group's entitlement to benefit from the treaty, or the existence or scope of a particular treaty right, remains in dispute) as well as to *proven or undisputed* s. 35 rights.

[Para. 5.2400] *Haida* may not apply at all when the rights are already proven. The overlapping functions of the *Sparrow* and *Haida* frameworks raise some tricky theoretical issues which have yet to be resolved by the courts. Three of those issues are briefly discussed here:

(a) Does it even make sense to speak of the *Haida* framework where there is a proven (or undisputed) right at stake, and there is no question that the right will be infringed by the proposed course of action? Should the Crown not instead be operating (and ultimately judged) under the *Sparrow* justification framework?

(b) The duty to consult and accommodate is more onerous the stronger the rights claim, and is presumably strongest for proven rights. If an aboriginal group succeeds in proving an aboriginal right and the infringement of that right, and the Crown proceeds to argue that the infringement is justified by pointing to its prior consultation and accommodation efforts, will the court review those prior efforts based on their adequacy for proven rights (which they are now) or unproven rights (which they were when the consultation took place)?

(c) If an aboriginal group has unproven rights which are threatened by a proposed project that has not yet been approved, is it confined to challenging the consultation/accommodation process

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[Section 5:58]

[1]A fuller discussion of the *R. v. Sparrow*, 1990 CarswellBC 105, [1990] 1 S.C.R. 1075 (S.C.C.) framework can be found in this Chapter in §§ 5:24 and 5:25 to 5:32 [defendant was a member of Musqueam Band].

[2]The Supreme Court of Canada referred to this passage of text as follows: "*Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them: J. Woodward, Native Law, vol. 1 (loose-leaf), at p. 5-35. The duty is prospective, fastening on rights yet to be proven." *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, 2010 CarswellBC 2867, [2010] 4 C.N.L.R. 250 (S.C.C.) at para. 35. Also quoted and followed in *Bande des Atikamekw d'Opitciwan c. Procureure générale du Québec*, 2017 QCCS 3947, 2017 CarswellQue 7542 (C.S. Que.), at para. 20.

(*Haida* framework), or may it also proceed to prove its rights and challenge the proposed project as an infringement of those rights?

§ 5:59 Applicability of *Haida* framework to proven rights

[Para. 5.2410] Negative effects, short of infringement—*Haida* may apply. In some situations, the Crown is considering a decision which may affect a proven (or undisputed) aboriginal or treaty right. If the decision may have a negative effect on an established treaty right without actually infringing it (as *in Mikisew* and *Little Salmon / Carmacks First Nation)*, it makes sense for consultation to proceed under the *Haida* framework. Similarly, if it is not immediately obvious whether the proposed activity will in fact infringe the right, the consultation to make that determination would presumably be governed by the *Haida* principles. However, if it becomes apparent that a proposed decision *will* infringe a proven aboriginal or treaty right, the relevance of *Haida* is unclear. Arguably it is the *Sparrow* justification test that should become the operative framework.[1]

[Para. 5.2420] *Sparrow* is more onerous than *Haida*. Although the justification test itself has yet to be fully developed, it appears to impose a more onerous standard than the standard that would be used to assess the Crown's consultation and accommodation efforts under the *Haida* framework. This is because the *Sparrow* justification test

(a) requires the Crown to show that the infringement would result from a valid governmental objectives,[2] a factor not considered under the *Haida* framework; and

(b) requires the Crown to show that its actions were consistent with its fiduciary obligations towards the aboriginal group,[3] whereas *Haida* requires the government to live up to the "honour of the

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[Section 5:59]

[1]The Supreme Court of Canada has yet to consider how the *Sparrow* framework applies in the context of modern treaty rights. Arguably the threshold for infringements of treaty rights—historical and modern—should be extremely high because the Crown has deliberately made these particularly promises to aboriginal groups and obtained benefits in exchange for those treaty promises.

[2]Admittedly, it remains to be seen how easy it is for the Crown to establish that an objective is "valid": *Delgamuukw v. British Columbia*, 1997 CarswellBC 2358, [1997] 3 S.C.R. 1010 (S.C.C.) suggests that a wide range of economic activities would satisfy this test, while *R. v. Sparrow*, 1990 CarswellBC 105, [1990] 1 S.C.R. 1075 (S.C.C.) [defendant was a member of Musqueam Band] and *R. v. Gladstone*, 1996 CarswellBC 2305, [1996] 2 S.C.R. 723 (S.C.C.) [defendants were members of Heiltsuk Band] suggest that the objective must be "compelling and substantial" *(e.g.*, conservation, or public safety). In *Xeni Gwet'in First Nation v. British Columbia*, 2007 CarswellBC 2741, 2007 BCSC 1700 (B.C. S.C.), the only aboriginal title case since *Delgamuukw*, the British Columbia Supreme Court adopted a relatively high standard to assess the validity of the legislative objective (at paras. 1096-1107).

[3]*R. v. Sparrow*, 1990 CarswellBC 105, [1990] 1 S.C.R. 1075 (S.C.C.) at 1116-1119 [defendant was a member of Musqueam Band]; *R. v. Gladstone*, 1996 CarswellBC 2305, [1996] 2 S.C.R. 723 (S.C.C.) at paras. 54-55 [defendants were members of Heiltsuk Band].

Crown," a standard which the Supreme Court of Canada expressly chose in *Haida* over the fiduciary standard, presumably because it is more flexible.

[Para. 5.2430] If there is a chance of infringement, the Crown should anticipate that *Sparrow* will be applied. Since the *Sparrow* framework is more onerous, and since any court challenge to an infringement of an already proven or undisputed right would necessarily lead to the application of that framework, it would make more sense for the Crown to focus on meeting the *Sparrow* justification standard prior to approving decisions that will clearly infringe s. 35 rights.

[Para. 5.2440] Satisfying *Haida* may be necessary, but not sufficient. Of course, many of the general principles that animate consultation and accommodation under the *Haida* framework would also inform the *Sparrow* analysis: concepts such as early notification to the aboriginal group and the sharing of all necessary information presumably apply to consultation under the *Sparrow* framework as well. However, parties should be aware that in the case of a proven treaty or aboriginal right, consultation and accommodation in keeping with the *Sparrow* standard—however it may develop over time in relation to aboriginal rights, historical treaty rights and modern treaty rights — is probably required.

§ 5:60 Standard for consultation and accommodation if the infringement occurred before the right was proven

[Para. 5.2450] Consultation under *Haida* may be inadequate if rights are ultimately proven. The relationship between the *Haida* framework and the *Sparrow* framework will be at issue in cases where the s. 35 right is unproven during the consultation process, but is ultimately proven in litigation which challenges the Crown decision that resulted from the consultation process. Like the *Haida* framework, the *Sparrow* justification framework obliges the Crown to show that it consulted with the affected aboriginal group.[1] Should the court review whether the consultation was adequate based on the fact that the right was only *asserted* at that time, or should it assess whether the consultation was adequate for a *proven* right, which it now is?

[Para. 5.2460] Why the higher standard will be applied. Some might argue that it would be unfair to retroactively hold the Crown to a higher consultation obligation if it adequately discharged its obligations under the *Haida* framework for what the right was at the time of consultation, namely an asserted right. However, it seems that there would be an even greater injustice if an aboriginal group went to the (often enormous) effort of proving a s. 35 right, only to have the Crown's efforts to achieve an accommodation be judged on the same standards as

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[1]*R. v. Sparrow*, 1990 CarswellBC 105, [1990] 1 S.C.R. 1075 (S.C.C.) at 1119 [defendant was a member of Musqueam Band]; *R. v. Gladstone*, 1996 CarswellBC 2305, [1996] 2 S.C.R. 723 (S.C.C.) at para. 55 [defendants were members of Heiltsuk Band].

if they had never obtained that ruling. After all, the s. 35 right already existed when the Crown-aboriginal consultation originally took place, and the aboriginal group has already borne the cost of having to go to court to prove a right which it held all along. Moreover, the courts do not temper their s. 1 justification analysis for violations of *Charter* rights on the basis that the Crown had not yet obtained the judiciary's confirmation of the *Charter* right's existence. Indeed, although *Sparrow* and *Gladstone* pre-dated the *Haida* case, in both of those earlier decisions the Supreme Court of Canada confirmed the applicability of the *Sparrow* framework to regulations that the Crown had adopted *before* the aboriginal right in question had been proven. In other words, the Court did not shy away from applying a fiduciary standard simply because the courts had not previously confirmed that the s. 35 right existed. Therefore, it is suggested here that once a right is proven, it would make sense to assess whether the Crown's prior consultation efforts were adequate for a proven right.

[Para. 5.2462] Before and after—how proving the right may change the Crown's duty. The Supreme Court of Canada has confirmed that proof of the right, or establishment of the right by agreement, changes the nature of the Crown's obligation. Four crucial paragraphs from *Tsilhqot'in*, 2014 SCC 44, are reproduced here in full:

> [89] Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII), [2010] 2 S.C.R. 650, at para. 37.
>
> [90] After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.
>
> [91] The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong—for example, shortly before a court declaration of title—appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

[92] Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

[Para. 5.2464] The special effect of a court declaration. In the passages quoted above the Supreme Court of Canada emphasizes the crisp divide between the enforceability of Aboriginal title before and after the moment when title is recognized (that is, by court declaration or agreement). This is a departure from the long-settled legal principle that a declaration is a judgment that proclaims the pre-existing rights of the parties. But in this case, there is a fundamental difference between the right of the parties before and after the issuance of the declaration because the issuance of the declaration itself changes the rights of the parties. The remedies for pre-declaration infringements include "injunctive relief, damages, or an order that consultation or accommodation be carried out"; the remedies for post-declaration infringements include "the usual remedies that lie for breach of interests in land"—including, one would assume, ejectment for trespass.[2]

§ 5:61 Ability of aboriginal groups to litigate under the *Haida* or *Sparrow* framework prior to a decision being made or implemented

[Para. 5.2470] Situations may arise where aboriginal groups have a choice between *Haida* and *Sparrow*. Now that the courts apply the *Haida* framework to assess the adequacy of Crown-aboriginal consultation and accommodation *before* a decision has been made or implemented, it is not clear whether aboriginal groups who have the opportunity to use that framework may instead choose to prove their s. 35 right and obtain anticipatory relief to protect that right pursuant to the *Sparrow* framework.

[Para. 5.2480] Practical considerations about that choice. Of course, proving the existence of a right often requires a multi-year trial, and it has historically been difficult for aboriginal groups to secure injunctions to protect their asserted rights in the interim. Indeed, the impracticality of using *Sparrow* in an urgent situation is the very reason the Supreme Court of Canada confirmed the existence of the alternative *Haida* framework. However, where the proposed government decision is still a long ways off (say, for example, with a major development that will be subject to a multi-year approval process), the aboriginal group might be willing to try to prove its rights once and for all in

[2]The *Tsilhqot'in* Case: The Recognition and Affirmation of Aboriginal Title in Canada, by David M. Rosenberg, Q.C. & Jack Woodward, Q.C., UBC Law Review Volume 48, Number 3 from October 2015, "Special Issue: Tsilhqot'in Nation v. British Columbia".

advance of that decision, with the goal of obtaining better protection for its rights once they are proven.

[Para. 5.2490] Situations where only *Haida* may be used. There is one paragraph in the *Mikisew* decision which suggests that if the approval has not yet been made, a party must litigate on the basis of the *Haida* framework:

> Where, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.[1]

[Para. 5.2500] ***Haida*** and ***Sparrow*** involve two different types of litigation. This passage seems to direct the courts to apply *Haida* before they apply *Sparrow*. However, litigation under these frameworks is very different: *Haida* cases are generally judicial review applications and tend to be based primarily on the consultation record between the parties (there are exceptions to this rule); in contrast, proof of aboriginal or treaty rights requires the aboriginal group to conduct a trial in which it provides direct, admissible evidence to establish the existence of its right and the existence of a current or upcoming infringement of that right. Consultation and rights claims may even be brought in different courts, since a judicial review for lack of consultation against any federal official will need to be brought in Federal Court, while aboriginal groups can obtain declarations and other relief relating to the existence and infringement of their s. 35 rights in the provincial superior courts. Therefore, proving a breach of the Crown's duty to consult and accommodate and proving the existence of a s. 35 right and its breach are separate matters which will not normally be suited to the same proceeding.

[Para. 5.2510] When only an injunction based on *Sparrow* will suffice. The suggestion here is that the courts should be open to hearing a *Sparrow* case in those rare situations where an aboriginal group seeks to prove its rights and obtain protective relief in anticipation of a decision that has the potential to infringe those rights. Indeed, it would undermine s. 35 if aboriginal groups could only benefit from the higher protection that flows from holding a *proven* right once the right has already been infringed. In any event, this issue seems to have only been the subject of passing judicial commentary to date,[2] and so hopefully the courts will provide clarity on it in the near future.

[Section 5:61]

[1]*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para. 59.

[2]Justice Conrad discusses *Sparrow v. Haida* choice in *R. v. Lefthand*, 2007 CarswellAlta 850, 2007 ABCA 206 (Alta. C.A.) at paras. 161-168 [defendant was a member of Bearspaw Band] and ultimately seems to say that the courts "may" rely